COMPONENT I:

THE MEXICAN AND CARIBBEAN SEASONAL AGRICULTURAL WORKERS PROGRAM: REGULATORY AND POLICY FRAMEWORK, FARM INDUSTRY LEVEL EMPLOYMENT PRACTICES, AND THE FUTURE OF THE PROGRAM UNDER UNIONIZATION

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Executive Summary

The Canadian Seasonal Agricultural Workers Program (CSAWP) has been in existence for approximately 36 years. The CSAWP began as a pilot program between Canada and Jamaica in 1966. Since that time the CSAWP has expanded to include Mexico, Barbados, Trinidad & Tobago, and the Eastern Caribbean States of Dominica, Grenada, St. Kitts/Nevis, St. Lucia and St. Vincent & the Grenadines.

CSAWP is a formal program of "managed" circular migration. It facilitates the temporary migration of Caribbean and Mexican agricultural workers into Canada to meet fruit, vegetable and horticulture (FVH) growers' demand for low-skilled labour. HRDC's stated objectives of the program are paraphrased as follows:

- Meet qualifying FVH growers' seasonal demand for low-skilled agricultural workers during the peak planting and harvesting season when there is a relative shortage of similarly-skilled Canadian workers;
- Help maintain Canada's economic prosperity and global agricultural trade competitiveness through timely planting, harvesting, processing and marketing of fruits, vegetables and horticulture crops, and expand job prospects for Canadian citizens dependent on agriculture and agriculture-related employment opportunities;
- Enhance and maintain the Canadian economy's efficiency through better allocation of local labor resources;
- Improve the economic welfare of the migrant workers by providing them with temporary full-time employment in the labor-intensive commodity sectors of the FVH industry at relatively higher wages than they could obtain from similar or alternative activities in their home countries;
- Facilitate the return of the workers to their home countries at the end of their temporary employment in Canada.

CSAWP is managed and implemented within a three-tier institutional framework. At the federal level, the program is implemented within the framework of the *Immigration Refugee and Protection Act* and *Regulations* and a labour market policy premised on the "Canadians First" principle. At the provincial level, statutes relating to employment standards, labour and health govern program implementation. The program is also implemented within bilateral administrative arrangements between Canada and the source countries. These arrangements are formalized in Memoranda

of Understanding (MOUs) and Employment Contracts between FVH growers and migrant workers and the Government Agents of the supply country.

The main objective of the research undertaken by the North South Institute on CSAWP'S institutional framework is twofold. First, to factually establish the "good practice" areas of CSAWP'S regulatory and policy mechanisms and industry-level employment practices that have worked, or are working well in the interest of the migrant workers and their FVH employers, and areas that might not have worked, or are not working well in the interest of both the migrant workers and their employers and which, therefore, may need "good practice" principles attention. Second, to propose practical recommendations, that CSAWP managers might use to build upon the areas of the program that are found to have worked or are working well, in order to address the challenges in those areas that might not have worked, or are not working well in the interest of both the migrant workers and their employers. The research also examines a possible role for unions in CSAWP operation at the FVH industry level in shaping the future direction of the program. The findings, conclusions and recommendations presented in this report are based on content analysis of the relevant federal and provincial statutes, the MOUs, Employment Agreements, the Supreme Court of Canada's decision in *Dunmore v. Ontario (A.G.)*, and international conventions, as well as sample interviews with CSAWP policy and operational managers. Data from workers was derived from surveys collected and summarized by researchers in Mexico and Caribbean.

Section I of the Executive Summary presents findings on the CSAWP'S institutional framework; Section II, industry-level employment practices; and Section III, the role of unions in the context of the *Dunmore v. Ontario (A.G.)*. Conclusions regarding CSAWP "best practice" features and recommendations for future action follow.

Ontario was used as the case study since the majority of the CSAWP workers are placed on Ontario farms.

I. The Program's Institutional Framework

The CSAWP is established under a series of instruments that operate within the general labour and employment legislative scheme in Canada and the provinces.[1] These instruments delineate the duties and obligations of the various stakeholders in the Program and provide a comprehensive scheme for the migration of workers. The CSAWP may be described as a "government to government" managed program of migration. Private actors and any role they may have in the CSAWP are defined and regulated by government. The primary Canadian government agency in the administration of the Program is Human Resources Development Canada (HRDC). Government agents from Mexico and the Caribbean act as Government Agents in Canada between the workers and the Canadian government and growers. The Canadian Government privatized the administration of the CSAWP by delegating certain duties to the Foreign Agricultural Resource Management Services (FARMS) in Ontario, which is a non-profit organization charged with transmitting and processing employment orders accepted by Human Resource Centres. A Board of Directors elected from representatives in the grower community governs FARMS. It identifies itself as an organization "run by employers and it is for the employers". Similar private administration has been established in Quebec, with the Fondation des Entreprises en Recruitement de Maind'oeuvre Agricole Etrangere (FERMES).

Some of the key findings of the CSAWP institutional framework are the following:

1. The starting point in understanding the industry level practices of the CSAWP is to note the legal vacuum that exists for the protection of agricultural employment and labour rights in Ontario. As the Supreme Court of Canada noted in the *Dunmore v. Ontario (A.G.)* decision, the workers' exclusion from such a protective regime have disadvantaged them while living and working in Canada.

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[1] The primary documents are the Memoranda of Understanding between Canada and Mexico and Canada and the Caribbean states. Attached as annexes are 1) Operational Guidelines and the 2) Employment Agreement that is required to be signed by all participating employers and workers.

2. The legal status of the MOU between Canada and the supply countries is defined as an "intergovernmental administrative arrangement", not an international treaty. Therefore, the MOUs do not legally bind the parties. However, the Canadian government's decisions may still be reviewed under *Charter of Rights and Freedoms* and general principles of administrative law.

3. The MOUs incorporate the policy objectives and rationale of the CSAWP. It emphasizes the role of the state as determining those aspects of the program which are to their "mutual benefit"; monitoring the movement of workers; and ensuring that CSAWP workers do not displace domestic labour. The benefit to Canada and growers have been outlined at the outset of this Executive Summary. From the perspective of the sending countries, the CSAWP supports economic development at home through remittances of foreign currency. For example, in 2001, OECS reported that approximately $2 million per year is sent back in remittances, and Jamaica benefited from approximately $7.6 million in remittances. Workers benefit from earning Canadian dollars used to improve living conditions for themselves and their families when they return home.

4. The Employment Agreement is an employment contract that is supposed to be signed by the worker, the employer and the supply country government agent. It does not state how the Employment Agreement is to be enforced. Therefore, theoretically, it can be enforced like any other employment contract in the Canadian courts.

5. Workers are admitted into Canada under the general provisions relating to the issuance of temporary work permits under the *Immigration and Refugee Protection Act*. HRDC is required to provide a labour market opinion for each application based on factors outlined in the Act:
   a. Is the work likely to result in direct job creation or job retention for Canadian citizens or permanent residents?

   b. Is the work likely to result in the creation of transfer of skills and knowledge for the benefit of Canadian citizens or permanent residents?

c. Is the work likely to fill a labour shortage?

d. Will the ages and the working conditions offered be sufficient to attract Canadian citizens or permanent residents to, and retain them in, that work?

6. The labour shortage in agriculture has been couched in terminology of “reliability” and “suitability”. There is no shortage of low-skilled Canadian workers, but rather, the shortage is qualitative in that even unemployed Canadians refuse to work in agriculture because of low wages and difficult working conditions.

7. CSAWP workers are authorized to remain in Canada only for a temporary period not exceeding eight months. Workers are required to live on the grower’s property and to work only in agriculture. The majority of the CSAWP workers are “named” by growers to participate in the Program. The “naming” process provides workers a level of job security for future employment; but at the same time it may also act as a disincentive for a worker to raise complaints for fear of the employer not “naming” him/her for the next season. Many workers have been returning to Canada over several years under the “naming” process; however, workers do not accrue any rights to Canadian citizenship.

8. The CSAWP allows for workers to be transferred to another farm with permission from HRDC and the Government Agent. This allows workers to extend their stay in Canada thereby earning more wages, and growers have access to labour without going through the immigration process again. Government Agents may also activate the transfer process to ensure that a worker does not have to go home if he/she has difficulties with his/her employer. Currently, Government Agents report that the transfer process is cumbersome and believe that FARMS should take a greater lead in administering this process. Because FARMS arranges for travel for all workers, it is able to track the dates of departures and arrivals of migrant workers, and therefore, has information readily available if there are openings on another farm. Mexico and the Caribbean states only have information about the movement of workers from their own countries. FARMS argues that this role should be assumed by government.

9. The Employment Agreement allows employers to repatriate workers for "non-compliance, refusal to work, or any other sufficient reason". Government Agents may also remove workers from a farm if the grower breaches the Employment Agreement. The repatriation provisions are interpreted at the discretion of the employer and the Government Agent, and there is no formal right of appeal. The premature repatriation provisions undermine the workers' ability to enforce their rights under the Employment Agreement or laws of Canada. The practical implication is that the worker is immediately removed from the grower's property, requiring costs for alternative accommodation to be incurred at the same time as employment income has ceased. If a transfer placement is not available, there is some urgency to return the worker home to avoid any additional costs for room and board. It is extremely difficult for the worker to claim damages for breach of contract in these circumstances.

10. Interviews with various stakeholders suggest that the role of FARMS is no longer limited to administration; it also participates in setting the policy direction of the program. This has become most apparent at annual regional and national meetings where the operational aspects of the CSAWP are reviewed.

11. While the commodity groups play an integral role in the CSAWP and are formally recognized as such, there is no recognition for workers' participation. The rationale for this exclusion is that the supply country consulates provide this representation.

12. The role of the Government Agents is program administration, policy inputs, and dispute resolution. They process approved requests for workers; provide worker orientation; inspect accommodations on the farms; investigate conflicts and disputes between workers and between workers and employers. They also provide general administrative services, such as processing tax returns and worker's compensation claims. All of the Government Agents are situated in Toronto.

13. The Mexican consulate currently lacks resources to effectively manage the administration of the program. There were 7,633 Mexican workers under the CSAWP in Ontario for 2002 and only five Mexican officers and some volunteers to serve them. Workers voice

frustration with the consulate's failure to respond to their complaints. FARMS voiced similar complaints.

14. Interviews with stakeholders reveal that Government Agents may also act in the interests of employers. The Operational Guidelines also state that the role of the Government Agent is to act in the interests of the employer. This "dual role" may create a conflict of interest in the Government Agent's role as the workers' representative.

15. The Government Agents also ensure that their respective country's receive as many placements as possible in order to maximize the return of remittances. Combined with the employers right to select the supply country of workers, there is a competitive structure among the consulates. This has been encouraged by the Canadian government. This structure undermines the Government Agent's ability to pursue workers' grievances, knowing that an employer may often find a worker from another supply country if one Government Agent does not agree with his or her treatment of a worker.

16. There currently lacks a formal independent dispute resolution mechanism in the Employment Agreement. An informal mechanism is in place whereby employers and Government Agents exercise discretion in determining whether there is a breach of the Employment Agreement, and the remedy for either party is to remove the worker from the farm. The Government Agents play a "dual" role of representing workers' interests and acting as a "neutral" mediator, also representing the employer's interests. Government Agents may also concede to the employer's interests for fear of "losing the farm". This raises a potential conflict of interest and denies workers independent representation should the worker and the Government Agent disagree on any particular matter relating to the worker's employment.

17. Despite any disagreement with the Government Agent or worker, the employer can make the ultimate decision and repatriate the worker. The current tool for employer accountability is the country's right to refuse to provide the employer a worker in future seasons. However, as reported by the Government Agents, the employer has little difficulty obtaining a worker from another country in these circumstances creating a competitive dynamic

among the supply countries. The current mechanism also does not allow the employer to challenge a Government Agent's decision to remove a worker from the farm if the Government Agent feels that the employer has breached the contract.

18. Canadian government representatives and consulate officers reported that this informal system is functioning well from their perspective because it is flexible and cost-effective. While the current informal dispute resolution mechanism may ensure that the interests of the state parties are met, this conclusion was examined from the perspective of the worker and against the policy objectives of the CSAWP.

19. The Canadian Government has devised a program for managed migration to meet the private sector's demand for labour and to prevent illegal trafficking of workers. There are at issue two relevant policy objectives in the CSAWP instruments and immigration laws: 1) migrant workers are to be afforded equal treatment to Canadian workers, and 2) the hiring of migrant agricultural workers will not result in depressed wages and working conditions unattractive to Canadian workers. Canadian agricultural workers have access to employment related tribunals and courts to enforce their rights. Migrant agricultural workers may also theoretically access these mechanisms. However, migrant workers do not have the same labour mobility rights as Canadian workers and may be subject to premature repatriation before they are able access or realize their rights under mechanisms otherwise available to Canadian workers. Migrant workers have further disincentives to raise complaints for fear of repatriation or being “blacklisted” from future participation in the CSAWP. The unique circumstances of migrant agricultural workers and their lack of mobility rights reveals that workers are not provided equal treatment with Canadian workers when the *effect* of the repatriation provisions makes it difficult to enforce their rights.

20. The current mechanism allows for the earlier stated objectives to be undermined because the effect of the CSAWP'S structure denies migrant workers equal access to dispute resolution mechanisms otherwise available to Canadian workers. This, in turn, leads to the potential of worker complaints about poor working conditions being ignored. Persistence of poor working conditions will continue to be unattractive to Canadian low-skilled workers.

Therefore, from a public policy perspective, migrant agricultural workers and employers should have an open, accessible mechanism to ensure due process of complaints. While flexibility and cost-effective mechanisms are worthy considerations, structuring and checking discretion will also strengthen the instrumental framework as a credible mechanism by preventing the potential for arbitrary decision-making and creating procedural fairness for workers. The call for a mechanism that guarantees due process is consistent with standards in the international conventions applicable to migrant workers.

21. The findings suggest that provincial authorities take a “hands off” approach as it relates to the application of labour and employment legislation to migrant workers because there is an assumption that HRDC is ensuring enforcement. However, expertise in the provincial laws lie with provincial authorities. Furthermore, it is the provincial authorities, that can ensure that proactive steps are taken as it relates to housing and working conditions. HRDC does not have this jurisdiction.

II. Industry Level Practices of the CSAWP

This component examines: migrant labour costs; working conditions; and rules and regulations. Generally, the government and private sector stakeholders were satisfied with the operation of the program. This section highlights portions of the report relating to industry level practices that may require improvement. Some of the key findings include the following.

1. Migrant workers' wages are low and heavily deducted. The Employment Agreements provide that workers shall be paid wages, which ever is greatest: the provincial statutory minimum wage; the rate determined annually by HRDC to be the prevailing wage rate for the type of agricultural work being carried out by the worker in the province in which the work will be done; or the rate being paid by the employer to his Canadian workers performing the same type of agricultural work. The minimum wage in Ontario is $6.85; wages for CSAWP workers in 2002 based on the “prevailing wage rate” was $7.25.

2. The methodology of setting the “prevailing” wage rates has proved to be the most contentious issue among the parties and stakeholders at this time. HRDC is attempting to

resolve this problem by contracting departments within the government to establish a standard national wage structure methodology. A large number of workers are returning workers from previous seasons, but wages do not reflect their seniority or skills appreciation.

3. In addition to the normal deductions Canadian workers incur, migrant workers' wages are subject to additional deductions that reimburse employers for partial travel expenses and visa fees. As well, workers from Mexico and certain Caribbean states have deductions for non-employment related insurance coverage. Caribbean workers remit 25% of their wages as part of the compulsory saving scheme; a portion is returned to the worker when he/she returns home, another portion may be allocated for liaison office administrative costs and other expenses relating to the program. The Government Agents identified the “unfairness” of the employment insurance premium deductions when the migrant workers cannot access unemployment benefits because of their temporary status in Canada. Workers may have theoretically collect sickness and maternity/parental benefits under the *EI Act*, however, collection of these benefits is extremely rare. The federal government rationalizes the deduction because it is the work that is insurable and not the worker. A deeper analysis of the *Employment Insurance Act* reveals that this rationale is inconsistent with the broader policy purpose of the *EI Act* which is to provide temporary income for workers who are unemployed not at the fault of the worker.

4. CSAWP workers work extremely long hours (9-15 hours per day), up to seven days a week, with few rest periods. However, the Ontario *Employment Standards Act* excludes agricultural workers from provisions relating to minimum hours of work, daily and weekly/bi-weekly rest periods, statutory holidays, premium overtime pay. The Mexican Employment Agreement attempts to fill this gap by providing some standards for rest periods.

5. Agricultural work is one of the most dangerous occupations in Canada. However, agricultural workers continue to be excluded from *Occupational Health & Safety Act* in Ontario. A large number of CSAWP workers are exposed to workplace hazards including pesticides and operation of machinery. However, safety training is inconsistent and based on employer discretion.

6. The Government Agents reported that while they had heard cases of workers being exposed to pesticides, there were very few cases reported most recently. Some Government Agents also reported that health and safety training and protective clothing are provided, while others believed that there was inadequate protection against pesticides. The University of Guelph provides pesticide training but 2001 data indicate that training is still low relative to the number of CSAWP workers that come into Ontario. The training is provided to workers doing the actual spraying. However, workers not directly handling the pesticides raised concerns about being in the fields when the spraying was done or being ordered to re-enter fields too early after spraying. Government Agents stated that when such cases were reported, investigations were performed and the workers' concerns were unfounded. There appears to be a gap between what are proper re-entry times and the workers' understanding of these guidelines. It was acknowledged by some Government Agents that the problem of workers' exposure to pesticides is difficult to assess because their information is dependent on workers reporting incidents; this may not always happen for fear of repatriation by the employer. Government Agents also report that a worker's attempt to refuse unsafe work may lead to repatriation.

7. In terms of housing, the Government Agent reported that most housing was acceptable and that housing has improved over the years. Housing is reviewed in a two stage process. The Ministry of Housing inspects accommodation prior to the arrival of the worker; and then the Government Agent visits the site to determine whether it meets an "acceptable standard". Two issues were raised as concerns. First, many accommodations do not have indoor bathroom facilities, and second, not all Ministry of Health housing inspections are being completed before a worker arrives in Ontario. The second stage of housing inspections, i.e. the Liaison Officer's inspection, is assessed at the discretion of the Government Agents. Some Government Agents state that the Ministry housing guidelines were not high enough and out of date. A worker may not be placed with an employer if the Government Agent believes the accommodation is not acceptable and the employer refuses to improve them. However, it was acknowledged that if one country does not place a worker in housing considered to be sub-standard by a Government Agent, another country may accept the conditions for their workers.

III. Unionization and Industry Level Migrant Agricultural Labour Markets

The recent Supreme Court of Canada decision in *Dunmore v. Ontario (A.G.)* was hailed as putting to rest the controversy of whether agricultural workers have the constitutional right to join a union. The Court held that agricultural workers have the right to form employee associations and protective legislation to allow workers to organize "without intimidation, coercion or discrimination". While growers and most Government Agents expressed concerns and resistance in the unionization of migrant agricultural workers, the decision of the Supreme Court of Canada has indicated that worker's right to organize and join an association of their choice should be recognized while they are in Canada.

More recent events indicate that this matter continues to be the centre of significant political tensions in the Ontario agricultural community. At present, agricultural workers, as held by the Supreme Court of Canada are disadvantaged in all aspects of Canadian society. Agricultural workers and migrant workers continue to be denied the right to unionize and collectively bargain despite the *Dunmore* decision and the enactment of the *Agricultural Employees Protection Act, 2000.* Rather, the Ontario Government has applied a minimalist approach in its interpretation of *Dunmore* by only allowing workers to participate in "associations" and make representations which do not require an employer to engage in any additional consultations or negotiations. Therefore, the current impact of *Dunmore* on migrant agricultural workers is minimal in terms of having any effect on their current working conditions.

Some key findings on the implication and impact of unionization are:

1. If farms are covered by the model of unionization based on current labour relations law in Ontario, farms will most likely be unionized on a farm by farm basis, assuming that a sufficient number of union cards are voluntarily signed by workers. Based on the current model, unionization on these individual farms, where a union has been certified, will likely cause reconfiguration of the applicable instruments that apply to migrant workers' terms and conditions of employment. Based on the definition in the collective agreement, the union may be the only recognized bargaining agent on behalf of workers in a defined bargaining unit on an individual farm.

2. If unions are permitted to bargain for the terms and conditions of migrant workers, the Employment Agreement will likely be replaced by the collective agreement based on current labour relations law. The role of Government Agent would continue to be important in the operation of the CSAWP especially in: recruiting workers; managing the migration of workers from the supply country to Canada; processing income tax returns, CPP and worker's compensation claims; providing policy inputs into the direction of the program; and negotiating with the Canadian government as it relates to the framework of the CSAWP. These roles may be strengthened while the union may relieve Government Agents from workers' grievances about working conditions or the enforcement of local laws.

3. Unionization will likely result in increased wages and benefits for migrant workers. Traditionally, unions have also ensured job security for workers by providing a dispute resolution mechanism if workers were unjustly terminated. Remedies may include reinstatement.

4. One outcome of unionization may be increased mechanization resulting in a decreased demand of agricultural labour, including migrant workers.

5. Growers have expressed that if unions were to come onto farms, they would consider moving or closing operations as a response. This would also result in a decreased demand of farm labour or as a response of employers to avoid perceived costs of a unionized labour force. The perceived costs growers associate with unions, including increased wages and benefits, which make it difficult for the farm to be viable. Growers are concerned about the right to strike which may have devastating consequences on the harvest.

6. Unions may be sensitive to the unique circumstances of agriculture as evidenced by the union's concession to give up the right to strike when agricultural workers briefly gained the right to collective bargain in Ontario between 1994-95 under the *Agricultural Labour Relations Act*.

7. If migrant agricultural worker gain the right to collectively bargain, this will result in union dues deductions from migrant workers' wages ranging from 1-2%. Currently, Caribbean workers pay 5-7% of their wages for services of the Government Agent to cover expenses relating to the general administration of the CSAWP as well as employee representation in the day to day employment matters of workers.

IV. Conclusions

A. "Good Practice" Areas of the CSAWP

"Best practices" are defined as practices that have "proven and have produced successful results" that are sustainable, and that can be replicated elsewhere. Taking this definition and applying it to the Canadian seasonal agricultural labour markets, best practice may be described as good practices at the policy and regulatory, labour-management relations, farm industry employment, and migrant worker-farm community levels that make the farm labour markets work well in the interest of both the migrant workers and the growers who employ them. Based on this definition, the research finds that CSAWP exhibits "good practices" in the following areas:

- Government controlled migration of foreign labour, which minimizes the exploitation of migrant labour via labour contractors or other unregulated or exploitive private means. Managed migration reduces the risk of illegal migration.

- The instrumental framework of the CSAWP including the MOU, Operational Guidelines, and the Employment Agreement which delineates the roles, duties and obligations of the various stakeholders. This delineation provides benchmarks for program evaluation in determining what is working in the interests of workers and employers and what is not working in the interests of workers and employers at all levels of the program.

- The Employment Agreement provides an instrument by which workers and employers are made aware of the terms and conditions of employment before the commencement of the employment relationship. Because agricultural workers are exempted from several Ontario employment related statutes, the Employment Agreement fills this gap in some

circumstances. For example, Mexican workers are entitled to meal breaks which they would not otherwise be entitled to under provincial laws.

- The instrumental framework of the CSAWP, in particular the Operating Guidelines, provides an informative tool of detailing every step in a multi-party, complex set of administrative processes in bringing migrant workers to Canada.

- Annual CSAWP review meetings at both the regional and international levels Regular face-to-face meetings among the various stakeholders ensure the smooth operation of the CSAWP and provide a reliable forum for issues to be addressed on a regular basis. This serves to create a program that is responsive to all interests as well as building relations and contacts among the stakeholders.

- The Government Agents play a constructive role in providing information to workers, administering the program in certain aspects and providing policy inputs into the program.

- The ability of farmers to have “named” workers return on an annual basis, which may minimize the transient nature of the migrant worker by having the stability of returning to the same employer.

- The transfer process which allows workers to move to other farms as opposed to returning home, should problems arise with a grower during their work permit.

B. CSAWP Areas that may need “Good Practice” Principles Attention

- The “dual” role of Government Agents as worker representatives which creates potential for conflict of interest and may undermine independent representation of workers.

- The competitive structure of the program among the consulates to place workers on farms which may undermine enforcement of the contracts for fear of having workers replaced by workers in other supply country.

- The impact of the repatriation provisions, the competitive nature of the program among the supply countries, and the lack of migrant worker's mobility in Canada have had an adverse impact on the enforcement of employment standards and the Employment Agreement between the worker and the employer.

- The increasing role of agricultural private sector interests (i.e. FARMS) in policy-making is causing tensions in relations between supply countries and the Canadian government. This also diminishes the “government to government” nature of the CSAWP.

- The Mexican consulate has inadequate resources to service the number of Mexican workers currently in the program.

- The lack of an objective methodology in the determination of appropriate wages for migrant agricultural workers.

- The application of Canadian laws and the policy objectives that underline them need to be responsive to the unique circumstances of migrant agricultural workers. For example, the policy objectives for the deduction of EI premiums cannot be reconciled with the immigration restrictions and lack of mobility placed on migrant workers.

- There is an inconsistency of interpretation of “acceptable standards” in housing among the Liaison Officer and guidelines for housing inspections are outdated.

- There are varying practices relating to training and protective clothing against pesticides. In light of the exclusion of agricultural workers from the *Occupational Health and Safety Act* in Ontario, the level of pesticide training and use of protective clothing is dependent on the goodwill of the employers.

- There is no system in place to address disputes that cannot be amicably resolved or to provide open accountability to all participants in the program. Enforcement of employment standards and contracts are left to the discretion of individuals instead of objective criteria.

- There is hesitancy of some participants in the CSAWP to recognize independent migrant worker associations in the operation of the program whereas employers are provided formal recognition and opportunities for policy inputs.

V. Selected Recommendations

The following are selected key recommendations arising from the findings. Additional recommendations may be found in the report.

Government of Ontario

1. Provincial Ministries should become more active in the annual review meetings in order to educate themselves on the CSAWP and how it fits within the provincial legislative framework, and to provide Government Agents with resources and contacts in case of questions about provincial employment and labour laws.

2. The Ontario *Employment Standards Act* should be amended to include agricultural workers under provisions relating to minimum hours of work, vacation pay, daily and weekly/bi-weekly rest periods, and overtime pay.

3. Stakeholders should encourage and allow for agricultural workers to be covered by the *Occupational Health and Safety Act* ("*OHSA*") in Ontario. Inclusion of agricultural worker under *OHSA* will assist in addressing worker's health and safety concerns, including pesticide use, by providing an institutional framework in which this may be addressed.

4. Housing inspection guidelines need to be updated in consultation with all Government Agents collaboratively to ensure that consistent standards are applied for all migrant workers regardless of the supply country from which they come.

Government of Canada

5. Review of deduction of Employment Insurance ("EI") premiums should be undertaken with the recognition that CSAWP workers are paying premiums into a system in which it rarely sees any benefit. It is recommended that workers be exempt from paying EI premiums or be reduced in recognition of the limited access workers have to benefits under the EI scheme.

6. An objective formula for the appropriate calculation of migrant workers wages should be established. This initiative is under way by the federal government and is encouraged to be completed. A stable and reliable formula for the calculation of wage rates will serve to minimize the current hostilities among the state stakeholders.

7. Seniority of returning named workers should be recognized in the wage rate calculation as well as skill levels of workers.

8. Absent legislative protection under the *Occupational Health and Safety Act* or the *Employment Standards Act*, migrant agricultural workers should be provided with rest periods, overtime pay and health and safety protections under the Employment Agreement recognizing that there are benefits to employers and workers for such protections.

9. Guidelines or a policy statement be drafted on the interpretation of "non-compliance, refusal to work, or any other sufficient reason". In particular, note that a breach of contract will not be found where a worker refuses work that is unsafe.

10. The power of the employer to repatriate workers should be minimized. It is recommended that there should be a minimum two (2) week waiting period before a worker is sent home in order to allow the worker the opportunity to raise a complaint about the validity of the repatriation decision. If the worker accepts the repatriation decision, the two (2) week period may be waived to allow for immediate return. If the worker files a complaint, then an independent body should investigate the complaint and the worker should be allowed to stay until the investigation is complete or a decision on the merits of repatriation has been

determined. The transfer process may be utilized during this period in order to place workers with other farmers during this interim period.

11. It is recommended that a review of the dispute resolution mechanisms under the CSAWP be undertaken in order to ensure procedural fairness and enforcement of the various instruments.

12. It contemplating a possible dispute resolution mechanism, the following factors should guide the deliberation:

    a. proceedings must be quick and cost effective since migrant workers are restricted to Canada for a short period of time and farm production should not be jeopardized.

    b. to address these concerns, negotiation and mediation be built into the mechanism as stages of dispute resolution before using formal hearing processes.

    c. if workers are members of a union, then the Employment Agreement should explicitly recognize the arbitration process under any applicable collective agreement as required by law.

13. The dispute resolution process may include stages of informal process which may escalate to binding processes of arbitration should the dispute not be resolved. For example, the parties may try to mediate the dispute with all representatives in a formal meeting; the next stage would be to use a trained neutral third party mediator to attempt to resolve the dispute; the next step would be binding arbitration with reasons for decision. The Employment Agreements should include a roster of mutually agreeable arbitrators or mediators. An established list will ensure that the dispute is heard expeditiously and supersedes time that may be expended in finding agreement on the arbitrator.

14. The dispute resolution mechanism should be available to all affected parties and parties should have direct access to it. Therefore, while Government Agents should be able to file disputes with the body on behalf of a migrant worker, the worker should also be able to access the mechanism him or herself should the Government Agent disagree with the worker. The worker should have the right to represent himself independently or through an employee association.

15. The dispute resolution mechanism should be paid for by the Canadian Government in recognition that resources will need to be committed in ensuring that policy objectives and contractual provisions intended to guarantee fair treatment of migrant workers are in fact enforceable. This will reinforce that HRDC's mandate to ensure that wages and working conditions are not depressed by the hiring of migrant workers.

16. The workers' right of association and their right to appeal involuntary repatriation should be enshrined in both the MOUs and the Employment Agreements.

17. A central database of all worker complaints should be maintained by HRDC in order to track patterns of industry level practices which may assist in developing future policy objectives and guidelines for the CSAWP. The database may also be used to track good and bad employment practices and employers in assessing future employer participation in the CSAWP.

18. In light of the greater policy role that the private sector is taking in the operation of the CMAWP, this perspective needs to be balanced with greater participation of workers, their representative organizations, and/or labour groups at the annual meetings. They may give input on the impact of the program on the current labour market as well as addressing concerns about wages and working conditions.

Supply Countries

19. Amend the Operational Guidelines to clarify that, while the Government Agent will endeavour to ensure the smooth functioning of the program, the role of the supply country's government agent is to represent the worker's best interest should a conflict arise between the worker and the employer.

20. Consulates are under-resourced in performing their task as worker representative and additional resources are required if they are going to continue to provide services for its nationals. Physical distance makes it difficult to effectively and expeditiously resolve

dispute as they emerge on the farms. Local or satellite offices closer to the farming communities in which workers are placed should be considered

21. The orientation program should include information on migrant workers' right to join a union or any other worker association of their choice while working in Canada.

22. If the migrant workers voluntarily elect to join a union or any worker association of their choice, the Canadian, Caribbean and Mexican Governments and growers participating in the program should grant institutional recognition of such unions or worker associations.

23. If workers are unionized on a particular farm, consider whether the current compulsory administrative deductions for these workers may be decreased in light of some of the administration costs relating to contract enforcement being shifted to the union.

FARMS

24. Employers could be made aware through F.A.R.M.S. Information Package of the right of migrant workers to join an employees' association or to become a member of a trade union.

25. Further review and discussion is required about FARMS role in the administration of the transfer process. In the alternative, the central database of information that FARMS currently controls as it relates to the movement of workers needs to be shared in a format that is accessible and will reduce the cumbersome nature of the transfer process. It is recommended that a central body that has access on the movement of workers from all supply countries be mandated to administer the transfer process.

I. Introduction

The Canadian Migrant Agricultural Worker Program ("CSAWP") in Canada was inaugurated in 1966 as a pilot program between Canada and Jamaica to allow for 264 Jamaican agricultural workers to come to Canada temporarily to harvest tobacco in Southern Ontario. The program was implemented because of the inadequate supply of "reliable" agricultural labour from within the Canadian labour pool. Over the last 36 years, the CSAWP has expanded in all directions: there are more countries sending workers to Canada (Mexico, Jamaica, Trinidad & Tobago, Barbados, and the Organization of Eastern Caribbean States ("OECS")); there are more agricultural commodity groups in which workers are placed; there are more provinces participating in the program (i.e. Nova Scotia, New Brunswick, P.E.I., Quebec, Manitoba, and Alberta); and the CSAWP is serving as a model for managed migration in other Canadian industries (i.e. hospitality, construction, and meat packing).

Table 1: Distribution of Caribbean & Mexican Seasonal Agricultural Workers, 2002

Source Country of Worker	Canada	Ontario	Quebec	Alberta	Manitoba	N.B.	P.E.I.	Nova Scotia
Mexico	10,779	7,633	2,635	195	276	12	28	
Jamaica	5,272	5,211	38		7			16
Barbados	556	475	9					72
Trinidad & Tobago	1,481	1,481						
OECS	447	413	34					
Total:	**18,535**	**15,213**	**2,716**	**195**	**283**	**12**	**28**	**88**

Source: Human Resources Development Canada

The North South Institute has undertaken a multi-disciplinary examination of the CSAWP with the overall objective of identifying and examining its "best practice" (institutional, industry-level employment, social relations, source country economic development) features and outcomes, as well as examining the future direction of the program. The goal of the NSI project includes putting forward for stakeholder consideration:

- strategic ways in which the program can build upon its “best practices” features while seeking to address areas that may not have been working in the economic and social welfare interests of the migrant workers, employers, and farm communities of the workers' employment concentration; and

- options for the future direction of the program.

This component will focus on the Canadian institutional context of the program and industry level employment practices. In particular, the following questions will be examined:

- What is the overall legal and institutional framework governing seasonal agricultural workers' employment in Canada? How does the CSAWP interact with international labour agreements or conventions?

- How does the CSAWP's policy framework translate into actual farm industry-level employment practice?

- What impact does the role of trade unions have on the future of the CSAWP?

- What should be the future direction of CSAWP?

This component is based on data collected between March 2002 and June 2003. The findings of this component are based on primary and secondary research. Interviews were conducted between March 2002 to June 2003 of various stakeholders including Human Resources Development Canada advisors and regional managers; government and consulate representatives from all participating sending countries; representatives from FARMS and FERMES; Canadian Immigration and Department of Foreign Affairs officials; and various representatives of the United Food and Commercial Workers Canada (“UFCW”). Data on workers participating in the program was derived from secondary sources and worker surveys summarized and analyzed by the Mexican and Caribbean researchers in this project. Documents were requested and received from various stakeholders which included statistical information and documents used in the operation of the program. In addition, secondary documents such as academic articles, books, media

reports, and other institutional studies were reviewed. Applicable legal instruments including relevant statutes, regulations, guidelines and international conventions were analyzed. As well, research was conducted on relevant case law and general principles of applicable law.

As will be discussed in further detail below, it is concluded that agricultural workers are governed by provincial legislation as it relates to labour and employment laws. Therefore, there may be some variance in terms of the labour and employment practices of migrant workers depending on the province in which they work. Ontario was selected as the case study for the operation of the CSAWP because the majority of the migrant workers (85 - 90%) under CSAWP work in Ontario. However, federal legislation such as the *Employment Insurance Act*, the *Immigration Act*, and the *Canada Pension Plan*, apply to all agricultural migrant workers regardless of the province they are working in. In addition, the *Charter of Rights and Freedoms* has general application to all migrant agricultural workers.

This report will first examine the history of the CSAWP, in order to provide background and context for today's policy rationale for the program. The current institutional framework of the CSAWP will then be reviewed based on the instruments governing the program, including the Memoranda of Understanding between the supply countries and Canada; operational guidelines; the employment agreement; and government policy statements. These instruments are placed within the general framework of Canadian immigration laws and the applicable provincial and federal employment laws. This section will also review the administration of the program and the role of the various parties and stakeholders in the program. The next section will examine how the institutional framework and administration of the CSAWP operates in terms of industry level practices, including migrant labour costs; conditions of employment; and the application of rules and regulations. The impact of unionization on the CSAWP will be examined based on an in-depth analysis of the Supreme Court of Canada decision, *Dunmore v. Ontario (A.G.),* and the recently proclaimed *Agricultural Employees Protection Act, 2002*. Unionization will be examined as it impacts migrant workers' wages; demand for migrant workers; increased mechanization; and the role of liaison officers. The future direction of the program under unionization will be analyzed by locating various stakeholders and parties in current labour relations models. Finally, the institutional and industry level “best practices” of the CSAWP will be outlined. Recommendations to strengthen these “best practices” will be interspersed throughout this report where discussion

of various aspects of the program identify areas that require strengthening or are not working in the interests of migrant workers or employers.

II. Historical Background and Rationale for the Seasonal Agricultural Worker Program

Courts or adjudicators look at the legislative history and policy considerations underpinning statutory or contractual provisions in order to interpret the contemporary scope or application of a legal instrument.[1] The meaning of legislation must be gathered from reading the words in context, and this includes the external or social context such as the setting in which the provision was enacted, its historical background, and the setting in which it operates from time to time.[2] Therefore, in order to understand and interpret the legal framework of the CSAWP, it is necessary to consider first the historical background of the instruments as well as the policy intent of the CSAWP. This analysis will assist in the purposive interpretation of the legal instruments that govern the CSAWP, and will be reviewed in the following sections.

Historically, the agricultural industry has been generally unable to meet its seasonal labour demands in southwestern Ontario even during periods of high unemployment. Growers in this region have been confronted generally with two problems: 1) recruiting an adequate number of workers for the harvest, and 2) retaining those workers for the duration of the harvest.[3] The problems in the recruitment and retention of agricultural labour may be explained, in part, by the "poor wages, poor and unsafe working conditions, long hours of work, the lack of protection under provincial labour standards legislation, and the absence of habitable accommodation".[4] Industrialization and opportunities for factory jobs with higher wages, fringe benefits, and the promise of steady of employment also made it increasingly difficult for agriculture to meet labour

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[1] R. Sullivan, *Sullivan and Dreidger on the Construction of Statutes*, 4th ed. (Markham and Vancouver: Butterworths, 2002) at 112-113, 195-234, 457-464, 467-516; P.-A. Côté, *The Interpretation of Legislation in Canada*, 2d. ed. (Quebec: Les Éditions Yvon Blais Inc., 1991) at 313-361.

[2] R. Sullivan, *ibid.* at 457; P.-A. Côté, *ibid*. at 313-314, 345.

[3] Vic Satzewich, *Racism and the Incorporation of Foreign Labour* (London and New York: Routledge, 1991) at 58.

[4] *Ibid*. at 62. See also: Nandita Sharma, "On Being Not Canadian: The Social Organization of 'Migrant Workers' in Canada" (2001) 38:4 CRSA/RCSA 415-439.

demands from domestic sources. In a 1970 Background Paper on the Caribbean Seasonal Agricultural Workers Program, the Assistant Deputy Minister of Manpower and Immigration described the problem as follows:

> Wages and working conditions in agriculture lag behind those in other industries. Even in Ontario, the region of greatest farm labour demand in Canada, there is no indication that farm wage levels have risen sufficiently to compete with other industries in order to ensure an adequate labour supply. The development of secondary industries in many rural areas of Ontario has resulted in the withdrawal of workers from the seasonal agricultural work force. Younger workers, with higher educational levels, now have higher job expectations and even in periods of unemployment do not readily accept temporary work in agriculture.[5]

Since the 1940s, there has been a decline in the relative importance of agriculture in the Canadian economy and a corresponding decline in agricultural employment. In 1941, 28.9 % of the Canadian labour force was employed in agriculture but by 1966 this figure had dropped to 7.6%.[6] This drop in the agricultural labour force was not accompanied by a corresponding decline in the general need for labour. Farming was pre-dominantly a family affair prior to the Second World War, but as families became smaller and children sought opportunities in the urban centres, the need for hired labour increased.[7]

The Canadian government attempted to address these concerns with mobility grants, summer student programs, and farm labour pools.[8] Children, Aboriginal peoples, the urban unemployed, and convict labour in Quebec were all recruited or targeted to meet the labour demand.[9] During the Second World War, the federal government also supplied to growers German prisoners of war,

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[5] Background Paper—Caribbean Seasonal Agricultural Workers Program, Memo from Raoul Grenier, Assistant Deputy Minister to L. Couillard, Deputy Minister of Manpower and Immigration, February 17, 1970. National Archives of Canada, R. G. 118, acc. 85-86/071, vol. 81, file 3315-5-1, part 4.

[6] *Ibid.* at 35.

[7] Tanya Basok, "Free to be Unfree: Mexican Guest Workers in Canada" (1999), 32:2 LABOUR, Capital and Society 192-221 at 199.

[8] Irving André, "The Genesis and Persistence of the Commonwealth Caribbean Agricultural Workers Program in Canada" (1990) 28:2 Osgoode Hall Law Journal 243 at 256.

[9] Vic Satzewich, *supra* note 3, at 79-81.

Japanese Canadian internees, and conscientious objectors[10], predominantly Doukhobors and Mennonites. In general, the Canadian government looked to politically and socially marginalized populations on which mobility restrictions could be placed in order to meet the agricultural labour demand.

These schemes of internal mobilization of labour into farming communities proved to be ineffective because students returned to classes at the beginning of September during the peak harvest season and wages continued to remain low.[11] For example, in 1949, the average monthly wage for persons working in agriculture was $85, whereas the average monthly wage in all other industries was $172.[12]

The “inflexibility” of unemployment insurance benefits and welfare payments were also identified by the federal government as a disincentive for Canadian workers to work short periods in seasonal work. Agricultural wages were very low and since unemployment insurance benefits comprised only two-thirds of one's insurable earnings prior to becoming unemployed, the potential worker avoided agricultural labour in part because of the low unemployment benefits he or she expected to receive during the predictable off-season.[13]

After the Second World War, the federal government used immigration policies to address the on-going labour shortages. Between 1947 and 1954, Polish veterans were granted temporary entry into Canada under a labour contract which stated that they would remain in agricultural employment for a minimum of two years. Upon completion of the terms of the contract, plus three additional years residence in Canada, they could apply for Canadian citizenship.[14] Similarly, Canadian officials allowed Displaced Persons from Eastern Europe to settle permanently in

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[10] Vic Satzewich describes “conscientious objectors” as individuals who refused to enter the armed forces during the war. Instead of imprisonment, the Government forced them to work in “essential industries”, including agriculture.

[11] Irving André, *supra* note 8.

[12] Vic Satzewich, *supra* note 3, at 65.

[13] Irving André, *supra* note 8 at 256.

[14] Vic Satzewich, *supra* note 3, at 87.

Canada, provided that they remained in allocated farm employment for a period of one year.[15] Polish workers and Displaced Persons could not quit or change jobs without the consent of the Canadian Department of Labour, and violation of any terms of the contract could result in deportation.

In 1947, the Canadian government signed its first postwar bilateral agreement with the Dutch government to facilitate the entry of Dutch nationals who were channelled into farm labour positions. These workers did not face the threat of deportation like the Polish or Displaced Persons, and qualified for citizenship after five years of residency.[16]

These early immigration initiatives responded to the first problem of worker recruitment. However, retention continued to be a problem since many workers were leaving employment before and after expiry of their contracts. All of these immigrants had varying degrees of labour mobility within the Canadian labour market and there were few incentives to stay with agricultural work as discussed earlier. As a result, in the late 1950s and early 1960s, growers of southwestern Ontario lobbied the federal government to allow for the entry of migrant workers from the Caribbean on a seasonal basis, mirroring a program already in place in the United States. Growers sought entry of workers under strict restrictions which prevented high turnover or the possibility of departure during critical harvest times. In other words, growers were looking for a “reliable” labour force. The Canadian government's initial response was to resist the growers' request, and rather, focussed on the need to improve working conditions that would attract Canadians to farm labour positions.[17]

At that time, the Canadian government had concerns about the ability of Caribbean workers to adapt to Canada as well as the impact the workers would have on the racial demographic of Canada. 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

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[15] *Ibid.* at 93.

[16] *Ibid.* at 98-99.

[17] Tanya Basok, *Tortillas and Tomatoes* (Montreal & Kingston: McGill-Queen's University Press, 2002) at 220-224; Vic Satzewich, *supra* note 3, at 158; Letter from the Minister of Labour to the Essex County Associated Growers, April 12, 1965, National Archives of Canada, R.G. 76, vol. 842, file 553-67, pt. 2; Letter from R.B. Curry, Assistant Deputy Minister (Immigration) to Owen Rowe, Acting Commissioner, Easter Caribbean Commission, October 28, 1964, R.G. 76, vol. 842, file 553-67, pt. 1.

substantial increase in Negro immigration to Canada. The racial problems of Britain and the United States undoubtedly influenced this concern which of course still exists today."[18] Therefore, the Canadian government's requirement that workers remain in Canada only on a temporary basis, with no prospect of citizenship, was grounded in early racist immigration policy.[19]

In light of acute labour shortages and increased pressure from the farm lobby, the federal government finally relented to allow for the entry of 264 Jamaican workers into southwestern Ontario which inaugurated the Seasonal Agricultural Worker Program. The CSAWP eventually expanded to include Trinidad & Tobago (1967), Barbados (1967), and Mexico (1974) and the OECS – Grenada, Antigua, Dominica, St. Kitts & Nevis, St. Lucia, St. Vincent, and Montserrat (1976). The policy choice of the Canadian government was to allow the importation of "unfree" migrant workers on a temporary basis instead of insisting on the improvement of working conditions and wages. In this context, "unfree labour" is defined as workers who are politically and legally compelled to provide labour and unable to circulate in a labour market. It also denotes restricted access to rights and obligations of citizenship.[20]

Government responded to growers' concerns that they could not afford to increase wages or improve working conditions to attract Canadians because they were not only competing with industry for workers, but also with prices of imported foods.[21] Instead of improving working conditions, policy was constructed to justify the importation of Caribbean and Mexican workers as "suitable" for this work.[22] Consider statements made by Member of Parliament H.W. Danforth (Kent Essex) on July 20, 1973 in the Canadian Parliament:

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[18] Vic Satzewich, *supra* note 3, at 139.

[19] See: Vic Satzewich, "Rethinking Post-1945 Migration to Canada: Towards a Political Economy of Labour Migration" (1990) 28:3 International Migration 327-345.

[20] Tanya Basok, *supra* note 17, at 13-14; Satzewich, *ibid.* at 329-330, 334.

[21] Memo from R. Curry, Assistant Deputy Minister (Immigration) to Tom Kent, Deputy Minister of Citizenship and Immigration, January 21, 1966, National Archives of Canada, R.G. 26, vol. 145, file 3-33-6, Canada-West Indies Conference.

[22] Minister of Citizenship and Immigration, Jean Marchand, Confidential Memorandum to Cabinet, Seasonal Workers for Ontario Farms, March 30, 1966, National Archives of Canada, R.G. 118, accession 85-86/071, vol. 81, file 3315-5-1, part 1.

> Mr. Chairman, many people do not like to work in agriculture. They do not like the monotony, the conditions and the fact that you work sometimes in heat and sometimes in cold. That is all right; they do not like it and they should not be forced to work at it. We all agree with that... How [then] do they [farm owners] obtain labour? Many of them have encouraged offshore labour over the years which comes from three sources, the Caribbean, Portugal, and Mexico. We need this labour... and these people are used to working in the heat. They are used to working in agriculture, and they are satisfied with the pay scale... I feel that Canadians should provide work for Canadians wherever possible; Canadians should have the first opportunity to work. But... if Canadians do not want to work at this job — many of them do not, and have expressed this feeling in no uncertain terms — then I say that the producers of this nation are entitled to offshore, competent labour from wherever it may come, if these people are willing to work under the conditions prevailing in Canada today and produce crops for Canadian consumers.[23]

The expansion of the CSAWP was in response, in part, to the increasing worker abuses resulting from growers privately recruiting offshore workers and using private contractors to recruit Portuguese farm workers and Mexican Mennonites. These abuses came to the attention of a Special Task Force created by the Department of Manpower and Immigration and were described as follows:

> The authors of this report, and those who accompanied them, were shocked, alarmed and sickened at some of the arrangements made for accommodation in Canada for Mexican families, at their wages and working conditions, at the fact that the entire family works in the fields for the season, at the lack of schooling, at the evidence of malnutrition which exists among them, and at numerous other factors such as non-existent health facilities.[24]

The Task Force reported that the lack of suitable accommodation and low wages were the primary reason for the shortfall of agricultural labour. Based on the field observations of the abuses arising from the private recruitment of offshore workers, the Task Force made the following recommendation:

> If it is decided, as a policy matter, that the Department will continue to facilitate the bringing in of offshore seasonal workers from countries other than those included

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[23] *Hansards*, 20 July 1973: 5836 as quoted in Nandita Sharma, *supra* note 4 at 434.

[24] Canada Department of Manpower and Immigration. *Task Force, The Seasonal Farm Labour Situation in Southern Ontario: A Report*, Ottawa: August 11, 1973 at 17.

> under the Caribbean program, there must be negotiated with those countries - particularly Mexico and Portugal - agreements which guarantee basic and humane treatment of the workers involved, including wage guarantees, transportation assistance, health standards and accommodation criteria, among others. To this end, the Manpower Division of the Department must be involved in negotiations with foreign governments concerned, along with Immigration, External Affairs and other departments concerned.
>
> The Department must be prepared to commit substantial additional resources, either manpower or financial, if it is to continue, as it must, to be responsible for the recruitment and admission to Canada of offshore seasonal workers from whatever country... Until these resources are committed, the Department will continue to be open to quite justified criticism and no defence will be possible against the results of some of the deplorable conditions which now exist and which are identified in this report.[25]

A supplementary report from the Task Force confirmed that where government regulated and controlled movements existed, like the Caribbean Program, there were few breaches of the employment visa regulations.[26] As a result of the Task Force findings, the CSAWP was expanded to include Mexican workers in 1974. The Canadian Government publicly rationalized the need to formalize the movement of Mexican workers in order "to make certain that the workers who are admitted to Canada to help harvest our crops receive fair payment for their work as well as adequate accommodation and equitable treatment."[27]

Until 1987, the CSAWP determined the allowable number of workers with a quota system that the federal government announced every year. This policy caused adversarial relations between growers and the Canadian Government because growers desired a more flexible system that would allow for program expansion. Under this system, the annual average number of workers brought to Canada remained consistent at approximately 4,117 seasonal workers per year

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[25] *Ibid.* at 31-32.

[26] Canada Department of Manpower and Immigration. *Report on Migrant Farm Labour Investigation, Southwestern Ontario*, *August 27 - September 12, 1973*, Ottawa: October 5, 1973 at pp. 5-6.

[27] Office of the Minister of Manpower and Immigration, 'Press Release: Mexico-Canada', June 17, 1974.

between 1968 to 1986.[28] However, after 1987 and extensive negotiations with the agricultural private sector, the federal government changed the policy allowing the CSAWP to operate on a demand and supply basis. Under this system, the number of workers increased significantly with 8,539 workers arriving in 1988 and 12,237 in 1989.[29] At the same time, it was agreed that the private sector would absorb the administrative costs of the CSAWP, which led to the formation of the Foreign Agricultural Resource Management Services ("FARMS"). FARMS was established as a non-profit corporation mandated to process requests for CSAWP workers. FARMS was also invited to participate in operational and administrative annual review meetings of the CSAWP which had previously been government-only meetings. Similar private administration has been established in Quebec with the Fondation des Entreprises en Recrutement de Maind'oeuvre Agricole Etrangere ("FERMES").

In summary, the CSAWP and its expansion was in response to the continued failure to mobilize domestic labour. Low wages and poor working conditions made it difficult for growers to recruit and retain Canadian workers. Government insisted for a period of time that growers improve wages and working conditions to attract Canadians instead of importing labour. However, growers argued that they could not afford such improvements. With increasing pressure from growers and acute labour shortages, the Canadian government's policy shifted from improving wages and working conditions in agriculture that would attract Canadian workers, to importing workers who were "suitable" for agricultural work and would accept the *status quo*. The Canadian government tailored a program that met growers desire for a "reliable" workforce – that is, a labour pool that cannot threaten to leave the job during critical harvesting periods despite low wages and difficult working conditions – by allowing offshore workers to enter only on a temporary basis. After the implementation of the Caribbean Seasonal Agricultural Worker Program, the benefit of regulating the recruitment and movement of Caribbean workers became apparent. The 1973 Task Force exposed long-standing employer abuses faced by Mexican and Portuguese offshore workers who were privately recruited by employers or labour contractors. Expansion of the CSAWP to include

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[28] Commonwealth Caribbean and Mexican Seasonal Agricultural Workers Programs. Labour Market Services, HRDC, October 23, 1998 in Commission for Labour Cooperation, *Protection of Migrant Agricultural Workers in Canada, Mexico and the United States* (Washington, D.C.: Secretariat of the Commission of Labour Cooperation, 2002) at 8.

[29] *Ibid.*

Mexico was intended to address these abuses by ousting private recruitment and ensuring that workers were treated equitably through application of formal instruments.

The "quest for a reliable workforce" continues to be a matter of great concern for the horticulture industry in Ontario. The horticulture industry represents the primary commodity groups in which migrant workers work: fruit, vegetables, tobacco, ginseng, nursery, floriculture, and greenhouse vegetables. FARMS reports that the horticulture industry provides direct employment for approximately 102,000 people per year in Ontario. Many of those jobs are seasonal, with an average duration of eighteen weeks. A FARMS-sponsored report entitled "The Quest for a Reliable Workforce in the Horticulture Industry" (2003) describes the importance of offshore workers in horticulture [all emphasis in the original]:

> As it currently stands, reliable Canadians, including landed immigrants, fill 82% of those jobs. That is approximately **84,000 jobs for Canadians.** For the balance of 18,000 jobs, RELIABLE Canadians cannot be found. That is the experience of HRDC and the horticulture industry. Seasonal workers, from the Caribbean Commonwealth and Mexico, fill that critical 18% of the workforce. This is a core group of the workforce, forming the **KEYSTONE** to a complete harvest. Currently, the industry is not working at 100% of its capacity or efficiency! The limiting factor is labour. There are not enough RELIABLE workers, regardless of source. As a result, some crops are not harvested completely, new investments are curtailed and employment of Canadians is restricted.[30]

III. Policy and Institutional Framework of the Seasonal Agricultural Worker Program

Today, the Canadian government describes the CSAWP as a program of "managed migration" achieved through a partnership between the agricultural industry and government.[31] This partnership allows for on-going dialogue between industry and government to ensure that growers have a sufficient number of "reliable" workers, but at the same time government monitors the broader public policy relating to the impact of these workers on Canada's labour market.

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[30] FARMS. "The Quest for a Reliable Workforce in the Horticulture Industry" (Mississauga, Ont: 2003) at p. 2.

[31] Human Resources Development Canada, Ontario Region. "Partnerships, Agriculture Programs and Services", http://www.on.hrdc-drhc.gc.ca/english/ps/agri/partner_e.shtml , site accessed 3/21/2002.

This section will examine the institutional framework of the CSAWP, including the instruments and institutions specific to the program, as well as the general laws that apply to migrant agricultural workers while they are in Canada. It includes a review of the policy considerations which inform the current establishment of the institutional framework and provides general policy recommendations for the future of the program. As stated earlier, the case of migrant agricultural workers in Ontario will be used as the locus for analysis of the policy and regulatory framework of the program. Where Ontario laws are referenced, it should be noted that migrant workers in other provincial jurisdictions may have a different set of applicable standards based on the legislation of that jurisdiction.

A. Memoranda of Understanding ("MOU") between Canada and Mexico or the Caribbean States[32]

The Memoranda of Understanding and the annexed Operational Guidelines and Employment Agreements between the employer and the worker are the primary documents in facilitating the movement of Caribbean and Mexican workers to Canada under the CSAWP. These instruments set out the recruitment, selection, and documentation procedures for CSAWP workers.

1. Legal Status of MOU

The CSAWP is established by a Memorandum of Understanding signed by both Canada and Mexico. The federal Minister of Human Resource Development Canada ("HRDC") is the Government of Canada's representative and signatory for the MOU, whereas the Secretary of External Relations is the Mexican Government's representative and signatory. Jamaica is represented by the Minister of Labour, Social Security and Sports. The content of the MOU between Canada and Jamaica is the same as the MOU between Canada and all of the other

[32] This section is based on a review of the Memorandum of Understanding between the Government of Canada and the Government of the United Mexican States concerning the Mexican Seasonal Agricultural Workers Program in force from January 1, 2001 to January 1, 2005, and the Memorandum of Understanding between the Government of Canada and the Government of Jamaica concerning the Commonwealth Caribbean Seasonal Agricultural Workers Program in force from January 1, 1995 to January 1, 2000 and continues in force thereafter unless terminated by either party giving three (3) months notice in writing to the other party. Such notice has not been provided since January 1, 2000 and, therefore, this MOU remains in force.

Caribbean states participating in the CSAWP. Therefore, references to it are applicable to Trinidad & Tobago, the OECS, and Barbados.

The legal status of the MOU is described explicitly as an "intergovernmental administrative arrangement"; it does not constitute an international treaty. The parties agree that the MOU may be amended at any time with the approval in writing of both parties.

International treaties as defined by the *Vienna Convention of the Law of Treaties* are binding documents and may be subject to the principles of treaty interpretation under the *Vienna Convention*, (which include recognition of application of international law and principles of justice).[33] The state parties participating in the CSAWP have explicitly acknowledged that there is no intent to characterize the MOU as a binding treaty and, therefore, they are not bound by the requirements of the *Vienna Convention*. The language in the MOU also attempts to avoid any other alternative legally binding characterization, such as contract or international agreement, by calling the MOU an "administrative arrangement". The characterization of the MOU as determined by the state parties allows for more flexible and informal interaction between the parties. However, it also undermines the document as an enforceable instrument, and creates ambiguity as to the legal consequences should a party breach or violate a provision of the MOU itself or any of the provisions in the attachments.

The MOU states that any disputes which arise under the MOU respecting the interpretation or application of the MOU or its attachments (i.e. the Operational Guidelines or the Employment Agreement) will be resolved through consultation between both parties. However, the MOU is silent on what process would be undertaken if no resolution is achieved through consultations.

As an "administrative arrangement", actions or decisions under the MOU are arguably subject to the principles of administrative law. This body of law governs the implementation of public programs, particularly at the point of delivery, where they are likely to have their most immediate

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[33] The *Vienna Convention on the Law of Treaties* represents the worldwide consensus on how international instruments should be construed. The Convention entered into force on January 27, 1980. It has been ratified by Canada, Mexico, Jamaica, Barbados, St. Vincent and the Grenadines - all participants or parties in the CSAWP. Antigua & Barbuda, Dominica, Grenada, Montserrat, St. Kitts-Nevis, St. Lucia, also parties to the CSAWP, have not ratified the Convention as of 29 June 2001.

impact on the lives and rights of individuals.[34] The *Department of Human Resources Development Act* states that "the powers, duties and functions of the Minister [of Human Resources Development] extend to and include all matters over which Parliament has jurisdiction relating to the development of the human resources of Canada...and are to be exercised with the objective of enhancing employment, encouraging equality and promoting social security".[35] In this capacity, HRDC has arguably developed programs and procedures to allow for foreign workers needed for the Canadian labour market where it has been demonstrated that Canadians are not available. Thus, under administrative law principles, affected or interested individuals (i.e. migrant agricultural workers or others impacted by the CSAWP) may request the courts on a judicial review to determine whether the Minister exercised its powers, duties and functions appropriately or consistent with its objectives of "enhancing employment, encouraging equality, and promoting social security" by entering into the MOUs, or whether it is acting fairly in administering the MOU and its attachments. The precise argument and kinds of remedies that a court may order would depend on a particular set of facts.

In addition, the MOU (including the attachments) and the Canadian government's actions or decisions in administering the MOU may be reviewed under the *Charter of Rights and Freedoms.* The *Charter*, as part of *The Constitution Act, 1867*, is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force and effect. The mere fact that the MOU is drafted to avoid statutory or treaty characterization does not mean that the Canadian government is shielded from scrutiny, since it is well settled that the *Charter* applies not only to legislation but also to government actions under or authorized by statute (in this case the *Department of Human Resources Development Act*)[36] or executive decisions involving matters of a political or foreign policy nature.[37] The particular set of facts again would determine which portions of the *Charter* may be engaged and the kind of remedies that may be sought.

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[34] J.M. Evans et al., *Administrative Law*, 4th ed. (Toronto: Emond Montgomery Publications Ltd, 1995) at 3.

[35] R.S.C. 1996, c. 11, s. 6.

[36] Slaight *Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038.

[37] *Operation Dismantle Inc. v. The* Queen, [1985] 1 S.C.R. 441.

In the case of either a judicial review or a *Charter* challenge, the proceeding would only lie against the Canadian state. The supply countries would be immune from these proceedings since they are not bound by the laws of Canada.

In summary, while the parties to the MOU have characterized the instrument and its attachments as not legally binding, the Canadian government may still be held accountable pursuant to administrative and *Charter* law principles.

2. Policy Objectives Incorporated in the MOU

The preamble of the MOU states that the CSAWP symbolizes the "close bond of friendship, understanding and cooperation" which exists between the two countries. Furthermore, the preamble outlines the purpose of the MOU and the CSAWP as three-fold:

1. The CSAWP should continue to be of "mutual benefit to both parties".

2. The CSAWP should facilitate the movement of seasonal agricultural workers into all areas of Canada.

3. The operation of the CSAWP is dependent on Canada's determination of the need for seasonal agricultural workers to satisfy the requirements of the Canadian agricultural labour market.

The preamble incorporates the policy objectives and rationale of the CSAWP. In particular, it emphasizes the role of the state as: determining those aspects of the program which are to their "mutual benefit"; monitoring the movement of workers; and ensuring that migrant workers do not displace domestic labour.

The "mutual benefit of both parties" to the CSAWP will be examined based in large part on interviews with Canadian government representatives, Caribbean Liaison Officers and Mexican consulate representatives. From Canada's perspective, the CSAWP is a reported a benefit because it meets the following objectives:

- Meets qualifying fruit, vegetable and horticulture growers' seasonal demand for "low-skilled" agricultural workers during the peak planting and harvesting season when there is a relative shortage of similarly-skilled Canadian workers;

- Helps maintain Canada's economic prosperity and global agricultural trade competitiveness through timely planting, harvesting, processing and marketing of fruits, vegetables and horticulture crops, and expand job prospects for Canadian citizens dependent on agriculture and agriculture-related employment opportunities;

- Enhances and maintains the Canadian economy's efficiency through better allocation of local labour resources;

- Improves the economic welfare of migrant workers by providing them with temporary full-time employment in the labour-intensive commodity sectors of the fruit, vegetable and horticulture industry at relatively higher wages than they could obtain from similar or alternative activities in their home countries;

- Facilitates the return of the workers to their home countries at the end of their temporary employment in Canada.

The need for government actors to develop an institutional and regulatory framework for the migration of agricultural workers into Canada is also recognized as necessary in order to prevent the exploitation of migrant workers that may result from illegal migration, the use of labour contractors, or private recruitment. Evidence of abuses arising from these arrangements were documented in the 1973 Task Force, and present day examples of unscrupulous practices of labour contractors may be found in the United States and British Columbia.

From the perspective of Mexico and the Caribbean states, the CSAWP supports economic development of the supply countries through remittances of foreign currency. In 2001, Jamaica estimated that it benefited from approximately $7.6 million in remittances. The CSAWP also provides a scheme whereby high rates of unemployment may be temporarily relieved. In addition,

poverty and social dislocation may be exported to Canada for a period of time resulting in fewer pressures on local social benefit schemes. Workers benefit from Canadian wages which are used to improve farm workers' living conditions when they return home. As well, skills may be transferred in agricultural production at home. While both workers and the sending country identified benefits to the program, the characterization of those benefits may sometimes come into conflict. That is, the state's interest in the return of remittances may override the individual worker's grievances relating to his or her non-wage working conditions.

The MOU outlines the guiding principles in the operation of the CSAWP as agreed to by Canada and Mexico and the Caribbean, which are summarized below with some commentary.

1. Workers under the CSAWP are to be employed only in the Canadian agricultural sector, and only during periods determined by Canada and when Canadian workers resident in Canada are unavailable. The Canadian government has made it clear in its policy formulation of the CSAWP that migrant agricultural workers are intended to supplement the current Canadian labour force and not displace it.[38] Therefore, a key feature of the CSAWP is the “Canadians First” principle which requires growers to demonstrate that attempts were made to recruit and hire Canadian workers before approval will be given to a grower to hire a worker from Mexico or the Caribbean.[39] This principle also serves industry's objective of maintaining a “reliable” workforce during critical months of the harvesting season. The effect of the principle is to restrict migrant labour mobility in Canada and designate this labour pool as temporary.

2. The guiding principles state that workers under the CSAWP are employed at a premium cost to Canadian employers. This means that employers must accept the fact that hiring foreign labour will cost them more, as opposed to hiring local or domestic labour. The “premium” paid by the employer includes those costs which an employer would not otherwise incur if hiring local labour, such as adequate accommodation and travel

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[38] Human Resources Development Canada. *Statement of Policy and Terms and Conditions for the 2002 Commonwealth Caribbean and Mexican Seasonal Agricultural Workers Program* (hereafter “*2002 CSAWP Statement of Policy*”).

[39] *Ibid.*

expenses. By design, the “premium” aspects of the program emphasize the “Canadians First” policy objective of the CSAWP by attempting to make it more attractive to hire Canadian rather than foreign workers.

3. Under the Mexican MOU, workers are entitled to “treatment equal to that received by Canadian workers performing the same type of agricultural work, in accordance with Canadian laws”. In contrast, the Caribbean MOU states that workers are to receive “fair and equitable treatment while in Canada under the auspices of the Program”. While the Mexican MOU ensures that Mexican migrant workers are treated the same as Canadian agricultural workers, this may not always serve the migrant worker's best interests since Canadian agricultural workers in Ontario, for example, are excluded from several key labour and employment statutes. The Caribbean MOU provides for more general language which may be interpreted to either raise or lower the bar of the treatment of Caribbean workers relative to other agricultural workers. This language in practice is being interpreted by the parties as ensuring that Caribbean workers are treated the same as Canadian workers.

3. Annex I: The Operational Guidelines

The CSAWP is administered according to Operational Guidelines which are attached to the MOU as Annex I. The Operational Guidelines delineate how the CSAWP is to be administered and the role of the state and specified non-state actors, including designated duties and responsibilities. The Operational Guidelines are subject to annual review by both parties and amended as necessary to reflect changes required for the successful administration of the CSAWP and adherence to the principles contained in the MOU.

The Operational Guidelines provide for the recruitment of offshore workers which is closely regulated and monitored by the state parties. For example, the state parties agree that the employer and the Mexican or Caribbean Government Agent in Canada are responsible for selecting and providing the most economical method of air transportation to and from Canada, and this information will be communicated to HRDC. The Caribbean Guidelines further provide that the

employer or employer's agent will consult with the Caribbean Government Agent to ensure that the departure date from the Caribbean state is acceptable to the worker.

This formal and regulated method of recruitment is a “best practice” by ensuring that workers are tracked at every step in the process, and not subject to abuses or arbitrary treatment at the hands of employers or independent labour contractors.

The delegated duties of each state party are reviewed below.

Canada

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

1. Establish directions in accordance with Canadian immigration laws to limit the admission to Canada of Mexican and Caribbean workers seeking entry for the purpose of the CSAWP to persons selected by the sending country who:
   - are at least 18 years of age;
   - are nationals of the sending countries;
   - satisfy immigration laws;[40] and
   - are parties to an Employment Agreement attached to the MOU as Annex II.

   Canada will not process workers under the CSAWP through private contractors or other private means.

2. Provide adequate notice to Mexico and the Caribbean states as to the number of workers required by Canadian employers in order to facilitate the documentation process and enable their arrival by the dates required by the employers. The Mexican Operational Guidelines specifically state that Canada should provide Mexico with 20 working days notice as to the number of unnamed workers required by employers from the labour pool

[40] See next section on “Immigration Laws, Mobility Rights, and Prospects for Citizenship” for the criteria used to approve a temporary work permit.

maintained by Mexico. The Caribbean Operational Guidelines does not specify the number of days required for "adequate notice"; however, it states that named workers[41] should be processed as a priority.

3. Endeavour to notify Mexico as soon as reasonably possible of the cancellation of any requests for Mexican workers prior to their departure from Mexico. There is no similar provision in the Caribbean Operational Guidelines.

4. Review applications, medical reports (in consultation with the Canadian Regional Medical Office), and other worker documentation material related to admissibility; as well as, issue letters of introduction authorizing the issuance of individual employment or visa authorizations, and to advise Mexico and the Caribbean states when all documentation is complete. This review and issuance of work authorizations are performed by the Canadian consular offices in Mexico and the Caribbean.

   The Mexican Operational Guidelines specifies that the Immigration section will issue letters of introduction within 10 days of receipt of complete worker documentation. In exceptional cases and where an urgent requirement is identified, the Immigration Section of the Canadian Embassy in Mexico City will make all reasonable efforts to issue documentation as soon as possible.

5. Designate for the purpose of assisting in the administration of the CSAWP, the Foreign Agricultural Resource Management Service, and, in Quebec, the Fondation des Entreprises en Recrutement de Maind'oeuvre Agricole Etrangere (FERME), to transmit employment orders accepted by a local Human Resource Centre Canada (HRCC).

[41] A large number of the workers return annually to Canada under the CSAWP. The CSAWP allows for growers to "name" a worker hired from the previous seasons. If a grower is approved to hire a migrant agricultural worker but does not specify the name of the worker, then the "unnamed" worker is selected by the supply country from a pool of available workers.

FARMS and FERME are the administrative arms of the CSAWP. They are grower organizations funded exclusively through a user fee, collected from participating employers at the time their applications are approved for processing.[42]

Mexico/Caribbean States

Mexico and the Caribbean have similarly specified their duties and responsibilities under the CSAWP in their respective Operational Guidelines, as follows:

1. Once notice has been received by Mexico or the Caribbean state of the number of workers a Canadian employer requires, it shall complete the recruitment, selection and documentation of the workers and notify Canadian authorities of the number of workers, their names, and the dates of arrival in Canada. Mexico's Operational Guidelines specifies that this process will be complete within twenty (20) days whereas the Caribbean Guidelines simply state that this will be completed "within the specified time".

2. Select only persons who are capable of performing agricultural and horticultural work and who meet Canadian health requirements. Medical examinations of workers are to be arranged before arrival in Canada pursuant to the medical processing guidelines mandated by Citizenship and Immigration Canada.[43] The Caribbean states are expected to advise the worker to have available his/her own medical history.

3. Undertake to deliver applications, details of identity documents, and medical clearance to the Canadian consular offices. The Mexican Guidelines further specify the need to confirm with the Canadian consular office that a worker has no criminal record. While the Caribbean Guidelines only states that this delivery will be "in adequate time before departure of any given worker's flight", the Mexican Guidelines specifies that this must be completed ten (10) working days before the worker's departure date to Canada.

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[42] FARMS, *Employer Information Package*, 2002.

[43] Canada - Caribbean Region Seasonal Agricultural Worker Program. *Report on Medical Procedures.* (Annual Review Meeting, December 2001).

4. Maintain a pool of labour of persons who are suitably qualified and ready to depart for Canada when requests are received from Canadian employers. Mexico's Guidelines further provide that it will maintain a pool of at least 300 workers. The surplus pool of workers in the supply countries allows workers to be immediately available in cases of harvest-related emergencies or where replacement of workers are needed.

5. 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 under the Employment Agreement. It is important to note here that the role of the government agent is not just to represent workers while they are in Canada, but also to ensure that the employer's interests are met. This circumscribes or neutralizes the Government Agent's representation of workers and it is peculiar that a foreign state has to ensure that Canadian employer's interests are met in the functioning of the program; this should be role of the Canadian government.

Recommendation: Amend the Operational Guidelines to clarify that, while the government agent will endeavour to ensure the smooth functioning of the program, the role of the supply country's Government Agent is to represent the worker's best interest.

6. Ensure that Government Agents in Canada provide HRDC with information such as arrivals and repatriations, transfer notices, records of persons absent without leave (AWOL), records and other program data as may be necessary and mutually agreeable. As well, ensure that the Canadian Immigration Medical Services is provided with the personal details of all workers having to be repatriated for medical reasons, including all medical documents relating the worker's pre-employment examination.

7. The Mexican Guidelines include a statement that Mexico will recognize the role of any organization appointed by the Government of Canada to transmit orders accepted by a local Human Resource Centre Canada ("HRCC"). Therefore, for example, Mexico is acknowledging the role of FARMS and FERMES as appointed by Canada in the administration of the CSAWP.

8. The Mexican Guidelines provide that all Mexican CSAWP workers must, to the extent provided for in the Employment Agreement, be entitled to benefits for compensation because of employment-related injuries or diseases, as well as, insurance coverage for non-employment related injuries.

4. Annex II: The Employment Agreement[44]

The Operational Guidelines require that both workers and employers participating in the CSAWP are required to sign an Employment Agreement in form and content attached to the MOU as Annex II. While the Operational Guidelines delineate the duties and obligations of the state parties in the administration of the CSAWP, the Employment Agreement delineates the duties and obligations of the worker and employer in the conditions of employment. It also details the role of the Government Agent from Mexico and the Caribbean as it relates to these conditions.

The Employment Agreement is supposed to be signed and reviewed by the worker before arriving in Canada. The Employment Agreement applicable to Caribbean workers is similar to the one applicable to the Mexican workers; however, there are differences which will be highlighted when they occur. The interpretation of the Caribbean Employment Agreement and the Mexican Employment Agreement are not necessarily interpreted uniformly despite similar language.

The Employment Agreement is subject to annual review by both state parties to the MOU. Under the MOU with Mexico, amendments may be made only after consultation with employer groups in Canada to reflect the changes required for the successful administration of the Program and adherence to the principles contained in the MOU. In contrast, the Caribbean MOU states that amendments may be made only after consultation with interested parties. The Caribbean language may be interpreted to include non-governmental and workers' organizations, as well as employer groups. Currently, there is no consultation with employee groups or migrant worker representatives, except for the supply country's Government Agent.

[44] Commentary on the Employment Agreements for Mexico and the Caribbean are limited to the 2002 versions. These Agreements have been further revised for 2003.

The Employment Agreement does not stipulate how the Employment Agreement is to be enforced. Therefore, theoretically, it can be enforced in the same way as any other employment contract in the Canadian courts. There is no precedent or case law where either a worker or an employer have sought enforcement or damages for breach of contract under the Employment Agreement. This is not surprising since workers are only in Canada for a limited time and would have difficulty accessing legal representation. In addition, if the employer claims a breach of the Employment Agreement resulting in premature repatriation of the worker, enforcement becomes extremely difficult. The effect of the repatriation provisions will be discussed in further detail below.

The particulars of the Employment Agreement and their interaction with Canadian laws will be discussed in greater detail below.

B. Immigration Laws, Mobility Rights, and Prospects for Citizenship

A consistent theme in Canadian immigration policy has been the constant search for workers "to take jobs at the bottom rung of the occupational ladder."[45] As a British Columbia mining executive expressed in 1903: "We need immigrant workers...for the jobs Canadians won't do".[46]

The impetus for the creation of the CSAWP, as described earlier, affirms this statement. The CSAWP is motivated by growers' and government's inability to attract Canadians to perform agricultural labour as well as the need for a "reliable" agricultural workforce. "Reliable" in this context means no threat of leaving the job during critical harvest periods despite low wages and difficult working conditions. This section will examine how Canadian immigration laws and CSAWP instruments are used to incorporate Caribbean and Mexican foreign labour as "reliable" labour for agricultural production in Canada.

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[45] Donald H. Avery, *Reluctant Host: Canada's Response to Immigrant Workers, 1896-1994* (Toronto: McClelland & Stewart, 1995) at 233.

[46] *Ibid.* at 7.

1. *Immigration and Refugee Protection Act*

General provisions of the *Immigration and Refugee Protection Act*[47] *("IRPA")* and *Regulations*[48] relating to the issuance of temporary work permits apply to CSAWP workers. That is, an immigration officer authorizes the work permit if it is demonstrated that there is an offer of employment, and the offer is likely to result in "a neutral or positive economic effect on the labour market in Canada".[49] HRDC is required to provide a labour market opinion on the likely effect of approving a work permit for a temporary foreign worker by considering factors that are listed below.[50] Commentary is provided under some factors as it relates to the CSAWP.

- *Is the work likely to result in direct job creation or job retention for Canadian citizens or permanent residents?*

HRDC rationalizes that approval of CSAWP workers ensures that crops are planted and harvested in a timely manner so that other related employment opportunities in agriculture may be available to Canadians. For example, if Caribbean and Mexican migrant workers pick tomatoes, then employment is created for Canadian workers to process or can the tomatoes.

- *Is the work likely to result in the creation of transfer of skills and knowledge for the benefit of Canadian citizens or permanent residents?*

- *Is the work likely to fill a labour shortage?*

HRDC performs regionally an annual labour market analysis of the various commodity groups to determine where there are labour shortages for the purpose of determining eligibility for participation in the CSAWP during peak activity periods.

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[47] 2001, c. 27.

[48] SOR/2002-227.

[49] s. 200(1)(c)(iii) and 203(1) of the *Regulations*.

[50] s. 203(3) of the *Regulations*.

The labour shortage in agriculture has been couched in terminology of "reliability"[51] and "suitability". There is no shortage of low-skilled Canadian workers, but rather, the shortage is qualitative in that even unemployed Canadians refuse to work at low paying jobs in unsafe and poor working conditions.[52] For example, HRDC states that CSAWP workers will only be authorized if the supply of "reliable and qualified Canadians is determined to be inadequate" [emphasis added].[53] Furthermore, HRDC describes the program today as responding "to a critical shortage of available workers suitable for seasonal agricultural work".[54] [emphasis added] The suggestion is that while Canadians are not "suitable" for this type of work, migrant labour from Mexico and the Caribbean is "suitable" for otherwise difficult working conditions. The discourse of linking labour shortages with "suitability" carries with it the historical legacy of stereotyping certain workers based on race, national origin, or ethnicity as being more tolerant of poor working conditions than Canadian workers.[55]

- *Will the wages and working conditions offered be sufficient to attract Canadian citizens or permanent residents to, and retain them in, that work?*

Arguably, the current wage rates and working conditions are not sufficient to attract Canadians, thereby necessitating the CSAWP.[56]

When the Canadian government first considered the importation of Caribbean labour in 1966 in response to on-going agricultural labour shortages, it highlighted that there should be "no danger whatever of labour entering Canada on conditions that would be instrumental in holding down

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[51] FARMS. "The Quest for a Reliable Workforce in the Horticulture Industry" (Mississauga, Ont.: 2003); Human Resources Development Canada. *2002 CSAWP Statement of Policy*, http://www.on.hrdc-ddrhc.gc.ca/english/ps/agri/policy_e.shtml, site accessed 11/6/2002.

[52] Nandita Sharma, *supra* note 4 at 432-433.

[53] Human Resources Development Canada. 2002 CSAWP Statement of Policy, *supra*.

[54] Human Resources Development Canada. *Caribbean/Mexican Seasonal Agricultural Workers' Program - Overview* (2002), http://www.on.hrdc-drhc.gc.ca/english/ps/agri/labour_e.shtml.

[55] See earlier discussion under "Historical Background and Rationale for the Seasonal Agricultural Worker Program, *infra*, at p. 8-9.

[56] Nandita Sharma, *supra* note 4; Tanya Basok, *Tortillas and Tomatoes*, *supra* note 17 at 13-14.

wages paid to Canadian workers".[57] Hence, minimum wages and working conditions were established before Caribbean workers could enter under the CSAWP. The Minister of Citizenship and Immigration at that time stated: "They [wages and conditions] ensure that there will be no undercutting of Canadian labour."[58]

While government initially demanded that growers improve wages and working conditions for agricultural workers, the historical policy choice shifted to allow the importation of migrant workers who would accept current conditions. HRDC is now obligated under *IRPA* to review whether the wage rates and working conditions offered to CSAWP workers are wages and working conditions that would attract Canadians. The implications of this will be discussed in later sections in relation to the necessity of an enforceable dispute resolution process for migrant workers.

- *Has the employer made or agreed to make, reasonable efforts to hire or train Canadian citizens or permanent residents?*

This factor reiterates the "Canadians First" policy. That is, HRDC must be satisfied that "employment opportunities for seasonal agricultural work are made available to qualified and reliable Canadian citizens or permanent residents prior to accessing foreign seasonal agricultural workers."[59] [emphasis added]

The local Human Resource Centre Canada ("HRCC"), the front-line HRDC office responsible for delivering the CSAWP, undertakes a review to determine whether the grower has adequately demonstrated that efforts to find a Canadian worker were unsuccessful. This includes reviewing a "Human Resources Activities Record" that reports recruitment activities (i.e. listing positions with HRCC, job order, newspaper ads) in the last year.[60]

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[57] Minister of Citizenship and Immigration, Jean Marchand, Confidential Memorandum to Cabinet, Seasonal Workers for Ontario Farms, March 30, 1966, National Archives of Canada, R.G. 118, accession 85-86/071, vol. 81, file 3315-5-1, part 1.

[58] *Ibid*.

[59] Human Resources Development Canada. *2002 CSAWP Statement of Policy, supra*.

[60] FARMS. *Employer Information Package, 2002* at 33.

- *Will the employment of the foreign national be likely to adversely affect the settlement of any labour dispute in progress or the employment of any person involved in the dispute?*

If agricultural workers gain the right to unionize in Ontario, this factor will likely become more relevant than at the present time. One interpretation of this factor may be that if a trade union is engaged in a legal strike, and a grower attempts to hire offshore labour as replacement workers, HRDC may refuse validation of the work permit. That is, the approval of the offshore worker may be seen as interfering with the resolution of a labour dispute. The impact of unionization is discussed in further detail later in this report.

2. Temporary Status of CSAWP Workers

The CSAWP operates on a seasonal basis during specific peak periods between February 1 to November 30.[61]

Temporary foreign workers, including CSAWP workers, require a valid work permit before commencing employment in Canada. Under the CSAWP, the employer submits a request for migrant agricultural workers at the local HRCC with information including the number of workers required, the duration and location of employment, and pertinent tasks.

The length of authorized stay in Canada stipulated on the work permit corresponds with the anticipated length of employment. Authorized stay ends on the day on which any work permit issued to the temporary worker expires.[62] If the worker's employment terminates before the expiry date on the work permit, the worker may still reside in Canada until the date of expiry, but he or she is unable to work for another employer unless approved by an immigration officer.

The Employment Agreement delineates the conditions attached to the work permit approved under the *Immigration and Refugee Protection Regulations*. The Employment Agreement defines the scope and period of a worker's stay in Canada to be a period not less, than 240 hours in a term

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[61] Human Resources Development Canada. *2002 CSAWP Statement of Policy, supra*.

[62] s. 183 of the *IRPA Regulations*.

of six weeks or less nor longer than 8 months.[63] The completion date of employment is filled in on the Employment Agreement to correspond with the expiry date on the individual's work permit.

The Mexican Employment Agreement states that the employer is obliged to provide employment to the worker for a trial period of fourteen days from the date of his or her arrival and cannot discharge the worker except for "sufficient cause or refusal to work" during the trial period.[64] The Caribbean Employment Agreement states that an unnamed worker shall not be discharged during the trial period except for "misconduct or refusal to work".[65] There are no guidelines describing what these reasons for discharge mean or how they should be interpreted.

The average length of stay in 2001 for Jamaican workers was 14.2 weeks or 3.5 months,[66] and Mexican workers spent an average of 4.9 months in Canada.[67] Upon completion of the term of employment as defined in the Employment Agreeent and in the work permit, the worker must promptly return home.[68]

3. Selection of Workers: "Named" vs. "Unnamed" Workers

A large number of Caribbean and Mexican workers return to Canada year after year under the CSAWP. For example, 8% of the workers from St. Vincent and The Grenadines have over 20 years participation in the CSAWP and 53% have over 10 years participation; 37% of the workers

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[63] Human Resources Development Canada. *2002 CSAWP Statement of Policy*, *supra*; Mexican Employment Agreement, I.1; Caribbean Employment Agreement, I.1.

[64] Mexican Employment Agreement, I.4.

[65] Caribbean Employment Agreement, I.2.

[66] Roy Russell, "Jamaican Workers Participation in Canada's Seasonal Agricultural Labour Market and Development Consequences in their Rural Home".

[67] Gustavo Verduzco, "Mexican Workers' Participation in Canada's Seasonal Agricultural Labour Market and Development Consequences in their Rural Home Communities (Ottawa: North South Institute, 2003).

[68] Mexican Employment Agreement, IX.6; Caribbean Employment Agreement, IX.7.

from St. Lucia have over 10 years participation; 30% of the workers from Grenada have 8-14 years participation and 70% have 4 years or less participation.[69]

The Program provides a process whereby employers may request workers by name to return to work on their farms in subsequent seasons. These orders are processed as priority. Employers also have the choice of the supply country.

Named workers are considered a valuable supply of experienced workers. In 2002, there were 16,654 work placements approved under the CSAWP: 10,302 placements requested "named" workers (62%), and 6,352 were "unnamed" (38%). Caribbean workers are more likely to be "named" workers than Mexican workers. In 2002, 73% of Caribbean workers in Ontario were named whereas 52% of the Mexican workers were named. Seventy-four percent (74%) to seventy-eight percent (78%) of the Jamaican workers under the CSAWP were "named" workers for 2001-2002 making it the supply country with the highest percentage of "named" workers.

Table 2: CSAWP Named and Unnamed Workers in Ontario *

COUNTRY	Named		Unnamed		Total	
	2001	2002	2001	2002	2001	2002
Barbados	346	305	199	230	545	535
East Caribbean	302	317	146	110	448	427
Jamaica	4,372	4,481	1,551	1,265	5,923	5,746
Mexico	4,776	4,206	4,352	4,151	9,128	8,357
Trinidad/Tobago	1,117	993	671	596	1,788	1,589
TOTALS:	10,913	10,302	6,919	6,352	17,832	16,654

Source: FARMS. *Harvest System, Named & Unnamed Workers, 2000 & 2001.*
* This chart represents the number of work placements, not workers.

Generally, critics of guest worker programs have argued that many temporary workers do not return home after their contracts expire creating a pool of undocumented workers in the receiving country. However, the named worker process gives workers the reasonable expectation of

[69] Andrew Downes & Cyrilene Odle-Worrell, "Barbadian, Trinidadian and Eastern Caribbean Workers' Participation in Canada's Seasonal Agricultural Labour Market and Development Consequences in their Rural Home Communities" (Ottawa: North South Institute, 2003).

returning the following year and provides some level of security for future employment thereby reducing incentives for illegal settlement.[70] This system also fosters paternalistic relationships between workers and their employers. Loyalty of workers to their employers results in workers not wanting to abandon their employers and, therefore, lowers the incentive of non-return.[71]

The process of naming workers may have the effect of placing them in a vulnerable position *vis-a-vis* their employer. That is, the imbalance in the power relationship between employer and employee is exacerbated when the employer has the ability to determine the worker's future participation in the CSAWP through the "naming" process. A worker may be less inclined to raise grievances against their employer if he/she thinks that this may impact his/her job security in subsequent seasons.

4. Restrictions on Workers' Mobility and the Transfer Process

While in Canada, the migrant worker must live on the grower's property and in accommodation provided by the grower.[72] The worker cannot legally work for any other grower without approval of HRDC and the supply country's Government Agent.[73] If an employer induces or aids a worker approved under the CSAWP to perform unauthorized work for another person or to perform non-agricultural work, the employer will be liable to a penalty up to $50,000 or two years imprisonment, or both, under immigration laws.[74]

HRDC has published a Policy Statement Regarding Access to and the Termination of Assistance to an Employer under the Commonwealth Caribbean and Mexican Seasonal Agricultural Workers

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[70] Tanya Basok, "He Came, He Saw, He... Stayed. Guest Worker Programmes and the Issue of Non-Return" (2000) 38:2 International Migration 215-236.

[71] *Ibid.*

[72] Mexican Employment Agreement, IX.1; Caribbean Employment Agreement, IX.2.

[73] Mexican Employment Agreement, VIII; Caribbean Employment Agreement, VIII.

[74] This penalty is based on the 2003 Employment Agreements which reflects the recent changes to the immigration laws, ss. 124(c) and 125 of the *IRPA*. The 2002 Employment Agreements, VIII only provided a penalty of $5,000 or two years of imprisonment, or both.

Program, which elaborates the Canadian government's position as it relates to unauthorized employment.

> With respect to the matter of unauthorized employment, this is the main area where, from time to time, abuses in the Program have been encountered with some employers. In this regard, foreign workers have, from time to time, been loaned or transferred to other employers without prior approval of the worker, HRDC and the representative of the government of the country from which the worker came. This gives rise to a number of concerns.

While the Canadian Government has developed this Policy Statement, Mexican workers reported practices of loaning workers because of shortage of work on assigned farms. Twenty-three percent of Mexican workers indicated that on occasions their employers required them to perform activities different from those in the Employment Agreement (i.e. domestic work and maintenance).[75]

The Policy Statement warns that such practices may constitute a breach of the worker's employment authorization and result in prosecution of the foreign worker, the employer who loans or transfers the worker, and the employer to whom the foreign worker is loaned or transferred. In addition, foreign workers may be put at risk in terms of ensuring: insurance coverage if he or she is injured or becomes ill while working for the other employer; proper deductions being made from wages and properly remitted to the government agent in accordance with the employment agreement; and meeting fair wages and working conditions. Finally, HRDC is concerned that such practices may adversely effect the employment opportunities of Canadians.

The consequence of unauthorized employment as described above includes termination of assistance by the Canadian and foreign government in facilitating the inter-country movement of seasonal agricultural workers. In deciding whether to terminate their assistance, HRDC and the foreign governments concerned will take into account the "nature, circumstances, extent and gravity of the breach, and the wilfulness or intent of the employer and the employer's history of prior breaches". If a decision is made to terminate an employer from future participation in the CSAWP, the employer is provided an opportunity to make representations with respect to this

[75] Gustavo Verduzco, *supra* note 67.

proposed action. The final decision is left with HRDC, and it may decide to terminate future assistance or issue a warning. There is nothing in the Policy Statement to allow the worker to make representations.

Recommendation: The Policy Statement should be amended to allow workers to make representations about an allegation of unauthorized employment.

Employers may request and obtain "transfer workers", if available, with approval from HRCC and the supply country prior to the movement of such worker. "Transfer workers" are workers who have completed, or are about to complete, their first term of employment with an employer approved under the CSAWP.[76] The initial period of employment, combined with the transfer period of employment, must not exceed the 8 month maximum. There are no minimum hours of work to be guaranteed when a worker is transferred once the 240 hours has been attained.[77] The Caribbean countries have a separate Employment Agreement for transfer contracts. Mexico uses the same agreement for transfers as it does for arrivals. A transferred worker has a trial period of 7 working days from the date of arrival on the new farm, after which the worker will be deemed to be a "named" worker.[78] This is significant for the purposes of the repatriation provisions which are discussed below.

The transfer process benefits both workers and employers. Employers accepting transferred workers only have to pay the southbound airfares and the worker is available right away in Canada, and not subject to time delays resulting from the immigration process. Workers are provided an opportunity to work longer and earn more wages through the transfer process.

Recently, tensions have arisen between Mexico and FARMS as it relates to the transfer process. In light of Mexico's limited resources, which will be discussed in further detail below, Mexico wants FARMS to take over the administration of the transfer process, which is reported to be very time

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[76] Human Resources Development Canada. *2002 CSAWP Statement of Policy*, *supra*.

[77] *Ibid.*

[78] Mexican Employment Agreement, I.5; 2002 Transfer Contract for the Employment in Canada of Commonwealth Caribbean Seasonal Agricultural Workers, I.2.

consuming and cumbersome. In 2002, Mexico transferred 1,441 workers to other farms. It is anticipated that the numbers will be dramatically less for 2003 because Mexico has been taking the position that it will not transfer their workers until its demands are met. Because FARMS arranges for travel of all workers, it is able to track the dates of departures and arrivals of migrant workers and, therefore, would have information readily available if there were openings on another farm. Mexico and the Caribbean states would only have information about the movement of workers from their own countries. In light of the access to information on the movement of workers, there is some logic to FARMS taking on more of an administrative role in this area. FARMS argues that this role should be assumed by government.

Recommendation: Further review and discussion is required about FARMS' role in the administration of the transfer process. In the alternative, the central database of information that FARMS currently controls as it relates to the movement of workers needs to be shared in a format that is accessible and will reduce the cumbersome nature of the transfer process. It is recommended that the central database be accessible to all supply countries while maintaining workers' confidentiality (i.e. identification by number).

5. Repatriation

The repatriation provisions in the Employment Agreements allow the grower to repatriate a worker for "non-compliance, refusal to work, or any other sufficient reason". There are no guidelines or definitions of what these terms mean. After consultation with the supply country's Government Agent, the employer may terminate employment and repatriate a worker on these grounds based on the following distribution of costs[79]:

1. if the worker was requested by name by the employer, the full cost of repatriation must be paid by the employer (i.e. southbound flight only);

[79] Mexican Employment Agreement, X.1; Caribbean Employment Agreement, X.1.

2. if the worker was unnamed and selected by the supply country, and 50% or more of the term of the contract has been completed, the full cost of the returning worker will be the responsibility of the worker (i.e. southbound flight only);

3. if the worker was unnamed and selected by the supply country, and less than 50% of the term of the contract has been completed, the full cost of the northbound and southbound flights will be the responsibility of the worker.

The Mexican Employment Agreement states that if the worker wishes to return home early for personal or domestic reasons, and if the consulate officer is in agreement, the worker is allowed to return at his or her expense.[80] The Caribbean Employment Agreement states that if there are domestic or personal reasons for premature repatriation, and:[81]

1. if the worker was "named", the employer is obliged to pay the full costs of repatriation to Kingston, Jamaica (and not necessarily the travel costs to the country of residence if the worker lives outside of Kingston, Jamaica);

2. if the worker was "unnamed" and 50% or more of the term of contract has been completed, the Caribbean state will pay 25% of the cost of reasonable transportation to Kingston, Jamaica and subsistence expenses;

3. if the worker was "unnamed" and less than 50% of the term of contract has been completed, the worker is responsible for the full costs of repatriation.

If the worker is prematurely repatriated because of medical reasons, verified by a Canadian doctor, then the employer pays the "cost of reasonable transportation and subsistence", except when the condition was present prior to the worker's departure in which case Mexico will pay the full cost

[80] Mexican Employment Agreement, X.2.

[81] Caribbean Employment Agreement, X.2.

of repatriation for its workers[82] and the Caribbean worker has to pay for his or her own costs of return.[83]

The Employment Agreements stipulate that if it is determined by the consulate, after consultation with HRDC, that the employer has breached the employment agreement, and if alternative agricultural employment cannot be arranged through HRDC, the employer is responsible for the full costs of repatriation and payment to the worker for the total wages that would have been paid if the contract had been completed.[84]

The following table provides a breakdown of approved vacancies; total worker arrivals; total worker returns; and reasons for repatriation.

[82] Mexican Employment Agreement, X.3.

[83] Caribbean Employment Agreement, X.3.

[84] Mexican Employment Agreement, X.4; Caribbean Employment Agreement, VIII.4.

Table 3:Ontario Region - Caribbean Mexican Seasonal Agricultural Workers Programs
As of 31/12/2002

Year-To-Date Activity	Barbados		Eastern Caribbean		Jamaica		Trinidad & Tobago		Sub-Total Caribbean		Mexico		Combined Total	
	2001	2002	2001	2002	2001	2002	2001	2002	2001	2002	2001	2002	2001	2002
Vacancies Approved	561	558	457	454	6026	5893	1886	1682	8930	8587	9403	8636	18333	17223
Cancellations (All Reasons)	16	23	9	27	103	147	98	93	226	290	275	279	501	569
Total Worker Arrivals	477	475	426	413	5419	5211	1597	1481	7919	7580	8060	7633	15979	15213
Total Worker Transfers	68	60	22	14	504	535	191	108	785	717	1068	724	1853	1441
Total Worker Returns	477	475	426	413	5419	5211	1597	1481	7919	7580	8060	7633	15979	15213
(a) Contract Completions	427	401	393	379	5041	4856	1416	1306	7277	6942	7642	7018	14919	13960
(b) Breach of Contract	12	23	2	6	62	73	70	72	146	174	68	110	214	284
(c) Medical	7	8	3	3	27	28	13	12	50	51	24	61	74	112
(d) Domestic	10	8	6	11	39	21	36	37	91	77	155	254	246	331
(e) AWOL	5	4	12	7	228	190	28	34	273	235	135	121	408	356
(f) Marriage	8	11	2	1	20	22	19	6	49	40	0	1	49	41
(g) Death	0	0	0	0	0	4	0	0	0	4	2	0	2	4
(h) Visa Status Change	4	9	0	0	2	6	7	4	13	19	1	1	14	20
(i) Incompatible Match	4	11	6	6	0	0	0	0	10	17	33	56	43	73
(j) Other	0	0	2	0	0	11	8	10	10	21	0	11	10	32
No. Employed at Month End	0	0	0	0	0	0	0	0	0	0	0	0	0	0
No. Employers Involved	78	73	74	70	582	580	198	204	902*	895*	874	816	1687*	1622*

Source: FARMS, Harvest System

*** NOTE:** 104 Employers have approvals from multiple countries in 2001
102 Employers have approvals from multiple countries in 2002

The vague language of the repatriation provisions that allow employers the right to repatriate workers without further compensation for "non-compliance, refusal to work, or any other sufficient reason", allows the employer to arbitrarily remove workers from their property with no formal right of appeal. The implication of the premature repatriation provisions significantly undermine the migrant workers' ability to enforce any rights they may have. The workers' vulnerability is compounded by the fact that as non-citizens they have no rights of mobility while in Canada.[85] The worker may legally stay in Canada until the expiry of the work permit, regardless of the employer's decision to rescind the contract. However, if the employer triggers these provisions, the practical effect is that the worker is also immediately removed from the grower's property requiring costs for alternative accommodation to be incurred at the same time as employment income has ceased. Moreover, the worker is prohibited from working for another employer unless the consulate is able to find another farm for the worker. If a transfer placement is not available, there is some urgency to return the worker home in order to avoid any additional costs for room and board. In summary, if an employer decides to prematurely repatriate a worker, the only option for the worker is to either find employment on another farm through the worker's government agent and approved by HRDC, or to go home. It is extremely difficult, as the grower knows, for the worker to attempt any claim for damages for breach of contract in these circumstances.

Recommendation: Guidelines or a policy statement be drafted on the interpretation of "non-compliance, refusal to work, or any other sufficient reason". In particular, note that a breach of contract will not be found where a worker refuses work that is unsafe.

Recommendation: The power of the employer to repatriate workers should be minimized. It is recommended that there should be a minimum two (2) week waiting period before a worker is required to be sent home in order to allow the worker the opportunity to raise a complaint about the validity of the repatriation decision. If the worker accepts the repatriation decision, the two (2) week period may be waived to allow for immediate return. If the worker files a complaint, then the complaint should be investigated by an independent body and the worker should be allowed to stay until the investigation is complete or a decision on the merits of repatriation have been determined. The transfer

[85] Section 6 of the *Charter* only gives the right to mobility to Canadian citizens. This will be discussed in further detail below under section III.D.3: "Application of the *Charter of Rights and Freedoms*".

process may be utilized during this period in order to place workers with other farmers during this interim period.

6. Access to Citizenship or Permanent Residency

The CSAWP has been in existence now for 36 years and as demonstrated earlier a large number of workers arrive as "named" workers. Moreover, a number of workers have been returning to Canada on a seasonal basis for several years, working anywhere from 4-8 months of the year in Canada for up to 20 years. Despite the significant labour market and social attachment these workers have created in Canada, their years of labour in Canada are not recognized as it relates to mobility rights or citizenship rights in Canada. The current program which disallows any opportunity for increased immigration opportunities for Mexican or Caribbean workers and keeps them in the designated class of "migrant worker" essentially creates a class of "bonded" labour in Canada.[86]

Contrast this with the Live-In Caregiver Program. This program allows for foreign workers to provide unsupervised care for children, elderly adults or persons with disabilities in private households, recognizing that there is shortage of Canadian workers available for live-in care. In addition to the similar policy rationale with the CSAWP, the Live-In Caregiver Program also requires the worker to live on her employer's property. Here the similarity ends; however, domestic workers are eligible to apply for permanent residency status after working for two years as a live-in caregiver without having to meet the usual immigration criteria.[87] CSAWP workers are not.

The Canadian Government's rationale for this distinction is that Live-In Caregivers receive low wages and allowing them to obtain landed immigrant status after two years of participation in the program represents an additional incentive for recruiting purposes. It was explained that domestic workers take care of people, build bonds and human relationships, and engage in year-round

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[86] Tanya Basok (2000), *supra* note 70; Satzewich (1990), *supra* note 19; André, *supra* note 8 at p. 284.

[87] *IRPA*, s. 72, 110-115. See: Human Resources Development Canada. "Live-In Caregivers" at http://www.hrdc-drhc.gc.ca/hrib/lmd-dmt/fw-te/common/aide_care.shtml.

activity in Canada as opposed to seasonal Work. In contrast, the CSAWP was designed as a seasonal, temporary form of employment based upon market needs assessment. However, this rationale is flawed.

Migrant agricultural workers also receive low wages and build close social relations over years of returning to the same farms and communities in Canada. Furthermore, while the work may be "seasonal", resulting in periods of unemployment, the unemployment insurance scheme takes into account that there are industries that are seasonal in nature and, therefore, provides benefits to workers during the off-season, or retraining opportunities to move into year-round employment or other areas of employment during the off-season. The Government's rationale assumes that Mexican and Caribbean workers are not entitled to move into other areas of the Canadian labour market during the off-season or otherwise. It is noted that currently CSAWP workers pay premiums into the Canadian unemployment insurance scheme – some "named" workers have paid premiums over several years – despite having no possibility of receiving unemployment insurance benefits or retraining.

The emphasis on the temporary nature of the CSAWP work permit highlights the continued intersection of labour and immigration policy. As described earlier, the CSAWP was originally designed under a discriminatory immigration policy resulting in workers being denied any prospect of citizenship rights despite years of toiling on Canadian soil. The policy rationale at the inception of the CSAWP which persists today is that Canadians are not "suitable" for agricultural work and cannot be legally forced to perform this work; however, Mexican and Caribbean workers are "suitable" in performing low paying and difficult working conditions and may be legally forced to perform this work. This systemic legacy arguably results in the construction of Mexico and Caribbean countries as nations of workers to do work which citizens in First World countries refuse to do, creating a "racialised and inter-national hierarchy of states".[88] The current restrictions on migrant agricultural workers serve the employers' [89] and the supply country's interests, but not the workers' interest. That is, employers receive a "reliable" labour supply and the supply country

[88] Rachel Li Wai Suen, "You Sure Know How to Pick 'Em: Human Rights and Migrant Farm Workers in Canada" (2000) 15:1 Georgetown Immigration Law Journal 199 at 208; Basok (2000), *supra* at 222.

[89] André, *supra* at 284.

receives a “reliable” source of remittances. It also meets Canada's objective of avoiding full integration of low-skilled immigrants and their families into the Canadian landscape.[90] However, workers are denied opportunities for individual and familial betterment, both socially and economically, which may be achieved through labour market mobility and obtaining permanent residency status in Canada.

Barriers to citizenship places migrant workers in a position of social and political disadvantage. Migrant workers cannot vote for Canadian politicians who may campaign for improvements in wages and working conditions, or otherwise influence Canadian authorities to address concerns relating to their employment. Thus, migrant workers are limited in their effective participation in the political process.

The denial of immigration opportunities violates international conventions as it relates to migrant workers, which will be discussed in further detail below.

Recommendation: The CSAWP should allow migrant agricultural workers the opportunity to apply for immigration after two years participation in the CSAWP in the same way domestic workers under the Live-In Caregiver Program are provided this opportunity.

C. Administration and Operation of the Seasonal Agricultural Workers Program

The following discussion is primarily based on interviews of stakeholders and parties to the CSAWP, including Canadian government officials, consulate representatives, and FARMS and FERMES representatives. Questions were canvassed on the policy direction and functioning of the program from the perspective of their representative interests as well as those of workers.

The following discussion supplements the earlier review of duties and obligations of the various parties and stakeholder as outlined above. It provides insights into the practical operation of the CSAWP that are not mentioned in the Operational Guidelines attached to the MOUs.

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[90] Rachel Li Wai Suen, *supra* note 88 at 202. The Canadian Government's immigration policy prefers immigrants with skills and high levels of education as reflected in the “points system” in the *Immigration and Refugee Protection Act* which is applied in applications for permanent residency.

1. General Overview

Eligible employers requesting a foreign worker submit the request 8 weeks in advance of the job start date to the local HRCC. HRCC undertakes a review to determine whether the grower has adequately demonstrated that efforts to find a Canadian worker were not successful, and hiring a foreign worker will not adversely affect employment or career opportunities of Canadian citizens and permanent residents. A decision regarding the availability of Canadian workers is made by the local HRCC normally 4 weeks prior to the start date of employment. The employer pays HRCC upfront the visa costs for the worker which is later recouped from the worker through salary deductions. HRCC is also responsible for obtaining the employer's signature on the Employment Contract before the worker arrives, and transmits it to the Caribbean Liaison Office or Mexican consulate office.

Once the HRCC approves the request for a foreign worker, the order is faxed to FARMS for processing. FARMS will notify the appropriate Government Agent of requests for workers and make travel arrangements with CanAg Travel Services Ltd. ("CanAg"). CanAg is the authorized for-profit travel agency for the CSAWP. In response to escalating commissions, CanAg was formed in 1992 by a FARMS resolution to provide "uniformity of airfares, commissions and payment schedules, negotiations with the airlines and ground companies". It is owned and operated by the employers, with FARMS being the single shareholder. CanAg also coordinates the movement of workers from the airport to the employer's farms, which includes meeting the worker at the airport. The total cost for northbound flights in 2002 was: Mexico - $543; Jamaica - $496; and the rest of the Caribbean - $481. The total cost for southbound flights was: Mexico - $528; Jamaica - $496; and the rest of the Caribbean - $491. The employer pays the cost for the flights and, again, makes deductions from the worker's pay for partial recovery of the costs up to a maximum of $425 as per the terms of the Employment Contract.[91]

Prior to the worker's arrival, the employer is required to call the local Medical Officer of Health and arrange for an annual inspection of the seasonal housing accommodations. The inspection results are also supposed to be forwarded to the Liaison Offices or consulate prior to the worker's arrival.

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[91] Caribbean Employment Agreement, VII.3.; Mexican Employment Agreement, VII.2.

If time does not permit an inspection to take place prior to the worker's arrival, HRCCs should request the employer to provide a copy of the previous year's approval notice.[92]

Workers are recruited and selected (if not named) through employment centres in Mexico and the Caribbean. FARMS works with the Canadian embassies in the supply country to process the work permits. The Mexican and Caribbean governments are charged with obtaining criminal clearances and medical clearance from clinics endorsed by Canada. The Canadian Embassy reviews the medical reports and workers documentation before issuing letters of introduction authorizing the work permit.

Medical clearances have become a cumbersome process, especially for Mexico which accounts for the majority of the workers in the CSAWP. The process is characterized by two distinct phases. First, the medical examination of the worker is performed at a medical clinic in Mexico City approved by Canada. There are presently only five clinics, and they are all in Mexico City. In light of the number of Mexican workers that require medical examinations,[93] this creates a potential delay, especially in those cases where workers are not living in Mexico City. A sample of the medical examinations (20%) are sent to Port of Spain in Trinidad & Tobago where it is vetted by two Canadian doctors from Public Service Health. Notification of the results of the examination is sent back to Mexico to be submitted to the Canadian Embassy in Mexico, with the remaining 80% of the applications, to be reviewed for the work permit authorization. The Canadian government is concerned about workers being approved despite abnormal x-ray results and cases of tuberculosis being discovered after Mexican workers arrived in Canada. The Mexican government would like a Canadian doctor to be present at the Canadian Embassy in Mexico City to perform the medical assessments and to have more medical clinics approved in Mexico City and in other cities closer to the workers. There was a Canadian doctor at the Canadian Embassy until 1995 when Canada down-sized and centralized medical assessment offices in Trinidad & Tobago for the whole Caribbean and Central America.

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[92] Human Resources Development Canada. *2002 Administrative and Processing Procedures*.

[93] There were over 10,779 Mexican workers who arrived to Canada under the CSAWP in 2002.

Recommendation: Improve quality assurance in medical assessments and reinstate a Canadian doctor from the Public Service Health in Mexico City.

Recommendation: Open or approve more medical clinics for medical examinations closer to the workers' home communities.

Employers are charged with the responsibility of obtaining health cards for migrant workers upon their arrival in Canada if the worker has never had a health card. If the worker is returning, the Government Agent faxes confirmation of the worker's arrival to the Ontario Ministry of Health and the card is mailed to the worker at the farm where he or she is working. It takes approximately 3-6 weeks for health cards to be issued. In interviews with Government Agents, it was reported that some employers are not always making best efforts to obtain health cards for workers. If medical service is required and the physician cannot confirm that there is health coverage, he or she is allowed to ask for payment. Payment made to the physician can be recovered from that physician at a later date once the coverage is confirmed and the claim has been paid by the Ontario Health Insurance Plan ("OHIP").[94]

2. Role of FARMS

FARMS acts as a "friendly voice" for growers. As an interviewed representative said: "It is run by employers and it is for the employers". As noted earlier, FARMS is a not-for-profit organization that is comprised of elected representatives from the grower community. It is funded through an administration fee per worker that all participating employers must pay if workers are to be placed on their farms.[95] These fees pay for the administration costs associated with the CSAWP, and result in savings for the Canadian government that had previously incurred these costs. In 2002, there were 1,622 growers participating in the program in Ontario and paying fees to FARMS.

The FARMS Board members are themselves growers who employ foreign workers. They also supply growers with information on the regulations that govern the program, including employment

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[94] FARMS, *2002 Employer Information Package* at 20-21.

[95] The fee for 2002 was $32.00 plus GST per worker.

laws, health and safety laws, travel arrangements, and housing requirements. Its primary means of communicating these various rules and regulations is the *Employer Information Package* which is issued annually. The *Employer Information Package* is a useful resource for employers and provides easy to understand information on the applicable laws and policies of the program. This type of initiative should continue in the future direction of the program.

FARMS is accountable to HRDC for the administration of the program. On HRDC's behalf, FARMS communicates the orders for workers that have been authorized by the HRCCs to the governments of the supply countries. HRDC is dependent on FARMS to provide it with reports and statistical data on the CSAWP. Statistics Canada does not track information as it relates to migrant agricultural workers. HRDC relies on FARMS information to feed into policy recommendations relating to the CSAWP. FARMS is also the only body that maintains an up to date mailing list of all employers in the program and tracks the location of all migrant workers at all times. Therefore, HRDC relies on FARMS to disseminate information to employers in the program.

FARMS may also assist Foreign Government Agents in dealings with complaints against individual employers. Generally, in this capacity, the relationship with the majority of the Government Agents was described as co-operative and positive; however, FARMS expressed dissatisfaction with the services of the Mexican consulate. Specifically, the complaint was made that with the increased number of Mexican workers, the consulate has insufficient staff to provide the needed services. For example, representatives from the Mexican consulate do not visit the farms. In contrast, FARMS indicated that the Caribbean Liaison Offices provide a "complete" service and "operate as a business".

FARMS itself reports that it has and will act to address "bad" employers. However, informants raised concerns about the structural limitations within the program that restrict the effectiveness of this aspect of FARMS' role. While it was acknowledged that FARMS will attempt to assist the Government Agent if there is a conflict with a grower, FARMS is incapable of sanctioning the grower in any way if the grower does not respond to it.

FARMS has formal recognition to participate at annual review meetings, which provides it with the opportunity to raise the material interests of growers. HRDC describes the relationship with

FARMS as interactive and good, and sees a benefit to FARMS as a representative body that allows employers to negotiate directly with government offices on aspects of the CSAWP. Despite the Operating Guidelines defining FARMS role as purely administrative, it does act politically and advocates for the growers in policy negotiations. For example, HRDC states that wages are not negotiable; however, there is significant lobbying by FARMS as well as heated disputes between FARMS and the foreign Government Agents on the issue of wages and costs of the program to the employer.

3. Role of Caribbean Liaison Officers and Mexican Consular Officers

Generally, the role of the Caribbean Liaison Offices and the Mexican consulate (collectively referred to as "Government Agents") is program administration, policy inputs, and dispute resolution. They process approved requests for workers; provide worker orientation; inspect accommodations on the farms; investigate conflicts and disputes between workers and between workers and growers. Government Agents also provide general administrative services, such as processing tax returns and Workplace Safety Insurance Board claims. It was noted by all stakeholders that a good liaison or consular service is essential for the program to run smoothly.

It is also the federal government's position that the Government Agents should be interfacing with provincial officials on any specific employment related problem or request for information. However, interviews with the Government Agents indicated that this is not happening and there is inconsistency in terms of knowledge of the procedures for enforcing provincial legislation. For example, if the Government Agent believes there is a violation of the *Employment Standards Act*, he or she will call HRDC for assistance.

Recommendation: Educate Government Agents on procedural and substantive aspects of provincial employment laws. Provide Government Agents with provincial government contacts at various Ministries responsible for enforcement, and foster better communication between the Government Agents and provincial authorities.

The Government Agents make the program work. In particular, they are needed to ensure that complaints, conflicts, and disputes are addressed quickly and effectively. The Caribbean Liaison

Officers all reported that they make regular visits to work sites and make themselves readily accessible to workers every day of the week in case any incident should arise. It is observed that all of the Caribbean Liaison Officers are in Toronto.

The Mexican consulate, also in Toronto, raised workload problems in the administration of the program. There were 7,633 Mexican workers under the CSAWP in Ontario for 2002, and only five Mexican officers and some volunteers to service them. Mexico's lack of resources has a significant effect in its ability to service its workers, and this has become a contributing factor in strained relations with FARMS and HRDC. The only Mexican consular office is in Toronto, a long distance from several farms on which Mexicans are working. This has caused difficulties in addressing workers' problems or responding to disputes. The Mexican Consulate rarely visits workers on the farms. It claims that if workers have a problem, they will call a “1-800" number.

Workers' advocacy groups voiced frustration with the consulate's failure to respond to workers' complaints when either the worker calls or the workers' group calls on their behalf. This has created a gap in services for workers which has been filled by workers’ advocacy groups and trade unions, such as the United Food and Commercial Workers Canada (“UFCW”). The services they provide to migrant agricultural workers include legal referrals, assistance with Workplace Safety and Insurance claims, and other employment related advice and support. The UFCW Migrant Agricultural Workers Support Centre in Leamington, Ontario was opened in 2002 and additional centres were opened in Simcoe and Bradford in 2003. These Centres are, in many cases, performing the job of the Government Agent; however, they are receiving no funding from the Canadian Government or other stakeholders in the CSAWP to provide this service. In addition, if the Centres call the Mexican Consulate with respect to a worker’s complaint, in many instances, the Consulate refuses to recognize the Centre’s role in assisting workers. The “politicking” between the Centres and the Consulates results in the workers being caught in the cross-fire.

Recommendation: Create satellite Liaison Offices and Consular Offices closer to farm communities in order to be more accessible to workers.

Interviews revealed that there has been an adversarial and attitudinal shift from the Mexican consulate in the operation of the CSAWP. As noted earlier the majority of the workers in the

CSAWP are from Mexico. The Mexican consulate providing front-line services to the workers have taken a more assertive role in raising concerns about workers' working conditions. The agricultural industry claims that the Mexican consulate is making arbitrary and self-serving decisions in the administration of the program. The Mexican consular office in Toronto states that it is representing their workers who are facing poor working conditions and treatment; however, it also acknowledges that it does not have the resources to address the many problems. The Toronto consular office welcomed unionization as a solution to providing adequate representation of workers; however, the Mexican Embassy in Ottawa viewed unions as complicating matters and threatening the program. Whereas the former has direct contact with workers' issues, the latter has no direct responsibilities with respect to the workers. It was apparent that there was a difference of opinion about industry level practices between the Toronto consulate office servicing the program and Mexican officials involved in policy-making of the CSAWP.

The Government Agents are identified as the workers' representatives by themselves and other official CSAWP stakeholders. However, this role is compromised in two ways: 1) the Government Agent is also identified as a mediator in disputes; and 2) state interests and the competitive structure of the CSAWP may conflict with individual worker interests.

The Government Agent plays the role of a negotiator or mediator in assessing and resolving conflict situations. Government Agents described themselves as “mediators”, “neutral” or “in the middle”. As one Government Agent said: “I am there for the farmer and for the worker.” This is consistent with the language of the Operating Guidelines attached to the MOU which states that the role of the Government Agent is to ensure that the program is running smoothly “for the mutual benefit of both the employers and the workers”. The employers rely on this role to ensure that disputes do not escalate – “they [Government Agents] can put out brush fires”. In some circumstances, the Government Agent may also act as an arbiter in making a decision about repatriation of a worker if an employer makes a complaint. This decision may be made despite any protest of a worker.

Thus, Government Agents play a “dual role” in the dispute resolution process. They represent the worker, but also need to act as a mediator and arbiter. The worker, therefore, does not have

independent representation. In light of this, it is concluded that there is a conflict of interest in the Government Agent's role as the worker's representative because of the current CSAWP structure.

The second potential for conflict of interest arises from the state interest that the Government Agents represent which is to maintain their respective country's participation in the program, and obtain as many placements as possible in order to maximize the return of remittances. This fact tied with the employer's freedom to select workers from any of the countries at his or her discretion, creates a competitive structure among the consulates. As one HRDC official explained:

> *It's a five horse race here: four Caribbean countries plus Mexico and the employer has the choice of which ones they want to go to.*

Historically, the Canadian government encouraged the competitive structure of the CSAWP. Consider the following comments made by the Department of Manpower and Immigration in 1970 about the impact the inclusion of Trinidad & Tobago had on the operation of the CSAWP:

> An unnecessary 'competition' for vacancies has developed to the point where the Jamaican Liaison Officer is pushing Trinidadian seasonal workers, already in the country, out of their jobs and replacing them with Jamaican workers. We suspect this was achieved by 'advising' an employer how to force early repatriation of Trinidad workers.
>
> The workers from this island [Trinidad & Tobago] have a tendency to voice their grievances and requests for improvements in working and living conditions more frequently perhaps than Jamaicans, which is another reason why the latter are preferred over the two nationalities.[96]

When the CSAWP expanded again in 1974 to include Mexican workers, the Canadian Government rationalized its support of their inclusion because it would diminish the Caribbean's bargaining power:

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[96] Canada Department of Manpower and Immigration, Report on the Operation of the Caribbean Seasonal Workers Program: Confidential Report and recommendations for improvements in the operation of the Caribbean Seasonal Workers Program', Ottawa: November 20, 1970, National Archives of Canada, R.G. 118, accession 85-86/071, vol. 81, file 3315-5-3 at pp. 1-2.

> The signing of the Mexican agreement not only gives us alternative source of supply of agricultural workers but it also acts as a balancing force to the Caribbean supply. The latter is especially important, for we have noted in the last two years, at least, a "take-it-or-leave-it" attitude with the Caribbean Liaison Officers almost in direct proportion to the increased use of the Caribbean program. But taken together the present Caribbean and Mexican arrangements assure us of a virtually unlimited supply of workers.[97]

In another confidential brief, the Canadian government made the following comments about the increased volume of Mexican workers:

> Manpower have indicated they see this as a useful development in the sense that the competition aids Canadian producers in bargaining for conditions with the Caribbean authorities.[98]

Today, the Canadian Government continues to support the competitive structure of the CSAWP as being responsive to growers' needs. However, there is no comment on how the competitive structure may undermine the Government Agents' ability to pursue worker grievances. HRDC's response to the competitive structure of the program was as follows:

> *Competition helps. Yes, it is there between the Caribbean countries and between the Caribbean countries and Mexico... A healthy level of competition is a good thing for the program. The countries are anxious to supply labour to us and be responsive to suggestions that we make. The employer community is well served by that.*

Employers state that their choice of supply country for workers is determined in large part to the level of service that a consulate office will provide. An example was provided where a few years ago employers perceived problems with the Jamaican Liaison Office resulting in greater demands for Mexican workers. The Government Agents understand that they are in competition for worker placements on farms and therefore, have to be responsive to employers, and they were all aware

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[97] Memo from the Acting Director, Manpower and Employer Services Branch to the Director, Programs and Procedures Branch, September 17, 1974, National Archives of Canada, R.G. 118, accession 85-86/071, vol. 81, file 3314-5-1, pt. 8.

[98] Confidential Brief for Meeting on Sept. 23 Between External Affairs and Manpower and Immigration re: Expansion of Caribbean Seasonal Workers Program, September 20, 1974, R.G. 118, vol. 81, accession 85-86/071, file 3315-5-1, part 8 at p. 4.

that if a dispute is not resolved, a grower may select workers from another country. This point is best illustrated by one Government Agent's response to a question about the prospects of appealing an employer's determination of misconduct. He said:

> *The worker gets to have his say. I will try to resolve the situation. Usually the employer will give them another chance. But even it the worker is right, they may have to be sacrificed. I don't want to lose the whole farm. I tell the workers this before they come up. And I will try to transfer them. But you can't fight the farmer if the farmer really wants him off the farm. The farmers will threaten to go to another country. Sometimes, one worker must be sacrificed to save 20.*

Another Government Agent stated that his role in disputes is to, generally, make sure that the worker does the work – "I rarely lose farmers. They don't switch because of our service."

Another aspect to consider is whether workers are well served by this model. The competitive structure and the Government Agent's interests in retaining placements, again, has the effect of leaving the worker with no independent representation. The worker's individual interests are subordinated to the Government Agent's role as a worker representative, mediator, and government agent for their respective country. One Government Agent admitted openly that he feels he is in a conflict of interest because of these multiple roles and believes that workers' interests needed to be represented through an independent workers' organization or a trade union.

The Government Agents do not have guidelines in servicing workers outside of the MOU, the Operational Guidelines, and the Employment Agreement. Interviews with all of the stakeholders and parties indicated that there is no consistency in servicing workers, and the worker and employer rely on the judgment of the individual Government Agent to address any issues which may arise. There is also inconsistency in the tracking of workers' complaints and how they are resolved. Some share this information with FARMS and HRDC; others do not.

Recommendation: Further guidelines should be developed to remove any potential conflict of interest of the Government Agents in their representation of workers. For example, it should be stated that the Government Agent acts only on behalf of the worker's interests and employers may seek their own independent representation.

Recommendation: A central database of all worker complaints should be maintained by HRDC in order to track patterns of industry level practices which may assist in developing future policy objectives and guidelines for the CSAWP. The database may also be used to track "good" and "bad" employment practices in assessing future employer participation in the CSAWP.

Evaluation of the Government Agents was not canvassed with them. A standard evaluation of how they administer the program and service workers would assist in providing consistency in the delivery of their tasks and provide a mechanism of accountability. One possible model of evaluation may include the Government Agents completing a self-evaluation as well as HRDC, FARMS and workers submitting evaluations on an anonymous basis to Ministry offices in the supply country responsible for the policy development of the CSAWP. Outcomes of the evaluation should be shared with HRDC to ensure that the policy objectives of the CSAWP are being met.

Recommendation: Develop a model of evaluation of Government Agents to ensure accountability and consistency in the servicing of CSAWP workers.

4. Dispute Resolution

The dispute resolution mechanism in the administration of the program is informal and consultative. It works primarily through the Government Agents. If workers or employers have a conflict or dispute, they are instructed to call the Government Agent or the local HRCC. If the complaint is serious enough (as determined by the Government Agent), a visit may be made to the farm. While the Caribbean offices reported that visits will be made to the farms in an attempt to resolve disputes, the Mexican consulate rarely will go to the farm and attempts to mediate the problem over the phone. This again is explained by workload problems and lack of resources described above. It is the role of the Government Agent to exercise his or her discretion to address these situations. If Government Agents require assistance from either FARMS, or a Canadian government body (HRDC, Ministry of Health, etc.) they contact the appropriate individual. HRDC sees its role in disputes as a neutral mediator or facilitator and admits that while it may intervene, it cannot solve the problem.

FARMS' position is that it does not represent "bad" employers, defined as employers who allow unsafe working conditions or do not follow the rules of the program. In some circumstances, FARMS will attempt to assist the employer, and if the employer does not respond to a matter satisfactorily, in FARMS' opinion, then the grower is "on his own".

If all of these efforts fail, the consulate always has the ultimate authority to remove a worker from a farm for the grower's breach of contract, and transfer him/her to another farm. However, this assumes that another position can be found for the worker. The Government Agent's decision to remove a worker is made in consultation with HRDC.[99] HRDC stated in interviews that it does not service "bad employers" if a complaint is made about an employer. HRDC claims to remove employers from the program in obvious egregious situations such as physical abuse or failure to pay wages. In greyer areas, HRDC will not always agree with the Government Agent's decision, or agree that the employer's conduct warrants discipline. In one example, the Mexican consulate decided that several employers would not be serviced the following season and requested that HRDC refuse processing orders from these employers. HRDC took the position that it could not refuse to process an order on this basis because the issue was between the employer and the Mexican consulate.[100]

It should also be noted that, if an employer does not agree with a Government Agent's decision to remove a worker, the employer has no recourse to challenge the decision, except through the courts which is a costly and lengthy endeavour.

If a dispute cannot be resolved through consultation, the grower may repatriate the worker. The Employment Agreement provides a wide, unfettered discretion to the employer to prematurely repatriate a worker for "non-compliance, refusal to work, or any other sufficient reason, to terminate the worker's employment". There is no independent adjudicator to interpret these words, except arguably, the courts. But as discussed earlier, it is highly unlikely that an agricultural worker

[99] Mexican Employment Agreement, X. 4; Caribbean Employment Agreement, VIII. 4.

[100] Minutes of the Mexican Seasonal Agricultural Workers Program - Ontario Annual Operational Review Meeting, November 15, 2001.

would be in a position to file any proceeding in the courts. This provision does not serve the “best interest” of the worker because the test is highly subjective.

For the most part, the Canadian Government reported that the dispute resolution process was working well and needed no adjustment. The government likes this model because it is flexible and cost-effective. It was assumed by one government official that there is a “gentleman's agreement” among the consulates that if one consulate will not provide workers to “bad” employers, then the rest will not provide the grower with a worker. However, in practice, this is not the case. It was admitted in the interviews that despite learning from another Government Agent that a worker had been involuntarily repatriated, when a request came in from the employer to replace the repatriated worker, the Government Agent agreed.

The competitive structure of the program creates pressures to be inattentive to individual worker’s concerns, due to the potential loss of a grower to another country. The ability to simply switch to another country also increases the degree of employer power over workers and the Government Agents. The Government Agents noted that employers lack accountability if there is a dispute in the interpretation of the contract. It was suggested that there should be a mechanism to terminate employers’ access to the program. Another Government Agent estimated that approximately 35 probationary workers per year may be repatriated at the discretion of the employer with no recourse:

> *This generally happens if they [the workers] are ‘unsatisfactory’. They get a probation period of 2 weeks. It is up to the employer to decide. They judge the speed. Some might quit. Sometimes there are medical problems. They can appeal an employer’s decision to the Liaison Officer, but ultimately it is the employer who determines if they will stay or not. It is very difficult because of the competitive nature of the program. Farmers may come down hard on the workers. But there is nothing that can be done to force the employer to keep the worker. And the employer can always go somewhere else for workers. They hold that over your head... The program promotes competition between countries. There must be some other way to sanction the employers.*

The current mechanism makes workers particularly vulnerable. At present, their only contact to attempt to resolve a dispute is with the Government Agent. However, if the Government Agent disagrees with the worker's position, then this leaves the worker with no independent

representation and he or she is left to his or her own devices. Other disincentives also operate against a worker filing a complaint:

1. The Government Agent may not have the resources or staff to respond or investigate the complaint, which has been especially the case with Mexico;

2. The worker fears the threat of repatriation;

3. The worker fears being “blacklisted” by employer and/or Government Agents from future participation in the program.[101]

One policy answer may be that the migrant worker and the employer are in a private employment contractual relationship; migrant workers are in the same position as any other Canadian employee and should not have any greater rights with respect to the contractual relationship.

However, the migrant worker's employment relationship and contract should be examined in the context of the policy objectives of the CSAWP. Unlike other employee-employer relationships, the migrant worker has no input into the contractual arrangement in which he or she is entering. Assuming that the Canadian Government realizes that the migrant worker has very little bargaining power to negotiate such contracts, a standard Employment Agreement has been created on their behalf in order to avoid exploitation of migrant workers. If this purpose is to be realized, then there must also be effective enforcement.

There are two relevant policy objectives in the CSAWP instruments and immigration laws relevant to dispute resolution models: 1) migrant workers are to be afforded equal treatment to Canadian workers, and 2) the hiring of migrant agricultural workers must not result in wages and working conditions unattractive to Canadian workers.

Canadian agricultural workers have access to employment related tribunals and courts to enforce their rights. Migrant agricultural workers may also theoretically access these mechanisms.

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[101] Rachel Li Wai Suen, *supra* note 88 at 204.

However, migrant workers do not have the same labour mobility rights as Canadian workers and may be subject to premature repatriation before migrant workers are able to access or realize their rights under mechanisms otherwise available to Canadian workers. That is, if a Canadian worker is fired by an employer, he or she is free to find another job within Canada. On the other hand, if a migrant worker is fired, he or she is immediately returned home with minimal prospects of re-employment, and he or she may also be barred from future participation in the program.[102] The unique circumstances of migrant agricultural workers and their lack of mobility rights raise the question of whether these workers are provided equal treatment of Canadian workers when the *effect* of the repatriation provisions makes it difficult to enforce their rights.

The current mechanism allows for the earlier-stated policy objectives to be undermined because the effect of the CSAWP's structure denies migrant workers equal access to dispute resolution mechanisms otherwise available to Canadian workers. This in turn leads to the potential of leaving poor working conditions unaddressed. If poor working conditions persist, agricultural workers will continue to be unattractive to Canadian low-skilled workers. Therefore, from a public policy perspective, migrant agricultural workers and employers should have an accessible, enforceable mechanism to ensure due process for complaints. While flexibility and cost-effective mechanisms are worthy considerations, structuring and checking discretion will also strengthen the instrumental framework as a credible mechanism by preventing the potential for arbitrary decision-making[103] and creating procedural fairness for workers. The call for a mechanism which guarantees due process is consistent with standards in international conventions applicable to migrant workers.[104] It is also consistent with the Supreme Court of Canada's remarks in *Dunmore*, *infra* that from the workers' perspective, it may be in their best interest to have a more formalized dispute resolution process.

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[102] It is noted that several Government Agents stated that if he believed the employer was wrong in repatriating the worker, this would not be used against the worker in future participation in the program.

[103] Davis, "Discretionary Justice" (Louisiana State University Press, 1969)pp. 55-57, 65-67, 97-99, 102-103, 106-107 in Evans, J.M. et al. Administrative Law, 4th ed. (Toronto: Emond Montgomery Publications Ltd., 1995) at 1114-1119.

[104] *UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*

Recommendation: ***A review of the dispute resolution mechanisms under the CSAWP be undertaken in order to ensure procedural fairness and enforcement of the various instruments.***

Recommendation: ***In reviewing possible dispute resolution mechanisms, the following factors should be considered: proceedings must be quick and cost effective since migrant workers are restricted to Canada for a short period of time and farm production should not be jeopardized. To address these concerns, negotiation and mediation should be built into the mechanism as stages of dispute resolution before using a formal hearing process. For example, the parties may try to mediate the dispute with all representatives in a formal meeting; the next stage would be to use a trained neutral third party mediator to attempt to resolve the dispute; the next step would be binding arbitration with reasons for decision. If a worker is a member of a union, then the Employment Agreement should explicitly recognize the arbitration process under the applicable collective agreement as the dispute resolution mechanism, as required by law.***

Recommendation: ***It is suggested that the dispute resolution process be enshrined in the Employment Agreements and include a roster of mutually agreeable arbitrators or mediators. An established list will ensure that the dispute is heard expeditiously.***

Recommendation: ***The dispute resolution mechanism should be available to all affected parties and parties should have direct access to it. Therefore, while Government Agents should be able to file disputes with the body on behalf of a migrant worker, the worker should also be able to access the mechanism him or herself should the Government Agent disagree with the worker. The worker should have the right to represent himself independently or through an employee association.***

Recommendation: ***The dispute resolution mechanism should be paid for by the Canadian Government in recognition that resources will need to be committed in ensuring that policy objectives and contractual provisions intended to guarantee fair treatment of migrant workers are in fact enforceable. This will reinforce HRDC's mandate to ensure that wages and working conditions are not depressed by the hiring of migrant workers.***

5. Annual Review Meetings and Policy-Making

The primary role of HRDC in the CSAWP is policy development. HRDC defines its mandate as assisting Canadian employers to meet their human resources needs. In this capacity, HRDC is interested in the costs to the industry, and states that its interests are the same as FARMS. In Ontario, the HRDC Regional Manager provides policy analysis used at the senior level. This is achieved through consultation with local HRCCs as well as the Ontario Agricultural Advisory Committee ("Advisory Committee"). The Advisory Committee is co-chaired by government and industry and consists of representatives from the commodity groups as well as the Ontario Ministry of Agriculture and Rural Affairs. HRDC established the Advisory Committee to enhance consultation and partnership with the agricultural industry. The Advisory Committee provides recommendations on the policy statements and instruments relating to the CSAWP which are then communicated to senior HRDC officials overseeing the CSAWP. These recommendations influence or shape the complexion of the CSAWP. However, there is no Canadian labour representation in this process.

State representatives, FARMS, FERMES, and other commodity representatives meet annually both nationally and regionally to review the operational and administrative functioning of the CSAWP. These meetings are described as being an important place to make changes to the program.

There is first a regional meeting, for example in Ontario or Quebec, that is usually held in October or November. In Ontario, there are representatives from the regional liaison or consulate office, HRDC, FARMS, CanAg, and the Ontario Ministry of Health. The Ontario Ministry of Labour is advised of the meeting but generally does not attend except on an "as needed" basis. The Ontario Ministry of Agriculture and Rural Affairs attends as an observer. The regional meeting allows participants to raise concerns about the operation of the Employment Agreement as it relates to housing, wages, and working conditions.

Canada has historically met with the Caribbean and Mexican government separately because they have two different agreements, and there has been little interaction between the Mexican and Caribbean consulates. However, recent tensions among the parties and stakeholders relating to

the wage rate has spurred efforts for possible future coordination on some issues. In 2001, for the first time, Mexico and the Caribbean negotiated wages together. This collaboration was initiated by Mexico. According to one Government Agent, this was met by FARMS with resistence and displeasure because there was concern that the Caribbean States and Mexico would have greater bargaining power together in negotiating higher wage rates for workers. Decisions are rarely made at the regional meetings; decisions are generally deferred to the national meeting held in December/January following the regional meeting.

The national meeting alternates every year between Canada and Mexico or a Caribbean state. Meetings with Mexico and the Caribbean states are held separately. At the national meeting, there are senior government officials from Mexico and the Caribbean (i.e. representatives from the Ministry of Foreign Affairs, Ministry of Labour and Ministry of Health), FERMES, FARMS, growers from Manitoba, Ontario, Quebec, senior policy advisors and regional managers from HRDC, and the foreign Government Agents posted in Canada.

Problems that are not resolved at the regional meeting will be raised at the national meeting, which may include workers' complaints about working and living conditions. Problems are raised generally, as opposed to dealing with individual cases. The regularity of both regional and national meetings provide good opportunities to ensure that the CSAWP is regularly reviewed through face to face meetings. These interactions serve to strengthen social relationships which assist in the on-going relationships after the meetings in the administration of the program.

While there was consensus that these meetings serve an important operational aspect of the program, concerns were raised about the increasing role of FARMS and the adversarial effect of its participation. FARMS was described as very vocal and playing a dominant role in these meetings as it related to wages and working conditions, whereas HRDC representatives played a minimal role. The Government Agents perceived FARMS as having undue influence over the direction of the program. This was viewed as inappropriate for what is supposed to be inter-governmental negotiations. The general view of the government agents and other consulate representatives was that the role of FARMS at these meeting should be minimized and the Canadian government needed to take a more proactive role. The impression is that the Canadian government is losing control of the program to FARMS.

The role of FARMS needs to be clarified. The “official” position is that FARMS is only an administrative vehicle to assist Government Agents and employers in processing requests for foreign workers. In light of FARMS constituency (i.e. participating commodity sector representatives and growers who hire foreign workers) it is inevitable that private sector, partisan interests will be pursued when opportunities arise. This trend is diminishing the Canadian government’s role in the CSAWP.

Recommendation: The Canadian Government needs to take a more active role in ensuring that FARMS does not take over policy decision-making as it relates to CSAWP.

While employers and commodity groups are able to participate in the policy meetings, there are no non-governmental actors, workers' advocacy groups, independent migrant worker representatives, or labour groups at either the regional or national review meetings. The rationale is that workers' interests are represented by the supply country. However, once again, the Government Agents are required to play the “dual role” of representing the interests of their country's overall participation in the program *and* representing the interests of workers in the negotiation of working conditions. As noted earlier, this has the potential of creating situations of conflicting interests. Because employers are allowed to have representation at the meetings, the Canadian government does not have to play the same dual role (i.e. representing government and employers).

In addition, there may be larger labour market issues that need to addressed as they relate to the use of migrant workers in Canada, including the impact of migrant workers on working conditions in the industry. The parties may benefit from expertise and point of view of Canadian labour or other non-governmental actors.

Recommendation: CSAWP workers should be allowed independent representation at the regional and annual meetings.

Recommendation: In light of the greater policy role that the private sector is taking in the operation of the CSAWP, this perspective needs to be balanced with greater participation of workers, non-governmental and labour groups at the annual meetings which can

contribute inputs on the impact of the program on the current labour market as well as addressing concerns about working conditions.

The absence of provincial governments in these meetings is a weakness of the CSAWP. Research revealed that when advocacy groups raised problems about the enforcement of provincial legislation, the matter was deferred to HRDC. The findings suggest that provincial authorities take a "hands off" approach as it relates to the application of their labour and employment legislation to migrant workers because there is an assumption that HRDC is in charge. However, expertise in the provincial laws lies with provincial authorities and it is only the provinces that enforce their laws. Furthermore, it is the provincial authorities who can ensure that proactive steps are taken as they relate to housing and working conditions. HRDC does not have this jurisdiction. Advocating for greater participation by provincial governments in these meetings will serve to provide Government Agents with additional resources and educate the provincial government on its role in the operation in the CSAWP.

Recommendation: Provincial Ministries need to be better educated on the CSAWP and more active in the operation of the program.

D. The Application of Canadian and Provincial Labour and Employment Laws to Migrant Agricultural Workers - An Ontario Case Study

Justice L'Heureux Dubé in the recent Supreme Court of Canada decision relating to the exclusion of agricultural workers from provincial labour relations legislation, held [emphasis added]:

> I would like to make explicit reference to the fact that in these reasons we are not deciding on the rights, or lack thereof, of foreign seasonal agricultural workers and their families, who are regulated under federal legislation.[105]

This conclusion was made with neither party to the proceeding presenting any evidence or argument on the question of jurisdiction with respect to migrant agricultural workers. A closer analysis of whether migrant agricultural workers fall under provincial or federal employment and labour laws casts some doubt with Justice L'Heureux-Dubé's conclusion.

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[105] *Dunmore v. Ontario (Attorney General)*, *infra* at note , at 255

The Canadian *Constitution* provides that agriculture and immigration fall under the concurrent jurisdiction of both the provinces and the federal government, and provincial laws relating to agriculture are valid "as far only as it is not repugnant to any Act of the Parliament of Canada."[106]

The federal government has jurisdiction over general immigration matters in Canada[107] and the development of foreign worker migration programs. Therefore, the role of the federal government in these capacities is to develop the terms and conditions under which workers from outside Canada migrate to Canada to fill occupational positions. However, once workers are in Canada and working, then the determination of what laws apply relating to their employment requires looking at whether the occupation in which they are working falls under federal or provincial laws. Generally, there are no federal laws in conflict with the provincial regulation of agricultural employment. The CSAWP is an "inter-governmental arrangement", not a statute. Therefore, the better view is that CSAWP workers, once in the province, are covered by provincial employment laws like any other agricultural worker in Ontario.

Some employment-related statutes fall under the federal jurisdiction regardless of occupation and apply to all employees in Canada. For example, the federal government has exclusive jurisdiction over unemployment insurance under the *Employment Insurance Act* and retirement or disability benefits under the *Canada Pension Plan*.[108]

1. Provincial Jurisdiction

Agricultural workers in Ontario are excluded from several key labour and employment related statutes designed to protect workers and to provide a "floor" of standards. This has placed agricultural workers in a vacuum as it relates to legislative employment protections. The denial to

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[106] *The Constitution Act, 1867*, s. 95 -"In each Province the Legislature may make Laws in relation to Agriculture in the Province, and to Immigration into the Province; and it is hereby declared that the Parliament of Canada may from Time to Time make Laws in relation to Agriculture in all or any of the Provinces, and to Immigration into all or any of the Provinces; and any Law of the Legislature of a Province relative to Agriculture or to Immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada."

[107] *Immigration and Refugee Protection Act*, 2001, c. 27

[108] The *Constitution Act, 1867*, s. 91(2A)

agricultural workers of these protections has reinforced their position as vulnerable workers.[109] Thus, readers should not be mislead by language in the CSAWP Memoranda of Understanding and Employment Agreement that says Mexican and Caribbean agricultural workers are to receive "treatment equal to that received by Canadian workers performing the same type of agricultural work". This is a hollow promise in Ontario – what is being promised is equality to Ontario farm workers, "which is the equality of having no rights at all".[110]

The exclusion of agricultural workers from the Ontario *Labour Relations Act*, thereby denying them right to join a union and collectively bargain, will be discussed in greater detail in the sections below. The following is a description of some of the other key statutes as it relates to employment in Ontario. How these statutes apply, or do not apply, to migrant agricultural workers will be analyzed.

a. *Employment Standards Act, 2002*[111]

The *Employment Standards Act, 2002* provides employees with statutory minimum standards relating to their employment. This includes provisions for, but not limited to, minimum wage, overtime, hours of work, statutory holiday, equal pay for equal work, parental and pregnancy leave, emergency leave, severance pay, and termination notice and pay. However, agricultural workers are excluded from several provisions that are outlined below.

Ontario Regulation 285/01 under the *Employment Standards Act, 2002* distinguishes between "farm workers" and "harvesters". CSAWP workers may fall under either of these definitions depending on the kind of work that is being done.

A "farm worker" is defined as "a person employed on a farm whose employment is directly related to the primary production of eggs, milk, grain, seeds, fruit, vegetables, maple products, honey,

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[109] *Dunmore v. Ontario (Attorney General)*, *infra* at note

[110] Rachel Li Wai Suen, *supra* at note 88, at 206.

[111] S.O. 2000, c.4

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tobacco, herbs, pigs, cattle, sheep, goats, poultry, deer, elk, ratites, bison, rabbits, game birds, wild boar, and cultured fish".[112] These workers perform tasks such as planting crops, cultivating, pruning, feeding and caring for livestock.

A "farm worker" as defined under the *ESA* is not covered under the following provisions: hours of work; daily and weekly/bi-weekly rest periods; eating periods; overtime pay; minimum wage; public holidays; and vacation pay.[113]

Harvesters include workers employed on a farm to bring in fruit, vegetables and tobacco for marketing or storage[114] Harvesters are required to be paid the statutory minimum wage.[115] The employer is deemed to be in compliance with the minimum wage provisions if workers are paid a piece work rate that is "customarily and generally recognized in the area as having been set so that an employee exercising reasonable effort would, if paid such a rate, earn at least" the minimum wage.[116] The minimum wage in Ontario is $6.85.

If the farm employer provides the harvester with room and board, the legislation sets amounts which will be deemed to be paid to the harvester as wages for the purpose of determining whether the minimum wage has been paid:[117]

Serviced housing accommodation	$99.35/week
Housing accommodation	$73.30
Room	$31.70 a week if the room is private and $15.85 a week if the room is not private.
Board	$2.55 a meal and not more than $53.55

[112] O. Reg. 285/01, s. 2(2)

[113] O.Reg. 285/01 s. 2(2)

[114] O.Reg. 285/01, s. 24

[115] O.Reg. 285/01, s. 24

[116] O. Reg. 285/01, s. 25(1)

[117] O.Reg. 285/01, s. 25(5)

Under the CSAWP Employment Agreements, employers agree to provide workers suitable accommodation at no cost. This is a "premium" feature of the program. Therefore, these listed amounts are not deemed to be paid to the CSAWP harvester in determining whether the minimum wage has been paid.

Harvesters are not covered by provisions under the *ESA* relating to: hours of work; daily and weekly/bi-weekly rest periods; eating periods; and overtime pay.

Harvesters are also covered by public holidays and vacation pay provisions but only if they have been employed as harvest workers (and not as farm workers) for at least 13 weeks.[118] Vacation pay is calculated at 4% of total gross earnings. If a worker does a combination of farm work (i.e. cultivating crops or seeding) and harvesting, vacation pay is earned only on the wages earned harvesting.[119] This has been reported as causing confusion in determining whether a worker is eligible for vacation pay and public holidays because it is difficult to document when a worker is moving between "farm work" and "harvesting".

If an employer violates the applicable *ESA* provisions, including failure to pay wages for work performed,[120] an employee may file a complaint with the Ministry of Labour. Findings by an Employment Standards Officer of violations of the Act may lead to binding orders of compliance, including monetary orders. An employer's failure to comply with the Act may lead to further escalating fines and convictions.

The Act provides that an employer can not intimidate, threaten or dismiss a worker because he or she make inquiries about his or her rights under the Act; files a complaint with the Ministry; asks the employer to comply with the Act; exercises or attempts to exercise his or her rights under the Act. The burden of proof will be on the employer to show that he or she did not contravene the Act. If an Employment Standards Officer finds that a worker faced reprisals for attempting to exercise

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[118] O.Reg. 285/01, s.

[119] Ontario Ministry of Labour. *Fact Sheet: Employment Standards Act - Agricultural Workers* - http://www.gov.on.ca/LAB/esa/esa_e/fs_agri_e.htm

[120] s. 11

any of the above listed rights, the Officer may order that the employer reinstate the worker and/or pay the worker monetary damages.

b. *Occupational Health and Safety Act*[121]

Farming is one of the most dangerous occupations in Canada and in Ontario, involving exposure to a variety of hazards including unguarded machinery, working with large animals, falling hazards, extreme temperatures, and toxic chemicals and gases.[122] Deaths of farmers and farm workers represent 13% of all occupational fatalities in Canada.[123] In terms of fatalities in Canada, agriculture is the fourth most dangerous occupation after mining, logging/forestry, and construction.[124] In Ontario, agriculture has one of the three highest fatality rates of all occupational groups.[125] Between 1985 and 1994, there were 804 harvest-related injuries in Ontario resulting in admission to a hospital.[126] In August 12, 2002, a Jamaican worker under the CSAWP died while working when a 1,200 pound tobacco kiln fell on his chest and crushed him.

Despite these facts, agricultural workers are excluded from the *Occupational Health and Safety Act* ("OHSA").[127] With the exception of work performed by the owner or occupant of a private residence or to a servant of the owner or occupant of a private residence, agricultural workers are the only workers in Ontario that are excluded from OHSA.

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[121] R.S.O. 1990, c. O.1

[122] W. Pickett, et al. "Surveillance of hospitalized farm injuries in Canada" (2001) 7 Injury Prevention 123-128 at 123.

[123] Human Resources Development Canada. *Occupational injuries and their cost in Canada, 1991-95.* Ottawa, 1996.

[124] W. Pickett, et al. "Fatal work-related farm injuries in Canada, 1991-1995" (1999) 160 CMAJ 1843-8.

[125] W. Pickett, et al. "Nonfatal Farm Injuries in Ontario: A Population-Based Survey" (1995) 27:4 Accid. Anal. and Prev. 425-433 at 425.

[126] Lisa Hartling et al. "Injuries associated with the farm harvest in Canada" (1998) 158 CMAJ 1493-6.

[127] s. 3(2) - "Except as is prescribed and subject to the conditions and limitations prescribed, this Act or a Part thereof does not apply to farming operations."

OHSA establishes a mandatory, state-enforced system of minimum standards for occupational health and safety in Ontario. Workers covered by the OHSA have the right to a safe workplace. The exclusion from OHSA means that agricultural workers, including workers under CSAWP, do not have the following rights as embodied in the Act:

1. The right to know about workplace dangers: This includes the right to be told about workplace hazards as well as to receive instruction and competent supervision to protect workers' safety.

2. The right to representation through health and safety committees: Workers at workplaces with more than five employees are entitled to have a health and safety representative who is selected by the workers. Workplaces with more than twenty employees are required to have a mandatory joint health and safety committee.

3. The right to refuse unsafe work; and

4. The right to be free from employer reprisals for trying to enforce rights under the Act: Anti-reprisal provisions protect a worker from being punished, including dismissal or threat of dismissal, should he or she enforce or attempt to enforce his or her rights. This protection is especially important in a worker's right to refuse unsafe work.

Exclusion from OHSA also means that agricultural workers are not covered by the *Workplace Hazardous Materials Information Systems (WHMIS).*[128] WHMIS has three requirements: (1) labelling of hazardous materials used in the workplace;[129] availability of material safety data sheets;[130] and safety training to all workers who may reasonably be exposed to hazardous material

[128] Regulation 860, amended O. Reg. 36/93.

[129] Reg. 860, ss. 8-16.

[130] Reg. 860, ss. 17-18.

in the workplace.[131] Products under the federal *Pest Control Products Act*[132] are excluded from WHMIS.

The *Pest Control Products Act* (federal) and the *Pesticides Act*[133] (provincial) regulate the use of pesticides on farms. The *Pest Control Product Act* prohibits the unsafe manufacture, storage, display, distribution or use of pesticides. Products are required to be labelled providing information on the chemical properties of the product, instructions for its use, related hazards, and first aid instructions. In 2002, new federal legislation received Royal Assent but as of April 2003 it had still not come into effect.[134] This statute states that safety information be provided to "workplaces" where the product is used or manufactured. However, the legislation is silent on any requirement to train or provide information to workers. The provincial legislation also regulates the licensing and granting of permits for the use of pesticides. Persons applying pesticides are required to be trained; however, there is no requirement to provide other workers with information on pesticides being stored or used on farms or risks related to pesticide exposure. There is also no obligation to ensure the safety of agricultural workers in workplaces using pesticides.

Farm safety management in Ontario is voluntary. The Farm Safety Association (FSA), which is funded by the Workplace Insurance Safety Board, promotes safety and provides voluntary safety education to farm employers.[135] The FSA is governed by a board of directors comprised of eleven members elected by agriculture commodity organizations, eight members elected from the membership at large on a geographic basis, three associate members to broaden the board's industry knowledge and the President.[136] There is no worker representation. The FSA delivers an Agricultural Safety Audit Program developed by the Ontario Agricultural Human Resource

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[131] Reg. 860, ss. 6-7.

[132] chapter P-9.

[133] R.S.O., ch. P-11, as amended.

[134] *Pest Control Products Act*, 2002, c. 28.

[135] http://www.farmsafety.ca/profile.shtml, site accessed on 2/17/2003.

[136] *Ibid.*

Council.[137] The program is designed for injury prevention which may include a representative of the Workplace Safety Insurance Board (WSIB) or the FSA inspecting a workplace and making health and safety recommendations; but participation and implementation of the recommendations are voluntary.[138] The WSIB conducts less than ten ASAP audits a year.[139]

Lack of resources and the inability to enforce compliance impede the FSA from realizing its goals.[140] The FSA has reported that its largest limitation is willingness of employees, employer and family farmers to adopt safety work practices and to invest resources for dissemination of health and safety information.[141] The FSA has stated that it does not have the resources to reproduce or distribute its products to the greater farming population in Ontario, nor does the FSA have access to a mailing list for this population.[142] For 2001, there were only 8 FSA Health and Safety consultants to service 16,000 members.

Over the last 14 years, there have been several coroners' inquests into the death of farmers and agricultural workers. Recommendations from the coroner's juries have included extending OHSA coverage to include farm workers[143] or another alternative mechanism of ensuring enforceable standards.[144] Farm worker representation on health and safety issues has also been recommended, including farm worker representation on the FSA Board of Directors.[145] These

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[137] *Ibid.*

[138] http://www.farmsafety.ca/asap.shtml, site accessed 2/17/2003.

[139] Affidavit of Eric Tucker sworn on 9 May 2003, in *Fraser et al. v. Ontario (A.G.)*, Court File No. 03-CV-250815CM3, paras. 63 and 73.

[140] Verdict of Coroner's Jury: Redekopp, Ferrier, and Schulz (2001).

[141] Affidavit of Eric Tucker sworn on 9 May 2003, in *Fraser et al. v. Ontario (A.G.)*, Court File No. 03-CV-250815CM3, Exhibit "N" - Letter from Dean Anderson, President & CEO, FSA to Dr. Bonita Porter, Deputy Chief Coroner of Inquests for Ontario, dated 27 January 2003.

[142] *Ibid.*

[143] Verdict of Coroner's Jury: Wiles (1991); McMillan (1992); Summerfield (1994); Redekopp, Ferrier, and Schulz (2001).

[144] Verdict of Coroner's Jury: Bellerose (1989); Cochrane (1990); Williamson (1996).

[145] Verdict of Coroner's Jury: Bellerose (1989); Summerfield, (1994); Redekopp, Ferrier, and Schulz (2001).

recommendations have not been implemented. The most recent Jury Recommendations highlighted that many farm workers do not have English as their first language putting them at greater risk of injury. The Jury recommended that FSA health and safety be translated into languages other than English and French. As a result, the FSA has translated into Spanish several facts sheets and produced Spanish videos in response to the increasing presence of Mexican seasonal agricultural workers in Ontario.[146]

On June 20, 2003, the United Food and Commercial Workers Canada ("UFCW"), two agricultural workers and the widow of an agricultural worker who died on the job, launched a *Charter* challenge of OHSA claiming that the exclusion from OHSA denied agricultural workers their rights to equality and life, liberty, and security of the person. This case highlights that while the Ontario government promised at the time OHSA was enacted that regulations would be passed to address the dangers of agriculture, that promise was never fulfilled. The application record in this case includes several expert reports detailing the dangers of farm work, the disadvantaged position of agricultural workers, and the inadequacy of voluntary farm safety programs in providing the same level of health and safety afforded to other workers in Ontario.

It is recommended that the OHSA be amended to include agricultural workers. The benefit of OHSA coverage to migrant workers is to reduce non-wage labour costs such as risk to their physical well-being and health. The benefit to employers is to reduce the incidents of workplace accidents which may have an adverse impact on payable Workplace Safety & Insurance premiums and work production slowing down as a result of the loss of injured workers unable to perform their duties.

Recommendation: Agricultural workers should be covered by the Occupational Health and Safety Act in Ontario, providing an institutional framework in which worker's health and safety concerns including pesticide use may be addressed.

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[146] http://www.farmsafety.ca/factsheet.shtml, site accessed on 30/05/2002; Affidavit of Eric Tucker, *supra*, note 139.

c. *Workplace Safety and Insurance Act*[147]

The *Workplace Safety and Insurance Act* (WSIA) promotes health and safety in workplaces and the reduction and prevention of workplace injuries and occupational diseases; facilitates the return to work and recovery of workers who sustain personal injury arising out of and in the course of employment or who suffer from an occupational disease; and provides compensation and other benefits to workers and to the survivors of deceased workers.[148]

The WSIA applies to farm employers and they are required to register with the Workplace Safety Insurance Board (WSIB) within 10 days of becoming such an employer.[149] In 2001, 24,013 farms in Ontario reported that they employed at least some hired labour.[150] However, in this same year, only 12,000 farms were registered.[151] Therefore, it appears that only half of farms employing hired labour are in compliance with registration obligations under the WSIA.[152]

Migrant workers under the CSAWP are insured for workplace injuries under the *Workplace Safety and Insurance Act.*[153] Coverage begins as soon as the workers reach the agreed-upon point of departure in their country of origin and they remain covered until they return home. While travelling in Ontario, the workers are covered when they are: travelling from an airport in Ontario to the employer's premises; using a means of transportation authorized by the employer; and following a direct and uninterrupted route to or from the employer's premises. In addition to coverage while

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[147] S.O. 1997, c. 16, Sch. A.

[148] s. 1.

[149] ss. 67 and 75.

[150] Statistics Canada, Ontario Farm Data, 19961, 1996, and 2001 Census of Agriculture, http://www.gov.on.ca/omafra/english/stats/census/summary.html, site accessed on 10/17/2002.

[151] Affidavit of Eric Tucker sworn on 9 May 2003, in *Fraser et al. v. Ontario (A.G.)*, Court File No. 03-CV-250815CM3, Exhibit "S" - Ontario Workers' Safety and Insurance Board 2001statistics.

[152] Affidavit of Eric Tucker sworn on 9 May 2003, *Ibid.* at para. 77.

[153] Workplace Safety & Insurance Board. *Operational Policy: Foreign Agricultural Workers*, Document Number 12-04-08.

in the course of employment, workers are also covered during periods of leisure, meals, and while sleeping in employer-provided quarters.

Employers are obligated to immediately report to the Workplace Safety & Insurance Board and the supply country representative all work-related accidents and illnesses. The employer is also obligated to make arrangements for the worker to see a doctor if the worker states he or she is in need of medical attention.

If a worker is injured and unable to work because of an accident at work, he or she must file a claim for benefits before leaving Canada. If the worker does not file before leaving Canada, the Government Agent is responsible for ensuring that the Form 6 – the Worker's Report of Injury/Disease – is completed by the worker and returned to the Workplace Safety & Insurance Board ("WSIB"). The WSIB must be notified when injured workers leave the country.

Research uncovered that the current Director of the WSIB Agriculture Section is also the president of the Canadian Horticultural Council, former president of the Ontario Fruit and Vegetable Growers' Association, and a long-standing member of the FARMS Board of Directors. He is also a grower and operates a company retailing his produce. It seems that there is conflict of interest to have a visible advocate for growers' interest in a government position which is supposed to serve the interests of both workers and employers.

d. *Human Rights Code*[154]

Migrant agricultural workers are covered by the Ontario *Human Rights Code* and have the right to employment and accommodation free from discrimination. The relevant provisions are as follows:

> **2.** (1) **Accommodation. -** Every person has a right to equal treatment with respect to the occupancy of accommodation, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age,

[154] R.S.O. 1990, C.H.19

martial status, same-sex partnership status, family status, disability or the receipt of public assistance.

(2) **Harassment in accommodation. -** Every person who occupies accommodation has a right to freedom from harassment by the landlord or agent of the landlord or by an occupant of the same building because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, marital status, same-sex partnership status, family status, disability or the receipt of public assistance.

5. (1) **Employment. -** Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, same-sex partnership status, family status or disability.

(2) **Harassment in employment. -** Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, record of offences, marital status, same-sex partnership status, family status or disability.

Migrant agricultural workers may file a human rights complaint with the Ontario Human Rights Commission if he or she is discriminated on any of the grounds listed above relating to accommodation provided by their employers or to their conditions of employment.

2. Federal Jurisdiction

a. *Employment Insurance Act*[155]

Despite changes over the last sixty years in the coverage and scope of the Unemployment Insurance program in Canada, the fundamental goal of the program has consistently been described as income support for people who are temporarily without work.[156]

The unemployment benefits scheme in Canada was based on “insurance principles”; it was contemplated that it would be run in the same manner as private insurance such as life, fire or theft. Legislation providing such benefits was intended to be actuarially sound: coverage, risks,

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[155] S.C. 1996, c. 23, as amended.

[156] *Tetreault-Gadoury v. Canada (Employment and Immigration Commission)* [1991] 2 S.C.R. 23 at 46.

premiums and benefits were to be carefully calculated and balanced. Unemployment benefits were seen as “rights” paid for by past contributions.

As a result of this series of legislative reforms, the current *EI Act* reflects several “non-insurance” social objectives that are part of the larger Canadian social security framework: temporary income replacement for insured employees who are absent from insured employment because of maternity, parental obligations or sickness; the redistribution of income among individuals and regions; the stabilization of the economy throughout the business cycle; and the facilitation of labour market adjustments to changes in the economy. The financing of these non-insurance objectives is achieved by employee and employer premium contributions. However, the fundamental objective remains providing employees benefits during periods of temporary unemployment, financed by premiums paid by employees and employers in insured industries.

The *Employment Insurance Act* (“*EI Act*”) provides “regular” benefits, or unemployment insurance benefits, as well as “special” benefits which include sick benefits, maternity and parental leave benefit. Entitlement to benefits is based on contributions (i.e. premiums) from earned wages in insurable employment. The *EI Act* distinguishes between two types of employment: “insurable” and “excluded”.[157] The *EI Act* requires persons in insurable employment to pay premiums[158] and outlines the general obligation of employers to pay the employer premium and to withhold employee premiums from wages.[159] Agricultural work falls under the definition of insurable employment, therefore, premiums must be deducted from wages deriving from this work.

Primary qualification for benefits is based on the accumulation of hours worked based on regional unemployment rates in a 52 week period. For regular unemployment insurance benefits, the number of hours required may range from 420 - 700 hours. For sickness, maternity and parental leave benefits, 600 hours is required. Several CSAWP workers are able to accumulate the requisite hours to qualify for benefits. For example, in the case of Jamaican workers in 2001, they

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[157] s. 5 of the *EI Act*.

[158] s. 67 of the *EI Act*.

[159] s. 82(1) of the *EI Act*.

work on average 63.65 hours per week and work an average season length of 14.2 weeks. This is equivalent to 903.83 hours in one season.[160]

However, despite working in insurable employment, paying premiums, and accumulating the requisite number of insurable hours, CSAWP workers have no prospect of collecting regular EI benefits. The requirement under the *EI Act* that claimants must be available for work in Canada in order to be eligible for benefits makes it virtually impossible for Mexican/Caribbean workers under CSAWP to receive regular unemployment benefits.

Subsections 18(a) and 37(b) of the Act are the relevant provisions, reproduced below.

> 18. A claimant is not entitled to be paid for a working day in a benefit period for which the claimant fails to prove that on that day the claimant was
>
> (a) capable of and available for work and unable to obtain suitable employment; ...
>
> 37. Except as may otherwise be prescribed, a claimant is not entitled to receive benefits for any period during which the claimant
> ...
> (b) is not in Canada.

Exceptions under s. 37 are listed in the *EI Regulations* at s. 55; none are relevant to migrant workers.

The Memoranda of Understanding and the Employment Agreements governing the CSAWP, in addition to the *IRPA*, clearly requires the workers to return to Mexico or the Caribbean upon completion of their defined term of work on a Canadian farm(s). Therefore, despite any period of unemployment a worker may experience after completing his or her contract in Canada, the worker is ineligible to claim regular EI benefits because of the operation s.18 and s. 37 of the Act.

In a certain narrow range of circumstances, CSAWP workers may be eligible to receive sickness benefits. However, once a worker returns home, he or she is ineligible to receive these benefits

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[160] R. Russell, *supra* note 66.

because the *EI Act* requires the claimant to be physically in Canada, unless seeking medical treatment not readily available in Canada. The data reveals in other papers in this project that even when workers are sick, they will continue to work. With respect to Caribbean workers in 2001, an estimated 50- 59% of these workers were required to work during their period of illness. Some employers did not allow them to report their injury or sickness.[161] Basok reports that in many cases Mexican workers continue working despite illness because they are not aware of their entitlements under Canadian legislation, they do no want lose wages, and they fear reprisals from their employer.[162]

In contrast, it is not necessary for a claimant to be in Canada in order to receive maternity or parental leave benefits. However, to be eligible for these benefits, the worker's child must be born while he or she is working in Canada, though it is not necessary for the child to be born in Canada. While it is theoretically possible for migrant workers to receive these "special" benefits, in reality they are rarely, accessed. The United Food and Commercial Workers Union has reported that while assisting some Mexican workers in processing applications for parental leave benefits in 2003, applications have been stalled. The Canadian Government has changed the Social Insurance Number (SIN) system post 9/11 so that workers must revoke their SIN on departure from Canada. Without a SIN, workers are unable to receive benefits. At the time of writing this report, there has still been no decision from HRDC about whether these applications will be accepted or not.

If the fundamental purpose of the *EI Act* is to provide benefits for workers during periods of temporary unemployment, it would appear to be at odds with this fundamental purpose to extract premiums from a group of workers who are employed under terms and conditions which ensure they can never collect benefits if they become unemployed. It is irrational to include CSAWP workers under the *EI Act* under these circumstance.

The *EI Act* contemplates that where individuals are unlikely to qualify for benefits, it follows that they should not have to pay premiums. This same rationale should be applied to CSAWP workers.

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[161] R. Russell, *supra* note 66; Andrew Downes et al. *supra* note 69.

[162] Tanya Basok, *Tortillas and Tomatoes*, *supra* note 17 at pp. 123-124.

For example, while all earnings from the first dollar in "insurable employment" are subject to premium deduction, the current *EI Act* provides that workers earning less than $2,000.00 per year shall have their premiums refunded.[163] The Government stated its rationale for this refund in the 1997 Employment Insurance Monitoring and Assessment Report as follows [emphasis added]:

> ....measures were also put in place to ensure fairness and to ease the transition to this new financing system. Individuals earning less than $2,000 per year will have their premiums refunded as they are unlikely to be able to qualify for benefits.[164]

CSAWP workers are denied equal benefit of the *EI Act* because, unlike other included workers, they pay premiums, but the legal framework within which they work makes it impossible for them to derive the principal benefit from the premiums that they pay: benefits during periods for which they are unemployed. This legislative decision to impose the burdens of the Act on these workers while denying them regular benefits fails to take into account their special circumstances, circumstances that are inextricably linked to personal characteristics, such as their status as migrant agricultural workers with only a limited right to work in Canada. This imposition of a legislative burden on an historically disadvantaged group arguably violates the substantive equality guarantees of s.15 of the *Charter*. This position is being advanced by the UFCW on behalf of CSAWP workers in a recently launched constitutional challenge against the Government of Canada. The UFCW is seeking a remedy that will make those provisions in the *EI Act* requiring CSAWP workers to pay premiums null and void.[165]

CSAWP workers have been contributing EI premiums for the last 36 years. In 2001, there were 17,382 CSAWP workers in Ontario and they contributed a total of $3.4 million to EI premiums.[166] These contributions went into the Employment Insurance Account which has a surplus that has

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[163] ss. 96(4) & (5) of the *EI Act*

[164] The 1998 Employment Insurance Monitoring and Assessment Report states that the refund is paid because "these people must pay premiums but will not have enough hours of work to qualify for benefits".

[165] *Fraser et al. v. Attorney-General of Canada*, Ontario Superior Court of Justice Court File No. 03-CV-257806CM2,12 November 2003.

[166] FARMS. "The Quest for A Reliable Workforce in the Horticulture Industry" (Mississauga, 2003) at p. 6.

grown from $666 million in March 1996 to $40 billion in March 2002.[167] The Auditor-General of Canada has publicly criticized the Canadian Government accumulating a surplus when the purpose of the EI program is to run on a break-even basis.[168] The Auditor-General believes that the current surplus cannot be justified in terms of the intent of the *EI Act*. This surplus continues to grow and has been used by the Canadian Government to pay down the national debt. On this issue, in the House Debates on October 30, 2002, Prime Minister's Chrétien said:

> .... [W]hen there is a surplus, in this instance, it is true that we used it to reduce the debt. That is how we were able to bring interest rates all the way down to where they are right now. This is benefiting all Canadians, because when they pay their residential mortgage loans, they pay less. The provincial governments are also paying less to service the debt. Everyone benefits from this government's sound management.[169]

The Canadian economy benefits, however, foreign migrant agricultural workers do not. In effect, Canada is profiting by receiving a straight transfer of payments from lowly paid migrant workers from developing countries. As noted by Paul Phillips, an expert economist who filed and affidavit in the UFCW constitutional challenge:

> The compulsory payment of EI premiums by migrant agricultural workers who are not entitled to regular benefits is not consistent with insurance principles. It is equivalent to assessing premiums on the self-employed who are ineligible for benefits or of charging premiums for life insurance which can not be paid to the estate or beneficiary of a dead person. It could be justified under the rubric of social insurance if it were an attempt to redistribute the cost of insurance from those with higher, steadier incomes to those who have lower, intermittent earnings but this is obviously not the case for assessing premiums on migrant agricultural workers. Indeed, it results in a regressive redistribution of income.[170]

The Government Agents reported that one of the most frequent complaints they receive from workers is with respect to EI deductions. This is supported by the workers' responses surveyed

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[167] Office of the Auditor General of Canada. *Report of the Auditor-General of Canada to the House of Commons, Chapter 11 - Other Audit Observations* (Ottawa, December 2002) at p. 40.

[168] *Ibid.* at p. 38.

[169] *Edited Hansards*, Number 018, 37th Parliament, 2nd Session, October 30, 2002.

[170] Affidavit of Paul Phillips sworn 6 October 2003, Exhibit "B" - Social Insurance, Income Maintenance, Seasonal Workers and the Evolution of (Un)Employment Insurance, pp. 53-54, for *Fraser et al. v. Attorney-General of Canada*, *supra* note 165.

in this project.[171] All of the Government Agents and many of the workers who raised this problem indicated that this should be remedied by creating some form of exemption for the workers, or in the alternative, creating a fund that will benefit migrant workers.

Recommendation: Amend the Employment Insurance Act to exempt migrant workers from deduction of premium payment in recognizing that CSAWP workers are paying premiums into a system in which it rarely sees any benefit.

Recommendation: In the alternative, if migrant workers are required to continue to pay premiums, benefits should be extended to allow for training opportunities or skills development. Or, benefits should be payable if workers are unable to work for any number of days while in Canada relating to inclement weather or other factors that are no fault of the worker.

b. *Canada Pension Plan*[172] [173]

Generally, migrant agricultural workers who have had *Canada Pension Plan* ("CPP") amounts withheld and remitted by their employer to the Canada Customs and Revenue Agency will be entitled to benefit from the CPP plan if they become severely disabled during their working years or once they reach 60.[174] If a worker opts to receive retirement benefits before age 65, the benefit will be reduced; whereas delaying receipt may increase the benefit.

Employers in Canada are required pursuant to the Act and its Regulations[175] to withhold CPP contributions from the pay cheques of any workers who are:[176]

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[171] Russell, *supra* note 66; Verduzco, *supra* note 67; Downes et al. *supra* note 69.
[172] R.S.C. 1985, c. C-8.

[173] The author is indebted to Julie Kon Kam King for her research and draft of this section.

[174] ss. 44 and 45.

[175] C.R.C. 1978, c. 385.

[176] ss. 12, 6, 49, 19, 20, and 21 of the Act.

- 18 or older, but younger than 70;
- are in pensionable employment during the year;
- have earned more than the basic exempted amount (in 2003 it is $3,500); and
- are not already receiving a CPP or Qubec Pension Plan retirement or disability pension.

Any worker who earns less than the basic exempted amount of $3,500 on a yearly basis are exempted from CPP deductions and the corresponding benefits. Practically speaking, even those workers who make just above the exempted amount do not necessarily benefit significantly from CPP because the amount that they would earn during their contributory period (between 18 years and 65) is calculated by taking the total pensionable earnings and then dividing this by the number of months worked in the contributory period[177], or by 120 months minus time excluded for reason of disability, whichever is greater. The CPP then also drops out 15 percent of the worker's lowest earning years during his/her contributory period from the pensionable amount. If a worker's pensionable earnings are low, the amount that is eligible to be given back in benefits is seriously reduced by this calculation process.[178]

Canada has international social security agreements with each of the participating countries in the CSAWP that provide for situations where a worker is splitting work or living periods between two places. If a worker does not live or work long enough in Canada to qualify for a CPP benefit, Canada will consider periods credited under the pension program in the agreement country as periods of contribution to the CPP.[179]

To qualify specifically for disability benefits under the CPP, migrant agricultural workers must meet the same requirements as other workers in Canada (earnings above the exempt level of $3,500 a year and withholding of payments and remittances with respect to CPP by the employer).

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[177] The contributory period commences January 1, 1966 or when the worker reaches the age of 18, whichever is greater, and ending when the worker reaches age 65 (before the end of 1986) or receives a retirement pension or reaches age 70 (after 1986): s. 49 of the Act.

[178] ss. 42, 50 ad 52 of the Act.

[179] s. 107 of the Act; See for example, Agreement on Social Security between Canada and the United Mexican States. Similar agreements have been signed with Jamaica, Barbados, Trinidad & Tobago, and all participating OECS countries.

Additionally, if the worker became disabled after December 31st, 1997, he/she must have contributed to CPP for a minimum of four of the last six years, and during that period must have earned at least 10 percent of the Year's Maximum Pensionable Earnings. In 2003, this amount was $39,000. The worker must also be disabled as defined under the legislation[180] and be under the age of 65.[181]

Under the international social security agreements between Canada and each country participating in the CSAWP, if a worker has not contributed to CPP for four of the six years but has contributed to the equivalent plan in an agreement country, then the worker may still qualify for disability benefits.

Government Agents in Canada are responsible for helping CSAWP workers in processing CPP claims. If the worker has already left the country he/she should be able to fill out a form or do this over the phone through the Canadian Consulate in his/her home country. As long as a worker meets the CPP eligibility conditions he/she can receive these benefits by cheque at an address outside of Canada.

FARMS reports that Canada collected $6 million CPP in 2001.[182] Low amounts are collected by CSAWP workers as illustrated by G. Verduzco where he reports that one worker who has now retired is only receiving $67.00 per month.[183] CPP amounts are discounted in many cases because employers do not "name" older workers which may force workers to draw on CPP benefits before

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[180] s. 42(2)(a) of the Act defines disability as:

- a "severe" mental or physical disability that makes the individual "incapable regularly of pursuing any substantially gainful occupation"; and
- a "prolonged" mental or physical disability that is "likely to be long continued and of indefinite in duration or is likely to result in death".

[181] ss. 44, 56 of the Act and ss. 43 and 52 of the Regulations

[182] FARMS. "The Quest for a Reliable Workforce in the Horticulture Industry" (Mississauga, 2003) at p. 6.

[183] Verduzco, *supra* note 67.

age 65.[184] The other component researchers in this project have identified areas for improvement relating to CPP, including better communication to workers about the operation and application of CPP; access to Canadian staff who may communicate this information in Spanish; and better administration of CPP.[185]

Recommendation: Determine whether the CPP may be amended to provide greater return for workers.

Recommendation: Educate workers on the application of the CPP and improve administration of CPP in order to make benefits more accessible to workers. Information should be available to workers in Spanish.

3. Application of the *Charter of Rights and Freedoms*

Section 6(1) of the *Charter* states that "Every citizen of Canada has the right to enter, remain in and leave Canada." Section 6(2) states that citizens of Canada or permanent residents have the right to take up residence in any province, and "to pursue the gaining of a livelihood in any province". These rights do not extend to non-citizens, who can be refused entry to Canada, and who can be admitted subject to conditions that do not apply to citizens. Therefore, migrant workers under the CSAWP do not have the same recognition of rights to mobility as Canadians while they are in Canada.

However, once a non-citizen is in Canada, even when entry is illegal, the non-citizen is entitled to those *Charter* rights which are not confined to citizens.[186] Most of the rights and freedoms under the *Charter* are not confined to citizens, and include the following: freedom of conscience and religion [s. 2(a)]; freedom of thought, belief, opinion and expression [s. 2 (b)]; freedom of peaceful

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[184] Verduzco, *ibid.*; Kerry Preibisch, "Social Relations Practices between Seasonal Agricultural Workers, Their Employers, and the Residents of Rural Ontario (North South Institute, 2003).

[185] Verduzco, *ibid.*; K. Preibisch, *ibid.*

[186] *Singh v. Minister of Employment and Immigration* [1985] 1 S.C.R. 177.

assembly [s. 2(c)]; freedom of association [s. 2(d)]; the right to life, liberty, security of the person [s. 7]; and the right to equality [s. 15].

Agricultural workers, in general, have used the *Charter* to challenge the current vacuum in legislative protections which are extended to workers in other industries. In particular, the freedom of association and equality provisions have been used by the UFCW to forward the rights of agricultural workers in challenges against the exclusion of agricultural workers from labour relations legislation[187] and the *Occupational Health and Safety Act*.[188] The claims have been grounded in arguments that agricultural workers belong to a group that is being discriminated against because of their "occupational status." If they are successful, migrant workers stand to benefit together with the general farm worker population from the outcome of these challenges.

There are also possibilities of bringing *Charter* challenges against those aspects of the legislative or government framework which are unique to migrant workers under the CSAWP. As noted earlier, the UFCW has also recently launched a constitutional challenge of the *Employment Insurance Act* on behalf of CSAWP workers. The challenge claims that migrant agricultural workers are a vulnerable group warranting protection under the equality provisions of the *Charter*; and the current application of the *Employment Insurance Act* discriminates against this group because of their status as a migrant agricultural worker.

In addition to claiming discrimination on the basis of "occupational status", migrant workers may also claim discrimination on the basis of race, national or ethnic background, and non-citizenship status[189], all groups recognized as having protection under the equality rights provisions.[190] The framework of these arguments will depend on the facts and context of the claim being pursued.

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[187] *Dunmore v. Ontario (Attorney General)*, *infra*.

[188] *Fraser et al. v. Ontario (Attorney General)*, Superior Court of Justice, Court File No. 03-CV-250815CM3, filed on June 20, 2003.

[189] *Lavoie v. Canada*, [2002] 1 S.C.R. 769; *Law Society of B.C. v. Andrews*, [1989] 1 S.C.R. 143.

[190] See also: Rachel Li Wai Suen, *supra* at note 88, at 208.

E. ILO Conventions and the UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families

There are five primary international instruments with respect to the rights of migrant workers: The Migration for Employment Convention, 1949 (ILO, No. 97); Migration for Employment Recommendation, 1949 (ILO, No. 86); Migrant Workers (Supplementary Provisions) Convention, 1975 (ILO, No. 143); Migrant Workers Recommendations, 1975 (ILO, No. 151);and the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. The Conventions and Recommendation spell out in detail the rights of migrant workers and their families; the responsibilities of sending and receiving countries; the proper recruitment and administration of the movement of workers to ensure their safety and well-being; and standards for conditions of employment. The Conventions aim at establishing standards that transcend national definitions of a foreigner's status to guarantee rights of migrant workers. It sets the "floor" of rights to which every migrant worker is entitled. These conventions provide guidelines to make current bilateral agreements with respect to seasonal agricultural workers in Canada more equitable. They may provide a model of "best practices".

The ILO Conventions and the UN Conventions emphasize the role of sending and receiving governments in the recruitment, placement and administration of migrant workers. Government is also seen as having a key role in ensuring adequate standards of employment and accommodation for migrant workers, and providing mechanisms for enforcement.

The CSAWP complies with the ILO Conventions and UN Convention in many respects. The following is not a comprehensive list of areas of compliance, but highlights some of the pertinent areas:

- the recruitment, placement, and administration of migrant workers are managed by government through inter-governmental arrangements and operational guidelines;
- government supervises a system of supervision of contracts of employment between employers and migrant workers;
- government requires that the contract of employment include conditions of employment and is delivered to the migrant worker prior to commencement of employment;

- assistance is provided to migrant workers while Canada through the establishment of Liaison Offices and Government Agents;
- the employment laws that apply to Canadian workers also apply to migrant workers in respect of wages, accommodation, social security, employment taxes;
- migrant workers are medically examined prior to departure and entitled to medical services while working in Canada.

Some areas where the CSAWP do not comply with ILO Coventions and UN Conventions are:

- while governments supervise over contracts of employment, the agreements do not indicate how contractual obligations will be enforced;
- lack of effective enforcement mechanisms to ensure contract compliance;
- migrant workers sustain costs in the recruitment, introduction, and placement for employment which should be free;
- workers do not have the right to belong to trade unions, collective bargaining, and elect representatives for this purpose;
- lack of recognition of voluntary organizations who may assist migrant workers while in Canada;
- migrant workers do not have the right to liberty of movement in the territory of the State of employment and freedom to choose residence here

While it appears that the Conventions provide means of protecting migrant workers' rights, some problems relating to their enforcement must be addressed. In order for these instruments to have any authority within individual states, the country must have signed and ratified the convention. The UN Convention was adopted by the General Assembly in December, 1990; but only came into force in July, 2003. To date, Canada has not ratified any of the above Conventions. Despite this limitation of enforcement, 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.[191]

[191] Rachel Li Wai Suen, *supra* at note 88, at 222.

Recommendation: ***Canada should ratify ILO Conventions relating to Migrant Workers and the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.***

Recommendation: Canada should review the current Memorandum of Understanding and Employment Agreements to be in line with the ILO Conventions and the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

IV. The Seasonal Agricultural Workers Program's Industry-Level Employment Practices

Having reviewed the broader institutional and policy framework of the CSAWP, including the interaction of provincial and federal employment laws, this section will examine how these structures impact industry-level employment practices. Employer-employee relations will be revealed through the application of the CSAWP Employment Agreements' provisions to the relationship.

A. Migrant Labour Costs

Interviews with stakeholders and worker surveys indicate that the issue of wages is the most important aspect of CSAWP. Canadian wages are cited by workers as the primary reason for their participation in the CSAWP. In the vast majority of their responses, improvements to the CSAWP are geared towards increasing their wages.

The Mexican/Caribbean CSAWP Employment Agreement provides that migrant workers shall be paid wages, which ever is greatest:

1. the provincial statutory minimum wage;
2. the rate determined annually by HRDC to be the prevailing wage rate for the type of agricultural work being carried out by the worker in the province in which the work will be done; or

3. the rate being paid by the employer to his Canadian workers performing the same type of agricultural work.[192]

In Ontario and Quebec, the industry practice for determining wages is based on the "prevailing wage rate" set by HRDC. The methodology used by HRDC to determine this rate has been ranked as the most contentious issue for all of the Liaison Officers and FARMS, and a weakness in the program. While the Employment Agreement states that HRDC determines this rate, in practice there is "hard-bargaining" between FARMS and the Government Agents over the appropriate wage rate.[193] The stakeholders criticize HRDC for the lack of transparency in the criteria for determining the wage rate.[194]

The wage rate was set at $7.50 in 2003, $7.25 in 2002, from $7.10 in 2001, for both Caribbean and Mexican workers. The HRDC wage rate is only slightly higher then the minimum wage of $6.85, and not subject to costs for accommodation as allowed under the *ESA*.

Some "named" workers may be paid more at the discretion of the employer. Instances were reported of Mexican workers directly negotiating higher salaries with their employer for wage rates as high as $11.00/hour.

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[192] Caribbean Employment Agreement, III.1.; Mexican Employment Agreement, III.2.

[193] Minutes of Regional Meeting, November 2001

[194] *Ibid.*

Table 4: 2002 Agricultural Prevailing Wage Rates - Ontario Region

COMMODITY	WAGE RATE
Tobacco Flue	**$72.50/Kiln** (1) **$7.25/hr** (2)
Tobacco Black	**$8.55/hr** (harvest) **$7.25/hr** (planting)
Canning/Food Processing (Fruit & Vegetables)	**$7.25/hr**
Nurseries	**$7.25/hr**
Vegetables (3)	**$7.25/hr**
Fruit (4)	**$7.25/hr**
Flowers	**$7.45/hr**

Source: FARMS. 2002 Employer Information Package

NOTE:

1. Includes emptying kiln. When tobacco is mechanically harvested, the first kiln filled that day will be paid per kiln ($72.50). Work beyond filling the first kiln that day is to be paid the hourly wage rate, including any additional kilns.

2. Includes planting and all hourly paid.

3. Includes ginseng and mechanically harvested tomatoes.

4. Includes apples

Historically, the Canada Farm Labour Pool program was available to determine the agricultural commodity wage rate. This was phased out during the early 1990s, after which time HRDC in consultation with the Ontario horticulture industry, conducted a wage rate survey through the network of Human Resource Centres as well as the regional Agricultural Employment Service Offices. The Agricultural Employment Service Offices were abolished in or about 1996. Since then, HRDC and industry agreed to use Statistics Canada wage rate by calculating the CPI variance between January and October, and using this value as a percentage, it would be applied to the previous years' wage rate. This calculation would be the "prevailing wage rate" for the upcoming year. However, in the last three (3) years the prevailing wage rate has been negotiated among the horticulture industry, HRDC, and the federal and provincial ministries of agriculture. There is currently no objective criteria to determine the wage rate for the purposes of the CSAWP except for general labour market trends and the overall state of Ontario horticulture. The practice has

been more recently to send wage surveys to the regional HRCC to be analyzed by a regional economist in determining wage rates.

As a result, FARMS has became more aggressive in attempting to negotiate the wage rate. FARMS has used the annual meetings to chip away at the "premium" features of the CSAWP - that is, those costs which the employer absorbs because of hiring migrant workers (e.g. the cost of housing, partial travel). FARMS has become increasingly vocal on this issue bringing into question its role at the annual review meetings. The Government Agents were of the single opinion that the Canadian Government is allowing FARMS to take over policy decisions which should remain among inter-governmental actors. The supply countries joined forces against FARMS for the first time in 2001 on the sole issue of the wage rate for 2002.

HRDC takes the position that it will not relent on the "premium" aspect of the CSAWP. This is consistent with the "Canadians First" policy and the Regulations under the *Immigration and Refugee Protection Act* that state the following factor must be considered in the issuance of a temporary work permit:

> whether the wages and working conditions offered are sufficient to attract Canadian citizens or permanent residents to, and retain them in, that work.

It is the interpretation of this researcher that this provision means that Canada must not compromise those "premium" aspects of the CSAWP. Arguably, the current wage and working conditions are not sufficient to attract Canadians. As was reviewed at the beginning of this component report, it was outlined how employers historically have sought to import "unfree" workers as an alternative to improving wages and working conditions. Deviation from the "premium" aspects of the program would be contrary to the principles embodied in the *IRPA*. On the contrary, the above cited provision may be used to increase the "premium" aspects against the employer.

Recommendation: The "premium" aspects of the CSAWP should be maintained and enhanced by the Canadian government.

HRDC has undertaken with Statistics Canada to develop a national wage rate methodology to address this problem. However, Government Agents continue to be critical about the lack of consultation and transparency.

Recommendation: The methodology for the prevailing wage rate be completed as soon as possible. The methodology should be transparent and shared with the supply country Government Agents; FARMS; and workers. Government agents and workers should be allowed an opportunity to negotiate and provide input into the appropriate wage rates.

Recommendation: FARMS' influence on the wage rate should be minimized recognizing that the CSAWP is an "inter-governmental administrative arrangement" as defined in the MOUs. If FARMS continues to directly participate in determining the wage rate as a non-state actor, then migrant worker participation should also be allowed.

CSAWP workers' wages are greatly discounted by several deductions; some are the same deductions remitted by Canadian workers, others are unique to CSAWP and outlined in the Employment Agreements. The tables below provide a comparison of the various deductions as it relates to Caribbean and Mexican workers versus Canadian agricultural workers. A distinguishing feature between the Mexican deductions and the Caribbean deductions is the 25% mandatory remittance from Caribbean wages called the Compulsory Savings Scheme. This deduction is remitted to the Liaison Officer and 18-20% is returned to the worker when he or she returns home. This provides a guaranteed flow of remittances for the supply countries. The remaining 5-7% is used to off-set administrative fees, additional travel costs or other expenses that may arise as a result of the worker's stay in Canada.

The tables do not reflect the additional deduction that is remitted to the Barbadian Government Agent for non-occupational insurance coverage. The tables also do not reflect the additional travel

expenses workers from the OECS and Trinidad & Tobago incur for connecting flights from their home to Kingston, Jamaica. Reimbursement for these flights may be taken from Government Agents out of the 25% mandatory Compulsory Savings Scheme deduction.

Table 5: Comparative Impact of Deductions and Remittances on CSAWP Workers' Wages

Caribbean Worker under CSAWP
(based on actual pay sheets of workers from OECS and Trinidad & Tobago, interviews Liaison Officers, and Employment Agreement))

Hourly Rate-	Bi-Wkly Pay (40 hrs/ wk) (1)	Canadian Statutory Deductions (2, 3)	Transport (4)	Visa Fees	Compulsory Savings Scheme	Bi-Wkly Pay after all deductions	Bi-Wkly Pay after all deductions and recovery of transport and visa fees
$7.25 (gross)	$580.00 (gross)	CPP:$20.93 EI: $12.76	$3.20/ working day $32.00 (bi-wkly) Max. $425.00	$5/day (14 days in bi-wkly period) Max: $150 over 30 days	25% from gross $145.00 Less 5% admin. fee (5) = 7.25 Bi-Weekly Remittance to Home Country Minus 5% Admin. Fee: $137.75	$319.31 **Hourly rate: $5.88** (6)	$401.31 **Hourly rate: $7.16** (6,7)

Mexican Worker under CSAWP
(based on actual pay sheets of Mexican workers, interviews with Mexican consulate, and Employment Agreement)

Hourly Rate	Bi-Wkly Pay (40 hrs/wk) (1)	Canadian Statutory Deductions (2, 3)	Transport & Visa Fees	RBC Medical Insurance	Bi-Wkly Pay after all deductions in 1st 4 wks	Bi-Wkly Pay after all deductions & 4 wks	Bi-Weekly Pay after deductions & recovery of transport/visa fees
$7.25 (gross)	$580.00 (gross)	CPP:$20.93 EI: $12.76	$150.00 (for the 1st 4 weeks) i.e. $37.50/wk ($75 bi-wkly) then 4% of gross on 5th wk to max. $450.00 i.e. $23.20 (bi-wkly)	$0.46/day $4.60 (bi-wkly)	$466.71 **Hourly rate: $6.26** (8)	$518.51 **Hourly rate: $6.90** (8)	$541.71 **Hourly Rate: $7.19** (8, 9)

Canadian Agricultural Worker

Hourly Rate	Bi-Weekly Pay (40 hrs/wk) (1)	Canadian Statutory Deductions	Bi-Weekly Pay after all deductions
$7.25 (gross)	$580.00 (gross)	CPP:$20.93 EI: $12.76	$546.31 **Hourly rate: $7.25**

1. These tables are based on a 40 hour work week which the average minimum work week as defined in the CSAWP Employment Agreements. While the average work week for CSAWP are more then 5 days per week, these tables are based on 5 working days per week for illustration purposes only.

2. As income tax deductions vary by individual worker income and marital status, these deductions were not included in any of the calculations. There were no income tax deductions on the pay sheets used to create these tables. Government Agents indicated that most workers are not required to make income tax deductions due to earnings that fall below the basic claim amount.

3. The Employment Agreements allow for a deduction of up to $6.50 per day for meals. This deduction was not included in the calculations as it was not included in the list of deductions on either of the sample pay sheets provided (Mexico, Trinidad and Tobago, OECS).

4. The Caribbean Employment Agreement states that the employer will pay the visa fee upfront and will be reimbursed by the Government Agent within 30 days (Art. VII-4). However, in practice, reimbursement is deducted directly from the workers' wages and not from the 25% mandatory remittance.

5. This amount varies by country, as some countries also provide supplemental medical insurance. Barbados and Jamaica retain 5%. Trinidad retains 6%, plus the costs of airfare between Port-of-Spain and Jamaica. OECS retains 7%, plus the costs of airfare between Port-of-Spain and Jamaica.

6. EI and CPP deductions, and the 20% savings, were not included in the calculation of the hourly rate.

7. The only deduction calculated into this hourly rate was the 5% program administrative fee.

8. EI and CPP deductions were not included in the calculation of the hourly rate.

9. The only deduction calculated into this hourly rate was the health insurance deduction.

The Employment Agreements require that employers must forward workers' pay sheets to their respective Government Agent so that the Government Agent may be satisfied that deductions are in compliance with the Agreements.[195] Interviews revealed that there were some delays in receiving pay sheets from employers, however, on the whole they were being forwarded.

[195] Caribbean Employment Agreement, V; Mexican Employment Agreement, VI

Several Government Agents have suggested that a wage scale should be developed which is commensurate with the skill-level of the worker. According to one consulate representative, there are requests for workers with higher skills but an expectation that they will be paid the same wage as a lower skilled farm worker. In addition, there is currently no recognition of seniority of a worker. Several workers return to Canada year after year and the accumulative years of service are not recognized. Returning workers often take on the task of training new workers for their employers. These additional duties, as well as accumulated skills, should be recognized in the wage rate.

Recommendation: Seniority of returning named workers should be recognized in the wage rate calculation as well as skill levels of workers.

B. Conditions of Employment and Work

1. Hours of Work and Rest Periods

The Mexican and Caribbean Employment Agreements provide that the average minimum work week shall be 40 hours.[196] The Caribbean Employment Agreement is silent on the expectation of hours per day nor does it provide for any rest periods. The Mexican Employment Agreement provides that a normal working day is not to exceed 8 hours, but "the employer may request of the worker and the worker may agree to extend his/her hours when the urgency of the situation requires it".[197] The Mexican Agreement also provides that for each six consecutive days of work, the worker will be entitled to one day of rest. This day may be postponed to a mutually agreeable date if there is urgency to finish farm work.[198] In addition, the Mexican Employment Agreement requires a minimum of 30 minutes for meal breaks.[199] The Agreement does not specify whether the meal break is paid or unpaid time off.

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[196] Caribbean Employment Agreement, III. iv; Mexican Employment Agreement, III. iv

[197] Mexican Employment Agreement, I.2

[198] Mexican Employment Agreement, I.3

[199] Mexican Employment Agreement, II.2

The Ontario *Employment Standards Act* ("*ESA*") provides a standard of 8 hours work per day and 48 hours per week.[200] However, if the employee agrees, he or she may work up to 60 hours in a work week.[201] Overtime is compensated with one and one half times his or her regular rate for each hour of work in excess of 44 hours per week unless there is agreement to average hours of work over four weeks.[202] The *ESA* provides for rest periods including: a period of at least 11 consecutive hours free from performing work in each day, unless the employee is on call[203]. In addition, the *ESA* states that employees should have one day of rest per week, or two consecutive days in every period of two consecutive work weeks.[204] Meal breaks should be provided in 30 minute intervals that will result in the employee working no more than five consecutive hours without an eating period.[205]

As noted above, agricultural workers are exempt from many of the minimum standards established by the *ESA,* including provisions relating to hours of work, overtime, public holidays, and periods of rest. Therefore, migrant agricultural workers are deprived of basic minimum working conditions and denied the statutory complaint mechanisms.

In light of the current working conditions of CSAWP workers, these exemptions are glaring. Government Agents claimed that workers have complained about these exemptions. For example, Government Agents reported that workers work between 9-15 hours per day and 6-7 days per

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[200] s. 17(1). More than 8 hours may be required if the employer establishes a regular work day of more than 8 hours for the employee, but no more than the number of hours in his or her regular work day may be required.

[201] s. 17(2). This provision was passed by the Ontario Conservative Government and received harsh criticism from labour groups highlighting that "agreement" to work more then 48 hours must be questioned in light of the unequal bargaining relationship between employees and employers.

[202] s. 22

[203] s. 18(1). Section 18(3) states that an employer shall give an employee a period of at least 8 hours free from work between shifts unless the total time worked on successive shifts does not exceed 13 hours or unless the employer and employee agree otherwise.

[204] s. 18(4). Section 19 provides that employees may be required to work hours in excess of statutory limits and during otherwise legislated periods of rest, to deal with an emergency or if something "unforseen occurs, to ensure that continuous processes or seasonal operations are not interrupted."

[205] s. 20. Section 21 states that employers are not required to pay employees during meal breaks unless required by an employment contract.

week. Several Government Agents also believed that it is unjust for workers to not receive premium overtime pay. As well, the Government Agents indicated that there is no regularity in breaks. While workers and employers are advised to hold breaks of 10 minutes after 5 hours of work, there is no mechanism to ensure compliance.

The Government Agents' observations are corroborated by the worker surveys gathered by R. Russell, A. Downes, and G. Verduzco for this project. Jamaican workers work on average 9.5 hours per day, 6.7 days per week.[206] This is equivalent to an average of 63.5 hours per week. Similarly, workers from the other Caribbean states reported working 9-14 days; 91% of Barbadian workers work 7 days per week.[207] Mexican workers also reported working long days (i.e. an average of 10 hours per day in April and between June to October, and an overall average of 7 days per week) in an accelerated pace. Workers reported kneeling and squatting all day.[208] There are short and few rest periods. Mexican workers also reported fear of reprisal for raising objections to these working conditions, and those workers who did raise objections were met with negative responses.[209] However, the majority of Mexican workers did not complain about working long hours because this translated into earning more income.

While the *ESA* exempts most agricultural workers from minimum standards, the Mexican Employment Agreement attempts to fill the gap by providing for some standards. This is a "best practice" that may also be applied to the Caribbean Employment Agreement. However, "best practice" principles will require effective enforcement of these provisions, including anti-reprisal provisions similar to the ones found in the *ESA*. Enforcement mechanisms may include the dispute resolution discussed earlier.

Recommendation: The ESA should be amended to include application of minimum standards to agricultural workers, including hours of work, rest periods, overtime, public holiday pay, and vacation pay for farm workers.

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[206] R. Russell, *supra*

[207] A. Downes, *supra*

[208] G. Verduzco, *supra*

[209] G. Verduzco, *supra*

Recommendations: Amend the Caribbean Employment Agreement to include standard hours of work and rest periods, and anti-reprisal provisions to ensure enforcement.

Recommendation: While workers may wish to work overtime hours for additional income, this practice should be rewarded with premium overtime pay as it is in other industries. The ESA should be amended to require premium overtime pay. In the alternative, the Employment Agreements should be amended to provide this compensation.

While "harvesters" under the *ESA* may be eligible for vacation pay if performing "harvest work" for 13 weeks, "farm workers" are not. Basok notes that "in order to establish whether Mexican workers have worked for thirteen weeks as harvesters, and not as a combination of harvesters or farm workers, growers need to keep track of all the tasks assigned to these workers. No grower in Leamington seems to bother to do so."[210] Basok also reports from her survey of Mexican workers that the majority of workers did not receive vacation pay and there were inconsistent practices across farms in this payment.[211]

Recommendation: Amend the ESA to remove the distinction between farm workers and harvesters and ensure that both groups of employees receive vacation pay consistent with workers in other industries.

2. Health and Safety

The Caribbean Employment Agreement provides that the employer shall:

> comply with all laws, regulations and by-laws respecting conditions set by competent authority and, in addition, in the absence of any laws providing compensation to workers for personal injuries received or disease contracted as a result of the employment, shall obtain insurance acceptable to the Government Agent to provide for such compensation to the worker.[212]

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[210] Basok, *Tomatoes and Tortillas*, *supra* at 108

[211] *Ibid.*

[212] Caribbean Employment Agreement, V.1.

As well, the Employment Agreement requires reporting to the Government Agent all injuries sustained by the worker which require medical attention.[213] The Mexican Employment Agreement has similar provisions,[214] as well as, requiring employees to pay premiums for non-occupational injury and sickness insurance.[215] The Agreements are silent on health and safety standards.

The CSAWP Employment Agreements do not provide any guarantee of safe work for migrant agricultural workers. In fact, the agreement reinforces the exclusion of agricultural workers from OHSA because it specifically states that employers can terminate workers for refusing to work without any qualification. Thus, a worker under the CSAWP may be terminated for refusing unsafe work. One Government Agent reported that workers have been sent home for refusing unsafe work. This exercise of discretion to punish workers for raising health and safety concerns, absent provincial health and safety legislative protection, needs attention.

Responses from workers surveyed in this project indicate that they are exposed to occupational hazards relating to the application of pesticides and use of farm machinery, including tractors. Eighty-eight percent of the Jamaican respondents answered affirmatively to working with pesticides and farm machinery. Less then 23% received training, and training was reported as informal; 57% of Jamaican respondents felt there were safety concerns with respect to tractor operation. Data from other Caribbean states indicate smaller numbers using pesticides but a large number (38% - 50%) operating farm machinery such as harvesters, tractors, and other farm implements. Forty percent of Barbadian workers reported that they did not wear protective clothing in the application of pesticides. Percentages of workers wearing protective clothing for the remaining Caribbean workers straddle a wide range. The worker data and interviews with the Government Agents suggest that there are inconsistencies in the level of training workers receive and the use of protective gear. Health and safety training is largely dependent on the discretion of employers.

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[213] Caribbean Employment Agreement, V.1. and 2.

[214] Mexican Employment Agreement, V. 1.

[215] *Ibid.* V.2.

The health and safety issue most frequently referenced by Government Agents was that of pesticide use. It was reported that there were no 'real' incidents of workers being required either to work in fields while pesticides were being sprayed, or to re-enter fields before re-entry times had passed; however, it was also reported that workers frequently have concerns about this issue. One Liaison Officer relayed: “I hear complaints about having to work in the field on short notice. The employer says the time is OK. The workers feel it should be longer. If they complain, we will investigate. The Ministry of Health consults.” Training is currently provided to workers applying pesticides. Workers who do not apply the pesticides raised concerns about being in the fields while pesticides are being sprayed or being required to re-enter fields too early after the spraying. Government Agents stated that when such cases were reported, investigations were performed and the workers' concerns were unfounded.

Government Agents and FARMS reported that some employers provide health and safety training and protective equipment (clothing), while others believed that there was inadequate protection against pesticides. On-Farm Training for Assistants (T.A.) is provided by University of Guelph Ontario Pesticide Education Program, however, the numbers were very low in relation to the overall number of workers in the CSAWP. In 1999/2000, there were only 121 T.A.s who received training and named their country of origin as other than Canada: 43 from Mexico; 34 from Jamaica; 8 from Trinidad; 1 from St. Vincent; and 3 from Barbados. Thirty-two (32) were unknown. The training only dealt with mixing, loading and applying agro-chemicals – as required under Regulation 914 of the *Pesticides Act* – as opposed to responses to accidents or safety precautions. The *Pesticides Act* is silent on these matters, and does not address concerns relating to application of pesticides while other workers are in the vicinity.

The discrepancy between worker perceptions of safety, even when it is determined that appropriate guidelines are adhered to, indicates several possibilities: that there is the need for further initiatives in the dissemination of information regarding appropriate safety standards; that appropriate guidelines are not being adhered to, but this is simply not being reported; or that existing guidelines are not adequate. Another possibility may be language barriers faced by Mexican workers where information is disseminated, but only in English. This situation should be clarified.

Other concerns raised by the Government Agents and workers with respect to health and safety issues:

- some growers rely on family doctors for their workers and it was believed that all workers should use previously approved doctors only;
- many growers are reluctant to report worker injuries, and workers often continue to work despite illness or injury because of fear of reprisal and losing wages; and
- workers' health cards are not received in a timely fashion.

Recommendation: Current language in the Employment Agreements that allow for workers' termination for refusal to work should be modified to ensure that termination or other reprisals will not result from workers refusing unsafe work.

Recommendation: Standardized health and safety training should be developed and delivered to all CSAWP workers. This training should be available in Spanish for Mexican workers.

Recommendation: Develop health and safety committees on farms with worker and employer representation to address health and safety concerns as they may arise on farms. Committee matters should be reported to the Government Agents and HRDC on a monthly basis in order to track these matters.

3. Housing

The Employment Agreements require that workers be provided with adequate living accommodation without cost. Such accommodation must meet the approval of the appropriate government authority responsible for health and living conditions in the province where the worker is employed. Accommodation must also meet with the approval of the Government Agent.[216]

[216] Caribbean Employment Agreement, II.1.; Mexican Employment Agreement, II.1.

It was reported by Government Agents that most housing is acceptable. However, there were three areas of concern raised by the Government Agents with respect to both housing standards and housing inspections.

First, it was reported that many accommodations do not have indoor bathrooms. This is raised consistently by workers.

Second, Ministry of Health housing inspections do not all take place before the workers arrive. In some cases, the Ministry may inspect the accommodations after the worker has begun his or her work on the farm. It was explained that this occurs because the Ministry of Health does not have enough time to inspect all of the accommodations before the orders for workers start to be filled. Efforts should be made to ensure that all housing is inspected before workers arrive. Given that the program has been in operation for several decades, it should be possible to predict and adjust to the periods of high demand for housing inspections.

Third, despite housing passing Ministry of Health inspections, there were some cases where the conditions still seemed very bad. There was suggestion that the housing inspections guidelines needed to be revised and were “severely outdated”. Some Government Agents state that the Ministry housing guidelines were not high enough and out of date. These guidelines outline the physical structure of accommodation; water supply; toilet facilities and sewage disposal; garbage control; and fire safety.[217] However, Government Agents stated that emerging concerns were coming from the “small details”. For example, overcrowding and inadequate fridge or closet space for the number of workers in the space.

A worker may not be placed with an employer if the Government Agent believes the accommodations are not acceptable and the employer refuses to improve them. However, it was acknowledged that if one country does not place a worker in housing considered to be sub-standard by a Government Agent, another country may accept the conditions for their workers. One Government Agent described the effect of raising complaints about living conditions and some of the challenges they face is ensuring “adequate” accommodation for workers:

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[217] Ontario Ministry of Health Guidelines on Accommodation for Migrant Farm Workers, updated 1982.

> *In the past, 5-6 years ago, there were many bad living conditions. This was publicized in the media. Majority now have decent living conditions. Only a small number don't. But some intimidate the worker. They say they won't have a job if there are problems, complaints. The Liaison Officers have been meeting to make sure the standards are shared and not undermined. I want to get HRDC to be in direct control [over] the Ministry of Health to do a proper job. We need to make sure inspectors don't do favours for their friends [approve housing that is sub-standard]. But also, the program is a numbers game. Some countries accept substandard conditions.*

The data received from the worker surveys also raised issues relating to overcrowding. For example, the crowding index for Jamaican workers' lodgings is 2.7 which according to researcher Roy Russell is above the acceptable index of 2.0 to 2.5.

Recommendation: Housing inspection guidelines should be updated in collaboration with all Government Agents to ensure that consistent standards are applied for all migrant workers regardless of the supply country from which they come.

C. Rules and Regulations

This section will review the industry-level application of rules and regulations. Rules and regulations relate to those defined in legislation, the Employment Agreements, and farm rules.

Data from workers surveyed for this project suggest that while workers receive pre-orientation about the nature of work on Canadian farms, in contrast, information relating to immigration laws; employment rights; or rules and regulations under the CSAWP received low positive responses. One Government Agent reported instances where the Employment Agreement is not always signed or read by the worker before departure to Canada. The Mexican Ministry of Labour is investigating this matter further. Research from G. Verduzco reveals that Mexican workers are not aware of their rights.

The Employment Agreements state that employers shall provide the worker and the Government Agent with a copy of rules and regulations of conduct, safety, discipline and care and maintenance

of property as the worker may be required to observe.[218] The interviews indicated that there was no uniformity as to whether individual employers post or distribute farm rules. It was also indicated in the interviews that most growers do not send their rules to the Government Agents for approval as required in the Employment Agreements. However, this was not identified as a concern by the Government Agents.

Employer rules are not translated into Spanish which results in workers not being aware of rules which may include curfews. Employer rules are rarely written, and if they are, not necessarily translated into Spanish. Mexican workers surveyed in this project experienced difficulties because of language barriers: they were unable to communicate with their employer; read signs on the farms; or understand papers that employers would make them sign from time to time. The following are some concerns Government Agents raised about the application of farm rules:

> *If the employer does not like the worker then they can be let go - [it is] not appropriate that just because [he is] working too slow he should be repatriated.*

> *If I tell the employer to keep the worker he may get angry and send the worker to the bunkhouse until the worker will ask to leave - [one] grower [was] kicking the door and punching the wall - [the] grower fired him because the worker called about only getting $7.10.*

The Government Agents and FARMS indicated that there are and have been some cases of verbal abuse and other forms of discrimination against the workers. However, all claimed that these were individual cases and all were dealt with as they arose. There were no consistent records of such matters. Small percentages of Caribbean workers reported maltreatment from the employers. One-fourth of Mexican workers surveyed reported that they were treated poorly by their employers, including verbal abuse, ignoring health problems, or overloading them with work.

A key issue as it relates to industry level application of rules and regulations is the question of enforcement. If workers have a complaint about enforcing their rights, they call their Government Agent. Workers from Caribbean states (except for Jamaica) indicated that there was difficult in contacting their Liaison Officer when problems or complaints needed to be communicated. Phone

[218] Caribbean Employment Agreement, I.3.; Mexican Employment Agreement, I.6.

messages were not returned and farm visits were rare which has left a perception that the Liaison Services are not effective. Similar responses were received from Mexican workers, but it is noted that Mexican workers perceived this as a greater problem than the Caribbean workers. Just under half of the surveyed Mexican workers believed that they were mistreated by the consulate; 51.1% expressed dissatisfaction with operation of the CSAWP, 14% of this number stated dissatisfaction was related to the lack of attention they received by consulate offices in Canada.

The vast majority of Mexican workers were aware that if there is a problem to call the consulate. The main reasons workers appealed to the consulates were (in order): 1) labour disputes; 2) health problems or accidents; 3) recovering tax, voluntary repatriation, and other administrative matters. Forty-four percent of Mexican workers who appealed to the consulate expressed dissatisfaction with the consulate's representation; another 45% said they received no response when labour complaints were registered.

Workers wanted more surveillance of their working conditions while on Canadian farms. The workers' responses are in contrast with responses from Caribbean Government Agents who reported being accessible to workers and making frequent visits to farms. Many Caribbean and Mexican workers do not file complaints because of fear of being sent home; fear of being transferred; fear of expulsion from the CSAWP; or fear of losing pay. If workers are not raising complaints with their Government Agents for reasons as listed above, Government Agents may not be aware of the scope of problems workers may be facing. A "best practice" model would have Government Agents doing regular unannounced inspections on farms as opposed to waiting for workers to raise complaints before visits are made.

There was very little knowledge of the Ontario *Human Rights Code*, on the part of both the Liaison Officers and the workers. Some Government Agents did not even know that the *Code* existed. As well, human rights issues are not addressed in the FARMS Employer Information Package or the Employment Agreement and does not appear in any of the documents relating to the CSAWP. However, it was reported by several of the Government Agents that workers face racial discrimination both at work and in some communities. The lack of knowledge of Canadian human rights models has resulted in cases where workers' human rights may be violated without knowledge of the worker or the Government Agent. For example, Seventh Day Adventists are

advised that if they are not prepared to work on Saturday, then they may lose participation in the program. The OECS Employee Farm-Workers Information Booklet (2001) states :

> "You may have to work seven days a week at times, so that, before accepting employment in Canada, you may have to consider whether your religion would prevent you from working on your Sabbath day."

This statement and practice may be discriminatory on the basis of a worker's religion under the Ontario *Human Rights Code*. There have been several cases determined by the Ontario Human Rights Tribunal and the courts that Seventh Day Adventists cannot be required to work during their Sabbath unless it can be demonstrated by the employer that accommodation of the worker's religion will result in undue hardship. The current instruments and information relating CSAWP must place a greater emphasis on human rights of migrant workers.

Recommendation: A 'best practice' model should seek to establish uniformity in rules and evaluations, and to promote widespread awareness of relevant human rights legislation.

Recommendation: Regular unannounced inspections of farms should be undertaken by Government Agents to ensure compliance with rules and regulations.

Recommendation: Greater emphasis on rules and regulations should be provided to workers in their pre-orientation training about the CSAWP.

Recommendation: Additional resources by supply countries be invested in their Liaison or Consular services to ensure enforcement of rules and regulations.

V. Unionization and Industry Level Migrant Agricultural Labour Markets

The question of unionization within agriculture has been a controversial issue in Ontario for more than a decade. Agricultural workers have been excluded from Ontario's labour relations regime since legislation was first enacted in 1943. The only other provincial jurisdiction in Canada to exclude agricultural workers is Alberta. This section will review the current labour relations model

in Ontario; the Supreme Court of Canada decision in *Dunmore v. Ontario (A.G.), infra*; the implications of *Dunmore*, including the newly enacted *Agricultural Employees Protection Act, 2002*; the debate around the inclusion of agricultural workers; and a discussion on models of labour relations in light of the current stakeholders' roles in the CSAWP.

A. Current Labour Relations Model in Ontario

1. General Overview

Before embarking on a discussion on what the future of the CSAWP may look like in the context of unionization, it is important to define and understand some basic labour relations principles as it applies in Ontario. This discussion is only intended to give a very general overview of what unionization means in Ontario; it is beyond the scope of this report to review the intricacies that arise from the discussion of each concept. Based on interviews with Government Agents' perceptions of unions, this section will attempt to place issues raised by the Government Agents within the current legislative framework. This discussion is based purely on a review of the current legislation and the leading case law without commentary or opinion.

The employment relationship in Ontario is defined by the law of contract. A simplistic definition of this relationship may be defined as the employer providing wages to an employee in return for services performed. In certain circumstances, employees may have relatively equal bargaining with the employer because, for example, they may have highly sought skills or membership in a high income category (i.e. senior executives). The Supreme Court of Canada has recognized on more then one occasion, however, that in most cases there is a power imbalance between the non-unionized employee *vis-à-vis* the employer; therefore, as a matter of policy, government has legislated certain minimum standards in employment, such as wages and hours of work. The Supreme Court of Canada held:

> The harm which the Act [*Employment Standards Act*] seeks to remedy is that individual employees, and in particular non-unionized employees, are often in an unequal bargaining position in relation to their employers. As stated by Swinton, supra, at p. 363:

> [T]he terms of the employment contract rarely result from an exercise of free bargaining power in the way that the paradigm commercial exchange between two traders does. Individual employees on the whole lack both the bargaining power and the information necessary to achieve more favourable contract provisions than those offered by the employer, particularly with regard to tenure.[219]

Historically, the rise of trade unionism was in response to this unequal bargaining power. While there may be unresolved philosophical issues associated with the benefits of trade unions, there is general acceptance that employees organize themselves in trade unions for the primary purpose of strengthening their bargaining power *vis-à-vis* employers.[220] Once a trade union obtains the right to represent a group of employees at a workplace, the individual employment relationship is displaced by the collective agreement negotiated between the union and the employer.

In Ontario, labour relations between a trade union and employer is governed by the *Labour Relations Act, 1995* ("the Act"). Disputes under the Act are resolved by an administrative tribunal, i.e. the Ontario Labour Relations Board. The purposes of the Act are set out at s. 2:

> "1. To facilitate collective bargaining between employers and trade unions that are the freely-designated representatives of the employees.
>
> 2. To recognize the importance of workplace parties adapting to change.
>
> 3. To promote flexibility, productivity and employee involvement in the workplace.
>
> 4. To recognize the importance of economic growth as the foundation for mutually beneficial relations amongst employers, employees and trade unions.
>
> 5. To encourage co-operative participation of employers and trade unions in resolving workplace issues.
>
> 6. To encourage co-operative participation of employers and trade unions in resolving workplace issues.

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[219] *Machtinger v. HOJ Industries Ltd.* (1992), 91 D.L.R. (4th) 491 (SCC) at 507 per Iacobucci J., cited with approval in Wallace v. United Grain Growers Ltd. (1997), 152 D.L.R. (4th) 1 (SCC) at 32-33.

[220] Neal B. Sommer & Stewart D. Saxe, *Understanding the Labour Relations Act* (Aurora, Ontario: Canada Law Book Inc., 1998) at 1.

7. To promote the expeditious resolution of workplace disputes."

A "trade union" is defined by the Act as "an organization of employees formed for purposes that include the regulation of relations between employees and employers and includes a provincial, national, or international trade union, a certified council of trade unions and a designated or certified employee bargaining agency". The Act also states at s. 5: "Every person is free to join a trade union of the person's choice and to participate in its lawful activities."

A trade union gains the right to represent employees only once it has achieved the majority and voluntary recognition of employees at a workplace in a defined bargaining unit. A "bargaining unit" is defined by the Act as "a unit of employees appropriate for collective bargaining, whether it is an employer unit or a plant unit or a subdivision of either of them".

A "collective agreement" is a written agreement between the union and employer that sets out the working terms and conditions for employees in the bargaining unit who are covered by the agreement.

The critical elements embodied in Canadian labour laws, including Ontario's Act, may summarized as follows [emphasis in the original]:

> "1. Unions may obtain bargaining rights by 'certification' from a labour relations board or by voluntary recognition by an employer.
>
> 2. Employees represented by a trade union at a workplace are grouped into 'bargaining units'.
>
> 3. Each bargaining unit has its own 'collective agreement' which governs the terms and conditions of employment for employees in the bargaining unit.
>
> 4. While a collective agreement is in operation, *no strikes or lockouts are permitted.* Disputes must be resolved by binding arbitration.
>
> 5. During collective agreement negotiations, both the employer and union have the an obligation to bargain in good faith. If agreement cannot be reached, then the union may call a strike or the employer may lock out the employees. However, a strike or a lockout can occur only after a government-supervised conciliation attempt has been undertaken.

6. Unions can lose their right to represent employees in the bargaining unit by voluntary action on the part of the employees."[221]

Other statutes have been enacted by the province which apply to specific sectors; but, often they adopt most of the terms of the Act, and deal with specific issues as they relate to particular sectors. These sectors include hospital/health care, teach and school boards, the provincial government, police departments, and fire departments.

2. Agricultural Workers Exclusion from Labour Relations Legislation

The Ontario *Labour Relations Act* states at s. 3(b) that it does not apply to agriculture. This provision was the subject was the subject of a constitutional challenge which will be discussed in further detail below.

In 1994, the New Democratic Party government of Ontario enacted the *Agricultural Labour Relations Act, 1994*[222] ("ALRA") following the recommendations in the Report of the *Task Force on Agricultural Labour Relations: Report to the Minister of Labour* (June, 1992).[223] This statute extended trade union and collective bargaining rights to agricultural workers but recognized that "agriculture and horticulture industries have certain unique characteristics that must be considered in extending those rights. Those unique characteristics include the seasonal production, climate sensitivity, time sensitivity, and perishable nature of agriculture and horticulture products, and the need for maintenance of continuous processes to ensure the care and survival of animal and plant life."[224] Therefore, ALRA prohibited resort to economic sanctions that may result in work stoppages (i.e. strikes and lock-outs) during critical harvest periods, and required collective bargaining disputes to be resolved by way of binding final offer selection by an arbitration board. ALRA only

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[221] *Ibid.* at 5

[222] S.O. 1994, c. 6

[223] The Task Force Recommendations were the result of consultation and consensus that included representatives from government, labour and the agriculture industry.

[224] *Preamble* to the ALRA.

applied to full-time agricultural workers and did not cover seasonal workers.[225] Therefore, CSAWP workers did not have the right to unionize or collectively bargain under ALRA.

In 1995, the Conservative Government of Ontario passed the *Labour Relations and Employment Statute Law Amendment Act, 1995*[226] ("LRESLAA") which had the effect of repealing the ALRA in its entirety and terminated any bargaining rights of unions and collective agreements under ALRA. Thus, agricultural workers were once again subjected to full exclusion from the *Labour Relations Act, 1995* [227]. The government's rationale for the repeal was "that unionization of the family farm has no place in Ontario's key agricultural sector".[228]

The repeal of the ALRA resulted in a decision by the United Food and Commercial Workers Canada ("UFCW") to challenge the LRESLAA and the denial of agricultural workers' right to join a union as a violation of agricultural workers' freedom of association under the *Charter.* The case eventually went to the Supreme Court of Canada, resulting in a significant decision on agricultural workers' right to unionize. However, equally significant is the Court's separation of the right to form a union from any corresponding right to collectively bargain.

This litigation will be examined in detail as well, as the passage of the *Agricultural Employees Protection Act, 2002*[229], which was the Ontario Government's response to the Supreme Court's decision. This Act makes it clear that the debate continues, and perhaps exposes the Supreme Court's decision as creating more confusion than clarity on the issue of appropriate dispute resolution mechanisms on farms. The practical implications of the decision and the impact of

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[225] s. 4(2). This provision allowed a trade union to be certified to represent seasonal workers only if a regulation was passed allowing for certification and the bargaining unit contained no employees other than seasonal employees. No regulation was ever passed.

[226] S.O., 1995, c. 1

[227] s. 3(b) - "This Act does not apply, to a person employed in agriculture, hunting or trapping."

[228] Statement by The Honourable Elizabeth Witmer, Minister of Labour for Ontario, Re: Introduction of Bill 7 (*An Act to Restore Balance and Stability to Labour Relations and to Promote Economic Prosperity*), Queen's Park, October 4, 1995.

[229] S.O. 2002, c. 16

unionization on migrant workers will be analyzed, resulting in recommendations for the future direction of unionization of migrant agricultural workers.

B. The Supreme Court of Canada's Decision of *Dunmore v. Ontario (A.G.)*[230]

1. The Facts

The ALRA was in effect from June 23, 1994 to November 10, 1995. During this period, UFCW was certified as the bargaining agent for approximately 200 workers at a mushroom factory in Leamington. UFCW also filed two certification applications for workers at the Kingsville Mushroom Farm Inc. and at Fleming Chicks (the latter was a respondent in this case). These certification activities came to an end with the passage of LRESLAA. The *Charter* application was brought by individual farm workers and union organizers from UFCW, challenging the government's repeal of the ALRA and the exclusion from the *Labour Relations Act, 1995* on the basis that preventing agricultural workers from establishing, joining and participating in the lawful activities of a trade union violated the workers' *Charter* protected freedom of association (s. 2(d))[231] and equality rights (s. 15).[232]

2. Judicial History

According to the Ontario Court (General Division)[233], per Sharpe J., there was no violation of the *Charter* because the *Charter* protects the right of workers to form a trade union, but not the right to collective bargaining. The Court held that the purpose of the impugned legislation was to deny agricultural workers the right to collectively bargain, not to form an association. Any deprivation of the right to form trade unions was due to the private actions of their employers (i.e. employers' may refuse union organizers access to private property to meet with workers or inflict economic

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[230] (2001), D.L.R. (4th) (S.C.C.) [hereafter "*Dunmore*"]

[231] s. 2(d) "Everyone has the following fundamental freedoms...freedom of association."

[232] s. 15(1) "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."

[233] *Dunmore v. Ontario (Attorney General)* (1997), 155 D.L.R. (4th) 193 (Ont. Gen.Div.)

reprisals) rather than the legislative regime itself. Based on this reasoning, the Court held that these actions are not subject to the *Charter*[234], which only applies to government actions.

Sharpe J. held that he had "no hesitation in finding on the evidence that agricultural workers are a disadvantaged group. They are poorly paid, face difficult working conditions, have low levels of skill and education, low status and limited employment mobility".[235] However, Sharpe J. also declined to recognize agricultural workers as an analogous group for the purpose of establishing discrimination under s. 15(1) because on his view analogous grounds require identification of a "personal trait or characteristic" on which differential treatment was based, and it was insufficient to identify an "occupational status" as such a characteristic.

In relation to the equality rights analysis, Sharpe J. did refer to migrant workers under the CSAWP at 216:

> While a sub-category of temporary seasonal workers brought to Ontario pursuant to a highly structured federal program may be identifiable by race and the status of non-citizen, I fail to see how their situation advances the applicants' case. These seasonal foreign workers were not covered by *ALRA*, they are not subject to *LRA*, and they would not gain the right to be members of a union or enjoy the right to engage in collective bargaining if this application were successful.

As noted earlier, the Court was correct to find that CSAWP workers were not covered by the ALRA because of their seasonal status. However, the Court did not elaborate its reasons for concluding that migrant agricultural workers would not be covered by the LRA if agricultural workers in general were included, or why they would not enjoy the right to join a union or engage in collectively bargaining if the UFCW was successful in this case.

The Ontario Court of Appeal upheld the decision and the reasons of Sharpe J. without further elaboration.[236]

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[234] at 206, folllowing *R.W.D.S.U., Local 580 v. Dolphin Delivery Ltd.* (1986), 33 D.L.R. (4th) 174 (S.C.C.)

[235] at p. 216.]

[236] *Dunmore v. Ontario (Attorney General)* (1999), 182 D.L.R. (4th) 471 (Ont. C.A.)

3. Reasons of the Supreme Court of Canada

The majority[237] of the Supreme Court of Canada in *Dunmore* concluded that the claim was established under the freedom of association provisions under the *Charter*, and therefore, declined to deal with the equality analysis. However, Madame Justice L'Heureux-Dube, in her own reasons and concurrent with the majority reasons, provided a s. 15 analysis and held that agricultural workers were an analogous group requiring protection of the equality provisions of the *Charter*.

The Court set the context by stating that this case presented the first opportunity for the Court to review the total exclusion of an occupational group from a statutory labour relations regime, where the group is not employed by the government and has demonstrated no independent ability to organize. The attack was described as an attack not on legislation restricting collective bargaining *per se*, but on legislation restricting the "wider ambit of union purposes and activities".

a. Freedom of Association Analysis

(i) Do the activities fall within the range of activities protected by s. 2(d) [freedom of association] of the *Charter*?

General Framework

The starting point for the Court was to review the Supreme Court of Canada's landmark 1987 "labour trilogy" cases, all of which concerned the right to strike.[238] The labour trilogy held that while workers have the right to come together to form a trade union under s. 2(d) of the *Charter*, the right does not extend to the right to collective bargaining. The Court held in these cases that governments are entitled to grant or withhold such rights unimpeded by *Charter* review.

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[237] The majority decision was delivered by Bastarache J. (McLachlin C.J.C., Gonthier, Iacobucci, Binnie, Arbour and LeBel JJ. concurring), further concurring reasons by L'Heureux Dubé, dissent by Major J.

[238] See: *Reference Re Public Service Employees Relations Act (Alta.)*, (1987), 38 D.L.R. (4th) 161 (S.C.C.); *P.S.A.C. v. Canada* (1987), 38 D D.L.R. (4th) (S.C.C.); *R.W.D.S.U. v. Saskatchewan* (1987), 39 D.L.R. (4th) 277 (S.C.C.). See also: *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367 at 401-2.

The traditional four-part formulation in the “labour trilogy”, and upheld in subsequent cases, established that freedom of association:

1. protects the freedom to establish, belong to and maintain an association to pursue common, lawful pursuits;

2. does not protect an activity solely on the ground that the activity is a foundational or essential purpose of an association;

3. protects the exercise in association of the constitutional rights and freedoms of individuals; and

4. protects the exercise in association of the lawful rights of individuals.

The Court defined the overall purpose of s. 2(d) as advancing the collective action of individuals in pursuit of their common goals. This purpose commands a single inquiry - has the state precluded activity because of its associational nature, thereby discouraging the collective pursuit of common goals?[239] Activities with an associational nature include those activities which are not protected under any other constitutional freedom and cannot be understood as the lawful activities of individuals: "... such activities may be collective in nature, in that they cannot be performed by individuals acting alone. The prohibition of such activities must surely, in some cases be a violation of s. 2(d)".[240] Thus, the Court recognized that the traditional test failed to capture the full range of activities captured by s. 2(d) and broadened the scope of freedom of association to include not only the protection of the exercise of individual activity through collective action, but also activities which are inherently collective and could not otherwise be exercised by an individual. The very notion of "association" recognizes the qualitative differences between individuals and collectives -- the community assumes a life of its own and develops needs and priorities that differ from those of the individual members.

For example, trade unions develop needs and priorities that are distinct from those of their members individually. These needs cannot be recognized if s. 2(d) is limited to protecting exclusively the lawful activities of individuals. The law must thus recognize that certain (but not all)

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[239] at p. 213

[240] *Ibid.*

union activities may be central to freedom of association even though they are inconceivable on the individual level. Such protected union activities, as cited by the Court, include making collective representations to an employer, adopting a majority political platform, and federating with other unions. But, they do not include collective bargaining or the right to strike.

Scope of State Responsibility

The Court held that a posture of government restraint in the area of labour relations can expose workers to a range of unfair labour practices and foreclose the effective exercise of the freedom to organize. While there is no constitutional right to protective legislation *per se*, the distinction between positive and negative state obligations ought to be nuanced in the context of labour relations. In this case, it is appropriate to recognize a positive state obligation to extend protective legislation to unprotected groups because excluding agricultural workers from a protective regime creates conditions for the violation of protected freedoms by exposing them, for example, to penalties and reprisals from employers. Therefore “underinclusion” can have constitutional dimensions under section 2(d).

In order to establish a claim that "underinclusion" constitutes a violation of s. 2(d), the applicant must:

1. establish that the claim is grounded in exercising a fundamental *Charter* freedom rather than in access to a particular statutory regime;

2. provide a proper evidentiary foundation which demonstrates that exclusion from a statutory regime permits a substantial interference with the exercise of protected s. 2(d) activity;

3. establish that the state is responsible for its inability to exercise fundamental freedoms.

The Court relied on international human rights and labour laws - I*LO Convention (No. 87) concerning Freedom of* Association and Protection *of* the Right to Organize; *ILO Convention (No. 11) concerning the Rights of Association and Combination of Agricultural Workers*; and *ILO Convention (No. 141) concerning Organisations of Rural* Workers *and* their *Role in Economic and Social Development* - to conclude that exclusion of a group from protection to form a trade union not only implicates the group's “dignity” interest, but also its basic freedom of association. While

Canada has ratified *Convention (No. 87)* but not *Convention (No. 11)* and *Convention (No. 141),* the Court found that all three of these instruments provide the normative foundation for prohibiting any form of discrimination in the protection of trade union freedoms, regardless of occupational category.

(ii) Does the impugned legislation, either in purpose or effect, substantially interfere with "freedom of association" activities by excluding agricultural workers?

Purpose of Exclusion

The effect of the LRESLAA was to subject agricultural workers to s. 3(b) of the *Labour Relations Act* (LRA) which excluded them from the labour relations regime set out in the LRA. The majority was not prepared to conclude that the purpose of the LRESLAA violated s. 2(d). However, the reasons refer to the Minister of Labour's statements which revealed that ALRA was repealed because "unionization of the family farm has no place in Ontario's key agricultural sector". The Court found these to be "troubling comments" from the Legislature.[241] In the majority's view, it was ambiguous whether the purpose of the exclusion from the LRA was to prevent creation of farm worker unions or, rather, to protect the family farm.

Effects of Exclusion

The majority did conclude, however, that the effect of the exclusion on farm workers violated s. 2(d) of the *Charter.* The history of labour relations in Canada illustrates the profound connection between legislative protection and the freedom to organize. The Court illustrated this point by making the following observations.

The LRA is Designed to Safeguard the Exercise of the Fundamental Freedom to Associate.

The Court held that the purpose of the LRA was not to create the right to organize, which exists independently of any statutory regime, but rather "instantiates" the right to organize. The LRA

[241] at 225.

"provides the only a vehicle by which employees can associate to defend their interests, and, moreover, recognizes that such association is, in many cases, otherwise impossible"[242].

The Court held that freedom to organize “lies at the core of the Charter's protection of freedom of association"[243] and reiterated that the right to freedom of association must take into account the important role of labour associations in working for the betterment of working conditions and protection of the dignity and collective interest of workers in a fundamental aspect of their lives: employment.[244] The Court linked the protection of the freedom to organize with the recognition of the "dynamic and evolving role" of trade unions in Canadian society, at 228:

> In addition to permitting the collective expression of employee interests, trade unions contribute to political debate. At the level of national policy, unions advocate on behalf of disadvantaged groups and present views on fair industrial policy. These functions, when viewed globally, affect all levels of society and constitute "an important subsystem in a democratic market-economy system.

The Court held that the suggestion that the minimum legislative protection cannot be extended to agricultural workers without extending full collective bargaining rights as "misguided".[245]

Without the Protection of the LRA, Agricultural Workers are Substantially Incapable of Exercising the Freedom to Associate.

The Court clarified that exclusion from protective legislation does not automatically create a Charter violation; rather, the effect of the exclusion has to demonstrate the group's inability to exercise a fundamental freedom or right without the legislative protection. The Court found that it is possible to draw distinction between groups who are "strong enough to look after [their] interests without collective bargaining legislation" and those "who have no recourse to protect their interests aside from the right to quit". Agricultural workers, the Court held, fall under the latter category

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[242] at 227.

[243] at 228.

[244] Per L'Heureux-Dubé J. in *Delisle v. Canada (Deputy Attorney General)* (1997),176 D.L.R. (4th) 513 (S.C.C.).

[245] at 229.

because "[d]istinguishing features of agricultural workers are their political impotence, their lack of resources to associate without state protection and their vulnerability to reprisal by their employers".[246] Therefore, there is no possibility for agricultural workers to realize their freedom of association without minimum statutory protection.

The Exclusion of Agricultural Workers from the LRA Substantially Reinforces the Inherent Difficulty in Exercising the Freedom to Associate.

The Court's final observation on the effect of exclusion from the LRA is that such exclusion has a "chilling effect" on non-statutory union activity and reinforces agricultural's workers disadvantage and isolation. The Court held that unionization introduces a form of political democracy into the workplace, subjecting employer and employee alike to the "rule of law". Thus, labour relations laws function not only to provide a forum for airing specific grievances, but also “for fostering dialogue in an otherwise adversarial workplace".[247] The exclusion of agricultural workers suggests that workplace democracy has no place in the agricultural sector and, moreover, that agricultural workers' efforts to associate are illegitimate. Exclusion of an entire category of workers from the LRA can only be viewed as a foreseeable infringement to their *Charter* rights.

The Court concluded that exclusion of agricultural workers from the LRA substantially interferes with their fundamental freedom to organize. The inherent difficulties of organizing farm workers, combined with the threats of economic reprisal from employers, and the message which delegitimizes associational activity for these workers, ensure the ultimate failure of organizational efforts.

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[246] at p. 230.

[247] at p. 233.

(iii) Does the exclusion from the LRA constitute a reasonable limit on agricultural workers' freedom to organize? (Section 1 Analysis)

Once a court has found a *prima facie* violation of a substantive provision of the *Charter*, the government may still succeed if it can demonstrate that the impugned provision is a "reasonable limit " under s. 1 of the *Charter*.[248]

In the leading case of *R. v. Oakes*[249], the Supreme Court of Canada held that in order to justify a prima facie violation of a *Charter* right under s.1, the defender of the impugned law, in most cases the government, has the burden to establish, on the basis of cogent and persuasive evidence, that:

1. the legislation's objective in enacting the provision which limits rights was sufficiently pressing and substantial to warrant overriding a constitutionally protected right; and

2. the means chosen to implement the objective must be proportional to the objective.

To meet the second part of the test, it must be demonstrated that the means are:

a) "rationally connected" to the objective;

b) impair the constitutional right "as little as possible", and

c) respect proportionality between the effects of the impugned legislation and the legislation's objective.

In *Dunmore*, the majority found that the legislature had demonstrated a substantial and pressing objective to override a constitutionally protected right or freedom, but that complete exclusion was not a proportional means by which to achieve this objective.

The analysis under section 1 in this case is significant in that the Court weighs and balances "the stark contrast" of "two conflicting views of an appropriate labour relations regime for agricultural

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[248] Section 1 of the *Charter* states: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it *subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society*." [emphasis added]

[249] [1986] 1 S.C.R. 103 at 136-139.

workers."[250] It is this analysis which engages the evidence of labour market policy objectives and economic theory with the constitutional rights of agricultural workers. It also provides some insights into what considerations should be taken into account in the future development of a dispute resolution mechanism in agriculture.

Sufficiently Important Objective Test

The Government argued that the exclusion of agricultural workers from the LRA was designed to meet valid public policy objectives, namely:

1. to recognize the unique characteristics of Ontario agriculture and its resulting incompatibility with legislated collective bargaining; and
2. to further the purpose of the LRA by extending legislated collective bargaining only to fields of employment where the Act's purposes can be realized.

The Court held that while it is accepted that certain occupations may, in certain circumstances, be incompatible with collective bargaining, it was not clear that agricultural workers fell within one of these categories. The Court avoided reaching any conclusions on this point by finding these arguments irrelevant because the right of association does not extend to collective bargaining. The only issue before the Court was whether the Government could justify its substantial interference with the right to form agricultural associations.

Upon review of the evidence, the Court was satisfied that many farms in Ontario are family owned and operated, and that the protection of the family farm is a pressing enough objective to warrant the infringement of s. 2(d) of the *Charter.* The fact that Ontario is moving increasingly towards corporate farming and agribusiness does not, in the Court's view, diminish the importance of protecting the unique characteristics of the family farm; on the contrary, it may even augment it. However, the Court held in achieving the objective of protecting the family farm, there must be a balancing of interests as opposed to denying total protection of the *Charter*.

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[250] *Dunmore v. Ontario (Attorney General)* (1997), 155 D.L.R. (4th) 193 at 201.

With respect to the Government's economic rationale for the exclusion of agricultural workers, the Court seems to have accepted the Government's evidence that agriculture occupies a volatile and highly competitive part of the private sector economy, that it experiences disproportionately thin profit margins and that its seasonal character makes it particularly vulnerable to strikes and lockouts. Moreover, these characteristics were readily accepted by the Task Force leading to the adoption of the ALRA, which recommended a system of compulsory arbitration in order to guard against the economic consequences of strikes and lockouts. The Court in turn rejected the UFCW's position that agriculture would not be substantially affected by small changes in the cost and operating structure of Ontario farming.

Proportionality Test

Having found that the Ontario Government had pressing and substantial objectives in protecting the family farm and farm productivity, the next stage of analysis required examining whether the *means* to achieve these objectives were (i) rationally connected, (ii) minimally impair the *Charter* freedom, and (iii) were not so severe in their effects that the *Charter* breach outweighs the objective's importance. In other words, were there any other less drastic means (for example, banning strikes and lockouts as embodied in the ALRA) of achieving the Government's objectives without the total exclusion of agricultural workers from the LRA. The Court concluded that the total exclusion was not rationally connected with the Government's objectives, nor did it minimally impair the worker's rights. The Court declined to balance the effects of the breach with the objective's importance, having answered the first two questions negatively.

Rational Connection

Can the formation of agricultural unions rationally be regarded as a threat to the unique characteristics of Ontario's agriculture? The Court's response may be found at 238:

> In my view, the Attorney General has demonstrated that unionization involving the right to collective bargaining and to strike can, in certain circumstances, function to antagonize the family farm dynamic. The reality of unionization is that it leads to formalized labour-management relationships and gives rise to a relatively formal process of negotiation and dispute resolution; indeed, this may well be its principal advantage over a system of informal industrial relations. In this context, it is reasonable

> to speculate that unionization will threaten the flexibility and co-operation that are characteristic of the family farm and distance parties who are otherwise, to use the respondent's words, “interwoven into the fabric of private life" on the farm. That said, I hasten to add that this concern ought only be as great as the extent of the family farm structure in Ontario and it does not necessarily apply to the right to form an agricultural association. In cases where the employment relationship is formalized to begin with, preserving "flexibility and co-operation" in the name of the family farm is not only irrational, it is highly coercive. The notion that employees should sacrifice their freedom of associate in order maintain a flexible employment relationship should be carefully circumscribed, as it could, if left unchecked, justify restrictions on unionization in many sectors of the economy.

The Court found that the denial of agricultural workers' freedom of association on economic grounds was even less convincing than the “family farm” argument. At 238-39:

> While this may be a rational policy in isolation, it is nothing short of arbitrary where collective bargaining rights have been extended to almost every other class of worker in Ontario. The reality, as acknowledged by all parties to this appeal, is that many industries experience thin profit margins and unstable production cycles; this may be due to unpredictable and time-sensitive weather conditions, as in the case of agriculture, or to other factors such as consumer demand and international competition. In my view, it would be highly arbitrary to accept this reasoning in respect of almost every industry in Ontario, only to extend it in respect of vulnerable agricultural workers to the point of denying them the right to associate. As Professor Beatty has written, "[i]f indeed collective bargaining increases the costs of labour to the overall detriment of society, then our legislators should repeal the legislation in its entirety rather than selectively exclude those most in need of its protection” ...
>
> ***Minimum impairment***

Under this part of the analysis, the Government made three arguments:

1. Unionization is not appropriate for the "vast majority" of Ontario agricultural operations;

2. No appropriate dispute resolution mechanism exists for agricultural workers; and

3. Extending collective bargaining rights to certain sectors of agriculture would be “arbitrary and impracticable".

The Court concluded that the wholesale exclusion of agricultural workers from the labour relations regime did not minimally impair their right to freedom of association. First, the exclusion is overly

broad because it fails to make any distinctions among the various sectors in agriculture. The Government's position ignored “an increasing trend in Canada towards corporate farming and complex agribusiness”. The modern “family farm” represents a sophisticated business unit with a minimum capital value of $500,000 to $1,000,000, depending on the commodity and type of operation. If this is the case, it was overinclusive to perpetuate a pastoral image of the "family farm", and "family farms" would not be affected negatively by the creation of the agricultural associations. The Court held that an employment relationship on the “family farm” does not diminish the quality of the relationship, at 243:

> The reality is that family involvement does not suffice to alter the essential qualities of an employment relationship; these qualities may include a contract of employment, a consistent wage, regular hours and a hierarchical relationship between employer and employee. Moreover, the traditional family farm is rapidly assuming a less important role in the agricultural sector, as evidenced by increases in non-family farm incorporations, hired farm labour, seasonal workers, and average labour costs (Jim White's report). Under these circumstances, what the Attorney General for Ontario refers to as an integration of "family and personal life" does not, in my view, justify the unqualified and total exclusion of agricultural workers from the LRA.

The Government attempted to argue that distinguishing various sectors of agriculture required an impossible line-drawing exercise which the legislature should have the discretion to reject. However, the Court held that this rationale had no weight given the fact that some legislation includes exceptions for smaller or family run farms, such as in New Brunswick and Quebec, as well as the ALRA itself.

Second, the Court held that there was no justification for excluding agricultural workers from all aspects of unionization. In particular, there was no evidence that providing workers with the minimal protection to form and maintain an employee association would pose a threat to the family farm structure.

b. Equality Rights Analysis

The majority declined to decide on whether agricultural workers' equality rights were also violated because the UFCW was successful on the s. 2(d) argument. However, L’Heureux-Dubé J., writing a concurring decision, considered the s. 15(1) argument and held that the occupational status of

agricultural workers constitutes an “analogous ground” for the purposes of an analysis under s. 15(1), noting that:

> In this case, there is no doubt that agricultural workers...*do* generally suffer from disadvantage, and the effect of the distinction is to devalue and marginalize them within Canadian society. Agricultural workers “are among the most economically exploited and politically neutralized individuals in our society” and face “serious obstacles to effective participation in the political process”....
>
> In light of this, I believe it is safe to conclude of agricultural workers what Wilson J. concluded of non-citizens in Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143 at p. 152...namely, that they “are a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated. They are among “those groups in society to whose needs and wishes elected officials have no apparent interest in attending”...

In her view, there was no reason why occupational status cannot in the right circumstances identify a protected group. She held that employment is a fundamental aspect of an individual's life and an essential component to identity. Agricultural workers generally suffer from disadvantage and the effect of the distinction made by their exclusion from the LRA is to devalue and marginalise them within Canadian society. However, her consideration of s. 15(1) did not lead her to conclude that a different remedy than the one ordered was appropriate.

It is noted that Justice L'Heureux-Dubé's analysis was based on agricultural workers in general, without distinguishing between migrant and domestic workers. In light of circumstances particular to migrant agricultural workers under the CSAWP, the case for the application of s.15 is even stronger. In particular, migrant agricultural workers are extremely vulnerable in light their prohibited mobility while in Canada; limited or no knowledge of English (in the case of Mexican workers); temporary status; and general economic disadvantage which requires them to migrate seasonally to Canada for employment. It will also be recalled that Mexican/Caribbean workers are required in Canada because the work they perform is viewed as undesirable by the Canadian workforce. In addition, migrant agricultural workers may qualify under other analogous groups recognized under s. 15 as a group defined by race and non-citizen status.

Therefore, it is concluded that migrant agricultural workers and the CSAWP group in particular would likely be recognized on analogous grounds as entitled to the equal protection and benefit of the law under s. 15.

Remedy

The Court declared that the LRESLAA as unconstitutional to the extent that it gives effect to the exclusion of agricultural workers by virtue of s. 3(b) of the LRA. The declaration was suspended for a period of 18 months, during which the legislature was required to enact legislation which is consistent with the principles articulated by the Court. The Court did not require or forbid the inclusion of agricultural workers in a full collective bargaining regime.

C. *Agricultural Employees Protection Act, 2002*

The Ontario Government's response to *Dunmore* was to narrowly and technically implement the decision. The *Agricultural Employees Protection Act, 2002 (*"AEPA*"),* which received Royal Assent on June 17, 2003, is the legislative response to *Dunmore.* It does not provide agricultural workers with the right to join a union. Rather, it only only allows them to form or join an "employees' association"[251], which is defined as "an association of employees formed for the purpose of acting in concert". This is in contrast with the definition of a "trade union" under the LRA which means "an organization of employees formed for purposes that include the regulation of relations between employees and employers".[252]

The other rights of agricultural workers under this Act are limited to[253]:

- the right to participate in the lawful activities of an employee's association;

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[251] s. 2(1)

[252] s. 1(1) of the *Labour Relations Act, 1995*

[253] s. 1(2). These rights do not go beyond the examples cited by the Supreme Court of Canada in *Dunmore* as being the kinds of minimum protections judged as essential for the exercise of the right to organize - see p. 246 of the decision.

- the right to assemble;
- the right to make representations to their employers, through an employee's association, respecting terms and conditions of employment; and
- the right to protection against interference, coercion and discrimination in the exercise of their rights.

The Act states that an employer shall give members of an employees' association who are employed by the employer a “reasonable opportunity” to make representations respecting terms and conditions of employment.[254] Considerations for whether a “reasonable opportunity” was given include: the timing of the representations relative to planting and harvesting times; the timing of representations relative to concerns that may arise in running an agricultural operation; and the frequency and repetitiveness of the representations.[255] This suggests that if an employees' association attempts to raise immediate health and safety concerns, for example, it may be barred from doing so if it interferes with agricultural production. In addition, the only obligation of the employer as it relates to any representations made by an employees' association is to listen to them if made orally, or to read them if they are in writing.[256] There is no obligation to discuss the representations with the employees' association, or to substantively respond to the representations.

As all migrant workers live on the property of the growers, it is of particular interest that any person or entity who wishes to access the property for the purpose of attempting to persuade the employees to join an employees' association must first obtain an order from the Agriculture, Food and Rural Affairs Appeal Tribunal.[257] The Tribunal can not make an order allowing access unless the person applying for the order satisfies the Tribunal that the order is necessary to communicate effectively with employees for the purposes of forming an employees' association or recruiting

[254] s. 5(1)

[255] s. 5(3). This list is not be interpreted as exhaustive - s. 5(4).

[256] s. 5(6)-(7)

[257] s. 7(1)-(2)

members[258], and such order cannot interfere with agricultural practices or privacy or property rights.[259]

Among the protections in the Act are the provisions in sections 8, 9 and 10 which state that no employers' organization, or person acting on behalf of an employer or an employers' organization can interfere with the formation, selection, or administration of an employees' association or the representation of employees by an employees' association. This means that employers cannot refuse to employ or to continue to employ a person or discriminate against a person in regard to terms and conditions of employment because a person is a member of an employees' association or exercising rights of association. Furthermore, persons are protected from the threat of dismissal, or any other kind reprisal, used as a means of coercion to become or refrain from becoming a member of an employees' association or exercising rights of association.

Relevant to the CSAWP is a provision in the AEPA which states that no employer or employers' organization, or person acting on behalf of an employer or an employers' organization [s. 9(b)]:

> shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of an employees' association or exercising any other right under this Act.

This means that the CSAWP Employment Agreements as negotiated between the state parties cannot contract out the right of an employee to join an association or union of their choice.

Contraventions of the AEPA are heard, not by the Labour Relations Board, but by the Agriculture, Food and Rural Affairs Appeal Tribunal under the Ministry of Agriculture, Food and Rural Affairs Act. There is no requirement that members of the Tribunal have any labour relations background. There is no automatic right to a hearing of an alleged contravention of the Act, as embodied in the *Labour Relations Act*, since the Tribunal has the right to dismiss an application if it finds, in its own

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[258] s. 7(6)

[259] s. 7(7)

discretion and without representations from the complainant, that the complaint is “trivial, frivolous, vexatious or made in bad faith”.

The reaction from UFCW to the passage of the AEPA was swift, promising a challenge to the new legislation as failing to comply with the *Dunmore* decision. However, the Supreme Court of Canada refused the Union's motion for a rehearing on whether the legislation complied with decision. This means that any challenge of the AEPA will have to start again as a fresh claim. The UFCW has vowed to continue the challenge in the courts, if necessary, and thereby the debate on the role of unions in agriculture continues.

D. The Impacts of Unionization: The Way Forward

1. Implications of *Dunmore* and the AEPA on Migrant Workers

The *Dunmore* decision was heralded by the UFCW as a victory that opened the door for organizing agricultural workers and collective bargaining in the agriculture industry. However, closer examination of the decision, while providing some keys insights into the nature of labour relations in this industry, does not go as far as many labour activists had hoped. The narrow interpretation taken by the Government in the passage of the *Agricultural Employees Protection Act, 2002* reveals some of the gaps in the decision, especially as it relates to the right to collective bargaining, and suggests that the legacy of the “labour trilogy” persists.

The most significant aspect of the decision is the Supreme Court of Canada's expansion of freedom of association to include those activities which are not only exercised individually but also collectively. It also goes far in finding that a disadvantaged group, like agricultural workers, should have legislative protection to prevent interference or coercion of workers attempting to organize. Without this, they are denied the constitutional freedom of association.

The decision is inherently flawed in that the right to join a union is divorced from the right to collectively bargain or the right to strike. While the Supreme Court of Canada recognized several trade union activities as worthy of constitutional protection (i.e. the freedom of assembly, the right to make representations), it denies recognition of what is arguably at the core of joining a trade

union. The Supreme Court held that the law must "recognize that certain union activities may be central to freedom of association even though they are inconceivable on the individual level"[260] and that certain collective activities must be recognized if the freedom to form and maintain an association is to have any meaning. The crafting of a remedy in *Dunmore* required legislative protections to join a union "along with protections judged essential to its meaningful exercise". A fundamental aspect of exercising rights of belonging to a union is the right of workers to collectively bargain for better wages and working conditions. Collective bargaining works to even the power imbalance in an employment relationship by allowing, as in the words of the Supreme Court, "the achievement of individual potential through interpersonal relationships and collective action". One only needs to look at labour relations legislation across this country which links the right to join a union with the power to collectively bargain and the regulation of employment relations.[261] However, the *Dunmore* decision maintains that the unprotected aspects of collective bargaining and the right to strike are statutory creatures and not central to the freedom of association or unionization. The line drawing of the Supreme Court, which says that the right to make representations is constitutionally protected, but the right to collectively bargain is not, undermines the activity of which makes trade unions meaningful. If an employer is not required to meaningfully consider representations, the purpose of making these representations is defeated.

While the majority in *Dunmore* does not specifically discuss the situation of migrant agricultural workers, it did have evidence before it describing the CSAWP and their working conditions, and we may infer that this evidence was relied upon in coming to the conclusion that agricultural workers are a disadvantaged group characterized by poor wages, low social status, and political impotence. However, we must also note that L'Heureux-Dubé J., writing in her own reasons, excluded migrant agricultural workers from her analysis because they are part of a "federal program". It is has been argued in the above discussion of Canadian Laws that the conclusion that migrant workers are federally regulated in terms of employment and labour laws is premature. A rigorous examination of the jurisdiction over migrant workers, which was not presented to the courts in *Dunmore,* would likely result in a reversal of this finding.

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[260] at 215

[261] See Ontario *Labour Relations Act*, purpose provisions s. 2, definition of "trade union" s.1(1), right to join a union s. 5.

Since migrant workers do have some *Charter* protections while working in Canada, despite their non-citizen status, it is concluded that the *Dunmore* decision has application to migrant agricultural workers. The practical implication of this decision means that migrant agricultural workers have the right to join a union or form an association while in Canada without intimidation, coercion or discrimination from their employers. Interviews with the UFCW have indicated that their attempts to organize or represent agricultural workers have been undermined in some instances because of Consulates and Liaison Offices advising workers that they should have no contact with the Union. While the UFCW has attempted to assist workers when the consulate fails to respond to a worker's grievance, the consulate's resistance in recognizing the union ultimately hurts the worker who ends up in the middle of a political struggle. A collaborative approach to addressing workers' complaints would be preferable.

In light of *Dunmore*, despite the role of the Government Agents in representing workers, it is now well settled that migrant workers may also seek participation in an employees' association of their choice and make representations via the employee association. The Supreme Court of Canada has stated that there are benefits to be gained by the participation of Canadian trade union which can "present views on fair industrial policy". While the protective measures and complaint process in the AEPA are aimed at employers, the consulates also have a role in ensuring that the freedom of association of migrant workers are not infringed while they are in Canada and respecting the valuable role of labour unions and associations in the employment relations.

The scope of activities within an employees' association is currently limited to those rights in the *Agricultural Employee Protection Act* as discussed above. It is too early to say whether *Dunmore* or the AEPA will have an effect of encouraging the establishment of migrant agricultural worker associations or the participation of migrant workers in a broader agricultural workers' association. As outlined earlier, recruitment may prove to be difficult since migrant workers are required to live on their employer's property and the "right of access" to the employer's property under the AEPA is not automatic.

Recommendation: Recognizing the recent developments arising from the Dunmore decision and the creation of new obligations under the Agricultural Employees Protection Act, all Government Agents, farm employers in CSAWP, and government parties be

educated on the impact of these developments on migrant agricultural workers, including the rights of migrant workers to join an employees' association or to become a member of a trade union of their choice without intimidation, coercion or discrimination.

Recommendation: All migrant workers receive as part of their orientation information about their right to join a trade union or an employees' association while in Canada without coercion, reprisal or discrimination as outlined in the Dunmore decision; as well as how to raise complaints if these rights are violated.

Recommendation: The Employment Agreements recognize and protect CSAWP workers' right to organize without intimidation, coercion or discrimination as outlined in the Supreme Court of Canada's decision in Dunmore. This includes recognition that workers cannot be repatriated for such activities.

Recommendation: All Government Agents, farm employers in CSAWP, and government parties recognize any agricultural employees' association or trade union which seeks to represent migrant workers and receive representations which they make. As a "best practice", these actors should voluntary recognize and collectively bargain with the trade union if it is demonstrated that a majority of the workers has signed as members of a trade union.

The impact of unionization on the migrant workers in Ontario can only be discussed hypothetically since CSAWP workers have never had the right to join a union since the inception of the program. Even during the short life of ALRA, migrant workers were not covered because of their seasonal status as discussed earlier. Similarly, with the exception of a 1½ year period in 1994-95, all agricultural workers in Ontario generally have been denied the ability to unionize. Therefore, there is no factual basis upon which an assessment of the impact of unionization of agricultural workers can be made in Ontario. As a result, comparative research was conducted to hypothesize on some of the effects and issues which may arise should unionization for agricultural workers ever become a reality in Ontario. As a preliminary note, the potential impacts of unionization must be distinguished from the impact of employee associations, as defined by the AEPA, because one model suggests the inclusion of collective bargaining rights and the other does not.

The following discussion is based on potential impacts of unions as defined in the *Labour Relations Act* on the industry-level operation of the program. It serves as a practical discussion and raises some of the policy considerations as opposed to a broader theoretical market impact assessment.

2. Impact on Migrant Worker Wages

The establishment of unions as defined under the *Labour Relations Act* will inevitably result in the deduction of union dues from individual workers' pay cheques. The level of dues is determined by the union's constitution and by-laws of the trade union. The level of deduction is generally a percentage of a worker's wages. The union incurs substantial costs in providing the benefits of collective bargaining which provides the rationale for why unions should be able to demand that all who receive the benefits of collective bargaining pay for them. Any union member may ask for and get an audited financial statement from the union as required by s. 92 of the LRA. In Ontario, the LRA requires that if a union requests, there shall be included in the collective agreement between the union and the employer of the employees a provision requiring the employer to deduct from wages of each employee in the unit affected by the collective agreement, the amount of the regular union dues and to remit the amount to the trade union.[262] The statute requires this deduction regardless of whether the employee chooses to be a member of the union or not – if the collective agreement covers the workers within the bargaining unit definition, the employee is required to pay union dues regardless of whether he or she chooses to be a member of the union. The rationale is that, if the employee is covered by the collective agreement, he or she still obtains the benefits of the collective agreement provisions. In summary, the dependent factor on whether a worker pays union dues is based on the worker's membership in the bargaining unit, not in the union.

From the migrant worker's perspective, at first blush, additional deductions from their wages seem onerous when they are already heavily compromised from several statutory deductions as well as deductions unique to the CSAWP. This deduction may have a further impact on the level of remittances that is returned to the supply country in terms of the worker’s voluntary remittances.

[262] s. 47

However, in the case of the Caribbean CSAWP, the 25% mandatory remittance is deducted based on gross wages, therefore union dues would not impact this amount.

Remittance of union dues means workers will benefit from the services that a trade union may offer, including an increase in wages. The trade union is obligated by statute to respond workers' grievances – they cannot be ignored. If a trade union carries the grievance, it will incur all costs, including legal costs, in advancing the grievance through the dispute resolution process under the collective agreement. When farm workers in the United States unionized, the benefits included improved wages, increased control over hiring practices, employer contributions for worker benefits, language training, improved housing, and other social services that enhance farm workers' control of their lives.[263] In Canada, Statistics Canada surveys show that people in union jobs earn more than people in non-union jobs.[264]

If we look at the case of California, agricultural workers who gained the right to unionize in the 1960s and early 1970s saw an increase in wages reaching above the national average. Between 1964 and 1973, wages increased by 120% and the gap between farm and non-farm wages was reduced significantly. Between 1965 and 1975, union organizing, combined with the scarcity of farm labour, led to an increase in real wages from $0.95 to $2.73. By 1975, the entry level wage on unionized farms in California was $3.11, as compared to the federal minimum wage of $2.10.[265] In the first year of contract negotiations, workers with union contracts gained an average wage increase of over 11%. By 1983, the average hourly wage for unionized farm workers was $5.54, as compared to $4.46 for farm workers who were not unionized.[266] In conclusion, while union dues

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[263] Carol Sakala, "Migrant and Seasonal Farmworkers in the United States: A Review of Health Hazards, Status, and Policy" *International Migration Review*, vol. XXI, No. 3, 659-87.

[264] Statistics Canada, "Labour Market Activity Survey," No. 71-205, unpublished, cited in Mary Cornish & Lynn Spink, *Organizing Unions*, Toronto: Second Story Press, 1994, p. 45

[265] Edid Maralyn, *Farm Labor Organizing Trends and Prospects.* Ithaca, NY: ILR Press, 1994; Linda Majka and Theo Majka. *Farmworkers, Agribusiness and the State.* Philadelphia: Temple University Press, 1982; Philip Martin, "Collective Bargaining in Agriculture", in P.B.Voos, (ed.) *Contemporary Collective Bargaining in the Private Sector*, Madison, WI: Industrial Relations Research Association, 1994, 491-528.

[266] Carol Zabin, "Mixtecs and Mestizos in California Agriculture: Ethnic Displacement and Hierarchy among Mexican Farm Workers", in Michael Peter Smith (ed.) *Marginal Spaces: Comparative Urban and Community Research*, volume 5. New Brunswick, NJ: Transaction Publications, 1995, 113-43.

may result in greater deductions, this must be assessed against the higher wages that workers may receive by virtue of unionization as well as services such as legal representation.

Currently, the 5 % - 7% of the 25% deduction from Caribbean workers pay cheques takes into account the administrative costs of the program, including the role Government Agents may play in representing workers. Arguably, this 5-7% amount may be reduced or eliminated if there is union representation because of a reduction of these administrative costs for the Liaison Offices in Canada. Because not all farms will unionize, Government Agents may be required to maintain a higher level of service for some workers compared to others. Therefore, the deduction may be adjusted accordingly in each individual case depending on whether the worker is unionized or not.

Recommendation: Assuming unionization of a farm, the impact on lower administrative costs of the Government Agent in the representation of workers be assessed in determining a reduction or elimination of the 5-7% mandatory remittance in each individual worker's case.

3. Impact on the Demand for Migrant Workers

The impact on agricultural employer's business operations is controversial as was demonstrated in *Dunmore* where both parties presented divergent evidence on the impacts of collective bargaining on farming operations, and this has been discussed in the decision.

The Ontario Government in *Dunmore* argued that the exclusion of agricultural workers from collective bargaining and unions is warranted because unionization would have an adverse impact on farming operations. Adverse impacts in operation may result in a decreased labour demand, which in turn results in a decreased demand of migrant agricultural labour.

International Competitive Environment

Canada as whole has one of the most trade dependent/affected economies in the world with 40 percent of gross domestic product being dependent on the export of goods and services in 1995.[267] The agricultural sector in Ontario now faces competitive pressure as a result of lifting of global trade barriers. The agricultural trade deficit increased from $1.5 billion dollars in 1988 to 2.4 billion in 1996.[268] Ontario farmers are likely to face growing competition from producers in other countries in the future, rather than declining competition, in light of Canada's ascension into international trade agreements such as NAFTA and the WTO.[269]

The reduction in tariffs and domestic subsidization of agriculture as a result of international trade agreements, will result in greater competition with exports. One position may be to argue that this competitive environment will result in Ontario farms to be substantially affected by even the smallest change in its cost and operating structure.

However, Canadian producers and providers in all sectors and in every province are likely to face growing competition from producers and service providers in other countries. Therefore, agriculture is not uniquely affected by this phenomena, and as the Supreme Court of Canada held, it would be arbitrary to recognize this phenomena in all industries and yet only deny agricultural workers the right to form a union.

Ontario Farms Today

Farms in Ontario are still largely family-operated businesses (98.5%). The number of farms have been steadily decreasing both nationally and in Ontario for the last five decades. In 1996, there were 276,548 farms in Canada and 67,520 farms in Ontario.[270] By 2001, there were 246,923 farms

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[267] Affidavit of Judy Fudge sworn September 23, 1997, *Application Record of U.F.C.W.*, relying on Department of Foreign Affairs and International Trade, "International Trade and the Canadian Economy," http://www.dfait-maeci.gc.ca/english/trade/wtointl-trade.htm.

[268] Affidavit of George Brinkman sworn August 18, 1997, *Application Record of the Attorney General of Ontario*, para. 9, Ex. "B" - OMAFRA ,1988 Agricultural Statistics for Ontario, Ontario Agri-food Trade by Commodity Group, 1996 (OMFRA), Ontario Agri-Food Trade by Region, 1996 (OMAFRA).

[269] Affidavit of George Brinkman, supra, at paras. 10-11.

[270] Statistics Canada, 2001 Census of Agriculture.

in Canada and 59,728 farms in Ontario.[271] The rate of decline is approximately 10.7% across Canada and 11.5% in Ontario.[272] While the number of farms have decreased, the size of farms and gross receipts have increased. In addition, the number of paid weeks of labour have increased substantially.[273] As cited by the Supreme Court of Canada, Ontario farms represent sophisticated business units with a minimum capital value of $500,000-to $1,000,000.

The argument often raised for the exclusion of agricultural workers from labour relations regimes is that the nature and risks associated with agriculture makes it incompatible with collective bargaining. The timing of the harvest of crops, perishability of the products, and seasonal sensitivities requires a flexible and responsive labour force. However, while these may be unique features of agriculture, the impact of unionization as enhancing these risks should not be automatically assumed. Labour relations legislation may be tailored to address these risks and the impact unionization may have on productivity. Therefore, the impact of unionization on business operations needs to be evaluated against the applicable labour relations regime. For example, the ALRA did not allow for work stoppages otherwise associated with a traditional labour relations model in response to these features of agriculture. It is further noted that other sectors which require a "flexible" work force operate under collective bargaining regimes.[274] Therefore, unionization may be adaptable according to working conditions.

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[271] Ibid.

[272] Ibid.

[273] James White, "A Profile of Ontario Farm Labour", March 5, 1997, Attached as Exhibit "B" to Affidavit of James White sworn March 6, 1997, Application Record of U.F.C.W., Table 10 - Hired Agricultural Labour Classified by Economic Sales Class of Farm (Source: Census of Agriculture, Statistics Canada, Various Volumes), Table 11 - Hired Agricultural Labour Classified by Economic Sales Class of Farm (Source: Census of Agriculture, Statistics Canada, Various Volumes), Table 25 - Farms Classified by Gross Receipts (Census Overview of Canadian Agriculture, Statistics Canada Cat. 93-348, Table 2B).

[274] For example, nurses, zoo workers, and firefighters all work under unpredictable conditions which may impact the welfare of animals and people. In the case, of nurses and firefighters this exigency is recognized by using alternative dispute resolution methods other than the right to strike.

Comparative Business Impact of Unionization in the U.S.

Since there is no empirical evidence on the impact of unionization in Ontario, a literature review was conducted of the experience in the United States with the rise of the United Farm Workers Union in order to gain some insights on the business impact of unionization on farms.

Aside from wage increases achieved through union contracts, unionization has produced some changes to employment practices within individual business operations. Seniority rules and protections against discriminatory discharge have created more stable employment. Grievance procedures provide formal protection against workplace abuses, and give workers a role in contract administration. Interviews with farm workers in Ohio found that workers are more likely to voice complaints over employer abuses once they have been organized.[275] Unionization has also introduced changes to the 'authority structure' of unionized farms, providing farm workers with a stronger position within decision-making processes.[276] The hiring halls serve as a means to distribute jobs, deliver services to workers, and in general provide an alternative to the labour contractor system of recruitment. Health and safety committees provide a means to monitor working conditions.

While the UFW contracts include some provisions that affect hiring practices, such as union hiring halls and seniority provisions, there are negotiable limits to the impact of such provisions on individual business operations. For example, this impact has been modified through negotiated contract language that allows employers to rehire previous employees, rather than submitting all jobs to the hiring hall, and through seniority language based on work experience with an employer, rather than union membership.[277] Moreover, while the provisions of union contracts alter the

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[275] Mooney, Patrick H., and Theo J. Majka (1995) *Farmers' and Farm Workers' Movements: Social Protest in American Agriculture*. New York: Twayne Publishers.

[276] Jenkins, J. Craig (1985) *The Politics of Insurgency: The Farm Worker Movement in the 1960s*. New York: Columbia University Press.

[277] Hayes, Sue Eileen (1984) "The California Agricultural Labour Relations Act and National Agricultural Labor Relations Legislation." In R.D. Emerson (ed.) *Seasonal Agricultural Labor Markets in the United States*, Ames: IO, Iowa State University Press, 328-370.

internal labour markets of unionized operations, the small number of collective agreements in effect has minimized the industry-level impact.

Less than a decade after the enactment of the California *Agricultural Labour Relations Act* (ALRA),[278] predicted that "the structure of farming will have more of an effect on labor than labor will have on the structure of farming"[279]. Consistent with this prediction, the impact of unionization at the macro-level has been very limited, particularly with respect to broader transformations that have occurred in the organization of agricultural production. The agricultural industry as a whole has experienced significant declines in the numbers of small farming operations, with corresponding increases in larger operations. [280] Concentration of ownership and the growth of large production operations have promoted 'industrial-style' employer-employee relationships.[281] The unionization of farm workers has not prevented these transformations from occurring.

Another significant transformation in agricultural production has been the shift from fully integrated business operations to a more highly disintegrated production chain. Through this transformation, "one of these entities might own the land, while another farms, and a third sells the commodities produced".[282] This has also included a shift from large brand-name corporations maintaining their own farming operations to their use of independent growers.[283] The independent growers are often large corporations as well, but with no identifiable brand name. In effect, this has enhanced the 'pyramid' structure of agricultural production, increasing the distance between the corporate brand-name of agricultural products from the employers of farm workers. The significance of this shift is twofold: it increases organizational flexibility, and it removes responsibility for the farm workers'

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[278] Coffey, Joseph D. (1984) “Discussion - CALRA and National Legislation.” In R.D. Emerson (ed.) *Seasonal Agricultural Labor Markets in the United States*, Ames: IO, Iowa State University Press, 370-75.

[279] Coffey, *supra* note 286.

[280] Martin, Philip L. (1994) “Collective Bargaining in Agriculture.” In P.B. Voos, (ed.) *Contemporary Collective Bargaining in the Private Sector*, Madison, WI: Industrial Relations Research Association, 491-528.

[281] Mooney, Patrick H. and Theo J. Majka, supra note 283.

[282] Martin, Philip L. (1996) *Promises to Keep: Collective Bargaining in California Agriculture*. Ames, IO: Iowa State University Press, xix.

[283] Martin, Philip L. 1994, *supra* note 288.

conditions of employment from the companies that package and market the commodities. It thereby deflects conflict over those conditions to the immediate employer of the farm workers at the lower end of the production chain. Not only has unionization not prevented this transformation from occurring, this shift makes organizing and representing workers more difficult, and has also undermined the boycott strategies of farm workers' unions. The direct employers are not identifiable to the general public and the corporations at the top of the pyramid claim to have no responsibility for the labour conditions in the fields.

Farm labour contractors constitute an important layer in this pyramid structure, and serve to create distance between growers and workers.[284] The contractors, who recruit and manage seasonal migrant labourers for growers, continue to play an important role in the business operations of agricultural producers. These 'middlemen' have been responsible for widespread abuses of farm workers, including providing wages as low as 50 percent of existing averages.[285] The influence of labour contractors declined in California during the 1960s and 1970s, as the UFW successfully lobbied to have the ALRA define the landowner or farm operator as the employer, not the labour contractor. Both the UFW and employer associations took responsibility for the recruitment and management of workers. However, once the influence of the UFW began to decline, the contractors began to re-emerge. Overall, the enactment of the ALRA did not bring about an end to the labour contractor system.[286] Further, since the 1980s, labour contractors have played a central role in preventing unionization of their crews of workers.[287]

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[284] Linder, Marc (1990) “Crewleaders and Agricultural Sweatshops: The Lawful and Unlawful Exploitation of Migrant Farmworkers.” *Creighton Law Review*, Vol. 23, No. 2, 213-233; Jenkins (1985) *supra* note 284.

[285] Zabin, Carol (1995) “Mixtecs and Mestizos in California Agriculture: Ethnic Displacement and Hierarchy among Mexican Farm Workers,” In Michael Peter Smith (ed.) *Marginal Spaces: Comparative Urban and Community Research*, Volume 5. New Brunswick, NJ: Transaction Publishers, 113-43.

[286] Hayes, Sue Eileen (1984), *supra* note 285.

[287] Edid, Maralyn (1994) *Farm Labor Organizing: Trends and Prospects*. Ithaca, N.Y. ILR Press.

A third transformation in agricultural production has been increased competition from agricultural producers outside the United States, in particular, Mexico.[288] Horticultural exports from Mexico have been increasing significantly since the 1980s. The pressure of increased competition has made growers further inclined to reduce labour costs and resist unionization.

In terms of the impact of unionization and collective bargaining on commodity prices,[289] suggests this will vary according to several factors. First, employers may chose to pass on increased costs to consumers. In the context of inelastic product demand, consumers may accept the increased cost, as was the case of 1979 UFW lettuce strike. Second, employers themselves may absorb the costs themselves, through reduced profit margins. Third, employee productivity may increase through improved working conditions and productivity initiatives (such as the initiative developed in Ohio), thereby eliminating any additional cost to either producers or consumers.

In a response to Hayes,[290] Coffey argues that even with significantly higher rates of unionization than those experienced in California, the economic impact on production costs would be minimal." Coffey further suggests that, for large farming operations, the costs of unionization may be low in relation to the benefits. Unionization can provide services such as worker recruitment, training, and benefit programs. This reduces the services the grower must take responsibility for themselves. or secure through the labour contractor.

Impacts on the Agricultural Labour Market

The agricultural labour market displays patterns of labour market dualism. There are two central categories of workers within agricultural production: a small, internal labour force of 'permanent' workers, and a much larger external labour force employed in seasonal work.[291] The permanent workers, who are responsible for management, sales, supervision, and maintenance, have

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[288] Zabin, Carol (1995), *supra* note 293.

[289] Hayes, Sue Eileen (1984), *supra* note 285.

[290] Coffey, Joseph D. (1984), *supra* note 286.

[291] Jenkins, J. Craig (1985), *supra* note 284.

relatively stable employment with working conditions that are superior to the large numbers of seasonal workers. The seasonal workers, who make up over 80 percent of the labour force, are responsible for low-skilled manual labour, such as planting, harvesting, and packing.

The seasonal agricultural labour market in California prior to unionization was described as 'structureless' in comparison to labour markets in manufacturing industries. [292]The labour market was characterized by a relative 'freedom' of entry, impersonal and anonymous relations between employers and employees, high rates of employee turnover, a lack of long-term commitments between employers and employees, little skills-based division of labour, piece rate payment systems, and flexibility in the maximum numbers of workers hired. Edid suggests that there are a number of similarities to the seasonal farm labour market in California in the 1990s, two decades after the enactment of unionization legislation. Entry into the market remains relatively free, the seasonal nature of the work minimizes personal interactions between employers and employees, piece rate payment remains common, and employers in labour intensive production are able to maintain a 'surfeit' of workers. Some changes are evident, however. Key differences include the increasingly dominant role of farm labour contractors in controlling recruitment and supervision of workers, particularly immigrant workers, and divisions of labour along the lines of seniority, skill, gender, and age.

The desire to minimize wage rates for large-scale labour intensive production has led California growers to recruit an oversupply of low-wage labour.[293] This has been secured through the use of migrant workers, documented and undocumented, from Mexico. Edid states "militant anti-unionism and a preference for a succession of foreign workers, and racial and ethnic minority workers, was the logical outgrowth of growers' drive to control the labour market".[294] Growers often over-recruit seasonal workers during peak harvest periods in order to hold down wages, increase flexibility in the deployment of labour, increase competition between workers, and to thus ensure labour

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[292] Edid, Maralyn (1994), *supra* note 295.

[293] Mooney, Patrick H. and Theo J. Majka (1995), *supra* note 283.

[294] Edid (1994), *supra* note 295, 22.

discipline.[295] Growers have also sought to increase the supply of immigrant workers in order to undermine unionization efforts.[296]

There has been a continually increasing pool of available migrant workers for seasonal farm labour in the United States. Immigration reform in the mid 1980s, through the *Immigration Reform and Control Act* (1986), led to the creation of the Special Agricultural Worker and Replenishment Agricultural Worker programs, which were intended to resolve the conflict over the use of immigrant workers on U. S. farms.[297] These Acts did not reduce the numbers of undocumented workers entering the agricultural labour market; however[298] estimates that the number of undocumented workers employed in U.S. agriculture in the mid-1990s is approximately equivalent to what it was a decade earlier, prior to the enactment of the IRCA. Further, the economic conditions that produce labour migration - poverty, economic dislocation, and a lack of local employment - have been exacerbated in the context of globalization and free trade agreements such as NAFTA.[299] Because of these conditions, it is predicted that the numbers of Mexican migrant workers destined for agricultural production, at least in the short term, will continue to grow.[300] Further, the provisions of the NAFTA agreement do not provide any legal protections for Mexican farm workers crossing into the United States, meaning that the vulnerability of these workers will be maintained.[301]

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[295] Jenkins J. Craig (1985), *supra* note 284, 19.

[296] Zabin, Carol (1995), *supra* note 293.

[297] Martin, Philip L. (1990) "Harvest of Confusion: Immigration Reform and California Agriculture." *International Migration Review*, Vol. XXIV, No. 1, 69-95.

[298] Martin, Philip L. (1996), *supra* note 290.

[299] Wilcox Young, Linda (1995) "Free Trade or Fair Trade? NAFTA and Agricultural Labor" *Latin American Perspectives*, Vol 22, No. 1, 49-58.

[300] Martin, Philip L. (1993) *Trade and Migration: NAFTA and Agriculture*. Washington: Institute for International Economics.

[301] Valdes, Dennis N. (1995) "Legal Status and the Struggles of Farmworkers in West Texas and New Mexico, 1942-1993." *Latin American Perspectives*, Vol. 22, No. 1, 117-37.

Unionization has had little impact on these trends within the agricultural labour market. In general, the economic insecurity created by a large oversupply of labour has impeded farm worker organizing initiatives. The labour supply is also characterized by high levels of ethnic and cultural diversity, which, combined with economic insecurity, has been manipulated by growers to impede collective initiatives.[302] Union organizing is further made difficult as many workers are not permanently in the country year round. The large pool of migrant labour creates a downward pressure on wages and working conditions as "the availability of such workers without options has usually kept the wages of seasonal workers paid on an hourly basis near the minimum wage".[303] Immigrant workers are often unaware of existing labour laws, or unwilling to report violations out of fears of job loss or deportation. In addition, growers have used farm labour contractors to recruit both documented and undocumented workers as replacement workers in order to defeat UFW strikes. Because of these combined trends,[304] concludes that the vast supply of labour available for seasonal agricultural production has significantly reduced the impacts of unionization on the agricultural industry.

Wall identifies several potential implications for agricultural operations in Ontario in the event that full-time employees opted to form orjoin a union.[305] First, wage increases would likely become a 'significant issue' in contract negotiations. Using a hypothetical model based on employee raises of ten and twenty percent, Wall suggests that such raises would have a 'minor effect' on the net income levels of Ontario farms, and would not create dramatic changes to the distribution of farms by income bracket. The exception to this is for farms with incomes of over $50,000. A ten percent employee raise would reduce the number of farms in this income bracket by ten percent, while a twenty percent raise would create a twenty percent reduction. As the majority of farms have net incomes below $50,000, Wall hypothesizes that wage increases of that proportion would not create significant consequences for the surrounding communities. A second possible implication is that Ontario growers could increase the level of mechanization on their operations to avoid increased labour costs.

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[302] Edid, Maralyn (1994), *supra* note 295; and Zabin, Carol (1995), *supra* note 293.
[303] Martin, Philip L. (1994), *supra* note 288, 519.

[304] Martin, Philip L. (1996), *supra* note 290.

[305] Wall, Ellen (1994) “Farm Labour Markets and the Structure of Agriculture.” *Canadian Review of Sociology and Anthropology*, Vol.

It is difficult to come to any concrete conclusions on what impacts unionization would have on farming operations and the demand for labour since several concrete factors will need to be considered including: the nature of labour relations legislation; the Ontario farm profile at any point in time; and the general economic health of the Canadian and international economy; the level of unionization within the industry; and technology.

4. Impact on Increased Mechanization of Agriculture

One of the most noted trends in agricultural production is mechanization. In the United States, rising wages in the 1960s was one of the factors that contributed to mechanization, particularly following the termination of the *Bracero* program. However, by the end of the 1970s, as farm wages began to fall and the numbers of migrant workers continued to increase, the drive towards mechanization slowed.[306]

In Ontario tomato harvesting, the mechanization of harvesting has resulted in a reduction of the numbers of workers hired per farm, a decrease in child labour, and an increase in resident part-time female employees.[307] Mechanical harvesters were introduced in Ontario primarily to meet the requirements of the food processing industry that needs a continuous supply of product, uniform in quality and size.[308] In Wall's study on the impact of mechanization on the tomato industry in Ontario, she found that numbers of hired labour necessary for hand harvest were reduced as a result of mechanization which had its greatest impact on non-resident workers (i.e. CSAWP workers, Mexican Mennonites, and non-Ontario workers participating in federal labour pool programs). However, despite mechanization, 34 percent of the labour used on machine harvest continued to be non-resident workers. While lower labour costs are often associated with mechanical harvesting, Wall concludes that machine harvested tomatoes received lower prices.

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[306] Philip Martin, *supra* note 72

[307] Ellen Wall, “Farm labour markets and the structure of agriculture” (1994) 31:1 Canad. Rev. Soc. & Anth. 65

[308] *Ibid.* at 68-69.

Therefore, capital interest at the food manufacturing level, not the grower level, might be the true beneficiary from any reduction in hired labour costs on the farm.[309]

Unionization may potentially have the effect of increasing mechanization resulting in a lower demand of agricultural workers, including migrant workers. Historically, employers, who face a labour force gaining power, have tried to reduce the numbers of workers in order to reduce the potential risk of labour disputes. Ontario agricultural operators might follow such a path and implement whatever robotic systems are and alternative technologies are available to replace workers.[310]

In the United States, the employment of seasonal agricultural workers has continued in other commodities, such as fresh fruits and vegetables. It is in these areas where migrant workers are most frequently employed. Harvesting these crops remains labour intensive and mechanization is lower than in agricultural commodities that are sold for processing.[311]

Some mechanization has also led to increases in the numbers of farm workers. Portable conveyor belts and cooling devices have facilitated the movement of packinghouse jobs into the fields. In California, this has led to job losses for unionized packinghouse workers, but has created more field worker jobs.[312]

The California *Agricultural Labour Relations Act* requires farm employers to bargain over "any changes in the terms and conditions of employment"[313]. There have been disputes over whether or not mechanization must be included within the scope of bargaining. In general, if mechanization displaces workers and does not alter the scope and purpose of a business, it is subject to

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[309] *Ibid.* at 74.

[310] Ellen Wall, “Unions in the Field” (1996) 44:4 Can. J. Agric. Econ. 515-526 at 523.

[311] Edid (1994), supra note 295.

[312] Philip L. Martin, *Promises to Keep: Collective Bargaining in California Agriculture.* Ames, IO: Iowa State University Press, 1996.

[313] quoted in Robert Cheasty “Agricultural Mechanization: The Grower's Duty to Bargain Under the California Agricultural Labour Relations Act” (1981) 14:3 UC Davis Law Review 621-50.

bargaining. As well, if the introduction of technology results in a change to wages and working conditions, the employer must bargain over those effects. Many United Farm Worker contracts in the United States contain provisions that limit the replacement of farm workers with machines. The typical provision in a contract is a requirement that an employer must bargain with the union over the introduction of machinery that will eliminate 25 percent or more of the farm's jobs.[314] If unionization is realized in Ontario, the union may be able to minimize the impact of mechanization by bargaining similar provisions in collective agreements covering migrant workers.

5. The Future of CSAWP under Unionization

If farms are covered by the model of unionization based on current labour relations law in Ontario, farms will most likely be unionized on a farm by farm basis, assuming that a sufficient number of union cards are voluntarily signed by workers. Based on the current model, unionization on these individual farms, where a union has been certified, will likely cause reconfiguration of the applicable instruments that apply to migrant workers' terms and conditions of employment. Based on the definition in the collective agreement, the union may be the only recognized bargaining agent on behalf of workers in a defined bargaining unit on an individual farm.

If unions are permitted to bargain for the terms and conditions of migrant workers, the Employment Agreement will likely be replaced by the collective agreement based on current labour relations law. The role of the Government Agent would continue to be important in the operation of the CSAWP especially in the following areas:

- recruiting workers
- managing the migration of workers from the supply country to Canada
- providing orientation to workers and other CSAWP materials
- processing income tax returns, CPP and worker’s compensation claims
- providing policy inputs into the direction of the program
- negotiating with the Canadian government as it relates to the framework of the CSAWP

[314] Philip Martin, *supra* note 87.

- servicing workers on non-unionized farms, and assisting and advising unions on unionized farms on the unique features of the CSWAP
- liaising with the Canadian government, the union, and employers.

Currently, the CSAWP policy position is that government agents from the supply country are the workers representatives. However, if unionization is realized in Ontario, then this role may shift to the trade union in some circumstances (i.e. where a union is certified to be the workers' bargaining agent on any one farm). Assuming a union is successful in obtaining certification to represent workers on a farm, the employer will be obliged under labour relations law to recognize the union as the sole bargaining agent for the purposes of negotiating terms and conditions of employment.[315]

As the role of a worker's representative, the union will investigate complaints, file grievances on behalf of the worker, and, if necessary, pay for the litigation for arbitration of the dispute before an arbitrator. This will have the effect of reducing some the administrative costs for the supply countries in the operation of the CSAWP by shifting the costs to the union.

The effect of unions representing workers will also address some of the concerns raised by the stakeholders and parties to the CSAWP of the chronic under-resourcing of consulate offices to carry out their functions. Sixty percent of Mexican workers supported unionization.[316] This support is likely explained by the workers' expressed dissatisfaction of the consular services. The union will also be in a better position to access and understand labour and employment laws in Canada.

This model envisions unions and Government Agents working collaboratively to promote the common goal of job security, fair wages, and decent working conditions for migrant agricultural workers'.

Recommendation: Establish a committee comprised of all Government Agents, FARMS, HRDC, UFCW, and worker representatives to review recommendations raised in this report

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[315] see s. 47 of the LRA

[316] Verduzco, *supra*

with the view of arriving to an institutional and/or operational approach of future partnerships.

6. Conclusion

At present, agricultural workers, as held by the Supreme Court of Canada are disadvantaged in all aspects of Canadian society. It explains why it is difficult for Canadian growers and government to recruit farm workers from the domestic labour market. Agricultural workers and migrant workers continue to be denied the right to unionize and collectively bargain despite the *Dunmore* decisions. Rather, the Ontario Government has chosen a minimalist approach in its interpretation of *Dunmore* by only allowing workers to participate in "associations" and make representations which do not require an employer to engage in any additional consultations. Therefore, the impact of *Dunmore* on migrant agricultural workers is minimal in terms of having any effect on their current working conditions or having their voices heard.

It is very difficult to assess the impact of unionization within a collective bargaining model in the Ontario agricultural labour market since there is no data to either support or refute the above assertions. The previous discussion simply highlights some of the issues and academic opinion on what the potential impacts may be on migrant labour. However, all of the literature takes into several factors unique to each jurisdiction in terms of assessing the impact of unionization, including the content of existing labour relations laws; the level of unionization within the industry; the economic climate within the industry both locally and internationally; and the political climate. Similarly, any conclusions on the impact of unionization in Ontario would have to take into account all of these factors. As UFCW continues to fight in the courts for agricultural workers' right to unionize, including migrant workers, we can only wait for further guidance on this issue from our legislators, or more likely from the courts.

VI. "Best Practices" of the Seasonal Agricultural Worker Program

The U.S. General Accounting Office (GOA) and the International Organization for Migration (IOM) define best practices as "good practices" that have worked well elsewhere. That is, practices that have "proven and have produced successful results" that are sustainable, and that can be

replicated elsewhere. Taking this definition and applying it the Canadian seasonal agricultural labour markets, best practice may be described as good practices at the policy and regulatory, labour-management relations, farm industry employment, and migrant worker-farm community levels that make the farm labour markets work well in the interest of both the migrant workers and the growers who employ them. They are practices that will produce a workable balance between farm employees' workforce needs and the wages and working conditions of the migrant workers, a balance that is “fair”, and which ensures that the market continues to meet the needs of circumstances of their families while at the same time meeting the needs of the growers for a core and reliable workforce.

In identifying those “best practices” which are working for migrant workers and growers, several interviews were conducted of the various stakeholders in CSAWP including grower associations, policy representatives of the federal government, Mexican and Caribbean consulate representatives, and organizations assisting migrant workers in the community. While migrant farm workers from the Caribbean and Mexico have been interviewed, this data was not available to the researcher at the time of drafting this report. Secondary sources of workers' testimonies have been relied upon to fill this gap. The discussion on the program's industry level employment practices is incomplete insofar that it does not include data from workers. Therefore, the point of view of the consulates, the federal government, and the growers have not been reconciled with industry level employment practices as experienced from the workers themselves.

A. “Good Practice” Areas of the CSAWP

1. Government controlled migration of foreign labour which minimizes the exploitation of migrant labour via labour contractors or other unregulated or exploitive private means. Managed migration reduces the risk of illegal migration.

2. The instrumental framework of the CSAWP including the MOU, Operational Guidelines, and the Employment Agreement which delineates the roles, duties and obligations of the various stakeholders. This delineation provides benchmarks for program evaluation in determining what is working in the interests of workers and employers and what is not working in the interests of workers and employers at all levels of the program.

3. The Employment Contract provides an instrument by which workers and employers are made aware of the terms and conditions of employment before the commencement of the employment relationship. Because agricultural workers are exempted from several Ontario employment related statutes, the Employment Agreement fills this gap in some circumstances. For example, Mexican workers are entitled to meal breaks which they would not otherwise be entitled to under provincial laws.

4. The instrumental framework of the CSAWP, in particular the Operating Guidelines, provides an informative tool of detailing every step in a multi-party, complex set of administrative processes in bringing migrant workers to Canada.

5. Annual meetings at both the regional and international level which review the operation of the CSAWP at both the micro and macro levels. Regular face to face meetings among the various stakeholders ensure the smooth operation of the CSAWP and provides an reliable forum for issues to be addressed on a regular basis. This serves to create a program that is responsive to all interests as well as building relations and contacts among the stakeholders.

6. The Government Agents play a constructive role in providing information to workers, administering the program in certain aspects and providing policy inputs into the program.

7. The ability of farmers to have “named” workers return on an annual basis which may minimize the transient nature of the migrant worker by having the stability of returning to the same employer.

8. The transfer process which allows workers to move to other farms as opposed to returning home, should problems arise with a grower during their work permit.

B. CSAWP Areas that may need “Good Practice” Principles Attention

1. The “dual” role of Government Agents as worker representatives which creates potential for conflict of interest and may undermine independent representation of workers.

2. The competitive structure of the program among the consulates to place workers on farms which may undermine enforcement of the contracts for fear of having workers replaced by workers in other supply country.

3. The impact of the repatriation provisions, the competitive nature of the program among the supply countries, and the lack of migrant worker's mobility in Canada have had an adverse impact on the enforcement of employment standards and the Employment Agreement between the worker and the employer.

4. The increasing role of agricultural private sector interests (i.e. FARMS) in policy-making is causing tensions in relations between supply countries and the Canadian government. This also diminishes the “government to government” nature of the CSAWP.

5. The Mexican consulate has inadequate resources to service the number of Mexican workers currently in the program.

6. The lack of an objective methodology in the determination of appropriate wages for migrant agricultural workers.

7. The application of Canadian laws and the policy objectives that underline them need to be responsive to the unique circumstances of migrant agricultural workers. For example, the policy objectives for the deduction of EI premiums cannot be reconciled with the immigration restrictions and lack of mobility placed on migrant workers.

8. There is an inconsistency of interpretation of “acceptable standards” in housing among the Liaison Officer and guidelines for housing inspections are outdated.

9. There are varying practices relating to training and protective clothing against pesticides. In light of the exclusion of agricultural workers from the *Occupational Health and Safety Act* in Ontario, the level of pesticide training and use of protective clothing is dependent on the goodwill of the employers.

10. There is no system in place to address disputes that cannot be amicably resolved or to provide open accountability to all participants in the program. Enforcement of employment standards and contracts are left to the discretion of individuals instead of objective criteria.

11. There is hesitancy of some participants in the CSAWP to recognize independent migrant worker associations in the operation of the program whereas employers are provided formal recognition and opportunities for policy inputs.

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