

SOLIDARITY FOREVER, CANADIANS NEVER:

SAWP WORKERS IN CANADA

by

Robert Marc Russo

LL.M., The University of British Columbia, 2006

LL.B., The University of British Columbia, 2004

B.A., The University of British Columbia, 1994

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Abstract

This doctoral thesis focuses on collective bargaining and temporary migrant workers within Canada participating in the Seasonal Agricultural Workers Program (SAWP). The intent is to analyze the range and efficacy of legal responses to the problems encountered by this community within Canada, focusing on the unionization of SAWP participants. The dissertation addresses the fundamentally legal relationship between unionization and SAWP workers in Canada. It takes an approach that considers both historical and legal considerations leading to the use of SAWP workers in Canada, and the eventual attempts at unionization. Recent legal developments in several Canadian provinces involving SAWP workers and efforts collective bargaining are analyzed. There is a comparison with similar efforts to unionize migrant workers in the United States, and of efforts to address violations collective bargaining rights through international complaints as well as within the broader framework of international law. The conclusion reached is that within the current framework of provincial labour legislation and the current structure of the SAWP, collective bargaining alone represents an inadequate response to violations of SAWP workers' workplace rights in Canada.

Preface

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Dedication

To my parents.

1 - Introduction

1.1 Statement of the problem

In August 2008 a group of farm labourers at Greenway Farms in Surrey BC, comprised largely of temporary foreign workers, voted to join the United Food and Commercial Workers (UFCW) union. One year later the bargaining unit voted to decertify itself. In between, many of the foreign workers were repatriated to Mexico and allegedly blacklisted from Canada's Seasonal Agricultural Workers Program.

These workers sought to unionize because of the problems they encountered while working on Canadian farms. They perform dangerous but essential work for the Canadian agricultural industry with musculoskeletal, transportation and other work-related injuries a common occurrence.¹ However they are largely invisible to Canadian society until the occasional news story exposes substandard working conditions or a horrific work-related accident. These incidents are all too common. From 1990-2005, 1,769 people were killed in "agricultural injury events" in Canada.² Agriculture remains the most dangerous occupation in Ontario with over 20 farm workers killed every year at

¹ The historically dangerous conditions of farm labour in Canada have been well documented. See J Parr "Hired Men: Ontario Agricultural Wage Labour in Historical Perspective" (1985) 15 LJCLS 91.; In the United States, the agricultural sector has historically had the highest annual work death rate of all industries due to accidents involving improper safety protocols with farm machinery and lax enforcement of workers' compensation regulations. See MA Purschwitz and WE Field, "Scope and Magnitude of Injuries in the Agricultural Workplace" (1990) 18:2 Am J Indus Med 179.

² Source: Agriculture and Agri-Food Canada, "Canadian Farm Fatalities Decreasing" (10 March 2009), online: <<http://www.casa-acsa.ca/english/PDF/Canadian%20farm%20fatalities%20decreasing.pdf>> While there were fewer fatal farm injuries in that period among those aged 15 to 59, those over 60 were actually at increased risk for fatalities resulting from farm machine accidents. Agricultural machines were involved in 71% of the fatalities with rollovers responsible for almost a quarter of the deaths.

work.³

In August 2002, a Jamaican seasonal agricultural worker was crushed to death by a 12,000-pound kiln of tobacco while working on a farm in the Brantford, Ontario area, leading to calls for greater Federal and Provincial oversight of workplace safety for temporary foreign farm workers.⁴ In September 2010, two Jamaican migrant workers died from workplace injuries suffered at a Filsinger farm near Owen Sound, Ontario.⁵ This last incident resulted in charges with possible jail time against four of individuals associated with the employer. But over a year later, only one individual was ultimately fined and charges against three others were dropped after an agreement between the Ontario Ministry of Labour and counsel for the accused.⁶ Migrant worker advocacy groups criticized the result, accusing the Ministry of Labour of “going easy” against employers causing the deaths of migrant workers.⁷

These are just two of the many examples of migrant farm worker deaths and legal responses. All of the migrant workers entered Canada through the federally administered Seasonal Agricultural Workers Program (SAWP). Over the last decade in Ontario there have been 33 reported SAWP workplace related fatalities and 1,129 premature

³ K Preibisch and LMH Santamaria, “Engendering Labour Migration: The Case of Foreign Workers in Canadian Agriculture” in E Tastsoglou and A Dobrowolsky, eds, *Women, Migration and Citizenship: Making Local, National and Transnational Connections* (Burlington: Ashgate Publishing, 2006) at 110.

⁴ I McImont, "Vigil in Canada for Dead Jamaican Farm Worker" (31 August 2002) *Jamaican Observer*, online: <http://www.jamaicaobserver.com/news/31205_Vigil-in-Canada-for-dead-Jamaican-farm-worker>

⁵ “Agricultural Deaths Preventable: Migrant Advocacy Group Calls On Provincial Government To Protect Workers: Snap Inspections, Coroner’s Inquest, And Criminal Investigation Needed To Show Zero Tolerance For Migrant Fatalities” (13 September 2010), Justicia for Migrant Workers, online: <<http://www.justicia4migrantworkers.org/>>

⁶ “Court Fines Supervisor \$22,500 in the Deaths of Two Jamaican Migrant Workers” (11 January 2012), Canadian Newswire, online: <<http://www.newswire.ca/en/story/904115/court-fines-supervisor-22-500-in-the-deaths-of-two-jamaican-migrant-workers>>

⁷ *Ibid.*

repatriations of SAWP workers for occupationally related illness or injury.⁸ In BC, there were 82 fatal injuries and 1,407 hospitalizations related to agricultural work from 1990-2000.⁹ Since BC joined the SAWP in 2004, there have been numerous deaths and injuries in farm worker transport in the province, including a 2007 crash that killed three workers and injured 14¹⁰; a toxic gas release in 2008 at a mushroom farm in Langley that killed 3 farm workers (who were not in the SAWP) and seriously injured 3 others¹¹; and an October 2010 vehicle accident involving workers from Greenway Farms in Surrey that critically injured one worker.¹²

The workers in the Greenway incident were riding on a pile of boxes in the back of a truck that had no seat belts. In 2009 Greenway farms, supported by Canada's agricultural industry, had launched a constitutional challenge to the migrant workers' ability to unionize on its farm. The farmers and the agricultural industry claimed that their very existence and economic viability were at stake. The workers and the UFCW argued that no worker in Canada – regardless of their nationality or status - should be denied basic collective bargaining rights. Although the Board ultimately ruled these

⁸ *Supra* note 5.

⁹ PE Saar, et al.. "Farm injuries and fatalities in British Columbia, 1990-2000" (2006) 97:2 Can J of Pub Health at 100-104.

¹⁰ "Van packed with farm workers crashes in BC, killing" (7 March 2007), CBC News, online: ><http://www.cbc.ca/canada/british-columbia/story/2007/03/07/bc-van-crash.html#ixzz19uijqjoW>>

¹¹ "BC mushroom farm accident kills three" (6 September 2008), Vancouver Sun, online: <http://www.canada.com/ottawacitizen/news/story.html?id=335e206a-652b-4d34-84cc-08d8de1a50f7>. The owners of the farm were prosecuted under BC's *Worker's Compensation Act*, but in September 2011 Crown prosecutors recommended that the owners be subjected to "hundreds of thousands of dollars" in fines in lieu of jail time. See J Saltman, "Mushroom Farm Faces Huge Fine", *Vancouver Sun*, (18 September 2011), online: <http://www.theprovince.com/Mushroom+farm+faces+huge+fines/5420649/story.html>.

¹² T Sandborn, "Hard Thanksgiving for Injured Farm Workers: BC Pickers were Hurt While Riding Unprotected with Produce Bound for Holiday Tables" (11 October 2010), The Tyee, online: <<http://thetyee.ca/News/2010/10/11/InjuredFarmWorkers/>>

workers could unionize it was too late – many of the Mexican workers had been repatriated, and the new bargaining unit voted for decertification.

This dissertation analyzes the Greenway decision and outlines similar cases. In 2008 temporary foreign workers at a Manitoba farm voted to decertify themselves just weeks after voting to join the UFCW. The UFCW continued its unionization efforts with some success and on September 21, 2009, a “breakthrough” collective agreement was reached between the United Food and Commercial Workers of Canada (UFCW) and Floralia Growers of Abbotsford, BC.¹³ The successful negotiations were notable for the promise of “justice and dignity” for the SAWP workers at Floralia Growers, and guarantee of certain rights and benefits, such as wage increases, procedures to address overtime hours, grievances and occupational health and safety improvements.¹⁴ However, in February 2012 workers at the farm applied to decertify their union in the midst of allegations of migrant worker blacklisting and foreign government interference in BC’s collective bargaining process.¹⁵

The Canadian government, foreign governments and some policy and academic experts have held up the SAWP as a “model” temporary foreign worker program with just a few flaws.¹⁶ Why then is it so difficult for these temporary foreign workers to

¹³ “Historic Victory for Migrant Farm Workers” (23 September 2009), UFCW Canada, Online: http://www.ufcw.ca/index.php?option=com_content&view=article&id=661&catid=5&Itemid=99&lang=en

¹⁴ *Ibid.*

¹⁵ T Sandborn, “Creating Centres for Migrants’ Universes” (16 February 2012), online: <http://m.thetyee.ca/News/2012/02/16/Migrant-Centres/>

¹⁶ See in general T Basok, “Canada’s Temporary Migration Program: A Model Despite Flaws”, Justicia for Migrant Workers, online: http://www.justicia4migrantworkers.org/bc/pdf/SAWP-A_Model_Despite_Flaws.pdf; J Henneby and K Preibisch, “A Model for Managed Migration? Re-examining Best Practices in Canada’s SAWP”, (2010) *Int’l Migr*, online: <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2435.2009.00598.x/full>

engage in collective bargaining? Why is the efficacy of a program judged by the survival of an industry that is premised on denying workers nationally and internationally guaranteed workers' rights? Is unionization the best way to address the SAWP's problems or are there other national or international legal remedies to pursue? This thesis addresses these questions.

1.2 The nuts and bolts of the SAWP

The SAWP was established in 1966 as the first temporary foreign worker program in Canada. It initially brought workers from former British colonies in the Caribbean to work temporarily on Canadian farms. Jamaica became the first country to send migrant workers under the SAWP in 1966, starting with 264 men. Trinidad and Tobago and Barbados followed in 1967, Mexico joined in 1974 and the Organization of Eastern Caribbean States¹⁷ joined in 1976. Only workers from these countries may participate in the SAWP. The program grew to include over 26,000 workers in 2009.¹⁸ Trade and labour cooperation has increased under the North American Free Trade Agreement (NAFTA) leading Mexico to supply the majority of SAWP workers coming to Canada, with BC employing a growing percentage of those workers.¹⁹

The SAWP is administered by Human Resources and Skills Development Canada

¹⁷ The OECS full membership comprises Antigua and Barbuda; Commonwealth of Dominica; Grenada; Montserrat; St. Kitts-Nevis; Saint Lucia; St. Vincent and The Grenadines.

¹⁸ Source: HRSDC, "Temporary Foreign Worker Program: Labour Market Opinion (LMO) Statistics, 2006-2009" (March 2010), online: >http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/stats/annual/table10a.shtml>

¹⁹ *Ibid.* After joining the SAWP in 2004, BC saw the number of its SAWP workers increase from 1,484 in 2006 to more than 3,768 in 2008.; For the effects of NAFTA on Mexican temporary labour migration to Canada see P Sawchuk, "Guest Worker Programs and Canada: Towards a Foundation for Understanding the Complex Pedagogies of Transnational Labour" (2008) 20:7/8 J Workplace Learning 492. For the effects of the North American Agreement on Labour Cooperation (the labour side-agreement to the NAFTA) on migration of Mexican farm workers see L Compa, "NAFTA's Labour Side Agreement and International Labour Solidarity" (2001) 33:3 Antipode 451.

(HRSDC) and Service Canada (SC), although Citizenship and Immigration Canada (CIC) is also involved in aspects of the program. The Government describes the program as matching “workers from Mexico and the Caribbean countries with Canadian farmers who need temporary support during planting and harvesting seasons, when qualified Canadians or permanent residents are not available.”²⁰ Only farms that produce “primary agriculture commodity sector products” may utilize SAWP workers.²¹ As of July 2011 farms in most Canadian jurisdictions are eligible.²² The SAWP currently operates within the framework of the Temporary Foreign Worker Program (TFWP), which includes a range of occupations allowing for various lengths of employment in Canada and even for eventual residency for some occupations.²³

The process of hiring SAWP workers begins with an employer completing a Labour Market Opinion (LMO) Form. The LMO form contains basic employer and employee information, including whether the employee request is for a direct arrival or transfer, the number of employees at the farm, and the types of agricultural commodities produced along with methods of production. The form allows the employer to request a

²⁰ HRSDC, *Ibid.*

²¹ *Ibid.* This includes: fruits, vegetables, greenhouses, nurseries, apiary products, tobacco, sod, flowers, Christmas trees and certain animal commodities (in Quebec only).

²² *Ibid.* Provinces participating in the SAWP as of July 2011 include: British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, New Brunswick, Nova Scotia and Prince Edward Island. Newfoundland, Yukon, Northwest Territories and Nunavut do not participate in the SAWP.

²³ HRSDC, online: <http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/fwp_forms.shtml> Other categories include exotic dancers, certain non-agricultural “low-skilled” occupations (i.e. clerical, retail, health, manufacturing, etc.) and live-caregivers who have the possibility of being granted eventual residency in Canada after a period of time of employment. The SAWP operates within the larger framework of the Temporary Foreign Worker Program. There are four “streams” under which foreign seasonal agricultural workers may now apply, including the SAWP. Other streams include “low-skilled” agricultural workers coming to Canada from non-SAWP countries, “high-skilled” agricultural workers (including apiary technicians and farm managers), and a “low-skilled” pilot project for foreign seasonal workers in certain mostly non-primary agricultural commodities.

specific worker or workers (the so-called naming of a worker) along with requesting any unnamed workers. The job offer information must indicate duties of the position, whether the position requires an English or French speaking worker and the requested arrival and anticipated departure date from Canada.

One of the basic purposes of the LMO form is to show that the employer has made efforts to “recruit and/or train willing and available Canadian citizens and permanent residents” for the position(s).²⁴ To that end, the government asks for a human resources plan, providing details of farm recruitment activities for Canadians in the relevant season including methods used to hire local workers or students. The wages for the requested worker must be specified on the LMO form, and are designed to illustrate that any wages offered by the employer are consistent with prevailing local wages in similar agricultural commodity work.

The other basic purpose of the LMO is to ensure that the housing and working conditions offered meet minimal provincial employment standards. Information on seasonal housing approval is requested, along with documented proof of seasonal housing inspection or, if that is not available, information on the previous year’s inspection along with a current housing inspection as soon as possible. Regarding working conditions, the LMO requests information on whether the position is part of a Union. If the worker is to be represented by a Union, specific information must be provided on the relevant Union Local, any consultations with the Union along with the Union’s position on hiring a Temporary Foreign Worker through the SAWP. Information is requested for any labour

²⁴ Citizenship and Immigration Canada, “Labour Market Opinion Basics” (10 June 2010), online: <<http://www.cic.gc.ca/english/work/employers/lmo-basics.asp>>

disputes in progress at the farm where the SAWP worker will be employed.

Along with the LMO form, the employer must submit a completed copy of the appropriate SAWP Employment Contract. There are currently six different Employment Contracts in the SAWP. There are two different Employment Contracts dealing with workers from Mexico or the Commonwealth Caribbean countries employed in Canadian provinces other than BC; two other contracts for SAWP workers from each of those areas who are employed in BC; and two other contracts for SAWP workers from Caribbean Commonwealth countries who wish to transfer to a new employer.²⁵ Differences among the employment contracts revolve mostly around allowed employer deductions to recover worker transportation and housing costs. Each of the SAWP Employment contracts contains some basic provisions covering:

- Scope and Period of Employment;
- Lodging, Meals and Rest Periods;
- Payments and Deductions of Wages;
- Insurance for Occupational & Non-Occupational Injury and Disease;
- Maintenance of Work Records And Statement of Earnings;
- Travel and Reception Arrangements;
- Obligations of the Employer and Worker; and
- Premature Repatriation.

To facilitate the administration of the program, Canada has signed a number of bilateral and multilateral agreements with Mexico and the Commonwealth Caribbean. These international agreements - or *Memorandums of Understandings* - contain basic provisions and protections for SAWP workers while in Canada. The Canada-Mexico SAWP operates according to a “bilateral *Memorandum of Understanding* (MOU) originally signed in 1974, which outlines the operational guidelines and responsibilities”

²⁵ HRSDC, “SAWP: Mexico, Caribbean 2011: Employment Contracts”, online: <http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/sawp_contracts.shtml#c01>

of each party in the program.²⁶ The agreement makes it the responsibility of Mexico and Caribbean Commonwealth countries to “assist” in the “recruitment, selection, and documentation of bona-fide agricultural workers” and in “maintaining a pool of workers who are ready to depart to Canada when requests are received from Canadian employers, and appointing agents at their embassies/consulates in Canada.”²⁷ Officials from source countries are also tasked in assisting Canadian government officials in the “administration of the program, and to serve as a contact point” for SAWP workers regarding any work-related complaints.²⁸

Despite the importance of the agricultural sector to the Canadian economy, SAWP workers do not have the opportunity to apply for permanent residence status. They may only remain in Canada for a minimum of six weeks to a maximum of eight months per year between January 1 and December 15, and they may return in subsequent years subject to the same entry and exit restrictions. The recruitment process on the Canadian side specifies certain minimal requirements, including experience in farming and being over the age of 18.²⁹ However, workers in the SAWP are selected by Mexico and participating Caribbean countries which generally require participants to have dependents in order to participate in the program.³⁰ This recruiting preference also results in a workforce that is more willing to work more hours. It is a strong incentive for SAWP

²⁶ HRSDC, “Temporary Foreign Worker Program”, (2010), online: <http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/stats/annual/foreword_sawp.shtml>.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ HRSDC, “Seasonal Agricultural Workers Program”, (2009), online:

<http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/ei_tfw/sawp_tfw.shtml>.

³⁰ This is viewed as an attempt by Canadian administrators to limit illegal overstays or attempts to gain permanent residency through marriage. See K Preibisch, “Local Produce, Foreign Labour” (2007) 72:3 Rural Soc 418 at 435.

workers to maintain their employment and remittances sent home - and to recognize the precariousness of their position in Canada.

1.3 Canadian labour law framework

Labour law in Canada falls under both federal and provincial jurisdiction, with both the federal Parliament in Ottawa and provincial legislatures able to enact labour legislation.³¹ The provinces have gained major jurisdiction due to various judicial rulings that have limited federal labour jurisdiction to a relatively small range of matters.³² Those labour matters under federal jurisdiction fall under the *Canada Labour Code*³³, while the provinces typically have labour legislation designated as Labour Relations or Industrial Relations Codes or Acts.³⁴ The section of the *Canadian Constitution Act (1867)* dealing with "property and civil rights" gives provinces a civil right over employment contracts, which typically place restrictions between employers and employees.³⁵ Federal jurisdiction over some employment matters arises out of S. 91 of the *Constitution Act (1867)* that gives the federal Parliament legislative authority over federal employees.

The *Canada Labour Code* is generally limited in its application to workers in "Works or undertakings connecting a province with another province or country"³⁶;

³¹ *Constitution Act, 1867* (UK), c 3., ss. 91 & 92.

³² *British Columbia Electric Ry. Co. v. Canadian National Ry. Co.* [1932] SCR 161; *Canadian Union of Public Employees v. Labour Relations Board (N.S.) et al.* [1983] 2 SCR 311; *United Transportation Union v. Central Western Railway Corp.* [1990] 3 SCR 1112.

³³ *Canada Labour Code*, RSC 1985, c L-2.

³⁴ "Labour Law in Canada", online: <<http://labourrelations.org/LabourLawCanada/LabourLawCanada.html>>.

³⁵ *Supra* note 33.

³⁶ "Division of Legislative Powers" Human Resources and Social Development Canada (HRSDC), online: <http://www.hrsdc.gc.ca/eng/lp/spila/elli/eslc/02Division_of_Legislative_Powers.shtml>. Examples of these works or undertakings include railways, bus operations, trucking, pipelines, ferries, tunnels, bridges, canals, telephone and cable systems.

international shipping, air transport, communications, banks, federal crown corporations and defined operations “declared by Parliament to be for the general advantage of Canada or of two or more provinces.”³⁷ Despite the federal jurisdiction over international matters, including the subjects of naturalization and aliens, most temporary foreign workers in Canada – including SAWP workers – are deemed by the federal government to fall under provincial jurisdiction.³⁸

As of February 2012, all Canadian provinces with the exception of Ontario and Alberta grant collective bargaining rights to farm workers through provincial labour legislation.³⁹ Alberta has the most extensive prohibition, banning agricultural workers from engaging in any type of collective bargaining activity.⁴⁰ Ontario was the scene of a protracted legal battle beginning in the 1990s. An NDP government extended full collective bargaining rights to farm workers in the province in 1994,⁴¹ only to have the legislation repealed by a Progressive Conservative government the following year.⁴² The current legislation in Ontario represents a modified structure of farm worker associations that nevertheless excludes farm workers from collective bargaining provisions available

³⁷ *Ibid.* Examples of operations deemed to be for the national advantage of Canada include flour, feed and seed cleaning mills, feed warehouses, grain elevators and uranium mining and processing.

³⁸ CIC, “Temporary Foreign Workers: Your Rights and the Law” online: <<http://www.cic.gc.ca/english/work/tfw-rights.asp>>. Section 91 of the Constitution Act, 1982 outlines the “Peace, Order and Good Government” [POGG] powers vested in the federal government, and section 91(25) specifically grants federal jurisdiction over naturalization and aliens.

³⁹ T Claridge, “Farm Workers’ Inability to Bargain Violates Charter” (28 November 2008) *The Lawyers Weekly*, online: <<http://www.lawyersweekly.ca/index.php?section=article&articleid=811>>

⁴⁰ *Alberta Labour Relations Code*, C. L-1

⁴¹ *Agricultural Labour Relations Act, 1994*, S.O. 1994, c. 6 (repealed 10 November 1995. See: 1995, c. 1, s. 80 (1)).

⁴² *Labour Relations and Employment Statute Law Amendment Act, 1995*, S.O. 1995, c. 1, Sched. A, passed by the Mike Harris government on November 10, 1995.

to most other workers through provincial labour legislation.⁴³

1.3.1 Law and employment in the SAWP

In 2011, the hourly wage rate for SAWP workers in British Columbia was \$9.28.⁴⁴ This is compared to the BC Minimum hourly wage of \$8.75 as of May 1, 2011, which is increasing to \$9.50 after November 1, 2011.⁴⁵ Under new guidelines issued by HRSDC, the Temporary Foreign Worker (TFW) Directorate now reviews SAWP wages to "ensure that wages being paid to temporary foreign agricultural workers are consistent" with Canadian farm workers' wages performing similar tasks.⁴⁶ Adjusted SAWP wages must equal or exceed provincial minimum wages. If provincial minimum wages remain stagnant for long periods, as occurred in BC under the Liberals from 2001-2011 or Ontario under former Premier Mike Harris, SAWP wages tend to remain below requirements for a living wage.⁴⁷

The Canadian agricultural industry often defends the SAWP by pointing out the shortage of agricultural labour in Canada.⁴⁸ Typically this defense is presented within the

⁴³ *Agricultural Employees Protection Act*, SO 2002, c 16; *Ontario Labour Relations Act*, SO 1994, c 1.

⁴⁴ BC Agriculture Council, "2010 Regional SAWP Meeting Notes" (26 October 2010), online: <<http://bcac.bc.ca/userfiles/file/wali/2010%20Regional%20SAWP%20meeting%20notes.pdf>>.

⁴⁵ BC Premier Christy Clark announced the minimum wage increase shortly after taking office in March 2011. The minimum wage in BC increases to \$9.50 as of November 1, 2011, before reaching the target of \$10.25 in May 2012.

⁴⁶ HRSDC, "Wage Rates" (7 September 2011), online: <http://www.rhdcc-hrsrc.gc.ca/eng/workplaceskills/foreign_workers/questions-answers/agricultural.shtml#w01> The TFW Directorate adjusts SAWP wages the first of January of each year.

⁴⁷ The Ontario rate for agricultural work after 1995 exceeded Ontario's general minimum wage rate of \$6.85 - a rate that went unchanged during Harris Conservative government from 1995-2002 and is considered far below the requirement for a "living wage." See Canadian Centre for Policy Alternatives, "Working for a Living Wage 2010", online: <<http://www.policyalternatives.ca/livingwage2010>>.

⁴⁸ Alberta Milk, "Farm Labour Initiative" (2009), online: <http://www.albertamilk.com/farmlabour/Farmlabour.aspx>. The dairy industry in Alberta is particularly affected by farm labour shortages, due to higher wages offered in work related to the petroleum industry.

context of the comparative unreliability of resident or citizen labour.⁴⁹ This then raises a question: What exactly is it that makes farm owners believe that Mexican or Caribbean farm labour is more reliable than Canadian labour? Is this an economic imperative, a predisposition, or a lack of desire for Mexicans or Caribbeans to do anything else? Do the civil rights of Canadian citizens and permanent residents somehow make them "unreliable" for agricultural work? This thesis will illustrate how throughout the 20th century the unattractive nature of agricultural work has often resulted in the use of captive or economically subordinate populations; yet other industries with demanding work continue to attract Canadian labour. Should we be satisfied with such characterizations in Canada today - especially in light of the nature of the work?

This question is particularly important because one of the distinctions of agricultural work is that it is exceptionally dangerous, with work-related injuries a common occurrence. As noted above workplace accidents are not uncommon, but the long-term effects of working on farms can also be hazardous. In 2004, a report by the Ontario College of Family Physicians linked the use of pesticides on Ontario farms to increased rates of cancer and neurological diseases.⁵⁰ Workplace safety regulations are in place, but the actual enforcement of these regulations when it comes to SAWP workers is questionable.⁵¹ Hours of work and minimum wage provisions in provincial labour codes are generally applicable to migrant workers within Canada but again there is some uncertainty in the actual application of these requirements. Although federal government

⁴⁹ Basok, *supra* note 16.

⁵⁰ M Sanborn, et al, *Pesticides Literature Review* (Toronto: Ontario College of Family Physicians, 2004) at 13-16.

⁵¹ Preibisch, *supra*.note 30 at 444.

officials are theoretically responsible for oversight of the program, in practice officials in Ottawa remain detached from participants from the time workers have entered Canada and begin working at their farm to the time when they are driven to the airport and flown back to their home countries. In addition, federal government officials are supposed to act to protect participants' rights but Canadian officials have been alleged to act more often in favour of employers' interests.⁵² Officials from SAWP workers home countries – who should nominally advocate on behalf of their citizens – nevertheless often act in the interests of the employer to protect the existence of the SAWP, and the remittances sent home by program workers.⁵³ The difficulty with participation in the SAWP is that the structure and operation of the program may hamper the ability of migrant workers to develop a level of worker consciousness that could challenge the restrictive structure of the program.

1.4 Existing literature on the issue

There is clearly a problem here – and it is not the main purpose of this thesis to expose this problem. Many other scholars have already done this quite effectively. Sawchuk's analysis clearly shows that guest workers in Canada today are “perhaps the closest approximation to the US system of chattel slavery” with many rights to health and safety limited, social benefits restricted, or freedom of movement severely restricted.⁵⁴ This is supported by interviews containing accounts of migrant workers comparing “life

⁵²*Ibid.* at 433. Preibisch provides an account of one government official urging a farmer complaining about his SAWP workers to threaten them (“tell them they're going home.”).

⁵³ S Ferguson, “Conditions Tough for Canada's Migrant Workers” (11 October 2004) Maclean's, online: <<http://www.encyclopediecanadienne.ca/articles/macleans/conditions-tough-for-canadas-migrant-workers>>.

⁵⁴ Sawchuk, *supra* note 19 at 500-501.

and work in Canada to slavery.”⁵⁵ My own field research revealed deplorable housing conditions for some SAWP workers on a Fraser Valley farm, with some workers drinking untreated water and forced to live in a converted refrigeration unit.⁵⁶

Gonzalez and Rodriguez pay particular attention to the vulnerability of SAWP workers and their analysis reveals that the Canadian government has failed to learn from previous mistakes in implementing guest worker policies. They identify two major flaws in the SAWP. The first is the lack of a permanent residency option in the program, which they ascribe to unwillingness on the part of Canadian society to absorb unacceptable migrants on the basis of race or social status.⁵⁷ This is an exclusionary policy that mirrors other patterns historically directed towards guest workers in settler societies. The lack of any permanent residency option distinguishes the SAWP from the high-skilled stream of Canada’s Temporary Foreign Worker Program, and the Live-in Caregivers program.⁵⁸ Some scholars attribute this to unwillingness on the part of Canadian society to absorb unacceptable migrants on the basis of race or socio-economic status.⁵⁹

⁵⁵ EE Grez, “Harvesting Seeds of Justice: The Plight of Migrant Farm Workers in Ontario” (2005) 68/69 Women and Environments Int’l Magazine 16

⁵⁶ Lucy Luna, Coordinator of AWA/UFCW Migrant Worker Support Centre, interview by author, Abbotsford, British Columbia, (22 August 2010).

⁵⁷ Gonzalez and Rodriguez, *supra* note 59.

⁵⁸ CIC, “Working Temporarily in Canada: The Live-in Caregiver Program” (3 February 2011), online: <<http://www.cic.gc.ca/english/work/caregiver/index.asp>>. The Live-in Caregivers Program allows foreign citizens to enter Canada on work permits provided they are qualified to provide care for children, elderly persons or persons with disabilities in private homes without supervision. Live-in caregivers must live in the private home where they work in Canada. A permanent residency option is available to live-in caregivers who have completed 24 months of authorized full-time employment in Canada or accumulated 3,900 hours of authorized full-time employment within a minimum of 22 months. The work experience must be acquired within four years of the date of arrival.

⁵⁹ AG Gonzalez and OR Rodríguez, “Patriarchy and Exploitation in the Context of Globalization” 39:2 (2006) Lab Cap & Soc 126 at 127. However, the same could be said for live-in caregivers, who are nevertheless given a pathway to Canadian citizenship. One possible explanation is that live-in caregivers, a large percentage of which come from the Philippines, are more likely to speak one of Canada’s official languages (i.e. English in the case of Filipino live-in caregivers).

The second flaw is the paradoxical nature of the program. For the SAWP program to be successful, it must offer a lower paid, more compliant, thoroughly disciplined, and easily disposable workforce. There has been significant research into the benefits of SAWP workers to agricultural employers, and their defense of the program. These benefits include the provision of a “flexible” workforce with limited rights relative to domestic workers.⁶⁰ Employers have the advantage of federal and even provincial government assistance in selecting, dispatching, and disciplining workers provided at no cost by supplying countries. Preibisch notes that throughout the 20th century, the unattractive nature of agricultural work has often resulted in the use of captive or economically subordinate populations; yet other industries with demanding work continue to attract domestic labour.⁶¹

There is also a large gender imbalance in the program as men constitute the overwhelming number of participating workers. Under the SAWP, employers are specifically permitted to request workers by name.⁶² Only in 1989 did employers begin requesting women workers in the SAWP.⁶³ Despite a slight uptick in female participants in recent years, the program remains overwhelmingly male.⁶⁴ Male and female workers are hired to perform specific tasks according to gender, as well as by country of origin, in

⁶⁰ Preibisch, *supra*.note 30.

⁶¹ *Ibid.* at 430.

⁶² The total number of “named” workers must be specified in the LMO form. See Service Canada, “Application for a Labour Market Opinion – Seasonal Agricultural Workers Program”, (2012), online: <[http://www.servicecanada.gc.ca/eforms/forms/sc-emp5389\(2012-01-008\)e.pdf](http://www.servicecanada.gc.ca/eforms/forms/sc-emp5389(2012-01-008)e.pdf)>.

⁶³ K Preibisch and EE Grez, “Migrant Women Farm Workers in Canada” (July 2008), online: <http://www.rwmc.uoguelph.ca/cms/documents/182/Migrant_Worker_Fact_Sheet.pdf>.

⁶⁴ *Ibid.* For example, Ontario in 2006 received 15,576 SAWP workers with only 393 being women, representing at 2.5% the highest proportion of women to date. Seventy five percent of those women came from Mexico, 18 percent from Jamaica, and the remaining from Barbados and Trinidad and Tobago.

order to prevent worker fraternization or unity in the face of oppressive employer labour practices.⁶⁵ The overwhelming male bias is justified by the legal structure of the program, and often rationalized by employers through the misconception that women do not wish to participate in particular farming occupations, or in temporary international migration in general.⁶⁶ Language also plays a key role in this selection, as workers are picked according to different languages spoken - a process that makes inter-worker communication difficult, if not impossible, and is designed to frustrate efforts at worker solidarity towards any problems in labour conditions.

The SAWP represents immigration policy acting as a “powerful tool” in the regulation of labour markets.⁶⁷ Canada's approach to temporary foreign workers purposefully favours highly skilled temporary foreign workers over those temporary workers in the least desired, lowest paid sectors of the Canadian.⁶⁸ The increased dichotomy between skilled and unskilled temporary foreign workers reflects Canada’s position within the larger processes occurring between labour and economic globalization. Santos provides the example of migrant workers as a focal point of tension

⁶⁵ Preibisch, *supra*.note 30 at 436.

⁶⁶ This rationalization is offered despite the fact that female migration from Latin America and the Caribbean to North America has been occurring for decades, and in recent decades the gender distribution among permanent migrants has been reasonably balanced. See I Omelaniuk, “Gender, Poverty Reduction and Migration” (2005), online: <<http://siteresources.worldbank.org/EXTABOUTUS/Resources/Gender.pdf>>

⁶⁷ Preibisch, *supra* note 30.

⁶⁸ In 2001, Ottawa began a pilot-program to admit the partners of highly skilled temporary workers for employment in Canada. This program does not apply to the partners of “low-skilled” temporary workers, including those workers in the agricultural commodity sectors of the SAWP. See Canadian Council for Refugees, “Non-Citizens in Canada: Equally Human, Equally Entitled to Rights”, Report to the UN Committee on Economic, Social and Cultural Rights on Canada's compliance with the International Covenant on Economic, Social and Cultural Rights, (March 2006) at 6-7. The *Spousal Employment Authorization* initiative includes the spouses and common-law partners of management and professional employees as well as those of other “skilled” workers. As of April 2011 the Pilot continues.

between national and transnational forces.⁶⁹ However, left unanswered is the role of national organized labour in tensions around the use of migrant workers, a use that reflects both the state's desire to reassert sovereignty and a broader conflict between North and South.⁷⁰ In exploring the relationship of law to globalisation, existing literature demonstrates the difficulty of law's engagement with migrant workers, an engagement that requires a reappraisal of the tools, ideas and agenda of legal theory.⁷¹ The relationship is made more complex by the temporary status of the legal subjects. Even the simplest concepts of law - starting from a core point that all "groups have disputes and the need to prevent and settle them" - proves challenging when applied to seasonal agricultural migrant workers.⁷²

SAWP workers remain with only temporary status in Canada with no prospect of family reunification or permanent residency to enable sponsorship of families. Many workers return to Canada for periods of 8 months per year – some for year and after year, for decades - with women and children left behind in migration source communities in Mexico and the Caribbean.⁷³ The SAWP is structured to favour applicants with families as those workers are believed to be less likely to want or attempt to stay in Canada after the growing season is over. The program is thus at odds with the *Immigration and*

⁶⁹ B De Sousa Santos. *Towards a New Legal Common Sense* (Chicago: Northwestern University, 2003) at 1-14. Santos notes that the end of the period of "organized capitalism" in the 1970s "seems to coincide with the demise of permanent migration and settlement." While only four countries (USA, Canada, Australia and New Zealand) accept permanent migrants conferred with eventual citizenship rights as a matter of policy, virtually all countries are participating in some sort of system of temporary migration scheme.

⁷⁰ *Ibid.*

⁷¹ W Twining, *Globalisation and Legal Theory* (London: Butterworths, 2000)

⁷² *Ibid* at 76.

⁷³ Canadian Council for Refugees, *supra* note 68.

Refugee Protection Act's stated objective to reunite families in Canada.⁷⁴ It is also not consistent with Canada's historic policy of allowing farm worker migrants to eventually obtain residency and citizenship.⁷⁵

The chronic separation from families and withholding of national citizenship rights or permanent residency – or indeed any prospect of permanent residency to those participating in the SAWP – creates an inequality that puts these temporary workers within the bounds of legal discrimination. Moreover, the fact that temporary foreign workers are rapidly becoming the core workforce for horticulture operations in Canada has profound implications for the general immigration debate in Canada. These workers are in a much more vulnerable position than Canadian workers in the same industry and, as has been more widely visible in the United States, are especially vulnerable to widespread exploitation.

Although there has been considerable study of the social condition of SAWP workers in Canada⁷⁶, including the inadequate legal protections for those workers⁷⁷, legal studies of the response to these problems through unionization are largely absent from the literature. Partially this is because of the recent nature of unionization efforts directed at

⁷⁴ *Immigration and Refugee Protection Act*, SC 2001, c 27 s 3(d).

⁷⁵ CIC, "Forging Our Legacy: Canadian Citizenship and Immigration, 1900–1977 - Canada Welcomes Dutch Farmers" (1 July 2006), online: <<http://www.cic.gc.ca/english/resources/publications/legacy/chap-5a.asp#chap5-8>>. Citizenship and Immigration's website contains many historic accounts of European farm worker migration to Canada. This excerpt chronicles the immigration of Dutch farming families throughout the 1950s.

⁷⁶ See J Hennebry, "Bienvenidos a Canadá? Globalization and the Migration Industry Surrounding Temporary Agricultural Migration in Canada" (2008) 35:2 *Can Stud in Population* 339; Gonzalez and Rodriguez, *supra* note 59; Preibisch, *supra* note 30.

⁷⁷ P Taran, E Geronimi, *Globalization, Labor And Migration: Protection Is Paramount* (Geneva: ILO, 2002). Taran and Geronimi argue that the role of social partner and civil society organizations in promoting comprehensive, sustainable and standards-based approaches to migration by governments is essential.

SAWP workers. Studies that focus on the legal problems encountered by workers participating in the SAWP have tended to focus more on the social conditions of the workers and the failures of the program rather than examining the practical impacts of any potential solutions to those problems.⁷⁸ Recently launched legal aid projects for temporary foreign workers tend to focus on legal assistance for workers in immediate need, rather than taking a scholarly approach towards analyzing the effects of collective organization.⁷⁹ Other studies that have focused on unions and migrant workers have tended to adopt a solely Marxist approach emphasizing the value of class struggle.⁸⁰

1.5 Need for research

How will unionization help to address the flaws in the SAWP, a program that has existed for over 40 years and flourished in a non-union environment? This is one of the central questions of this thesis and existing literature has not definitively answered this question. The collective agreements that have been initiated within the SAWP framework in the past several years represent a recent and fluid legal development. The prospect of SAWP workers going on strike is one that until recently would have been dismissed as operationally impractical. The recently negotiated collective agreements are unprecedented in that they apply to workers operating in a program that legally allows for repatriation of workers and selectivity in hiring. Both of these practices have been

⁷⁸ Grez, *supra* note 55.

⁷⁹ An innovative concept recently launched by MOSAIC includes a one year legal education and facilitation project for temporary foreign workers. This project, funded by the Law Foundation of British Columbia, will deliver workshops and presentations in Vancouver/Fraser Valley, Penticton, Prince George and Victoria. The project will also prepare public legal education materials for temporary foreign workers and community workers working with or interested in temporary foreign workers. The project is delivered in collaboration with settlement agencies in Penticton, Prince George and Victoria.

⁸⁰ J Butovsky, M Smith, "Beyond Social Unionism: Farm Workers in Ontario and Some Lessons from Labour History" (2007) 59 Labour, online: <<http://www.historycooperative.org/journals/llt/59/butovsky.html>>.

recently used to obstruct unionization.

The nature of agricultural work and the historical resistance to Canadian agricultural worker unionizations, combined with the legal swathe wrapped around temporary migrant farm workers, have combined to act against the development of collective bargaining on Canadian farms. This has changed dramatically within the last decade, but scholarly attention has not kept pace with rapid legal developments in this area. The need for scholarly analysis of unionization and SAWP workers is prompted by the expanding use of temporary foreign workers in Canada. The Canadian government has recently expanded Service Canada's Temporary Foreign Worker Program (TFWP) to cover agricultural workers. There are several indications that the Canadian government is moving in this direction as a means of avoiding the regulatory structures offered by the SAWP. Part of this is due to the process of "ordering" workers through third-party agencies. This is becoming increasingly common in Canada and the TFWP allows for a less restrictive role for third party agencies than the SAWP.⁸¹ Hennebry notes that family members and occasionally lawyers most often facilitate workers' entrance into the SAWP. Her work on networks relating to the operation of the SAWP reveals an extra-legality in the form of individuals similar to the "coyotes" that facilitate entrance for Mexican migrants into the United States. In relation to entering the SAWP, these individuals are offering to get Mexicans into the program for a fee, often a rather large amount.⁸²

Does unionization run contrary to de-regulation of government involvement in the

⁸¹ Hennebry, *supra* note 76.

⁸² *Ibid.* at 347.

use of temporary foreign workers? Hennebry has “described a process by which time and space are not given and absolute, but are increasingly “compressed” by new transportation and communication technologies.” This has had the effect of increasing the networks of temporary migration, and is at least partially responsible for the huge increase in SAWP and TFWP participation within the last decade. Arguably, through these advancements, temporary migration networks have been made more extensive and robust.⁸³ The formation of these networks is perhaps one of the most disturbing aspects of the rise in SAWP and FWP participation. They are “mesostructures” forming around temporary migration patterns, encouraging “individuals, groups, or institutions” to “take on the role of mediating between migrants, their employers, and political/economic institutions” with the goal of profiting off of migrants.⁸⁴

The need for analysis of unionization and SAWP workers is made more urgent by these developments. They may render migrant workers even more “vulnerable, temporary, and tertiary; providing a captive market for an expanding migration industry comprising third-party recruiters, communication and transportation service providers, and other private intermediaries.”⁸⁵ As Sawchuk notes, three other sectors have featured prominently in recent migrant worker policy discussions, including hospitality (e.g. hotels, seasonal resorts), transportation (i.e. trucking), and light manufacturing (food processing, plastics and other consumer products).⁸⁶ This has profound implications not

⁸³ *Ibid.* at 341.

⁸⁴ *Ibid.* at 345. “Mesostructures” in this context means a complex web of actors, including the interaction between government officials, and employers as well as recruiters and immigration brokers or consultants. It may also implicate unions and other aspects of civil society.

⁸⁵ *Ibid.* at 347.

⁸⁶ *Supra* note 19.

only on the rights of migrant workers in these sectors but if expanded significantly the “economic effects on broader labour market conditions would likely multiply, spreading well beyond these sectors.”⁸⁷ The use of temporary foreign workers may also be displacing the use of domestic workers from traditionally lower income groups in some provinces. Preibisch notes that while the number of hourly employees fell dramatically in both Ontario and Quebec from 1983 to 2000, participation in the SAWP increased dramatically; there is also evidence that temporary foreign workers have displaced First Nations workers in some industries in Manitoba.⁸⁸

The questions addressed in this dissertation deal with legal issues that until recently have never been raised in Canadian courts. There is scholarly research on unionization of Canadian agricultural workers and the historical presence of migrant farm worker populations in Canada, but there is extremely little in the way of legal analysis relating to ongoing legal court challenges, unionization campaigns and SAWP workers. This dissertation provides the first comprehensive effort to examine the Canadian legal response to collective bargaining and temporary migrant farm workers. The dissertation does not consider unionization, agricultural work, or migrant workers as separate historical actors. It considers them together within a historical and legal context that has, up until very recently, preempted the use or even the introduction of collective bargaining as a remedy to chronic problems within the SAWP.

⁸⁷ *Ibid.* at 496-497.

⁸⁸ *Supra* note 30.

1.6 Theory and methodology

In my prior work,⁸⁹ I developed a theory of “labour development” as part of an examination of the relationships between the developed and developing world in regulating labour. I argued that the type of social instability caused by economic globalization is not taken into account by conventional Western labour law, and I raised two main points in my conclusion. First, labour development programs as they currently operate are a fundamentally inadequate response to deal with the problems posed to workers in developing countries by economic globalization. Second, the structure of these programs may perpetuate a hierarchy of haves and have nots, or even an informal imperial community.⁹⁰ By definition, such a community is composed of unequal members.

This dissertation builds on this theoretical analysis and applies it to a very specific community – temporary migrant workers in Canada and employed through the SAWP. The aim of this dissertation is not to combine various theoretical approaches into a coherent whole. Rather, my intention is to draw from many theoretical approaches in order to assist this dissertation’s goals. These goals include exposing the operation of law within the context of the SAWP and to outline potential changes in the legal framework that could aid in addressing problems with the program. Put simply, legal theory is used in the service of these objectives and not vice versa.

⁸⁹ R Russo, *Labour Development: The Improbable Reconciliation of Globalization with the Rights of Workers* (LLM Thesis, Vancouver: UBC, 2006).

⁹⁰ J Tully , "On the Nature of the 'New' Imperialism", Lecture at Demcon Colloquium on Political, Social, and Legal Theory session, Victoria, BC, (30 September 2005).

I am referring to “legal theory” here as an ecumenical term. My use of theory in this context is not to adapt a particular theory in a narrow sense. Instead, my usage of theory is a meta-analysis drawn primarily from law but also from history, political science and economics. The relationship between theory and data in this dissertation should add to the scholarly movement towards a general legal methodology that will assess the role of national and international law, governments, non-governmental actors and institutions responding to the phenomenon of temporary labour migration.⁹¹ The methodology utilized in this dissertation is aimed at developing a legal framework that allows for an effective response to conditions arising from this phenomenon.

The primary methodology that I utilize consists of legal research and analysis into the political and legal responses to temporary migration of agricultural workers, focusing on the unionization of workers in the SAWP. It is concentrated on national and international legal responses relating to collective bargaining and SAWP workers. The heart of this thesis lies in the legal analysis of specific legal instruments available as potential remedies to the problems faced by SAWP workers in Canada. However, the broader context of this thesis lies in the exploration of law and inequality. The research here does not directly incorporate gender or language analysis, but these are important markers of the presence of inequality. The inequality lies within the structure of the SAWP, and the roots of the program.

Legal research and analysis generally encompasses research into applicable jurisprudence, legislation and other legal documents that relate to the SAWP program,

⁹¹ A Paulus, “From Territoriality to Functionality? Towards a Legal Methodology of Globalization”, online: <<http://www.cpogg.org/paper%20amerang/Andreas%20Paulus.pdf>>.

unionization and law. For this dissertation it involved analyzing relevant and recent Supreme Court of Canada judgments. I examined the arguments contained in the factums of both the UFCW and the Ontario government. There were also several intervener briefs submitted by interested third parties in various actions that were examined. These included briefs arguing in support of governments, employers, unions and other non-governmental organizations. The methodology involved researching and analyzing lower court and tribunal decisions, including farm employers' constitutional appeals at the BC Labour Relations Board directed against unionizing SAWP workers in BC. I also analyzed the federal SAWP Contract of Employment within the framework of relevant provincial labour legislation, including the BC *Labour Relations Code*⁹² and the Ontario *Agricultural Employees Protection Act*.⁹³ I examined provincial labour legislation, unionization campaigns and decisions from Manitoba, Alberta and Quebec as well. These sites represented a sample of union activity, or lack of activity due to restrictive provincial labour legislation.

My research and analysis extended into signed collective agreements in BC covering SAWP workers between the UFCW and Floralia farms, and UFCW and Sidhu & Sons farms. It also encompassed international law, including relevant ILO labour conventions dealing with freedom of association and collective bargaining; UN instruments such as the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*⁹⁴; and the North American Agreement

⁹² *Labour Relations Code*, RSBC. 1996, c 244, s 2(6)(1).

⁹³ *Agricultural Employees Protection Act*, SO 2002, c 16

⁹⁴ *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, 2220 UNTS at 3.

on Labour Cooperation (NAALC), signed under the auspices of the NAFTA. Both the national and international legal migrant labour analysis is situated within the unique historical context of unionization and farm workers in Canada.

The legal research and analysis's purpose was to test the supposition that unionization will correct the problems identified above and allow the SAWP to better function in those workers' interests. Combined with interview data and the comparative analysis with the United States, it assisted in mapping outcomes regarding unionization of SAWP workers. The research plan involved accessing these documents and information through government archives located online and in physical locations. My plan took into account that, depending on the information obtained, there may well be no clear answer to the question of unionization of SAWP workers. Instead, the legal research was designed to find pieces of data relating to this question, and the legal analysis was designed to try to fit the pieces together in order to map outcomes and support the conclusions reached under each section.

The causes and effects of farm labour migration are considered in this dissertation within the historical context of the SAWP's adoption. Any analysis of labour migration must also draw upon elements of economic theories of international migration as part of the context of the exercise, but economic theories have otherwise not been extensively considered. These are areas that have been extensively covered by scholars in recent years and they tend to focus on the economic effects of labour migration rather than the legal responses to the phenomenon.⁹⁵ The focus here is primarily on the response of

⁹⁵ For economic considerations of immigrant labour and work, see A Islam, "The Substitutability of Labor Between Immigrants and Natives in the Canadian Labor Market: circa 1995" (2009) 22:1 J of Population Econ 199; For historical considerations, see Sawchuk, *supra* note 19.

unionization in Canada, but other legal responses such as NGO involvement, public lawyering responses and jurisprudential considerations of national and international laws are examined as well.

1.7 A map for this dissertation

Chapter 2 provides an historical and conceptual introduction to agricultural work in Canada, and Canadian labour laws in relation to the agricultural sector. The Chapter begins with an historical overview of farming and farm workers in Canada. It then examines the growing shortage of agricultural labour that accompanied farm mechanization and urbanization of the labour force. The development of the SAWP was a response to these chronic labour shortages that became increasingly acute after the Second World War. The federal government tried various schemes to solve this problem leading up to the creation of the SAWP, and this Chapter analyzes them for their effectiveness. In response to continuing farm labour shortages, the farm lobby, particularly in Ontario, increasingly lobbied the federal government to allow Caribbean farm workers to enter Canada as seasonal workers.⁹⁶ The difficulties in obtaining and retaining a “reliable” agricultural workforce meant that farm labour required a type of worker that was not only cheap but also with severely limited freedoms.⁹⁷ Historically, the agricultural sector in Canada utilized both permanent migrants and temporary foreign

⁹⁶ JL Findeis, *The Dynamics Of Hired Farm Labour: Constraints And Community Responses* (New York: CABI, 2002) at 177.

⁹⁷ T Basok, “Free to Be Unfree: Mexican Guest Workers in Canada” (1999) 32:2 Lab Cap Soc 192. Farm labour has been referred to as “unfree.” The phrase “unfree labour” is used in comparison with wage labour or free labour, concepts that in Marxist terms refer to economic compulsion. Marx did not actually use the term “unfree labour” in his work.

workers from Latin American and the Caribbean⁹⁸ but for the past 40 years, the Canadian government has had long-standing reciprocal agreements through the SAWP to facilitate the temporary entry of agricultural workers into the country. I examine the evolution and recent trends in temporary labour migration to Canada and the historical response of Canadian unions to these trends. The historical review is designed to set the context for the legal analysis and comparisons that follow in the following chapters.

Chapter 3 discusses the legal context around agricultural labour, SAWP workers and collective bargaining. The historic agricultural economic model hindered unionization efforts. Farm labour unionization was also hampered by the dominant model of collective bargaining in Canada, one that assumed the norm of an adult, white male citizen holding a single job at a stationary work-site.⁹⁹ The unionization process accelerated with a 2007 ruling by the Court granting limited constitutional protection to collective bargaining in Canada under Section 2(d) of the *Canadian Charter of Rights*.¹⁰⁰ The chapter also analyzes decisions in the BC Labour Relations Board, Ontario Court of Appeal and the Supreme Court of Canada significantly affecting farm workers' collective

⁹⁸ Applied History Research Group, "The Peopling of Canada" University of Calgary (1997), online: <http://www.ucalgary.ca/applied_history/tutor/canada1891>. Towards the end of the nineteenth century, Canada wanted a permanent immigrant population of agricultural settlers established in its newly acquired western provinces and territories. In addition to British immigrants, Eastern European immigrants recruited as farmers and farmworkers included Mennonites and Doukhobors from Russia and Germany, Ukrainians and Icelanders. As late as the 1950s, Canada continued to recruit permanent European migration to work in rural areas as farmhands. See Canadian Encyclopedia, "Portugal and Canada", online: <<http://www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=A1ARTA0006423>>

⁹⁹ L Vosko, *Precarious Employment: Understanding Labour Market Insecurity in Canada* (Montreal: McGill, 2006) at 375.

¹⁰⁰ *Health Services and Support-Facilities Subsector Bargaining Association v. British Columbia*. [2007], 2 SCR 391, 2007 SCC 27.

bargaining rights.¹⁰¹ The chapter's research was conducted through use of Union and Government archives, research through legal databases, and interview and questionnaire data from union and federal government workers. This chapter also analyzes the SAWP Employment Contract and compares it to collective agreements covering SAWP workers.

Chapter 4 performs a focused, qualitative analysis of unionization of migrant farm labour in the United States, and compares outcomes with the situation in Canada. U.S. labour law is examined and the history and law relating to migrant farm labour is analyzed. The comparison analyzes similarities and differences in the recent legal responses to alleged violations of law respecting unionization of workers in the United States and Canada. The U.S. analysis focuses on migrant workers in the United States under the H-1A Visa, a temporary migrant farm worker program. The common thread includes complaints related to workers' efforts at unionization.

Chapter 5 performs a qualitative and comparative analysis. The framework is the North American Agreement for Labour Cooperation that includes the United States, Canada and Mexico. The case studies include complaints lodged through the NAALC mechanism against either Canada or the United States, regarding workers and collective bargaining rights within their respective territories. The efficacy of complaints directed through the NAALC, as well as the lack of activity related to Canada, are analyzed.

Chapter 6 examines the theoretical and practical applications of international law to SAWP workers. The international agreements that form part of the SAWP are basically administrative arrangements but they are also international in scope. This chapter defines

¹⁰¹ *Fraser v. Ontario (Attorney General)*, 2008 ONCA 760; *Ontario (Attorney General) v. Fraser*, 2011 SCC 20.

migrant workers and economic globalization within the context of SAWP workers and addresses theoretical conceptions of law in relation to those workers. I focus on exactly what kind of international law could emerge in this paradigm. The theoretical considerations here help to highlight the basis for politicians' and jurists' reluctance to apply international standards where Canadian labour laws or constitutional "protections" are already in place through instruments such as Canada's *Charter of Rights and Freedoms*. I then examine these international standards and Canada's limited accession to international human rights treaties affecting migrant workers.

The conclusion in Chapter 7 provides an overview and synthesis of the research findings. It comments on the original contributions, both theoretical and practical, of these findings to the relevant conceptual fields. It finally offer suggestions for future research, and some possible legal reforms to address some of the issues raised in the dissertation research.

2 - History of Agricultural Sector, Farm Labour Migration to Canada

The chapter is designed to set the context for the Canadian and international legal sections that follow. Building on the introductory chapter's considerations of the SAWP and collective bargaining, it will provide a historical framework and introduction to the phenomenon of farm labour migration to Canada and the origins of "guest worker" agricultural worker programs in Canada.¹ The purpose of this Chapter is to trace the development and evolution of seasonal agricultural migration to Canada in order to specifically map out certain elements inherent in the modern SAWP that continue to reflect traditional attitudes towards agricultural labour migration and migrant farm workers' rights in relation to collective bargaining.

The Chapter first provides a brief framework regarding labour migration and economic globalization. This framework underlies the history of farm labour migration to Canada leading ultimately to the creation of the SAWP. The chapter then provides a history of Canadian government attempts to satisfy chronic agricultural labour shortages throughout Canada. Farming operations in Canada are contrasted with evolving immigration policy. Portuguese agricultural labour migration to Canada is examined as this community represented one of the last permanent agricultural labour migrations to this country. The chapter then focuses on the advent of temporary agricultural based labour migration to Canada and the origins of the SAWP. Particular attention is focused

¹ The concept of "unfree" agricultural labour and incorporation of foreign labour into the Canadian farm labour context has been explored by scholars. See V Satzewich, *Racism and the Incorporation of Foreign Labour: Farm Labour Migration to Canada Since 1945* (New York: Routledge, 1991); Basok, "Free to be Unfree", *supra* note 97.

on the importance of the British colonial legacy in facilitating the creation of the SAWP, and the role of economic, racial, and political considerations that fuelled the development of the program. The conditions that have kept the SAWP in existence for over 40 years will be contrasted with the conditions specifically inherent in the program itself that mirror a more a general attitude in Canadian society towards race, workers' rights and temporary labour migration. Finally, the chapter analyzes the beginnings of the farm worker unionization movement in Canada. The agricultural labour movement is analyzed at the end of this chapter as it is an outgrowth of the historical conditions of Canadian farm labour as well as providing the context for the legal analysis in Chapter 3.

2.1 Framework for analyzing farm labour migration

A program such as the SAWP defines its participants in terms of the temporary transfer of labour as a commodity.² The historical-structural theoretical framework focuses on the transfer of value as a commodity has been applied in a variety of models, such as "Dependency theory" that originated following the Second World War. It is predicated on the notion that, due to asymmetrical patterns of trade and the nature of post-colonial relationships, resources flowing from developing to developed countries primarily benefit the latter.³

The various models of the historical-structural framework apart from dependency theory share some core similarities. The migrant's labour is seen as his or her most valuable commodity. The export of seasonal agricultural labour cannot engender

² HA Watson, "Theoretical and Methodological Problems in Caribbean Migration Research: Conditions and Causality" 31:2 Soc and Econ Stud 165

³ FH Cardoso, E Faletto, eds *Dependency and Development in Latin America* (Berkeley: University of California Press, 1979)

development on the same scale as that achieved by wealthier states. Transmission of this type of human capital alone does not foster a process of innovation as seen in the industrial revolution, nor does it allow the "periphery" to develop autonomous means "of technical innovation."⁴ As opposed to a circular development pattern, the historical-structural framework treats migration as a uni-directional exchange or transfer of labour as value.

The historical-structural framework borrows heavily from Marxist conceptions of class structure and the exploitation of labour relationships in an unequal relationship. The role of class conflict in this analysis ensures that the mechanisms for exploiting this relationship, as well as the resulting contradictory tendencies rooted in the relationship's structure, have to be explicitly managed.⁵ The organizing principle is that of capital accumulation and expansion with little room for developing workplace rights.⁶ The framework takes a "macroeconomic" approach involving a holistic examination of structural factors impacting labour migration, such as recruitment and compensation.⁷ The framework thus allows for distinction between individual motives for temporary labour migration and the function of structural changes that "propel aggregate population movements."⁸

The SAWP can be situated within this historical-structural framework.

⁴ M Vernengo, "Technology, Finance and Dependency: Latin American Radical Political Economy in Retrospect" (2006) 38:4 *Rev of Radical Pol Econ* 551.

⁵ Cardoso, *supra* note 3.

⁶ CH Wood, "Equilibrium and Historical-Structural Perspectives on Migration" (1982) 16:2 *Int'l Migration Rev* 298 at 302.

⁷ *Ibid.*

⁸ *Ibid.*

Fundamentally, it is a program whose entire premise is based on an unequal relationship between employer and employee. The inequality in relationships is more generally reflected in the relationships between Canada and the source countries for SAWP workers. This inequality fundamentally conflicts with law's formal commitment to equality or legal egalitarianism.⁹ SAWP workers fail to capitalize on law's promise of equal access to collective bargaining mechanisms. The injustice that may result from retaliatory SAWP worker deportation, for example, is one that Canadian workers never endure.

Moreover, a program such as the SAWP aims to turn migration into a movement that is always based on economic need – the need for economic transfer of labour. Migration under such a program must be made constant in a *qualitative* and *quantitative* sense, meaning that the migratory movement consists only of a set number of low-skilled, temporary, agricultural workers. This is outside of, and indeed in contradiction with permanent migratory patterns going back to the industrial revolution that are inherently unequal, at least qualitatively if not quantitatively.¹⁰ Economic globalization has altered this pattern only to the extent that the set number of SAWP workers in Canada has been gradually increasing over the past two decades. These considerations make it extremely difficult to conceive of reforming the program, for example by granting national citizenship or permanent citizen rights to these workers.

⁹ See D Howard, *The Primacy of the Political: A History of Political from the Greeks to the French & American Revolutions*, (New York: Columbia University Press, 2010). The Athenian leader Pericles likely first enunciated the Greek concept of equality before the law in 5th century BC. Although law was not designed to create full equality in life, law is supposed to ensure equal justice for all.

¹⁰ This has been the case at least since the Industrial Revolution, which accelerated the “uni-directional” migration away from rural, agricultural work to urban, industry based labour. See in general P Hudson, *The Industrial Revolution* (New York: Bloomsbury, 2009). This remains the case even under an economic points-based immigration system such as Canada's.

2.2 Overview of early Canadian farming

Prior to the industrial revolution and the development of farm machinery, farm operations consisted largely of manual labour. The industrial revolution modernized the farming industry as mechanized vehicles gradually replaced the oxen and the horse drawn cart as methods of plowing the land. The development of farm equipment such as tractors and hay bailers fundamentally changed farm operations. Farms became much larger, more mechanized, and evolved towards industrial agriculture. By the early 20th century new methods of farming and strains of wheat and crops were being researched so that farming could remain profitable. These new methods were developed at places such as the “experimental farm” at Indian Head, Saskatchewan.¹¹ Indian Head was part of a group of five experimental farms set up under the *Experimental Farm Station Act* of June 2, 1886.¹² The farm was intended to meet new settlers’ requirements for best local farming practices by providing reliable information gleaned from long-term scientific studies on field crops and horticulture.¹³

Following Confederation in 1867 authorities in Ottawa felt a need to “populate” the “empty” West while viewing the growing labour shortage on Western farms with some concern. Canada had passed its earliest immigration laws with a view to populating the

¹¹ AE Smith "The Encyclopedia of Saskatchewan Agriculture Canada Research Stations", online: <http://esask.uregina.ca/entry/agriculture_canada_research_stations.html>.

¹² The experimental farms were located at: Nappan, Nova Scotia; Brandon, Manitoba; Indian Head, North-West Territories; and Agassiz, British Columbia and Ottawa, Ontario – with the Central Experimental Farm at Ottawa acting as the headquarters for the Experimental Farms System.

¹³ New European settlers to Canada found themselves forming part of a loosely distributed rural population. These homesteaders needed information on new techniques of agricultural production. The Saskatchewan government came up with the idea of providing this information by train, since most settlers were close to railway stations, and so the “Better Farming Train” was launched in 1915. The trains traveled throughout rural Saskatchewan in early June, often stopping in two communities a day. See “Saskatchewan Settlement Experience” (2005), online: <<http://www.sasksettlement.com/display.php?cat=Agriculture&subcat=Better%20Farming%20Trains>>.

country as protection against civil disturbances or rebellion from the aboriginal and Métis populations. The *Immigration Act of 1869* established a so-called “open door” policy, with some restrictions and barriers placed on criminals, the ill and disabled, and the poor. In 1872 Ottawa passed the *Dominion Lands Act*¹⁴ giving male European and American immigrants free land in return for a promise to cultivate the land and live on it permanently.

“Open door” is a misleading term for Canada’s early migration policy as it was economically discriminatory and openly racist. Ottawa mainly focused on attracting farmers and labourers. These immigrants often worked as seasonal farm labourers, or in railway construction and mining in order to save funds to purchase their homesteads.¹⁵ In addition, government policy targeted white, northern European and American immigrants while attempting to exclude non-whites through measures such as the *Chinese Immigration Act 1885* also known as the *Head Tax Act*.¹⁶

The "Open door" policy formally ended with the enactment of the 1906 *Immigration Act*.¹⁷ Canada's new immigration law reflected the ideas of the Immigration Minister at the time, Frank Oliver. Oliver designed the act to exclude a wider range of "undesirables" and enable deportations. Significantly although the Act sought to limit the

¹⁴ *Dominion Lands Act, 1872* SC 1872, c.23, s.10.

¹⁵ N Kelly, M Trebilcock, *The Making of the Mosaic: A History of Canadian Immigration Policy* (Toronto: University of Toronto Press, 2000) at 132.

¹⁶ *Chinese Immigration Act 1885*, c 71. The Head Tax Act was particularly odious as thousands of Chinese workers had been brought into Canada as labourers to help build the Canadian Pacific Railway (CPR). See V Knowles, *Strangers at Our Gates: Canadian Immigration and Immigration Policy, 1540-2006* (Toronto: Dundurn Press, 2007) at 71-72. Between 1881 and 1884, as estimated 15,701 Chinese male migrants were allowed into British Columbia to help in the construction of the CPR. The head tax severely limited subsequent Chinese migration for decades. The head tax on Chinese immigrants remained in place until 1947.

¹⁷ *Immigration Act*), SC 1906, c 19.

role of immigration booking agents through reductions in bonuses, it allowed for bonuses to encourage migration of farmers and farm labourers.¹⁸

It is difficult overstate the importance of the 1906 *Immigration Act* in shaping patterns of temporary agricultural migration occurring a half-century later. The 1906 *Immigration Act* lasted for decades until new immigration legislation eliminated expressly racist immigration provisions. During this half-century - and despite Oliver's disdain for some Continental European immigrants - a significant number of these Europeans immigrated to Canadian farms. From 1896-1914, approximately one million continental Europeans migrated to work on Canadian farms.¹⁹

The Great Depression in the 1930s in particular brought a very sharp decline to European labour emigration to Canada. However, it also brought a temporary halt to the exodus of Canadian farm labour to depressed urban areas. Employment of farm labour actually increased during this period. By the late 1930s a glut of farm workers was making it more difficult for the urban unemployed to earn money in harvest work.²⁰ The outbreak of the Second World War in 1939 caused another seismic shift in labour and in farm production methods. Real wages for farm labourers had declined to a low of \$322 per year in 1933 before going back up somewhat to \$559 annually in 1941.²¹

¹⁸ *Ibid.*

¹⁹ D Avery, *Reluctant host: Canada's Response to Immigrant Workers, 1896-1994*, (Toronto: McClelland and Stewart, 1995) at 12, 24. The First World War, its aftermath and the Great Depression beginning in 1930 played on pre-conceptions of Anglo-Canadian worries over the slow "Canadianization" of certain continental European migrants who emigrated as farm laborers.

²⁰ M Horn, *The Depression in Canada: Responses to Economic Crisis*, (Toronto: Copp, 1988) at 35

²¹ Canada Department of Labour, *Labour Gazette* (Ottawa: Queens Printer, 1942) at 851. For comparison, the post-war decline in small farm operations and proliferation of large agricultural operations meant that by the 1970s there was less than half the number of farm operators in Ontario than during the 1918-1939 period - with approximately the same number of agricultural wage workers. See Joy Parr, "Hired Men: Ontario Agricultural Wage Labour in Historical Perspective" (1985) 15 *Labour/Le Travail* 91 at 102.

In addition, following the large-scale introduction of farm machinery and other technological advances as well as improved marketing practices, the farming model moved away from the small family unit and became more efficient, larger and less labour intensive. By 1941, the number of farms in Canada reached 732,800 - a number that would represent a peak preceding a slow and irreversible decline.²² The farm labour population was gradually freed up and farm workers left rural areas for the cities to look for work in fields such as government, business, professional trades, education and finance.²³

2.3 The Federal-Provincial Agricultural Manpower Program

In the first years of the Second World War many farmers and farm labourers enlisted or obtained employment in the urban war industries. From 1939-1941, provincial governments retained jurisdiction over farm labour recruitments and placements. Full employment was achieved in Canada by 1941, and by early 1942 a shortage of farm labour seriously threatened the food supply.²⁴ In 1941, federal involvement in recruiting and transporting agricultural workers began as part of federal expansion over human resources during the war. The "higher wartime demand for almost every kind of goods and services exerted increasing pressure on the available supplies of

²² Statistics Canada, "Farming in Canada", online: <http://www43.statcan.ca/03/03b/03b_002_e.htm>. By 2001 there were 246,923 farms in Canada. See CBC News, "Agriculture Census", online: <<http://www.cbc.ca/news/background/agriculture/>>.

²³ Statistics Canada, "Tables by Subject: Agriculture Statistics in Canada", online: <http://www40.statcan.ca/101/ind01/12_920.htm>. In the 1951 census the agricultural sector continued to decline but still employed one-fourth of the Canadian population. See E Cloutier, ed, *The Canada Year Book 1951 - The Official Statistical Annual of the Resources, History, Institutions, and Social and Economic Conditions of Canada* (Ottawa: King's Printer, 1951); By 1956, the total number of occupied farms dropped 7.7 percent, while total farm acreage decreased only 0.1 percent. See Canada Department of Labour, *Labour Gazette* (Ottawa: Queens Printer, 1957) at 938.

²⁴ F Sherrin, "Farm Labour: Wartime Policies" (February 1947) *Econ Annalist* at 16-21.

manpower" and the federal government "began to extend its regulative activities in order to achieve the most rational possible allocation of human productive resources among Canadian industries" including positions within the agricultural sector.²⁵

There was a lack of "floating" labour available during the war, which caused the federal government to begin considering the national and international movement of farm workers (the latter to and from the United States).²⁶ Finding Canadian workers to fill these positions increasingly became the focus of federal/provincial conferences convened to deal partially with agricultural labour shortages.²⁷ The growing shortage of agricultural labour during the war led to the *Stabilization of Employment in Agriculture Regulations* being enacted on March 23, 1942 that prohibited any male engaged in "agriculture" work from obtaining any employment outside of agriculture.²⁸

Beginning in 1941 and 1942, along with the *Stabilization of Employment in Agriculture Regulations*, a program known as the "Federal-Provincial Agricultural Manpower Program" (Manpower Program) was launched as a cooperative arrangement between the federal government and most Canadian provinces to provide an "adequate

²⁵ CM Chesney, *An Analysis of Agricultural Adjustment to Wartime Demand with Particular Reference to State Intervention and Control in the Second World War*, (Saskatoon: Dept. of Economics and Political Science, University of Saskatchewan, 1952) at 114.

²⁶*Ibid.* at 114-115.

²⁷ Vosko, *supra* note 99.

²⁸*Stabilization of Employment in Agriculture Regulations (1942)*, PCO 2251 (21 March 1942). "Agriculture" was defined to include the production of field crops, fruits, vegetables, honey, poultry, eggs, livestock, milk, butter or cheese. Farmers or farm labourers could apply for permission to engage in other types of work, but such permission was subject to a National Selective Service officer consider the applicant's importance relative to "the conditions essential for the maintenance or necessary increase of agricultural production in Canada." Exceptions were created for seasonal employment in a "primary industry" that was defined as lumbering, logging, forestry, fishing and trapping. The Regulations were further extended by PCO 7595, (26 August 1942) and PCO 1355, (4 March 1944).

supply of workers for agricultural and other related industries.”²⁹ The first Manpower Program agreement between the federal government and Ontario was concluded in May 1941.³⁰ In 1942 several other provinces took advantage of Ottawa's offer to conclude similar agreements.³¹ Under this arrangement, the federal government and participating provinces shared equally in expenses incurred in organizing, recruiting, transporting and placing farm labourers.³²

The program provided for movement of Canadian farm workers within provinces, as well as movement between provinces, to work on Canadian farms. One of the first larger uses of the Manpower Program occurred due to a shortage of farm workers to harvest grain in Saskatchewan.³³ On February 26 1943, the Minister of Labour outlined a national farm labour program that called for expanding Federal-Provincial cooperative farm activity, which in Ontario had already resulted in "50,000 workers [being made] available for farmers who otherwise would not have gone near a farm."³⁴ Other labour resources were specifically targeted for farm work, including expanding use of students, POWs, interned Japanese-Canadians, and Indians living on reserves.³⁵ The Ontario

²⁹Canada Department of Labour, *Annual Report* (Ottawa: Department of Labour, 1966) at 62. Newfoundland remained excluded from the program.

³⁰Under the authority of PCO 27/3191 (6 May 1941), renewed under PCO 3903, (11 May 1942).

³¹Authorized by following Orders in Council under the War Measures and the War Appropriations Acts: PCO 37/7359 (19 August 1942) [Manitoba and Saskatchewan]; PCO 40/7829 (1 September 1942) [British Columbia]; PCO 7871 (3 September 1942) [Alberta]; and PCO 46/9150 (7 October 1942) [Nova Scotia].

³²*Ibid.* The agreements included welfare assistance and payments for incidental expenses

³³Canada Department of Labour, *Labour Gazette* (Ottawa: Queens Printer, 1942) at 1301. An Order-in-Council was passed in October 1942 authorizing the federal Minister of Labour to pay the cost of transportation to and from Saskatchewan of persons ordinarily engaged in agriculture, retired farmers and students recruited in other provinces.

³⁴Canada Department of Labour, *Labour Gazette* (Ottawa: Queens Printer, 1943) at 186-187.

³⁵*Ibid.*

government through its placement service initiated "Brigades" to mobilize students and other young adults for farm work.³⁶ Starting in 1943, prisoners of war were authorized for use in farm labour.³⁷

A Federal-Provincial arrangement was finalized in 1943 authorizing the distribution and transport of farm labour, in addition to annual agricultural manpower conferences between Ottawa and the participating provinces.³⁸ The first annual Federal-Provincial Agricultural conference (initially called the "Dominion-Provincial Agricultural Conference") was held in December 1943 in Ottawa. A "comprehensive national program" was outlined with "good results" achieved in 1943 to deal with farm labour shortages through partnerships and agreements with provincial governments.³⁹ Inter-provincial movement of farm workers was paid at full cost by the federal Department of Labour, while the federal and provincial governments shared costs for intra-provincial movement equally. The wartime farm labour mobilization efforts were so successful in allocating workers that from 1940-1943, Canada increased its agricultural output by 50

³⁶The Ontario Government organized a Farm Service Force composed of seven "brigades" including the "Farm Cadet Brigade" composed of young men aged 15 to 18 working on dairy farms or in mixed farming; "The Farmerette Brigade" enrolled all young women 16 years old or over in high schools, normal schools, universities and other educational institutions, including the teachers, to work in fruit and vegetable production; and the "Children's Brigade" composed of children on farms could enrol to assist in farm production, particularly berry picking, weeding and garden work. Ontario Farm Service Placement officers made upwards of 54,000 placements through these Brigades in 1942. See J Coke, "Farm Labour in Canada" in BA Campbell and J Coke, eds *Farm Labour in Wartime* (Ottawa: Dominion Department of Agriculture, 1942) at 292.

³⁷PCO 2326 (10 May 1943), Authorizing the Minister of Labour to utilize the services of prisoners-of-war in agricultural and other labour. Following the attack on Pearl Harbour, interned Japanese-Canadians were used as farm labourers in sugar beet work in Alberta, Manitoba and Ontario. See Coke, *Ibid.* at 293.

³⁸PCO 3620, (4 May 1943) - Authorizing agreements with the provinces of Canada regarding the more effective use of agricultural man-power within each province. The conferences also featured foreign delegates with interests in Canadian agricultural production and farm labour supply.

³⁹Canada Department of Labour, *Labour Gazette* (Ottawa: Queens Printer, 1943) at 1617-1621.

percent despite a 23 percent overall reduction in available manpower.⁴⁰ Begun as a wartime effort, the Manpower Program continued on after the war as the primary government response to shortages of agricultural labour in Canada. The urgency of wartime farm labour mobilization evolved into post-war regulation through institutions created during the war. By the early 1950s, the Manpower Program had settled into a familiar pattern. Delegates to the 10th Federal-Provincial Farm Labour Conference held on December 3-5, 1952 in Ottawa reported that "farmers were generally satisfied with the workers they received" including American farm workers entering Canada under the program.⁴¹

Attempts to recruit workers from Indian reservations and the native population in general continued in some prairie provinces, with mixed results. Status Indians often crossed into the United States for better paying farm work.⁴² However, close cooperation

⁴⁰ Canada Department of Labour, *Labour Gazette* (Ottawa: Queens Printer, 1944) at 561-562, 713. In July 1943, farmers were transported from Saskatchewan to Ontario to help with haying and early harvest, an excursion that the Department of Agriculture indicated "should be noted by our historians" as it was the first time farm labour had been transported from the prairies to Ontario. In 1944, the last full year of the program during war-time, Canada allocated over \$500,000 to the provinces for shared-cost intra-provincial transfers of farm labour, and \$300,000 to meet the costs of inter-provincial transfers of workers to farms.

⁴¹ Canada Department of Labour, *Labour Gazette* (Ottawa: Queens Printer, 1953) at 43, 45. Tobacco farms remained the principal destination for American migrant workers. Workers with tobacco farm experience in southern U.S. states were particularly sought after, and 1,517 entered Ontario in 1952 to work in the province's tobacco fields. During that year a hostel in Simcoe, Ontario suffered "congestion" from a large number of extra-provincial and American tobacco workers moving into the area that was "relieved" through a reduction in the number of transient tobacco harvesters. By 1951, in the final years of its operation the "Farm Labour Camp" for farm labourers under the age of 18 supplied 706 boys and girls to 144 fruit growers in the province, a decline from the 1,133 young workers supplied to 217 growers. The Federal-Provincial Farm Labour Committee recommended in 1952 that the camps be discontinued due to the prohibitive cost of operation and the availability of local farm labour.

⁴² Canada Department of Labour, *Labour Gazette* (Ottawa: Queens Printer, 1953) at 45. The term "Status Indian" derives from the *Indian Act* R.S., 1951, c. I-5. "Status Indians" is a legal term for individuals listed in the Federal Government's Indian Registry System, and have certain rights not granted to other unregistered aboriginals. The main rights are associated with the granting of reserves, and rights associated with hunting fishing, exemptions from taxations and government regulation in areas of tobacco trade, and able to cross the U.S./Canada border according to various Treaty Rights. In 1953 Saskatchewan reported

between Canada and the United States had enabled New England growers to import Canadian labour and have a generally successful season in 1953.⁴³

By 1953 Canadian officials continued to generally praise the program as helpful in relocating domestic labour for agricultural work, although they noted increasing complaints related to worker retention, workplace safety and unemployment insurance.⁴⁴ There is no mention in any of the federal government documents during this period of allowing farm workers to form representative associations or to join trade unions and engage in collective bargaining.⁴⁵

After 1945, the federal government also began to look abroad for more sources of agricultural labour. Polish war veterans and displaced persons were contracted to work on Canadian farms and Ottawa sent officials to interview eastern European refugees in Germany and offer them opportunities for farm labour in Canada.⁴⁶ Canadian officials offered these migrants a one-year contract in an occupation chosen by the Canadian

that 100 sugar beet workers "from the Indian population went to Montana for the sugar beet crop there" rather than stay on the province's farms.

⁴³ Canada Department of Labour, *Labour Gazette* (Ottawa: Queens Printer, 1953) at 47. The American delegate, Dave Fessenden from the Bureau of Employment Security, emphasized the success of the program. There were no concerns over surpluses, agricultural placement figures were also up in spite of inclement weather conditions, and Fessenden expressed "gratification" that Canada was able to recruit farm labour "so promptly on such short notice."

⁴⁴ Canada Department of Labour, *Labour Gazette*, (Ottawa: Queens Printer, 1953) at 46. The representative for the Canadian Federation of Agriculture, R.A. Stewart, noted that complaints revolved around the "quality" of worker received and he noted that farmers "will be more particular as to the type of help they get" through the Manpower Program. Stewart commented on retention problems with farm labour and noted the "desirability of extending social benefits to agricultural workers" including coverage under the Unemployment Insurance Act and provincial Workmen's Compensation Acts as a means of "holding workers on the farm."

⁴⁵ The Labour Gazette statistics from 1932-1966 contain entries on the number of unionized occupations in Canada along with categories for total numbers of workers and the number of unionized workers in each occupation. While agriculture is listed as an occupation in this table, entries in each year for the unionized workers column reported a "0" or "N/A" entry.

⁴⁶ The attempts to recruit these Eastern Europeans for farm work were complicated by the professional background and relatively advanced education of many of the displaced persons.

government, after which many migrants could move to urban areas to join relatives or other members of their community. Most of the contracted agricultural workers left their farms after the expiration of their contracts, and some even did so prior to contractual expiration.⁴⁷

Although it was estimated that approximately 3,500 immigrant farm workers would be needed for 1953, some farmers continued to resist requesting immigrants for farm labour. That same year the BC provincial government noted that Okanagan farmers “showed little interest in applying for immigrant labour” with farms in the Okanagan Valley relying on students and itinerant labour being flown in “from points as far east as Prince Edward Island.” Some farmers in Quebec also complained of “instability” with 345 Italian immigrants who were placed on Quebec farms in 1952.⁴⁸ British Columbia complained that “Industrial employment has seriously depleted the supply of competent permanent workers for agriculture.”⁴⁹ The Ontario government expressed “difficulty” in retaining immigrants on their farm placements for 1952, noting a decrease from 1951 levels and the failure of the keep imported displaced persons from leaving agricultural work once in Canada, and the difficulty keeping important displaced persons as agricultural labourers after their arrival in Canada.⁵⁰

⁴⁷*Ibid.* From the provincial viewpoint, the most difficult problem with the Manpower Program and immigrant farm labour was the “failure of a number [of immigrant farm laborers] to carry out their undertaking to remain on the farm for the required 12 month period.”

⁴⁸Canada Department of Labour, *Labour Gazette* (Ottawa: Queens Printer, 1953) at 44-45. During that time, 140 Italian immigrants working on Quebec farms were “borrowed” by Ontario to meet a shortfall of workers in sugar beet thinning operations.

⁴⁹Canada Department of Labour, *Labour Gazette* (Ottawa: Queens Printer, 1953) at 46.

⁵⁰*Ibid.* at 45. Ontario specifically noted that “Farm placements in Ontario in 1952 were fewer than in 1951. A total of 1,066 German farm workers were brought into the province under the assisted passage plan. Another 331 single DP [Displaced Persons] workers were enlisted at Ajax, Quebec and Sudbury. Some difficulty was experienced in keeping these immigrants in farm work because of the large number with

The main target sources for immigrant farm work in the mid-1950s were Germany and other northern European countries. This was reportedly due to similar farming conditions in those countries to those in Canadian farmlands.⁵¹ 500 single German farm workers were initially requested for 1953, but as the season progressed, the total rose to 2,050 German workers and their families.⁵² Ontario officials complained that the "number would not have been so high if all those who had been placed on farms remained."⁵³ Germans came over as displaced persons on contracts to work on farms for a period of 12 months, but the Ontario government estimated that between 30-40% of German farm worker immigrants defaulted on their contracts in 1953.⁵⁴ Small groups of farm workers were still obtained from refugee camps in Italy, Austria and Hungary as well.⁵⁵

2.4 Growing debate over farm labour sources and immigration to Canada

The Displaced Persons phase of immigration gradually wound down and a Citizenship and Immigration representative noted in 1952 that immigration had become

special skills who were anxious to find work in their own trades. It was reported that of the whole group, 159 left farm work. Immigrant couples were easier to place than immigrant families as the latter often found existing accommodation inadequate. Altogether there were 1,461 immigrant placements as compared with 2,091 in 1951."

⁵¹ Canada Department of Labour, *Labour Gazette* (Ottawa: Queens Printer, 1954) at 70.

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ *Ibid.* Gillis was a long-standing trade unionist, and from 1920-1940 rose through the ranks of the United Mine Workers of America (UMW) Local 26.

⁵⁵ *Ibid.* Largely unsuccessful efforts were made to deploy labourers to farms from the influx of Hungarian refugees entering Canada in 1956 as a result of the Soviet suppression of the Hungarian revolution. Many of those arriving in Canada from Hungary as refugees turned out to be industrial workers from Budapest. Some efforts were attempted to place some of these refugees on farms but none turned out to be experienced farm labourers and most lasted a very short period on farms before moving to urban areas.

"a matter of persons of one country being fitted into the society of another."⁵⁶ In practice, this meant expanding the target sources of farm immigrant labour to other parts of Europe. It also illustrates that immigration officials viewed farm labour immigration as the gateway to "fitting" an immigrant into Canadian society. This took place within an ongoing debate in Parliament over the appropriate levels of unskilled labour immigration to Canada. M.P. Clarence Gillis of the Cooperative Commonwealth Federation put forth the case for vocational training for Canadians noting the "queues of unskilled workers" and rising importation of unskilled labour at a time when "bulletin boards in the employment offices show that there is quite a demand for skilled workers."⁵⁷ Tory M.P. Edmund Fulton criticized the government's immigration policy and its response to the increased need for farm labour:

In particular, we are hardly keeping pace with the demand for farm workers. I think anyone coming from an agricultural constituency will agree that there is a considerable shortage of farm workers, and that the Government's immigration policy does not seem to be in tune with the necessities in that regard...⁵⁸

The exodus of farm labour to urban areas averaged about 60,000 workers yearly from 1948-1954.⁵⁹ A report presented at the 1952 annual federal-provincial conference on farm labour noted deficiencies in living conditions on Ontario farms as one obstacle to farm worker retention.⁶⁰

⁵⁶Canada Department of Labour, *Labour Gazette* (Ottawa: Queens Printer, 1953) at 48.

⁵⁷*Ibid.* at 829.

⁵⁸*Ibid.* at 830. Fulton would later go on to become Justice Minister in Prime Diefenbaker's Conservative government and support the import of temporary agricultural workers from the former British West Indies.

⁵⁹ Canada Department of Labour, *Labour Gazette* (Ottawa: Queens Printer, 1954) at 646.

⁶⁰ *Ibid.* at 72. The report was based on the findings of a farm labour survey in the summer of 1952 to best determine how to meet the problem of acquiring and keeping farm labour. It was presented to the

Most provinces continued to report acute shortages of farm labour and the inability of immigrants and other labour sources to maintain an adequate supply. This led to a renewed effort to recruit farm labour from Canada's aboriginal population although that population had, to a lesser degree, followed the general trend in the 1950s towards urbanization and movement from reserves and agricultural areas to urban population centres.⁶¹ The Department of Indian Affairs became more involved in the annual farm labour conferences after 1950, participating along with the Department of Labour and the Department of Immigration. The 14th Federal-Provincial Farm Labour Conference praised the Department of Indian Affairs for "arranging a greater number of its charges" for participation in farm work, and "tribute was paid by delegates from western provinces to the Indians for their good work in various fields."⁶² These compliments contrasted with other less positive comments on transplanted status Indian farm workers.⁶³

International representation at the annual Federal-Provincial farm labour conferences also increased, with representation from several Western European countries

conference by Professor S.H. Lane, Department of Agricultural Economics, Ontario Agricultural College, Guelph, Ontario.

⁶¹ Institute on Governance, "Reframing the Issues: Emerging Questions for Métis, Non-Status Indian and Urban Aboriginal Policy Research", 79th Congress of the Humanities and Social Sciences Concordia University, Montréal, Québec, online: <<http://iog.ca/sites/iog/files/Reframing%20the%20Issues.pdf>>. Status Indians were likely targeted because of their continued concentration on reserves and limited mobility and employment opportunities when compared to immigrants. The shortage of agricultural workers and need for increasing farm output also led to the use of aboriginal and Métis child workers in local farms located on federally operated Indian Residential Schools. For gallery of photographs of child farm workers at Kamloops Indian Residential School, see "Kamloops Indian Residential School Children Worked Farms" online: www.fallenfeatherproductions.com

⁶² Canada Department of Labour, *Labour Gazette* (Ottawa: Queens Printer, 1957) at 34.

⁶³ T Basok, *Tortillas and Tomatos: Transmigrant Mexican Harvesters in Canada* (Montreal: McGill-Queens, 2002) at 31. The federal government noted that the Indian farm workers were "steady workers when they were working. But they were slow and were not too dependable after pay-day... Some of the Indians left half-way through the season to plant trees or to work as guides during the hunting season, indicating a preference for work closer to their homes."

and the United States in attendance as well as representatives from the International Labour Organization.⁶⁴ The Minister of Labour stated in 1957 that Canada would increasingly look to emigration from countries in Europe “now under the heel of the tyrant” to acquire badly needed farm labour.⁶⁵ But by the late 1950s, the supply of displaced persons had mostly run out. Federal government efforts for permanent settlement on tobacco farms in Ontario were directed more towards eastern and southern European migrants in response to MPs’ continued calls in Parliament to alleviate Canada’s farm labour shortage.⁶⁶

Reading the reports of federal officials, it appears that by 1960 Ottawa was increasingly isolated in its approach to the farm labour shortage issue. The provinces, opposition MPs and farm growers had long pressured the federal government regarding agricultural labour shortages. Farmers in the interior of British Columbia in the 1950s faced a severe shortage of farm workers to help with the harvesting season.⁶⁷ Security issues with some individuals, and general concerns with using some immigrants as farm

⁶⁴ Western European countries represented at the 1957 farm labour conference included the United States, the United Kingdom, Germany, Italy, and the Netherlands.

⁶⁵ Canada Department of Labour, *Labour Gazette* (Ottawa: Queens Printer, 1957) at 35. The Minister of Labour, Milton Gregg, was generally taken to refer to Eastern Bloc countries with this reference, but emigration of experienced farm labourers from dictatorships in Spain and Portugal was also contemplated.

⁶⁶ Canada Department of Labour, *Labour Gazette* (Ottawa: Queens Printer, 1956) at 633. Pressure on the federal government to relieve the farm labour shortage came from opposition parties in Parliament, and from provincial pressure at the Farm Labour Conferences. On May 2, 1956, Tory M.P. Lewis Cardiff queried the government on the response to the farm labour shortage. The Minister of Labour responded by reiterating that the Department of Citizenship and Immigration indicated that “activities were being carried out” by both the Labour and Immigration Departments.

⁶⁷ Royal BC Museum, "The Early Migrants and their Work on Canadian Farms", online: <<http://www.livinglandscapes.bc.ca/thomp-ok/ethnic-agri/portuguese.html>>. In October 1955, the Cooperative Packinghouse in Osoyoos was forced to halt packing operations for several days to assist farmers with an apple harvesting crisis described as “a combination of picker shortage and apple drop.” During this “picking emergency” students from the South Okanagan High School had their classes cancelled so they could go work on the fields and pick apples.

workers remained a paramount issue throughout this period, but these concerns could be overridden when agricultural labour shortages became critical.⁶⁸

Some agricultural employers in British Columbia responded to farm labour shortages in the province by calling on the federal government to authorize the use of temporary foreign workers. In 1957, the BC Fruit Growers' Association adopted a resolution at its annual conference asking the Federal government to import seasonal agricultural workers from Mexico or the Philippines:

Whereas there is a general shortage of agricultural labour throughout Canada, and Whereas in this past year of light crop the National Employment Service could not provide us with sufficient labour for orchard employment, and Whereas Boards of Trade and School Boards who have assisted at the harvest season for years past now are becoming reluctant to. Therefore be it resolved by this 1957 B.C.F.G.A. Annual Convention that the Provincial Department of Agriculture be requested to explore the possibilities of bringing into the province labour from Mexico or the Philippines for seasonal agricultural employment, to be moved to various parts of the province as required, and with the understanding that they will be returned to their country of origin at the end of the crop year.⁶⁹

In 1960, agricultural employers urged Ottawa to adapt a farm labour scheme then operating in the United States. That American program moved approximately 8,000 West Indian itinerant farm workers in the US from state to state “in accordance with

⁶⁸ R Whitaker, *Double Standard: The Secret History of Canadian Immigration* (Toronto: Lester and Orpen Dennys, 1987) at 81. In 1956, an acute shortage of farm labour in Ontario resulted in the speedy entry of East German refugees in West German camps to Canada, where they were sent to work on Ontario farms. The labour situation in Ontario was urgent, and the steady stream of refugees arriving in West Germany offered a source of farm workers who “could be obtained in a few weeks if the immigration procedure could be speeded up” and normal security checks dispensed with until the farm labour quota was filled, according to immigration officials at the time. Concerns were expressed over the identity and back ground of the German refugees. Economic needs overrode security concerns over the identity of these refugees, and cabinet approved this temporary breach in security policy.

⁶⁹ Royal BC Museum, *supra* note 67.

seasonal requirements.”⁷⁰ It was proposed that workers would be transferred to Canadian farms for work, and then returned to the United States. The proposal was based on the perception that West Indian workers were “self-disciplined and diligent and who only remained for a limited period fulfilling the needs of the particular job.”⁷¹ The Canadian government declined to accept the proposal, partly because the Immigration Minister at the time favored a Canadian program that involved direct Canadian-Caribbean negotiations.⁷²

2.5 Portuguese farm labour migration to Canada c1950-60

Despite the increasingly urgent need for farm labour, many farmers continued to oppose using non-European labour. In response to the 1957 BC Farm Growers’ Association Conference resolution which called for using Mexican and Filipino migrant farm labour, many Conference delegates argued that “Mexicans would not work in packing-houses” and that farmers could expect “a lot of trouble if Mexicans are imported” to work on Canadian farms.⁷³ European farm migration was still preferred and the government targeted Europeans seeking to escape the various emerging post-war dictatorships as potential farm labour. Although the Labour Minister’s 1957 comment about emigration from European countries under the “heel of a tyrant” may have been directed more against Soviet-bloc countries, many Portuguese at the time were seeking to escape their own right-wing dictatorship.

⁷⁰ TA Carmichael, *Passport to the Heart: Reflections on Canada Caribbean Relations*. (Kingston: Ian Randle Publishers, Kingston Jamaica, 2001)

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ Royal BC Museum, *supra* note 67.

Portuguese immigration to Canada beginning in the 1950s represented one of the last groups of “unskilled” migrant farm workers that permanently immigrated to Canada shortly before the enactment of the SAWP. From a federal perspective it was hoped that Portuguese immigration would provide an example of government-to-government negotiations in acquiring farm workers to meet Canada’s farm labour shortage. Portuguese were contracted as farm workers and the reasons for their immigration in the 1950s and 1960s mirror many of those of SAWP participants. Many Portuguese migrants had originally planned to stay in Canada only temporarily. Yet in the end virtually all of this community settled permanently in Canada, usually migrating to urban areas to escape harsh rural work.

Following 1945, Portuguese immigration to Canada was limited by Lisbon to those migrants possessing a valid Canadian employment contract. This was meant in part to prevent any mass exodus from Portugal.⁷⁴ This began to change in the 1950s due to internal opposition to the repressive government, fomented partly by increasing unemployment in the Portuguese agricultural sector.⁷⁵ While post-war Europe had begun to recover and prosper Portugal's agrarian economy stagnated. The country lacked industrialization and the ability of large cities to absorb a large and growing population of rural, unemployed labour.

These developments occurred at a time when the Canadian government was faced

⁷⁴ From 1932 to 1968 Portugal was ruled by Antonio Salazar, presiding over a far-right, quasi-fascist authoritarian government. The Salazar government preferred Portuguese migration to Portuguese colonies in Africa. See also A Sousa, *The Formative Years: Toronto's Portuguese Community (1953-1967)* (Toronto: University of Toronto, 1986) at 4.

⁷⁵ *Ibid.* There was also general Portuguese resistance to migration to Portugal’s war-torn African colonies, and changes in Brazil’s immigration policies, which made that traditional destination more difficult for Portuguese migrants.

with a relatively prosperous and expanding economy suffering farm labour shortages. The pressures from transportation companies and farmers desperate for agricultural workers, as well as private migrant brokers who wanted to profit from increased Portuguese emigration to Canada, spurred the negotiation of bilateral agreements between the two governments in 1953.⁷⁶

The agreements allowed Portuguese immigrants to enter Canada to fill a temporary shortage in the labour market for low-skilled labour. They were intended to work on farms or on the construction of a northern railway. The first Portuguese migrants entering Canada under the rubric of the labour agreements, 85 single males arrived on May 13, 1953 at Pier 21 in Halifax, Nova Scotia. That number grew in 1954 to include 950 males, including farm workers sent to Ontario, Alberta, and British Columbia as well as railway workers.⁷⁷ By 1957, the number of Portuguese farm labourers in the program more than doubled, to include approximately 2,000 farm labourers.⁷⁸ Portuguese migrants at this point were all contract workers, whose transportation and housing within Canada was provided by the Department of Immigration until employers could inspect and transport the workers they wished to employ to their farms or other workplaces.⁷⁹

The Portuguese community that had become established in Canada by the late 1950s benefited from sponsorship provisions of the new immigration laws of the 1950s. The *Immigration Act* allowed for residents already in Canada to sponsor new migrants

⁷⁶ D Marques, J Medeiros, *Portuguese Immigrants: 25 Years in Canada* (Toronto: West End YMCA, 1980) at 17.

⁷⁷ Sousa, *supra* note 74 at 5. This number included 700 agricultural workers and 250 tradesmen from the Azores. See Royal BC Museum, *supra* note 67.

⁷⁸ *Ibid.* Approximately one-half of the farm workers came from the Azores and one-half from the Portuguese mainland. See Royal BC Museum, *supra* note 67.

⁷⁹ Sousa, *supra* note 74 at 6.

without economic requirements.⁸⁰ This had a large impact on the nature of Portuguese migration: between 1957 and 1967 more than half of all Portuguese immigrants entering Canada were sponsored dependents while at the same time the number of Portuguese farm labourers entering Canada decreased.⁸¹ Sponsors, usually close family members, provided immigrants with a sense of security and place to stay initially.

Portuguese migrants contracted to work on Canadian farms generally spoke neither French nor English, and worked long hours performing arduous and physically demanding work for relatively low wages often in poor living conditions. Much of the rural labour that migrated was uneducated and illiterate, although some migrants possessed more education and quickly moved on from farm work in Ontario to eventual work in urban areas, gaining education in Canada along the way.⁸² Portuguese-Canadian scholars have noted the loneliness of this community and their exploitation by farmers, many of whom did not fulfill obligations to their workers that were outlined in their employment contracts, resulting in many of these migrants leaving these jobs “as soon as they could” for large urban centres where they took on jobs in the construction industry.⁸³ The fact that they were single with extended families in Portugal made it both easier to move to Canada’s largest cities and more imperative to find better paying work to send more remittances home.⁸⁴ Most Portuguese who settled permanently in Canada resulted

⁸⁰ Although there were expectations that these immigrants would eventually enter the labour force and set up their own families.

⁸¹ Sousa, *supra* note 74 at 8.

⁸² L Smedman, "Portuguese Immigrants Came to Work" (30 October 2009) Vancouver Courier, online: <<http://www.observatorioemigracao.secomunidades.pt/np4/1122.html>>.

⁸³ Sousa, *supra* note 74.

⁸⁴ See D Higgs, G Anderson, *A Future to Inherit: The Portuguese Communities of Canada* (Toronto: McLelland & Stewart, 1976) at 118-119; Royal BC Museum, *supra* note 67. Examples of this shift

from a “chain migration” related to those original farm workers who came to Canada in the early 1950s.⁸⁵

Following its peak in 1957, the low skilled labour migration program wound down from 1958-60. Even after the creation of the Caribbean SAWP in 1966, smaller numbers of unauthorized Portuguese and Mexican migrants continued to be recruited to Canadian farms through often unscrupulous brokers, resulting in numerous problems relating to working and living conditions.⁸⁶ Mexico’s accession to the SAWP in 1974 alleviated the need for Portuguese farm labour, and the unauthorized import of farm labour dropped sharply.⁸⁷

Some scholars have noted that the end of the Portuguese-Canadian unskilled migration initiatives coincided with a reduced demand for low-skilled labour in Canada.⁸⁸ The need for farm labour, however, remained critical, so this cannot be the whole explanation for the program’s demise. Even if the end result was a thriving Portuguese immigrant community, attempts to recruit reliable farm labour from Europe again proved disappointing. There was a declining pool of Portuguese farm worker migrants, but the demise of the program could also be attributed to difficulties in worker retention on farms and the early abrogation of workers’ farm employment contracts. These were not “unfree

included many Portuguese who initially migrated as farm labourers and eventually purchased their own farms. This transformation from temporary migrant worker to the feeling of being a true immigrant in Canada is symbolized by the general experience of the Portuguese community in Toronto that viewed the shift from temporary foreign farm worker to permanent urban worker as akin to moving from simple migrant to a true immigrant, intent on settling in Canada

⁸⁵ In 1987, an estimate recorded approximately 200 out of the 643 commercial farms in the Osoyoos area of Southern BC were owned by Portuguese migrants. See P Koroscil, “Portuguese in the South Okanagan” 51 *Okanagan Hist* 43 at 44-46; Royal BC Museum, *supra* note 67.

⁸⁶ Basok, *supra* note 16.

⁸⁷ *Ibid.*

⁸⁸ Marques & Medeiros, *supra* note 76.

workers” in the sense of being subject to temporary regulated entry to Canada with limited mobility rights, close supervision and the constant threat of deportation. It’s interesting to note that in 1974, the Ontario Federation of Labour recommended that Canada negotiate an SAWP agreement with Portugal (as well as Mexico).⁸⁹ Canadian politicians lumped in Portuguese workers as “suitable” for farm labour in Canada.⁹⁰ A federal task force harshly criticized living conditions for Portuguese migrants and recommended that Canada negotiate a government to government agreement with Portugal in order to facilitate better living conditions for its emigrants working on farms in Canada.⁹¹ Despite these recommendations, Portugal did not join the SAWP.

2.6 Continuing farm worker retention problems

Much discussion was spent in the late 1950s and early 1960s on problems with living and employment conditions related to farm worker retention. The annual Federal-Provincial farm labour conferences repeatedly emphasized the need to improve living conditions on farms, increase wages, and to consider extending federal and provincial employment benefits to farm workers.⁹² The basic wage for farm labour in Ontario in 1956 was \$75 a month, including room and board, a rate far below what could be earned in industrial work in cities such as Toronto or Windsor.⁹³

The provincial governments launched studies and programs designed to educate

⁸⁹ G Sanderson, “The Sweatshop Legacy: Still With Us in 1974” in Canada Department of Labour, *Labour Gazette* (Ottawa: Queens Printer, 1974) at 406.

⁹⁰ Jean Marchand, Minister of Citizenship and Immigration, “Confidential Memorandum to Cabinet: Seasonal Workers for Ontario Farms” (30 March 1966), National Archives of Canada, RG 118, A 85-86/071, V81, F3315-5-1, PT1.

⁹¹ Canada Department of Manpower and Immigration. *Task Force Report: The Seasonal Farm Labour Situation in Southern Ontario* (Ottawa: Queens Printer, 1973) at 31-32.

⁹² *Ibid.*

⁹³ Canada Department of Labour, *Labour Gazette*, (Ottawa: Queens Printer, 1957) at 531

farmers on ways to retain farm labour. In 1960, the Ontario Department of Agricultural Economics surveyed farmers and workers in 16 townships across Ontario that were representative of livestock farming areas of the province. The results of this study were produced in a circular and indicated that farmers and workers agreed in order of importance that reasonable and regular working hours, good food and living quarters, and good wages were essential factors in retaining farm workers.⁹⁴ Points of difference between them included the importance of prompt payment of wages and job-sharing. Whereas farm workers considered prompt regular pay and a definite employment contract regarding wages and length of work to be very important, farm owners were more concerned with sharing undesirable jobs and time off for vacations.⁹⁵

There was also disagreement on the importance of wages and employment. Although workers rated a “definite agreement re wages and employment” in the top half of topics to consider as important, farmers ranked it close to the bottom of their priorities.⁹⁶ The circular advised farmers not to consider what “he thinks is important” but to learn “where he was wrong in his views of what his help consider to be important.”⁹⁷ Curiously, among 20 topics rated in order of importance by farmers and their workers, the topic of farm worker safety was not included in the table at all.⁹⁸

⁹⁴ SH Lane and DR Campbell, *How to Keep Your Farm Help* (Guelph: Ontario Agricultural College, 1960). 320 farmers and 137 farm workers were questioned in the 16 townships. 81 of the farm workers interviewed were related to their employers – mostly father-son relationships. Both farmers and their workers selected from a list of 20 factors the 5 factors they felt contributed most to a satisfactory relationship between farmer and farm worker.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ *Ibid.* Although not entirely clear as the questionnaire is not available, it appears that farmers and farm labour were asked the question “What are the most important things for a farmer to keep in mind if he

In this period there was significant movement of agricultural workers between Canada and the United States, with these movements being formalized in the late 1950s by a series of Federal-Provincial Agreements under reciprocal arrangements with the United States Employment Service.⁹⁹ The movement of farm labour flowed in both directions. In fiscal year 1962-1963, a significant number of potato pickers (7,303) and apple pickers (341) moved from Quebec, Nova Scotia and New Brunswick to Maine, New York and New Hampshire, while a lesser number of apple pickers (66) moved from Vermont to Quebec.¹⁰⁰

Migration of American farm workers to Canada was regulated with the issuance of temporary work visas to Americans working in Canadian tobacco fields.¹⁰¹ Punishment of Americans who entered Canada illegally to work on tobacco fields was generally lax, and consisted of requiring those workers to return to the border crossing to obtain a temporary visa.¹⁰² With the exception of tobacco field workers who moved in significant numbers from U.S. southern states to Canada, most of the farm labour migration in 1965 was from Canadian provinces to U.S. Border States. The program

intends to hire and keep good help?" and then provided with a list of 20 topics, compiled by the Ontario Department of Agriculture, to rank in order of importance. The circulars also featured cartoons illustrating how hours, living conditions and wages were problem areas for workers. One cartoon pictured a tired farm worker struggling to perform morning chores. Another illustration showed crowded living conditions as unproductive and unhelpful in retaining farm labour. The circular concluded that "farmers are inclined to underrate some things which their workers consider important" in particular worker participation in planning farm work, and job satisfaction. Year-round contracts, isolation, lack of time-off and vacations were not cited as drawbacks to farm employment.

⁹⁹ Canada Department of Labour, *Labour Gazette* (Ottawa: Queens Printer, 1963) at 71.

¹⁰⁰ *Ibid.*

¹⁰¹ J Pickersgill to A MacNamara, Memo, (9 June 1944), Public Archives of Canada, RG 27, V668, F6-5-26-2, PT1; V Satzewich, *Racism and the Incorporation of Foreign Labour: Farm Labour Migration to Canada Since 1945* (New York: Routledge, 1991) at 109.

¹⁰² J Dwyer to M. Crosbie, Memo (5 November 1954), Public Archives of Canada, RG 27, V668, F6-5-26-2, PT4; Satzewich, *Ibid.*

worked well enough "without clashing of gears" to earn repeated praise by both Canadian and American officials in the annual farm labour conferences.¹⁰³ However, the chronic problem of retaining these workers on farms remained and American officials conceded that on this point "no answer has yet been found."¹⁰⁴

2.7 The end of the manpower program

Federal-provincial transfers continued into the last years of the farm Manpower program.¹⁰⁵ In the fiscal year 1965-1966, a new form of Agricultural Manpower Agreement was entered into between the federal government and the provinces. This agreement vested the recruitment, movement and placement of agricultural labour with the National Employment Service.¹⁰⁶ The Department of Labour described this as a "broadening of the program" due to the "current buoyancy of the economy, [and because] the problems of filling agricultural manpower requirements have become more difficult."¹⁰⁷

The 1965-66 Department of Labour Report described a continuing shortage in agricultural employment, due to "greater use of short-term labour", mechanization, and increased job opportunities in non-agricultural industries.¹⁰⁸ The report went on to state that any shortfall in labour would be dealt with by "appropriate training and movement of

¹⁰³ Canada Department of Labour, *Labour Gazette* (Ottawa: Queens Printer, 1954) at 67-68. American officials noted that shortages of farm labour in both countries "had been eased by the movements of agricultural workers back and forth across the international border."

¹⁰⁴ *Ibid.*

¹⁰⁵ Canada Department of Labour, *Labour Gazette* (Ottawa: Queens Printer, 1964) at 72. In fiscal year 1963-64, the program allocated various amounts to provinces ranging from \$5,000 to P.E.I. and New Brunswick, to \$40,000 to Alberta.

¹⁰⁶ Canada Department of Labour, *Labour Gazette* (Ottawa: Queens Printer, 1966) at 62.

¹⁰⁷ *Ibid.* at 69.

¹⁰⁸ *Ibid.* at 102.

unemployed persons from various areas of the country.”¹⁰⁹ In 1965-66, the NES enlarged the farm labour recruitment program by opening 52 temporary farm placement offices at “strategic locations” across Canada.¹¹⁰ Further attempts were made to promote farm employer interest in providing worker accommodation to transplanted workers, and in utilizing aboriginal labour. For the first time, an accommodation subsidy was paid in Ontario by the federal government under Federal-Provincial Agreements and the use of Status Indian labour was increased in southwestern Ontario.¹¹¹

The annual reports during the early 1960s generally reached similar conclusions regarding shortfalls in farm labour placement and the difficulties in recruitment and interprovincial movements were a recurring necessity to meet agricultural labour requirements.¹¹² The numbers fluctuated from year-to-year, but the patterns of movement remained largely the same. Despite the “erratic demand and supply situation in agriculture” and the “varying patterns of employment between regions”, the NES was able to record a total of 101,035 farm placements during fiscal year 1965-66.¹¹³

In a foreshadowing of the move towards utilizing other foreign agricultural labour,

¹⁰⁹ *Ibid.* at 69

¹¹⁰ *Ibid.* at 103. Regions each received different numbers of offices, show in in parenthesis: Atlantic Canada (2), Quebec (5), Ontario (11), Prairie Provinces, (25) and Pacific Region (9)

¹¹¹ *Ibid.* at 103. Subsidies were offered at the rate of \$150 per approved head to fruit and vegetable growers for assistance in the building of accommodation in relation to the need for worker housing. The NES, with the assistance of the Department of Indian Affairs, was able to recruit 550 workers from reserves in the northern sectors of the province.

¹¹² Canada Department of Labour, *Labour Gazette* (Ottawa: Queens Printer, 1962) at 94. During the fiscal year 1960-61, general farm workers were moved from Nova Scotia and New Brunswick to Ontario, Fruit Pickers (mostly students) were moved from Quebec to Ontario, and sugar beet workers moved from Saskatchewan to Alberta

¹¹³ Canada Department of Labour, *Labour Gazette* (Ottawa: Queens Printer, 1966) at 104. This represented a slight drop from the work provided for 147,693 farm labourers during the 1960-61 fiscal year. See Department of Labour (1962) at 94.

the responsibility for the National Employment Service was transferred to the new Department of Manpower and Immigration in June 1966.¹¹⁴ This "one agency" approach to farm labour was also designed to ensure coordination with provincial programs.¹¹⁵ The Department of Manpower and Immigration's creation reflected the new focus of Canadian immigration policy on acquiring skilled workers and professionals. It also demonstrated the increasing influence of certain economists who portrayed a growing "competition" among countries for economic based immigration.¹¹⁶

The Department of Labour's final comment in 1966 on the problem of farm labour recruitment and retention provides an interesting glimpse into the mindset of government policy makers at the time:

The solution of manpower problems in agriculture depends in part on the improvement of working and living conditions in agriculture, and much research is required. This is provided for by the new agreement under which the provinces are required to establish federal-provincial agricultural manpower committees to deal with the matters. These committees, chaired by senior officials of the provincial departments of agriculture, are also to consider other action, such as the training of workers, to improve the supply of manpower.¹¹⁷

In the midst of chronic farm labour shortages, extending federal workplace benefits to farm workers became more of a priority for Ottawa. On April 1, 1967 unemployment insurance coverage was finally extended to agricultural and horticultural workers under the federal *Unemployment Insurance Act*. The explicit rationale extending

¹¹⁴ Canada Department of Labour, *Labour Gazette* (Ottawa: Queens Printer, 1966) at 62; Satzewich, *supra* note 101 at 109.

¹¹⁵ As expressed by the Deputy Minister of the Department of Citizenship and Immigration in March 1966 to the National Agricultural Manpower Committee in Ottawa. See Canada Department of Labour, *Labour Gazette* (Ottawa: Queens Printer, 1966) at 295.

¹¹⁶ *Ibid.* at 645.

¹¹⁷ *Ibid.* at 62.

Unemployment Insurance was to make farm labour "more attractive" to domestic and immigrant workers, and to help farmers "overcome difficulties" in hiring "capable help."¹¹⁸ The extensions of benefits to Canadian farm workers came at a time when Ottawa had largely abandoned the idea of using domestic workers or permanent immigration as a solution for agricultural labour shortages.

2.8 The Caribbean as source of temporary farm labour

In October 1942, in the middle of war-time labour shortages, the Department of Agriculture had made one of the first brief references to utilizing Caribbean workers as farm labour in Canada:

A recent proposal is that labour may be brought in from the British West Indies for work on crops such as sugar beets, vegetables and fruits...An experiment was carried out in Western Canada whereby an international exchange of combines and combine crews was arranged. The exact number of combine crews with their equipment who entered Canada is not available but it is believed to have been more than one hundred. While problems of exchange, immigration regulations and other details had to be ironed out it is thought that this plan holds considerable promise for the future.¹¹⁹

Despite this relatively positive appraisal of the experiment, the concept of Caribbean seasonal farm labour migration went no further in the 1940s. During the 1950s within the context of decolonization Canada's immigration policy was increasingly criticized as racist and outdated. On April 27, 1954, the Negro Citizenship Association of Toronto protested that Canada's immigration policy discriminated against British subjects who were black.¹²⁰

¹¹⁸ *Ibid.* at 644.

¹¹⁹ Coke, *supra* note 36 at 293.

¹²⁰ Canada Department of Labour, *Labour Gazette*, (Ottawa: Queens Printer, 1954) at 646.. In a brief submitted to the Minister of Citizenship and Immigration, the Association made several requests, among them:

The first continuing Canadian scheme involving the import of Caribbean labour occurred in the mid-1950s in the area of domestic workers.¹²¹ The initial program involved the worker being granted landed immigrant status and required to work as a domestic for one year, after which they had the option to stay in domestic work or find work in another field in Canada.¹²² Many of the women intended to work as domestics, but encountered problems with working conditions and employer harassment.¹²³ After problems arose in retaining workers in the domestic labour field, the program was altered

“The definition of “British Subject” in the Immigration Act be amended to include all those who are for all other purposes regarded as British subjects and citizens of the United Kingdom and Commonwealth;

That provision be made in the Act for the entry of a British West Indian, without regard to racial origin, who has sufficient means to maintain himself until he has obtained employment;

That an immigration office be set up in a centrally-located area of the British West Indies for the handling of prospective immigrants...”

¹²¹ The Canadian Encyclopedia, “Baby Boom”, online:

<<http://www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=a1ARTA0000437>>.

Following the end of the Second World War, the subsequent baby boom, and the growing employment of women in the Canadian workforce, there was a large shortage of domestic workers in the Canadian labour market. The West Indian Domestic Scheme was created in 1955, allowing a limited number of non-white, female domestic workers into Canada, also introducing to this group the opportunity to ultimately take up residency and bring their families to Canada. The initial quota was limited to 100 women, and the eligibility criteria included being single, female, in good health between the ages of 18 to 35 with a minimum of Grade 8 education. See Carmichael, *supra* note 70 at 140.

¹²² SA Gopaul-McNicol, *Working with West Indian Families* (New York: Guilford Press, 1993) at 73. The scheme was very carefully monitored by the Canadian government, and particular notice taken of training given to domestics in the West Indies. In addition to some complaints about improper worker attitude towards their employers, the scheme encountered difficulties with women entering Canada through the program that did not have experience as domestic workers, but instead came from other occupations such as teachers, nurses and secretaries.

¹²³ M. Silvera, *Silenced: Talks with Working Class West Indian Women About Their Lives and Struggles as Domestic Workers in Canada* (Toronto: Sister Vision, 1983) at 78, 112-113. In this respect, the West Indies domestic workers encountered many problems that seem disturbingly reminiscent of problems noted with the SAWP. Caribbean women complained that their treatment largely depended upon their employers, some of whom were “good” while others worked them like “slaves” and subjected them to poor working conditions. The opportunity to apply for permanent immigration after 1 year of domestic work in Canada was undermined by the negative attitudes displayed by many of the domestics’ employers. Domestics’ attempts to further their education in Canada often ran into opposition from their employers who saw them only as servants. Many of the women were also educated or had experience in other occupations and after a year some of them chose to leave domestic service and pursue other employment. Thus the initial scheme did present a new avenue of advancement for some West Indian women. But it also left Canada with a continuing shortage of domestic workers. Ottawa responded to this by restricting West Indian women to specific domestic employment, with a specific employer, for a definite period of time. See also Gopaul-McNicol, *Ibid.* at 73.

so that the visa holder was required to report any changes in employment to the Immigration and Employment Commission or risk being deported.¹²⁴

In the 1950s and early 1960s, no mention was generally made in the annual Federal-Provincial conferences of acquiring temporary Caribbean or Mexican foreign farm labour to meet agricultural work needs. In 1965, a report to the federal government by the Essex Country Growers Association recommended the temporary importation of “skilled” farm workers from the Caribbean as an alternative to transplanting urban workers who were ill-suited to farm work.¹²⁵ Government officials replied that poor wages and living conditions, restrictions on worker movement and continuity of employment on farms were among the primary reasons for Canada’s farm labour shortage.¹²⁶ The agricultural sector in turn responded that growers' could not afford to raise wages or improve conditions due to competition from lower-priced foreign imports.¹²⁷ Provincial governments continued to wrestle with the problems of competition from an expanding Canadian economy able to offer Canadian agricultural

¹²⁴ Silvera, *Ibid.* at 8. In addition, In addition, training schools were set up throughout the West Indies to train domestics and prepare them for migration to Canada. Correspondence from the Office of the Commissioner for Canada in Port-of-Spain, Trinidad on the subject "Domestic Servant Training Schools in Grenada and St. Lucia" noted that the Office was "very much impressed with the atmosphere of the school and with what seemed to be a very high calibre of education." See Carmichael, *Passport to the Heart*, *supra* note 70 at 141. New domestics' from the West Indies faced a worsened situation following the elimination of the permanent residency option. No longer entitled to automatic landed immigrant status after 1 year in Canada, cases of "sexual harassment, alienation, inadequate pay" along with horrible working conditions dramatically increased, along with discrimination and unequal treatment as they were excluded from CPP or UI insurance despite paying premiums into the programs. The domestics' situation in this regard has been compared to Caribbean SAWP workers' "unvarnished exploitation" and discriminatory treatment in Canada. See also "Welcome Wears Thin When Crops In" *Globe and Mail* (2 October 1986) A9.

¹²⁵ Basok, *supra* note 63 at 31.

¹²⁶ Satzewich *supra* note 101 at 158.

¹²⁷ 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.

workers higher paying work in big cities, as well as political pressure from some influential growers to import temporary foreign agricultural workers.¹²⁸

The Department of Labour voiced its opposition to using Caribbean seasonal workers on the premise that the domestic Canadian labour market could still satisfy grower's needs:

Your representation concerning the temporary admission of workers from abroad is based on the assumption that workers in the numbers required cannot be recruited in Canada. This, however, has not been established and it is felt that the requirements of agriculture can be met through a vigorous recruitment program involving local recruitment, day-haul movements, and the transfer of workers within and between provinces. It is the view of the government that we cannot import temporary workers at a time when the government is spending large sums to rehabilitate unemployed agricultural workers...in other parts of Canada, when we are proposing to move workers who need employment from designated areas at public expense and when substantial sums are being spent through retraining and in other ways to move unemployed workers into employment in Canada...If the growers were to offer wages and conditions to the extent proposed in respect to workers from Jamaica, taking into account the total cost of such a movement to the growers, it is felt that we can meet your labour requirements from within Canada.¹²⁹

The federal government eventually consented to the importation of Caribbean farm workers in 1966 when Jamaican farm workers were allowed entry to Canada under a temporary employment contract in an experiment to work in the south-western Ontario fruit and vegetable industry.¹³⁰ Unlike the initial experiment carried out in 1942, the Minister of Manpower and Immigration indicated that this experiment, if successful, would lead to the negotiation of a broader agreement with other Caribbean countries

¹²⁸ One of the growers applying pressure to import foreign workers was Eugene Whelan, a Liberal MP for Essex-South and a future Minister of Agriculture.

¹²⁹ Satzewich, *supra* note 101 at 164.

¹³⁰ Satzewich, *supra* note 101 at 110.

interested in supplying temporary agricultural workers.¹³¹

Following this experiment, the Government reported that farm employers were "well satisfied with their performance" and farm labour recruitment for the 1967 season was targeted on Barbados, Trinidad and Tobago, as well as Jamaica, with further expansion of Caribbean source countries planned for 1968.¹³² An offshore labour agreement was reached with the Commonwealth Caribbean marking the beginning of the SAWP.¹³³

2.8.1 Why the Caribbean as a source for temporary farm labour?

Canada and the former British West Indies have shared a long economic and political relationship that later facilitated Caribbean migration to Canada. The legacy of British colonialism meant that the two sides shared similar institutions that allowed for the development of close commercial, investment, cultural and political ties, and even calls for political union, which persisted into the 1950s.¹³⁴ Following the Caribbean

¹³¹ Canada Department of Labour, *Labour Gazette* (Ottawa: Queens Printer, 1967) at 382.

¹³² *Ibid.*

¹³³ Basok, *supra* note 63 at 32.

¹³⁴ R Winks, *The Blacks in Canada: A History*. (Montreal: McGill-Queen's Press, 1997). Proposals for an economic and political union between the British West Indies and Canada surfaced as early as Canada's confederation in 1867. Following the First World War, proposals originated from both London and influential businessmen in Canada for some sort of union between the British West Indies and Canada. The ideas persisted throughout the 1920s and 1930s, despite the Canadian public's general opposition to the idea. Canadian public opinion opposed the idea partly because of resistance to Canada becoming a formal colonial power, but also due to opposition to absorbing large amounts of non-white Canadians into a new union. Canadian Businessmen such as Thomas Macaulay, future President of Sun Life, pressed for annexation of British Caribbean possessions. Macaulay successfully urged the Bahamian Colonial Legislative Council to present a proposal for union with Canada to London, which the Colonial Office ultimately rejected. See Carmichael, *Passport to the Heart*, *supra* note 70 at 6-11. Crowe, a businessman and philanthropist, had long advocated a union between the English speaking countries of the western hemisphere. His career involved urging the accession of Newfoundland into Confederation, as well as working extensively with labour unions to improve labour conditions in the Newfoundland fishing and timber industries. In 1921, Crowe's desire for closer links were partially fulfilled after Ottawa ratified a mutual trade preferences pact with the British West Indies, which among other things provided for the subsidization of steam ship service between the Caribbean and Canada. Crowe urged Prime Minister Robert Borden's Conservative government to issue a report titled *Confidential Memorandum Upon the*

colonies' independence in the 1960s, Canada's relationship with the individual Caribbean countries moved more to regulating labour migration, and gradually reforming laws allowing for permanent migration of certain individuals.¹³⁵

The historic migration pattern between Canada and the Caribbean occurred in clearly defined phases, shaping the character of West Indies migration to Canada.¹³⁶ Early movement between the two areas consisted of missionaries from Canada travelling to the Caribbean, with some British West Indians present in Canada. However, attempts at resettling restive native populations from the British West Indies to Canada were resisted by colonial authorities.¹³⁷ The number of West Indians allowed into Canada ground to a halt following the First World War.¹³⁸ Following the Second World War the number rose again, but the restrictive provisions of the Immigration Act of 1952, insured

Subject of the Annexation of the West India Islands to the Dominion of Canada which stated that one of the advantages of a Caribbean-Canadian union would be the acquisition of new tropical territory and agricultural markets for Canadian products. Similar proposals were made after the Second World War for Canadian annexation of Trinidad and Tobago, as well as Bermuda. On calls for a political union with Canada see M Van Steen, "Will Canada Reach Southward?" (March 1955) *Can Business* 34. Newfoundland's Premier Joseph Smallwood advocated that the British West Indies should become a province of Canada. Also supporting a union were political figures such as Senator Neil McLean of New Brunswick and the Hon. A.J. Brooks, a Conservative MP soon to become a cabinet minister in the Diefenbaker government. Among West Indian businessmen, Richard Youngman, President of Jamaica's Chamber of Commerce and Grantley Adams, President of the BWI Trades Union Congress and future Prime Minister of the West Indies Federation, support union with Canada. As nationalist movements gained momentum, the idea of union in the Caribbean became more closely linked with that of a West Indian Federation. A short-lived federation in the West Indies was formed in 1958, but it collapsed shortly after with the withdrawal of Jamaica and Trinidad.

¹³⁵ However the idea of a union between Canada and the Caribbean survives through the present day with comments by contemporary MPs to establish the Turks and Caicos as a Canadian territory. See "Remarks of Hon. David Kilgour - Secretary of State (Latin America & Africa)" (15 September 2000) in Carmichael, *supra* note 70 at xi.

¹³⁶ Carmichael, *Passport to the Heart*, *supra* note 70 at 116.

¹³⁷ *Ibid.* at 117. Attempts in 1796 to resettle Maroon rebels from Jamaica to Halifax encountered resistance from officials in their new destination, and the Maroons were eventually resettled in British Sierra Leone. During the nineteenth century a smaller group of West Indians settled in Victoria, BC and assumed full citizenship rights based on their colonial status. Towards the end of the nineteenth century, a small number of Barbadians were also recruited to work in the coal mines of Sydney, Nova Scotia.

¹³⁸ *Ibid.* Less than one thousand West Indians allowed in between 1920 and 1939.

that their relative numbers compared to European immigration remained low.¹³⁹ Although 2.5 million immigrants entered Canada between 1945 and 1962, only approximately 22,000 came from the West Indies.¹⁴⁰

After 1945, British colonial governments in the Caribbean increasingly pressured Canada to allow entry of their farm labour from the West Indies. In 1947, these governments, acting through their representatives in Canada and with the United Kingdom's High Commissioner in Ottawa, urged Canada to consider utilizing migrant farm labour from the Caribbean to offset chronic shortages in the Canadian agricultural labour force.¹⁴¹ This move was related to colonial economic and social conditions in the British West Indies.

The persistence of poverty in the Caribbean region was attributed to the low income and low-skill labour resources in plantation production.¹⁴² During a large part of British rule in the 19th and early 20th centuries, colonial state policy, influenced by the bigger plantation owners, consistently ignored and exploited small farmers.¹⁴³ During this period British colonial policy had generally focused on furthering the economic prospects of Jamaica as an exporter of agricultural staples. The motivations for this policy were partly to prevent labour instability by insuring the availability of agricultural work for the

¹³⁹ *Ibid.* at 138. The policy at the time reflected Prime Minister McKenzie King's infamous 1947 quote that Canadian immigration policy objectives should aim to avoid making "a fundamental alteration in the character of our population."

¹⁴⁰ BD Tennyson, "Canada and the Commonwealth Caribbean: the Historical Relationship" in BD Tennyson, ed *Canadian-Caribbean Relations: Aspects of a Relationship* (Sydney, NS: University College of Cape Breton, 1990) at 55.

¹⁴¹ Satzewich, *supra* note 101 at 146.

¹⁴² George Beckford, *Persistent Poverty: Underdevelopment in the Plantation Economies of the Third World* (New York: Oxford University Press, 1972).

¹⁴³ Carlene Edie, *Democracy by Default: Dependency and Clientelism in Jamaica* (Boulder, CO: Rienner, 1991) at 80

young, restless rural population.¹⁴⁴ Economic inequality however grew sharply as the living standards of the general Jamaican worker stayed stagnant and workers' riots made labour instability a constant worry for colonial authorities.¹⁴⁵ This led to some land reforms but left unsolved the questions of low-skill farm labour and poor wages for farm work.¹⁴⁶

The British Colonial Welfare and Development organization began operation after the Second World War with an emphasis on maintaining the welfare of the population rather than reforming the economy or considering development programs that would address inequalities in Jamaican society.¹⁴⁷ The exodus of the rural farm worker in Jamaica was due in large part to industries developed by Canadian corporations.¹⁴⁸ Canadian based trans-national corporations (TNCs) began to invest heavily in Jamaica's bauxite and manufacturing industries following the war.¹⁴⁹ The bauxite industry, "heavily mechanized" and using comparatively fewer and higher-paid skilled workers, created pressures on the general wage structure when compared to low-paying, more labour-intensive agricultural work.¹⁵⁰ Despite foreign companies' control over worker

¹⁴⁴ Douglas Hall, "The Colonial Legacy in Jamaica" 3 (1968) *New World Quarterly* 7 at 9. There were large scale worker-peasant riots in 1938, followed by the end of Crown Colony government and a new Constitution introducing universal adult suffrage.

¹⁴⁵ *Ibid.* at 10

¹⁴⁶ Edie, *supra* note 143 at 80-82

¹⁴⁷ Hall, *supra* note 144 at 10.

¹⁴⁸ Canadian banks such as Bank of Nova Scotia and Royal Bank had been operating in the West Indies prior to 1945.

¹⁴⁹ Edie, *supra* note 143 at 70.

¹⁵⁰ Hall, *supra* note 144 at 17; See also M Manley, *A Voice at the Workplace* (London: Andre Deutsch, 1975). By 1953, the average unskilled Jamaican worker could earn 13 pounds a week in bauxite work, just slightly more than a sugar-cane worker working full-time during the entire harvest. Labour was cheap and abundant in Jamaica, and unskilled bauxite mining developed an aluminum industry that grew to eventually

wages in the bauxite industry, worker militancy and strikes soon led to wage increases for bauxite miners well above the national average.¹⁵¹ The effect of the bauxite TNCs and their employment of labour at wages comparatively better than agricultural work meant a displacement of farm labour in Jamaica.¹⁵² By the 1960s, the Jamaican economy's dependence on the bauxite industry in particular effectively meant a loss of options for the Jamaican government regarding labour migration.¹⁵³

International development programs failed to address the root causes of rural unemployment in the West Indies. These programs lead Caribbean governments to pursue policies designed to reduce the pressure of urban areas absorbing large amounts of the rural unemployed.¹⁵⁴ Within this paradigm, external emigration to North America presented itself as an obvious solution to the problem of Jamaican rural-urban migration.

Canada justified the SAWP as a “temporary development aid” program aimed at the Commonwealth Caribbean.¹⁵⁵ This was in line with theories of international development aid promoted by the United Nations and the International Labour

account for 47 percent of Jamaican exports by 1968. See also O Jefferson, *The Post-War Economic Development of Jamaica* (Kingston: ISER, 1972)

¹⁵¹ Edie, *supra* note 143 at 71.

¹⁵² Jamaican Department of Statistics, *Statistical Digest and Annual Reports* (Kingston: National Planning Agency, 1972)

¹⁵³ See N Girvan, et al *The IMF and the Third World: The Case of Jamaica, 1974-80* (Uppsala, Sweden: Dag Hammarskjöld Foundation, 1980). For example, The Jamaican government accepted Canadian bauxite corporations' terms dictated to them for fear of withdrawal of investment that would cause an economic collapse.

¹⁵⁴ Hall, *supra* note 144 at 16. Following independence, the Jamaican government for example focused on economic policies directed towards the development of a peasant-agriculture economy and small-farming. The policies were pursued not only because of the efficiency of the rural estates but as a result of the government's desire to keep reducing *internal* unemployed agricultural labour migration to urban centres, regardless of the consequences for fragmenting small-farm units.

¹⁵⁵ Findeis, *supra* Ch 1, note 96 at 177.

Organization.¹⁵⁶ However, unemployment rates in Canada remained high in the mid-1960s. The prospect of importing foreign labour at a time many Canadians were looking for jobs could have left the government open to political attacks and the government may have sought to mitigate any political damage by justifying the importation of labour as both temporary and developmentally oriented.

2.9 SAWP recruitment and Jamaican clientelism

Ottawa's other justification for negotiating the SAWP dealt with the state-to-state nature of the program. The agreements facilitating the SAWP and government recruitment of workers were designed to replace migrant labour recruitment through private brokers with direct government involvement. The initial recruitment of Jamaican workers under the auspices of the government-to-government SAWP was therefore a critical component in Ottawa's acceptance of the scheme. Government recruitment of workers was designed to allow Ottawa to control the entry and exit of the workers, and also to replace the exploitation historically associated with the use of private brokers in European farm migration.

Jamaica, as the first country to supply workers under the SAWP, provides an interesting example of the flaws in the recruitment process. From the SAWP's inception political corruption in Jamaica has influenced the worker selection process in the program. During the period of decolonization from 1944-1962, political power in Jamaica was transferred to the "dominant middle-class leaders" resulting in a mixture of

¹⁵⁶ ILO, "Migrant Worker Remittances and their Impact on Local Economic Development", online: <http://www.ilo.org/asia/whatwedo/publications/lang--en/docName--WCMS_110240/index.htm>. The World Bank has also long provided empirical evidence of the scale of migrant worker remittances sent back to source countries. See World Bank, *Global Development Finance* (Washington, World Bank Publications, 2004). Current figures and analysis from the Bank show remittances sent home by migrant workers to be the second most important source of external funding for developing countries.

patronage and *clientelism* as a regular means of politics.¹⁵⁷ Clientelism meant that politics in Jamaica at the time the SAWP was negotiated was dominated by a “creed of bribery” and favoritism expressed by this notion:

Vote for me and,
You might get a job.
Vote for my opponent and,
If I win,
You probably won't.¹⁵⁸

Jamaica's political system, based on an exchange of material rewards for political support, would preclude participation into the SAWP for those who made unwise political choices or expressed sentiments critical of the program.¹⁵⁹ A Jamaican worker who has been returning to Canada for more than ten years under the SAWP explained that many Jamaican workers have an idealized view of Canada as a land of “milk and honey” that would lift them out of a life of poverty.¹⁶⁰

Jamaican society remains deeply stratified.¹⁶¹ The patron-client relationship between these desperately poor voters and politicians, political power brokers and civil servants meant that votes were often exchanged for the opportunity to leave Jamaica for

¹⁵⁷ Clientelism is defined as “a reciprocal exchange of goods and/or services on a personal basis between two unequal parties”. See Edie, *supra* note 143 at 16-17.

¹⁵⁸ Hall, *supra* note 144 at 13.

¹⁵⁹ JD Powell, “Peasant Society and Clientelist Politics” (1970) 64:2 *Amer Pol Sci Rev* 411; C Stone, “Political Aspects of Post-War Agricultural Policies in Jamaica (1945-1970).” (1974) 23:2 *Soc & Econ Stud* 145

¹⁶⁰ Niagara Magazine Group, online: <<http://www.niagaramag.ca/sitepages/?aid=1069&cn=Features&an=FEATURE%20TWO>>. The Jamaican SAWP worker noted that most Jamaicans “have no idea what to expect when they come [to Canada]...When I first heard about Canada and this program, I thought milk and honey was flowing in the streets. To be chosen to come is very, very difficult. Every guy wants a work ticket. You get one and you feel like you've won the lottery.”

¹⁶¹ At least 57 percent of the population was considered poor by the early 1970s. See Edie, *supra* note 143 at 17.

work abroad.¹⁶² Selection into the SAWP program, despite promises of reforms, remains heavily influenced by the Jamaican political machinery and government bureaucracy and in particular are subject to the whims of elected officials and bureaucrats.¹⁶³ Those who cause problems for the government while in the program have a valid concern that they will not be selected to return the following year to Canada. The fact that labour unions in Jamaica are an integral part of this system of clientelism makes SAWP workers situation even more problematic.¹⁶⁴

2.10 Racist stereotyping

Even while gradually opening up Canada to more non-White immigration, Canada's immigration policy-makers continued to emphasize certain aspects of legacy of colonialism. The division of permanent and temporary migration from the West Indies was couched within a labour and economic paradigm. But the social and economic stagnation of colonialism deeply influenced perceptions of non-white migrants. Perceptions of West Indians were influenced by general Canadian perceptions of "a colonial" destined "to live in an intellectually restricted world."¹⁶⁵ Agricultural labour from the Caribbean was viewed with hesitation by Canadian immigration officials, with some weighing the benefits of temporarily importing migrant farm labour with the

¹⁶² *Ibid.*

¹⁶³ More recently, Jamaican officials have tried to ensure that worker nominations for the SAWP are based on experience and not on clientelism. In the fall of 2003, Barrington Bailey, head of the overseas worker program at Jamaica's Ministry of Labor, indicated that SAWP applicants in Jamaica are still nominated by their local members of Parliament, but that unspecified measures would be taken to ensure that nominees have had farm work experience. See "Canada: SAWP: BC" (2004) 10:1 *Rural Migration News*, online: <http://migration.ucdavis.edu/rmn/more.php?id=824_0_4_0>.

¹⁶⁴ R Golsalves, "The Trade Union Movement in Jamaica: Its Growth and Resultant Problems" in C Stone and A Brown, eds *Essays on Power and Change in Jamaica* (Kingston: Jamaica Publishing, 1977) at 89-105.

¹⁶⁵ VS Naipaul, *Finding the Centre* (London: Harper Collins, 1984) at 32.

perceived disadvantages of altering Canada's long-standing immigration policy – a policy fundamentally based on racial preference.¹⁶⁶

Climate was a popular foundation for many stereotypes. The belief that Canada's climate in particular was unsuitable for West Indians was based on racial stereotypes of sun loving Caribbeans who would have no clue on how to function in Canada. This was more or less stated in parliament by the Immigration Minister in 1952:

In the light of experience it would be unrealistic to say that immigrants who have spent the greater part of their life in tropical or subtropical countries become readily adaptable to the Canadian mode of life which...is determined by climatic conditions...It is equally true that...persons from tropical or subtropical countries find it more difficult to succeed in the highly competitive Canadian economy.¹⁶⁷

Stereotypes of course are perceptions, biases or prejudices often based on simple premises.¹⁶⁸ Stereotyping is at its most powerful when dealing with subjects of race or gender.¹⁶⁹ These elements are present in both international trade and migration, and country of origin stereotyping has long been researched within international trade. It is referred to as the "country of origin" effect and has been acknowledged since the 1970s to influence importers' positive or negative perceptions of foreign products.¹⁷⁰

International migration is subject to the same forces. Ethnic and racial stereotypes

¹⁶⁶ Vic Satzewich, "Racism and Canadian Immigration Policy: The Government's View of Caribbean Migration, 1962-1966" (1989) 21:1 *Can Ethnic Stud* 77.

¹⁶⁷ H Potter, "Negroes in Canada" (1961) 3:11 *Race Class* 39; G Rawlyk, "Canada's Immigration Policy" (1962) 47 *Dalhousie Rev* 287 at 294.

¹⁶⁸ See generally W Lippman, *Public Opinion* (New York: Harcourt Brace, 1922). That these premises are simple is no coincidence as research has suggested that our real environment is too complex to allow humans to effectively process information, and that we manage by reconstructing a simplified environmental model according to our belief structure. Perceptions are formed by this belief system, which has both cognitive and emotional elements.

¹⁶⁹ FW Renwick, "International Marketing: The Canadian Image, Opportunities, Strategies and Structures" in Tennyson, *Canadian Caribbean Relations*, supra note 140 at 116-117.

¹⁷⁰ *Ibid.*

of migrants are greatly facilitated by the categorization of different physical appearances. They produce a trait driven stereotyping that equates certain races with certain traits.¹⁷¹ There is general agreement that such stereotyping occurs through societal perceptions directed against nationals of stereotyped countries.¹⁷² Such national stereotypes associated with a group generally perceive that group to be relatively homogenous - there is little individual differentiation in assigning traits or characteristics.¹⁷³ It is more likely that we will reinforce stereotypes through memories and experiences that reinforce a belief system.¹⁷⁴ Once formed, stereotypes act as powerful orientations to individual and societal behaviour, even influencing the origins of, and attitudes toward, government policy.¹⁷⁵

Racist stereotypes of West Indians have existed throughout Canada's history.¹⁷⁶ These stereotypes coexisted easily with the Caribbean farm labourer. Denying collective bargaining rights to Caribbean seasonal farm workers could be justified on the base of both race and economics. The type of economic freedom implied by collective bargaining is not part of this paradigm as it implies a certain resistance to authority that

¹⁷¹ GW Allport, *The Nature of Prejudice* (Cambridge: Perseus, 1979) at 73.

¹⁷²WG Sumner, *Folkways* (New York: Ginn, 1906). In defining "ethnocentrism" Sumner referred to feelings of national pride and xenophobia based on feelings of national superiority towards other cultures. Such national stereotypes are based on ethnocentrism or perceptions of migrants in relation to one's own cultural characteristics.

¹⁷³ H Tajfel, et al "Content of Stereotypes and the Inference of Similarity Between Members of Stereotyped Groups" (1964) 22 *Acta Psychologica* 19.

¹⁷⁴ *Ibid.*

¹⁷⁵ M Fishbein, I Ajzen, *Belief, Attitude, Intention and Behaviour: An Introduction in Theory and Research* (Reading, MA: Addison-Wesley, 1975) at 37, 227.

¹⁷⁶ They stereotypes can be generally summed up as: Canadian hard-working, used to the cold weather, stoic, toiling the land, (in this context a kind of Anglicized version of Russia); Caribbeans sun-loving, not too industrious, not too independent minded, suited for temporary farm labour.

these migrants were presumed to lack.¹⁷⁷

These racial stereotypes persisted in Canadian society into the mid-1960s. Canadians' perception of "blackness" stood out to many historians of the time, as "once a person is said to be black...then that is usually the most important thing about him."¹⁷⁸ Racial stereotypes along with the marginalization and discrimination inherent in the SAWP mirror some of the general attitudes and ignorance of part of the Canadian population, but they also magnify the vulnerability of the SAWP's participants. This perception was tied into economic considerations when considering agricultural labourers for collective bargaining rights or denying mobility rights to temporary foreign workers.¹⁷⁹

The pervasiveness of racism in the government is evident in the slow acceptance of changing migration patterns. From the beginning of the SAWP in 1966, and at a time when permanent black migration to Canada was about to increase dramatically, there were still doubts among government officials about the changes occurring in Canadian immigration law and policy. A 1966 Memo from the Assistant Deputy Minister of

¹⁷⁷ During the proposed Canada-Jamaica union in the 19th century, proponents argued it would benefit the Conservative government as "Negroes...were and always have been Conservatives...because they had an innate respect for authority." See AR Stewart, "Canada-West Indian Union, 1884-1885" (1950) 31:4 Can Hist Rev 369 at 377-381. On the subject of worker passivity, these sentiments ran counter to events of the time, which saw numerous strikes and labour disturbances among farm labourers in the West Indian colonies. See A Burns, *History of the British West Indies* (London: George Allen and Unwin Ltd., 1965) at 659. In 1847, a commercial crisis in Britain led to the bankruptcy of several prominent West Indian merchants who had provided credit for planters and the failure of many West Indian banks such as the Planters' Bank in Jamaica. Steep falls in the price of sugar put the final nail in the coffin of many growers, while others barely survived by drastically reducing the wages of farm labourers. Strikes and disorders followed in some West Indian colonies. Nevertheless by 1849, the Governor of the Leeward Islands could report to London on the "peaceful submission of the laboring class...to the reduction of wages."

¹⁷⁸ W Rodney, *The Groundings with My Brothers* (London: Bogle, 1969) at 17.

¹⁷⁹ The restrictions on SAWP worker movement have been compared to the indentured Indian land system operated by the British colonial government in Trinidad in the 19th and early 20th centuries, and even apartheid South Africa's passbook system. See Barratt supra at 80-81.

Immigration, relating to proposed immigration reforms, expressed concerns with the “long range wisdom” of “a substantial increase in Negro immigration to Canada.”¹⁸⁰

The immigration reforms of the 1960s allowed for unsponsored immigration to Canada on the basis of education, training and skills regardless of race and targeting skilled workers. The enactment of the points based system of immigration in 1967 was concurrent with the opening of Canadian immigration offices throughout the Caribbean.¹⁸¹ The family reunification clause in the 1967 *Immigration Act* made it possible for many Jamaicans to enter Canada as husbands or children of the Jamaican women who came to Canada as domestics during the 1950s and 1960s.¹⁸² Like other immigrant groups before them, most of these Jamaicans chose to settle in large cities rather than in rural farming areas.

One effect of the adoption of the points system in 1967 – a system based on individual selection - was to effectively bring to an end the *permanent* migration of occupational groups from the Caribbean. The government's experience with the West Indies domestics program encouraged Ottawa to pursue other government to government

¹⁸⁰ V Verma, “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”, online: <http://www.nsi-ins.ca/english/pdf/csawp_verma_final_report.pdf>

¹⁸¹ The changes were partly in response to newly independent and developing countries’ call for a policy more sympathetic to their overcrowded populations and unemployment resulting from rural to urban migration. See V Henderson, “Urbanization in Developing Countries” (2002) 17:1 World Bank Research Observer 89.

¹⁸² W Anderson, *Caribbean Immigrants: A Socio-Demographic Profile*, (Toronto: Canadian Scholars Press Inc., 1993). The liberalization of Canada's immigration laws initially lead to immigration from the Caribbean dramatically increasing, with approximately 40% of Canada's current black population (itself roughly 2.5% of Canadian population) claiming Jamaican heritage. See Statistics Canada, online: <<http://www40.statcan.ca/101/cst01/demo26a.htm>>. Most of this migration occurred between 1974 and 1989, with recent figures showing a sharp drop in Jamaican immigration to Canada. As of 2009, Jamaica ranks 24th in permanent migration to Canada. See CIC, “Facts and Figures 2009 – Immigration Overview: Permanent and Temporary Residents”, online: <<http://www.cic.gc.ca/english/resources/statistics/facts2009/permanent/10.asp>>.

negotiations with Caribbean states for *temporary* farm labourers. Federal control over the movement of these workers was a paramount issue.¹⁸³

2.11 Unions and the immigration reforms

Canadian unions, absent from any meaningful collective organizing of farm workers during the 1950s and 1960s, were mainly concerned with insuring that the immigration reforms did not result in abuses of process regarding the entry of skilled workers. This involved the admittance of immigrants with Nazi or fascist backgrounds, or the groundless surveillance of those accused of “subversive activities” or “communist” leanings.¹⁸⁴ The Canadian Labour Congress (CLC) complained that “Many new Canadians...showed no understanding of or respect for democratic trade union organizations.”¹⁸⁵ The CLC had expressed hope that at “some stage” of the immigrant screening process, organized labour would be represented but this was hampered by the presence of some Communist party members in trade union organizations.¹⁸⁶

There were attempts to involve CLC representatives in the selection of skilled workers from among European displaced persons and refugees. Symbolic of these attempts was a “comic exchange of letters” in 1948 that ensued between the federal Deputy Minister of Labour and the Representative for Canada of the International Fur

¹⁸³ Carmichael, *supra* note 70 at 146. In 1960, Ottawa had rejected a proposal to adopt the farm labour scheme operating in the United States, where 8,000 West Indian seasonal workers were transferred from state-to-state according to need, because the plan did not involve direct government-government interaction. The change to an individual selection immigration scheme and emphasis on skilled workers allowed Canada to justify the temporary importation of labour under the “unskilled stream” which includes the SAWP. The CIC’s website lists a myriad of residency opportunities under the points system, for skilled workers and for temporary foreign workers concerned skilled or with Canadian work experience. See CIC, online: <<http://www.cic.gc.ca/english/immigrate/index.asp>>.

¹⁸⁴ Whitaker, *supra* note 68 at 45-46.

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.*

and Leather Workers Union (IFLWU) when the latter put forth suggested names as their representatives in the screening process, who all happened to be Communist activists:

“You can take it as a fact that no one will be sent overseas to select displaced persons [for work in Canada] if he is a Communist. One of the duties is to ensure that displaced persons selected for admission to Canada are not Communists, and obviously it is my duty not to recommend a man [as labour’s representative] who is himself a Communist.”¹⁸⁷

The Labour department also warned that the IFLWU was “very badly infiltrated by the Communist element,” and that names put forth by Communist led or Communist infiltrated unions to assist in screening immigrants “can be viewed with a great deal of suspicion.”¹⁸⁸ This put an effective end to organized labour’s attempts to be involved in screening displaced persons for work in Canada.

Organized labour’s inability to unionize agricultural workers must be seen in the context of the time. Canadian unions were literally engaged in an often violent struggle for survival against the RCMP and hostile governments.¹⁸⁹ The Canadian state during this period “showed few compunctions about using the immigration laws as a means of barring left-wing labour union agitators.”¹⁹⁰ International unions and their executive members were particular targets during this period. The federal government was often “prone to identifying union leaders as Communists since this facilitated the intervention of the state” into matters of union organizing in areas such as mining operations in

¹⁸⁷ A MacNamara to R Haddow, Memorandum (4 June 1948). Public Archives of Canada, Department of Labour Records, V835, F1-28-1(1). The irony here is that the Deputy Minister was addressing this memo to Robert Haddow, a Communist activist in a Communist led union.

¹⁸⁸ ST Wood to A Macnamara, Memorandum (8 June 1948). Public Archives of Canada, Department of Labour Records, V835, F1-28-1(1).

¹⁸⁹ See generally Whitaker, *supra* note 68.

¹⁹⁰ *Ibid.* at 164. Several executive members of certain American unions, including the IFLWU, United Electrical Workers, American Communications Association, the Mine-Mill Union, Coke and Chemical Workers, and Office and Professional Workers Union.

northern Ontario in 1948.¹⁹¹ The mining industry, much like the agricultural industry, had “always been vehemently opposed” to trade unions and collective bargaining for miners.¹⁹² Much of the CLC’s energies during the post-war period were directed at unionizing miners.

Although Canadian unions have also had historically strong links with their international counterparts, until recently this did not extend into international coordination of efforts to unionize agricultural workers. Specifically, collective bargaining for temporary foreign farm workers was not addressed, and union efforts were directed more against opposing the expansion of “guest worker” programs in North America, although in the late 1990s there were increasing appeals to federal legislatures to pass laws protecting the rights of collective bargaining for agricultural workers.¹⁹³

Canadian unions have also had a long relationship with the ILO. National and provincial unions generally supported the ILO positions on migrant labour and economic development in the 1950s and 1960s.¹⁹⁴ The union’s support for the ILO during this

¹⁹¹ *Ibid.* at 154.

¹⁹² *Ibid.*

¹⁹³ Mary Finger, “Statement Against Proposed Guestworker Program” (13 February 1999), online: <http://www.ufcw.org/press_room/archived_press_releases/1999/ufcwaganstguestwrker.cfm>. Finger was the International Vice President of the UFCW at the time. In 1998, the United States Senate attempted to modify the H-2A Guest worker program to allow an unlimited number of temporary foreign workers into American poultry and packing industries. Labelling the H-2A program “perverse” and “human bondage” the UFCW International strongly opposed any expansion of the program, noting that “If Congress is really concerned about labor shortages in poultry and packing, the most logical step is to pass legislation that would protect the right of workers to organize.”

¹⁹⁴ The Cooperative Commonwealth Federation, a socialist federal party closely aligned with Canadian unions, supported the “Colombo Plan” which was strongly supported by the ILO as well. The “Colombo Plan” was instituted in 1951 as an association of Pacific and South-Asian Commonwealth Countries. It is described as “a regional intergovernmental organization for the furtherance of economic and social development of the regions’ nations. It is based on the partnership concept for self-help and mutual help in the development process with the focal areas being, human resource development and south-south cooperation. While recognising the need for physical capital to provide the lever for growth, the Colombo

period created somewhat of a convergence with Canada's positions at the time, as Ottawa also justified the SAWP on the basis that it addressed the underdevelopment of the West Indies.

2.12 Early Canadian government analyses of the SAWP

It bears repeating that in the early years of the program Canadian officials still viewed the SAWP as a temporary measure. In a 1970 Background Paper on the Caribbean Seasonal Agricultural Workers Program, the Assistant Deputy Minister of Manpower and Immigration described the problem of retaining Canadian agricultural workers 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.¹⁹⁵

Gradually, the SAWP came to be seen as a longer-term program, and had to be expanded to bring in more agricultural labour. In 1974 Mexico became the first country outside the former British West Indies to join the SAWP. In addition to the labour shortfalls, the program was expanded in part to address alleged abuses by private immigration brokers arranging to recruit Mexican and Portuguese farm workers. Following the end of the Canada-Portugal agricultural labour initiatives of the 1950s

Plan also emphasised the need to raise the skill level to assimilate and utilise the physical capital more efficiently.”

¹⁹⁵ R Grenier to L Couillard, Memorandum, (17 February 1970), NAC RG118, ACC85-86/071, V81, F3315-5-1, P4. The Memorandum contained a Background Paper on the Caribbean Seasonal Agricultural Workers Program.

some Portuguese migrants, along with a growing number of Mexicans, continued working on farms into the 1970s. Many of these workers were imported into Canada by private brokers operating without regulation, often resulting in allegations of terrible working and living conditions.¹⁹⁶ As a result, the government was faced with recommendations calling for temporary agricultural labour agreements to be negotiated with Portugal and Mexico similar to the ones already negotiated with the Caribbean Commonwealth.¹⁹⁷ The Department of Manpower and Immigration formed a Special Task Force on the issue that contained strong language on the migrants' working conditions:

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.¹⁹⁸

The Task Force report stated that Portuguese adult men in the Azores were recruited by a private broker to work as farm labourers in Canada, often without proper documentation, while working and living in deplorable conditions. The report further noted that the most secure way to prevent further abuses of migrant farm workers would be government to government agreements with source countries:

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

¹⁹⁶ Basok, *supra* note 63 at 32; *Task Force Report*, *supra* note 91 at 35. The report noted that one Mexican family working on a farm resided in “almost indescribable squalor” with severe health conditions affecting the mother and several children.

¹⁹⁷ Sanderson, *supra* note 89.

¹⁹⁸ *Task Force Report*, *supra* note 91 at 17. Recommendations of the Task Force also included the Direct involvement of Manpower Division, Immigration, External Affairs in negotiations with foreign government and a commitment of sufficient financial and labour resources to enable appropriate oversight.

than those included 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.¹⁹⁹

Ottawa successfully negotiated an SAWP agreement only with Mexico and Portugal remained excluded from the program. The expansion of the program with Mexico was explicitly justified on the basis that it would prevent wage and housing exploitation of Mexican workers.²⁰⁰ Privately, in Cabinet discussions, the Immigration Minister further explained the inclusion of Mexicans in the SAWP on the grounds that they were just as "suitable" for temporary farm work as West Indians.²⁰¹ Racist stereotyping was an integral part of the origins of the Mexican SAWP can be found in the statements of contemporary parliamentarians:

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... Many of them [farm owners] have encouraged offshore labour over the years which come 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.²⁰²

The expansion of the SAWP to cover Mexican workers resulted in the outlawing of private brokers. The subsequent regulation of agricultural workers' living conditions resulted in some improvements in workers' housing, although intermittent complaints

¹⁹⁹ *Ibid* at 31-32.

²⁰⁰ Office of the Minister of Manpower and Immigration, Press Release "Mexico-Canada" (17 June 1974).

²⁰¹ J Marchand, Confidential Memorandum to Cabinet, "Seasonal Workers for Ontario Farms" (March 1966) NAC RG118, A85-86/071, V81, F3315-5-1, P1.

²⁰² Statement of Hon HW Danforth in Parliament (20 July 1973) in N Sharma, "On Not Being Canadian: The Social Organization of Migrant Workers in Canada" (November 2001) *Can Rev of Soc & Anthr*, online: <http://findarticles.com/p/articles/mi_go2771/is_4_38/ai_n28880026/pg_9/>.

were made throughout the 1970s.²⁰³

2.13 Summary - expansion and wages of the SAWP

Ottawa maintained a strictly enforced quota on the numbers of SAWP workers brought into Canada until the mid-1980s. Until 1986, the number of SAWP workers admitted into Canada was based on a fairly consistent yearly quota of approximately 4,100 workers.²⁰⁴ Following negotiations with representatives from the agricultural sector, who argued for a more flexible intake of workers under the SAWP based on supply and demand, and participating foreign governments, Brian Mulroney's Progressive Conservative federal government removed the yearly quotas. By 1988, the number of SAWP workers admitted into Canada was increasing exponentially every year - more than doubling to over 8,500 in 1988.²⁰⁵

The success of the program in preventing overstays has been questioned in recent years, with reports that some Caribbean workers are running away from farms for cities like Toronto. In 2003, Canada's ambassador to Jamaica stated that Canada might reduce or eliminate the 5,000 Jamaicans a year from the SAWP because of illegal immigration and drug-smuggling.²⁰⁶ About 850 Jamaican farm workers had deserted from 1997 to 2002, with most not having been found.²⁰⁷ There were also second-hand accounts from farmers and government agents (both in Canada and in countries of origin) which have

²⁰³ Basok, *supra* note 63 at 33-36.

²⁰⁴ "Commonwealth Caribbean and Mexican Seasonal Agricultural Workers Programs: Labour Market Services" (23 October 1998), in Commission for Labour Cooperation, *Protection of Migrant Agricultural Workers in Canada, Mexico and the United States* (Washington, DC: Secretariat of the Commission of Labour Cooperation, 2002) at 8.

²⁰⁵ *Ibid.*; North-South Institute, "Migrant Workers in Canada: A Review of the CSAWP", online: <http://www.nsi-ins.ca/English/pdf/migrantworkers_eng_web.pdf>.

²⁰⁶ *Rural Migration News*, *supra* note 163.

²⁰⁷ *Ibid.*

noted recent problems with SAWP workers absconding from their place of employment and remaining in Canada past their departure date.²⁰⁸ There has been no Canadian government studies on overstay rates relating to SAWP workers. The structure of the SAWP – requiring workers to have dependent family members in their home countries - appears to have limited illegal overstays or attempts by SAWP workers to gain permanent residency through marriage.²⁰⁹ The World Bank has conducted studies showing the overstay rates to be relatively small at 1.5%.²¹⁰ This "negligible" figure, at current SAWP recruitment rates, would represent about 400-500 SAWP workers overstaying their visas in Canada.²¹¹

In 2010 Service Canada announced that it would be conducting “random audits of employers using the TFWP, which now includes the SAWP, in 2011.”²¹² Employers were advised that, while transferring SAWP workers to and from farms in Canada is permissible, employers cannot “lend” or “share these workers with another farm.”²¹³ The percentage of farm employers being audited was not specified. Employers were

²⁰⁸ T Basok, “He Came, He Saw, He (...) Stayed. Guest Worker Programmes and the Issue of Non-Return” (2000) 38:2 Int’l Migr 215.

²⁰⁹ Preibisch, *supra* Ch 1, note 30 at 435.

²¹⁰ Basok, *supra* Ch 1, note 16.

²¹¹ *Ibid.*

²¹² Alberta Beekeepers, Record of Service Canada Meeting to discuss SAWP with Alberta Employers, (27 October 2010), online: <<http://www.albertabeekeepers.org/documents/SAWPUupdateOctober2010.pdf>>. Employers were encouraged to “keep track of all pay stubs, time cards, etc., as well as honour all rules that are in the SAWP/TFWP contracts between themselves and their workers.”

²¹³ *Ibid.* The government warned that this would be a “a contravention of the *Immigration and Refugee Protection Act* and is punishable by a fine of up to \$50,000 and imprisonment.” Other changes to the program included Other changes to the SAWP program in 2011 included the transfer of medical exam responsibility for SAWP workers entering Canada from Canadian officials to home country officials. In response to this, Mexican officials instituted a “Fit for Work” exam that will be a requirement for any Mexican worker to be in the SAWP. Technical improvements include employer access to an online database of SAWP workers and their current availability status.

reminded that “When Mexican workers return home, it is very important that employers complete the worker evaluation issued by the Mexico consulate so that the Mexico Ministry of Labour can evaluate the program, the workers, and the employers.”²¹⁴ Finally, the program has grown considerably during Stephen Harper’s Conservative government. Between 2006 and 2011, the SAWP has increased to over 26,000 workers in 9 Canadian provinces.²¹⁵

Table 2.1 at the end of this chapter shows the total distribution of SAWP workers in Canada and by province.²¹⁶ The bars for each province and Canada proceed left to right from 2005-2010. From 2005-2008, a steady growth in the migration of workers can be seen across Canada and in most provinces. British Columbia joined the program in 2004, and shows the sharpest growth in workers during this period from 684 SAWP workers in 2005 to 3540 workers in 2010. While 2009 showed for the first time a slight drop of total SAWP workers coming to Canada, 2010 shows a slight uptick. Ontario remains the province with the largest share of SAWP workers.²¹⁷

²¹⁴ *Ibid.*

²¹⁵ HRSDC, online: <http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/stats/archive/annual2005-2008/table10a.shtml>.

²¹⁶ Data for Table 2.1 was obtained from HRSDC, “Table 9 (Annual): Number of temporary foreign worker positions on labour market opinion confirmations under the SAWP, by location of employment”, online: <http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/stats/annual/table9a.shtml>; HRSDC, “Table 10 (Annual): Number of temporary foreign worker positions on labour market opinion confirmations under the Seasonal Agricultural Worker Program, by location of employment”, online: <http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/stats/archive/annual2005-2008/table10a.shtml>.

²¹⁷ Alberta Beekeepers, “Record of Service Canada meeting to discuss SAWP with Alberta Employers, Edmonton, Alberta” (27 October 2010), online: <<http://www.albertabeekeepers.org/documents/SAWPUpdateOctober2010.pdf>>. Mexican nationals make up the majority of participants in the program, and most those workers are concentrated in Ontario. In 2010, there were a total of 23,000 Mexican nationals in the SAWP, with 51% of these workers in Ontario, 20% in Quebec, 15% in British Columbia and 5% in Alberta.

The graph in Table 2.2 illustrates wages for SAWP workers by province.²¹⁸ It also shows the wage and expected minimum wage increases in 2012. The official figures show the SAWP wage at least equal to or slightly ahead of the provincial minimum wage or prevailing agricultural wage. Four provinces will raise the minimum wage in 2012, while six provinces will see no increase. However some data indicates that SAWP workers are actually paid less than domestic workers for agricultural work in comparable commodities.²¹⁹

2.14 Seasonal agricultural workers in Canada and unions

The chronic government expressions of concerns over farm workers' wages, living and work conditions and lack of benefits would seem to be an ideal field for trade unionism. Despite this, as noted above, until relatively recently unions have not played a major role in organizing Canadian farm labour. In Canada farm worker resistance to intolerable working conditions historically consisted of escaping to urban centres for more tolerable labour at better wages. During the glut of farm labour in the 1930s, there were some attempts to organize former urban workers who had migrated to farm work to obtain more secure working conditions. The initial impetus for attempts to organize these workers came from the Communist Party of Canada, which had focused its efforts on former coal miners and machine operators doing agricultural labour.²²⁰ But in general unionization of farm labour was not viewed as a practical solution by federal and provincial governments. Farm workers remained excluded from both new provincial and

²¹⁸ Data for Table 2.2 was obtained from HRSDC, online:
<http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/vegetables.shtml#c1>.

²¹⁹ Preibisch, *supra* note 30. Preibisch notes that the data “focused specifically on foreign and domestic workers hired in the categories of farm laborers or harvesters, and nursery or greenhouse laborers.”

²²⁰ M Horn, *The Depression in Canada: Responses to Economic Crisis* (Toronto: Copp, 1988) at 35.

federal workplace laws that were guaranteeing workplace and collective bargaining rights. Farm labour was excluded from Ontario's *1920 Minimum Wage Act*, the *1922 One Day Rest in Seven Act*, and the *1935 Industrial Standards Act*.²²¹ Federal unemployment legislation pursued similar exclusions of farm workers.²²²

Labour codes in relation to agricultural work in the 1920s and 1930s “explicitly excluded farm workers from union organizing” as a “form of protection against Communist labour incursions” onto the family farm²²³ Following the second world war, despite the family farm’s diminishing share of the Canadian agricultural sector, labour codes were not altered to permit farm workers’ unionization. The increasing mechanization of farm production methods did not change the fact that farm labour remained seasonally dependent on crop cycles. Wages for hard farm work remained low and more opportunities in cities led to increasing migration of domestic farm workers from rural to urban areas.²²⁴

The post-second world war period witnessed greater union involvement with farm owner organizations. Much of the farmer-labour cooperation was the result of efforts by Joseph Lee Phelps. Phelps was one of the founders of the Farmer-Labour Party in Saskatchewan, which later became the Cooperative Commonwealth Federation (CCF), and built the Saskatchewan farmers’ union to a powerful political force.²²⁵ The Canadian Farmer-Labour Coordinating Council, representing both national and provincial

²²¹ L Vosko, *supra* note 99 at 261.

²²² *Ibid.*

²²³ Sawchuk, *supra* note 19 at 497.

²²⁴ Satzewich, *supra* note 101 at 81-82.

²²⁵ Saskatchewan Agricultural Hall of Fame, “Salute to Saskatchewan Farm Leaders: Joseph Lee Phelps”, online: <<http://www.sahf.ca/profile.php?id=107>>

organizations, held its inaugural meeting in Winnipeg in 1957. The approved policies came from farm union group recommendations that included little reference to farm labour.²²⁶ The Canadian Labour Congress (CLC) asked farm organizations to support its demands for collective bargaining for all government employees and the placing of immigration under the Department of Labour, as well as an advisory committee on immigration that would recommend legislative and policy changes.²²⁷ Although there may have been no explicit *quid pro quo*, organized labour remained relatively silent on the unionization of agricultural workers.

In the late 1950s and 1960s, as the issue of acquiring temporary foreign workers for Canadian agricultural work became more prominent, the Ontario Federation of Labour (OFL) issued its own study on the issue of foreign seasonal agricultural workers.²²⁸ The OFL study supported the federal government's Task Force report stating that bilateral seasonal farm worker agreements "with these two countries [Mexico and Portugal] would not only put an official seal of approval on these seasonal movements but would also give federal authorities some measure of control over wages and working conditions for transient labourers who are not covered now by either federal or provincial standards."²²⁹ The report made no mention of the possibility of organizing these workers in unions or engaging in collective bargaining for their interests.

²²⁶ Although there was reference to a "substantial increase" in the Colombo Plan, which was partly aimed at assisting unskilled workers in third world countries. See *supra* note 194 for an overview of the "Colombo Plan."

²²⁷ Canada Department of Labour, *Labour Gazette* (Ottawa: Queens Printer, 1957) at 1067.

²²⁸ B Ward, *Harvest of Concern: Conditions in Farming and Problems of Farm Labour in Ontario* (Ottawa: Ontario Federation of Labour, 1974).

²²⁹ Sanderson, *supra* note 89.

Unlike their American counterparts, unions in Canada were generally less vocal on the use of Mexican migrant workers on Canadian farms.²³⁰ Pressure from American unions on the US government was partially responsible for the ending of the *Bracero* program in the United States, which had brought in Mexican seasonal workers for temporary agricultural labour, and for changes in state laws regarding collective bargaining for farm workers.²³¹ Canadian unions did not actively engage with SAWP workers prior to the 1990s, during a period when unionization of agricultural workers was generally prohibited by law throughout Canada.²³² The unions did not generally view the employment of temporary foreign agricultural workers as an “obstacle to the unionization of farm labour.”²³³ They viewed the SAWP as an administrative program that did not “undermine” domestic agricultural employment.²³⁴ Organized labour in Canada took this position despite the fact that the SAWP “flourished” under labour codes that continued to exclude farm workers from unionization.²³⁵ This situation persisted until the 1991 provincial election in British Columbia, when a New Democratic Party (NDP) government introduced legislation repealing the legal prohibitions on farm workers unionization.²³⁶

²³⁰ Basok, *supra* note 208. The American Federation of Labor-Congress of Industrial Organization (AFL-CIO) had advocated the ending of the Bracero Program in the 1960s because it was “virtually impossible” to unionize American farm workers “as long as growers had access to braceros.”

²³¹ Carmichael, *supra* note 70 at 146. The Bracero program, and the issue of American farm workers and collective bargaining, is explored in more detail in Chapter 4.

²³² Basok, *supra* note 208.

²³³ *Ibid.*

²³⁴ *Ibid.* Again, this differed from the situation in the United States, where “organized labour and state departments representing its interests opposed the [Bracero] guest worker programme.”

²³⁵ Sawchuk, *supra* note 19 at 497.

²³⁶ BC Federation of Labour, “Farmworkers”, online: <<http://www.bcfed.com/issues/farmworkers>>

2.14.1 Genesis of the agricultural unionization movement

The election of the NDP government in Ontario spurred the UFCW to begin major efforts to collectively organize farm workers. This included efforts targeted specifically at foreign migrant farm workers.²³⁷ In 1994 the Ontario NDP government enacted the *Agricultural Labour Relations Act* (“ALRA”).²³⁸ The ALRA was a landmark piece of legislation, granting unprecedented collective bargaining rights to agricultural workers in the province. The ALRA led the UFCW to begin outreach programs to agricultural workers in Ontario. This led to 200 Canadian and resident agricultural workers unionizing at Highline Mushrooms in Leamington, Ontario in 1995.²³⁹ However, the ALRA did not directly address foreign migrant workers working on Ontario farms and there were no major campaigns to unionize SAWP workers at that time.

The newly elected Progressive Conservative government in Ontario repealed the ALRA in November 1995, replacing it with the *Labour Relations and Employment Statute Law Amendment Act* (LRESLAA).²⁴⁰ The LRESLAA barred all farm workers from collective bargaining and the Highline Mushrooms farm was decertified within a year. In response, the UFCW filed a legal challenge against the Harris government, alleging violations of workers’ *Charter* rights of freedom of association and equality.²⁴¹

²³⁷ Agriculture Workers Alliance, “History of Agricultural Workers in Canada”, online: <<http://awa-ata.ca/en/about/history-of-agricultural-workers-in-canada/>>.

²³⁸ *Agricultural Labour Relations Act 1994*, SO 1994, c 6. Repealed (10 November 1995). See: 1995, c 1, s 80 (1).

²³⁹ UFCW, “History of Agricultural Workers in Canada”, online: <http://www.ufcw.ca/index.php?option=com_content&view=article&id=2003&Itemid=245&lang=en>.

²⁴⁰ *Labour Relations and Employment Statute Law Amendment Act 1995*, SO 1995, c 1, Sched A, (passed by the Mike Harris government, 10 November 1995).

²⁴¹ *Canadian Charter of Rights and Freedoms*, ss 2(d), 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

This challenge was ultimately dealt with by the Supreme Court of Canada in the landmark *Dunmore v. Ontario* decision.²⁴²

In *Dunmore*, the Supreme Court held that agricultural workers' exclusion from Ontario labour legislation impeded their freedom to organize. The ruling also recognized the vulnerable position of agricultural workers and the power imbalance between managers and the marginalized farm workers' "political impotence" as well as workers' "lack of resources to associate without state protection and their vulnerability to reprisal by employers."²⁴³ The decision gave the Ontario government 18 months to address the exclusion of agricultural workers from the *Ontario Labour Relations Act*.

In response to *Dunmore*, the Ontario government in 2002 established the *Agricultural Employees Protection Act* (AEPA), which granted farm workers' the freedom to "associate" but not to collectively bargain.²⁴⁴ Despite its name, the AEPA offered no new protections to agricultural workers but attempted to comply with the *Dunmore* ruling through allowing farm workers to join an "association." The AEPA departed from the typical structure of labour relations by not requiring agricultural employers to engage in good-faith bargaining with employee associations. The AEPA contained no provisions for solving "bargaining" impasses, nor did it include any enforcement provisions in the event that the employer agreed to any of the workers' demands.²⁴⁵ The AEPA became the subject of a decade long court battle between Ontario and the agricultural industry on the one hand and the UFCW and migrant worker support

²⁴² *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016. (*Dunmore*)

²⁴³ *Ibid.* at para. 41.

²⁴⁴ *Agricultural Employees Protection Act*, SO 2002, c 16

²⁴⁵ Walchuk, *supra* note 223 at 154.

groups on the other, culminating in a 2011 Supreme Court of Canada decision that upheld the legislation.²⁴⁶ A detailed legal analysis of this litigation is included in the next chapter.

But it is important to note here that the AEPA was an outgrowth of the Ontario Conservative Government's view of labour-management relations in the agricultural industry. In the final analysis, labour relations analysts interpreted its emphasis on voluntary "negotiations" - without any enforcement provisions - as a throwback to labour-employer relations that existed prior to the Second World War.²⁴⁷ The Ontario government put forward a somewhat extreme concept of majoritarian representation, as the AEPA had no requirement that any farm worker associations would be supported by a majority or even a plurality of farm workers. The AEPA also took a unique view of the concept of exclusivity in bargaining as it allowed for the existence of multiple workers' associations for the same job classification. Such a scheme could either be viewed as encouraging representative freedom or fomenting "disunity and divisiveness within the workplace" through allowing "individual employees to 'bargain' outside of the association(s) at the workplace."²⁴⁸ The AEPA provided for no mandatory dues collections from workers, relying instead on a scheme of voluntary contributions.

The AEPA's existence hindered unionization, but did not stop efforts aimed at promoting awareness of legal rights in the foreign agricultural worker community. In 2002 the UFCW assisted in opening the first Migrant Agricultural Workers' Support

²⁴⁶ See *Ontario (Attorney General) v. Fraser*, 2011 SCC 20.

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid.*

Centre in Leamington, Ontario, with subsequent centres opening in Bradford and Simcoe, Ontario in 2003 and in Saint-Rémi, Quebec the following year.²⁴⁹ This was 36 years after the first Jamaican farm workers arrived in Canada through the SAWP.

The campaign to unionize agricultural workers fell under the general umbrella of the Agricultural Workers Alliance (“AWA”). The campaign focused on the perceived limits on protections for SAWP workers, compared to those available for residents, and aimed to provide equal protection for all agricultural workers. The newfound ability to unionize agricultural workers in the wake of the *Dunmore* ruling allowed the UFCW to build momentum to challenge perceived problems within the SAWP.²⁵⁰

The AWA is an association that works closely with the UFCW and both resident and foreign agricultural workers. It attempts to act as an advocate in particular for the concerns of SAWP workers and other temporary foreign workers on Canadian farms. Generally AWA support workers may be the main point of contact for many temporary foreign workers who may be in need of workplace related assistance or who may be facing legal problems relating to employment at a Canadian farm.²⁵¹ AWA workers also assist in providing legal information with issues relating to collective bargaining and help to run migrant worker support centres located near farming centres. The AWA’s efforts form the basis for much of the legal discussion in the following chapter.

²⁴⁹ *Ibid.*

²⁵⁰ The President of UFCW Canada, Wayne Hanley, stated that increasing the number of successful collective agreements on Canadian farms would encourage other workers “to seek the legal representation to deal with systemic problems with SAWP...and wages aren’t the only issue. So are fundamental workers’ rights.” See UFCW, “Seasonal farm workers in BC Go Union”, (8 August 2008), online: UFCW <http://www.ufcw.ca/index.php?option=com_content&view=article&id=593&catid=5&Itemid=99&lang=en>

²⁵¹ Agricultural Workers Alliance, online: <www.awe-ata.ca>. AWA case workers provide assistance with issues such as general labour rights, health and safety, taxation, cpp and ei issues, workers’ compensation, banking, and other issues related to daily life in Canada.

2.15 Conclusion

Understanding the historical and conceptual nature of farm labour migration to Canada is a fundamental part of understanding the relationship between collective bargaining and the SAWP. Consequently this chapter examined international farm labour migration within the context of neoliberal economic globalization. The evolution of seasonal agricultural migration to Canada was traced in order to specifically map out traditional racial attitudes towards farm labour migration. It has been illustrated that government attempts to satisfy chronic shortages in farm labour through shifting domestic labour between provinces met with mixed success. However, the use of immigration policy to facilitate the entry of permanent farm worker migrants was even less successful, as illustrated by the experience of the migration of Portuguese farm workers to Canada in the 1950s and 1960s.

The beginning of temporary agricultural labour migration was rooted in racialist conceptions of British West Indians and Mexicans as better suited for agricultural work. British colonial networks facilitated the creation of the SAWP, and the advent of the NAFTA caused a gradual realignment that has led to Mexican workers displacing Caribbean workers as the major labour component in the SAWP. Far from being a temporary development aid program, the SAWP along with the Temporary Foreign Worker program has become a critical element in Canada's immigration policy. This has happened even as temporary foreign agricultural workers continue to endure oppressive workplace conditions that Canadians have historically refused to tolerate.

These workplace conditions arise within a historical-structural framework, where labour from Mexico to the Caribbean is transferred to facilitate crucial benefits to the

Canadian agricultural industry. Of course, situating the SAWP within this framework does not mean that there are no benefits to SAWP supplying countries - or indeed to the individual SAWP worker. The sections of this chapter dealing with Caribbean workers illustrate that many SAWP participants still view agricultural work in Canada as the path to a better individual future for themselves or their families. What is asserted is that the framework disproportionately benefits Canada and Canadian agricultural employers. Within this framework, there is no better path for the developing societies nor do any accrued benefits lead to a gradual disappearance of the SAWP. In fact both Canada and SAWP source countries tout the success of the program in zero-sum terms. Canada praises the program as a model of efficient labour movement that keeps its agricultural industry afloat, while source countries view the draining off of otherwise surplus labour as a valuable means of containing potential social unrest among the otherwise unemployed and restless. This type of framework is much more likely to resemble a permanent state of affairs than a temporary arrangement. The irony is here that the workers remain temporary subjects of Canada (and effectively of their home countries as well, since many workers spend decades of their adult lives entering and exiting Canada for seasonal periods only) while the program itself continues to exist and expand.

The common theme behind tribunal and court applications, education efforts, and unionization of SAWP workers is the desire to obtain better working conditions. But it may also have the effect of denying individual agency to the SAWP workers. More fundamentally, these efforts may not produce the desired results. Access to legal information and representation proved critical to organizing efforts as attempts to unionize SAWP workers at farms in Ontario involved challenging the restrictive

provisions of the AEPA. The negotiating process for the collective agreements on two Ontario farms that had voted for certification did not progress smoothly due partially to employer resistance legally permissible under the AEPA.

As discussed in the following chapter, the AEPA formed the basis for legal challenges that went on for years. In 2003 the UFCW launched three court challenges that included a direct constitutional challenge to the AEPA, and another challenge that involved the mandatory deduction of EI premiums for SAWP workers. Although these cases were partially successful they also raise a series of questions on the efficacy of legal responses to collective organizing within the SAWP.

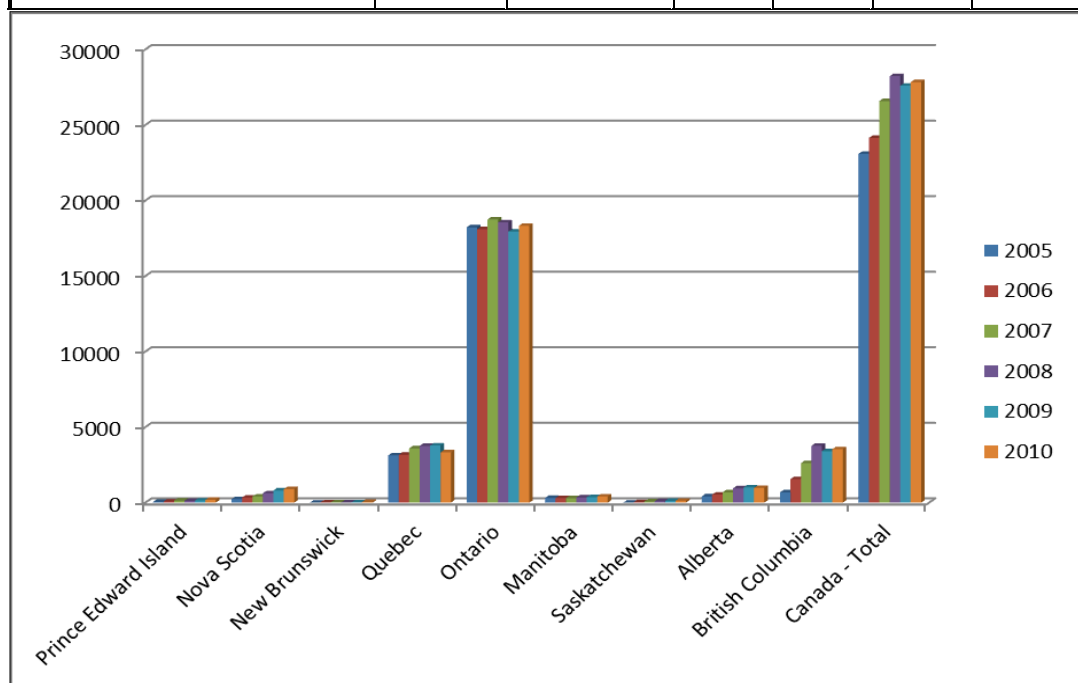
The nature and historical patterns of migrant farm labour coupled with the inherent legal obstacles means that SAWP workers' unionization faces unique and difficult obstacles. This chapter demonstrated that a framework was carefully constructed to alleviate chronic farm labour shortages through the use of a temporary farm workforce with limited rights, theoretically as a temporary measure. Over time, the gaining of some collective bargaining rights for farm workers has been balanced with the continued withholding of mobility rights through the use of temporary farm workers.

Farmers initially resisted the use of temporary foreign workers on racial grounds but there was also the gradual realization that the limiting of permanent residency and the prospect of temporary work in Canada could act to counter-balance any gains in workplace rights for farm workers. The collective bargaining gains in the agricultural field during the past decade have disproportionately benefited Canadian citizens or residents working in farm labour as they can unionize without the prospects of deportation and blacklisting facing foreign migrant farm workers. At its core, the legal

analysis in the following chapter operates within this paradigm, one where there is a fundamental legal inequality in the positions of the parties.

Table 2.1 Distribution of SAWP workers in Canada and by province²⁵²

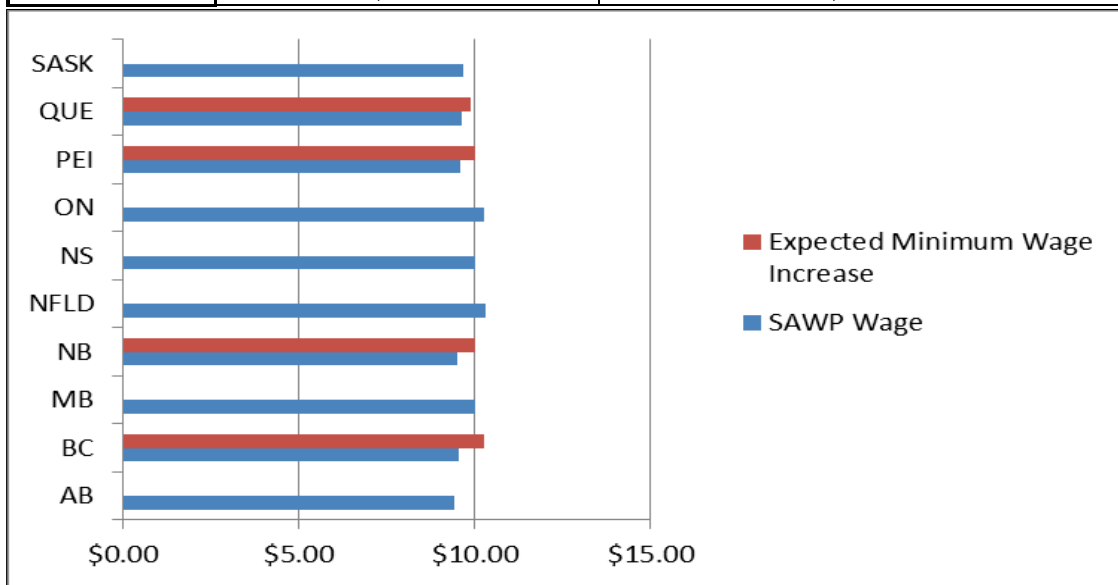
Province	2005	2006	2007	2008	2009	2010
Prince Edward Island	56	78	135	120	145	190
Nova Scotia	232	337	410	625	805	895
New Brunswick	--	18	25	15	25	50
Quebec	3,128	3,176	3,595	3,760	3,780	3,330
Ontario	18,227	18,100	18,745	18,550	17,940	18,325
Manitoba	311	301	295	345	365	405
Saskatchewan	--	42	80	100	120	130
Alberta	419	535	685	950	1,010	970
British Columbia	684	1,559	2,615	3,765	3,405	3,540
Canada - Total	23,090	24,146	26,585	28,230	27,595	27,835



²⁵² Data for Table 2.1 was obtained from HRSDC, “Table 9 (Annual): Number of temporary foreign worker positions on labour market opinion confirmations under the SAWP, by location of employment”, online: <http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/stats/annual/table9a.shtml>; HRSDC, “Table 10 (Annual): Number of temporary foreign worker positions on labour market opinion confirmations under the Seasonal Agricultural Worker Program, by location of employment”, online: <http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/stats/archive/annual2005-2008/table10a.shtml>.

Table 2.2 SAWP wage comparisons by province²⁵³

Province	SAWP Wage January 1, 2012	Expected Minimum Wage Increase in 2012
AB	\$9.40	\$0.00
BC	\$9.56	\$10.25 on May 1st
MB	\$10.00	\$0.00
NB	\$9.50	\$10.00 on April 1st
NFLD	\$10.30	\$0.00
NS	\$10.00	\$0.00
ON	\$10.25	\$0.00
PEI	\$9.60	\$10.00 on April 1st
QUE	\$9.65	\$9.90 on May 1st
SASK	\$9.67	\$0.00



²⁵³ Data for Table 2.2 was obtained from HRSDC, online: http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/vegetables.shtml#c1. Wages are for SAWP Commodities - Fruits, vegetables, flowers

3 - A Recent Legal Response to the SAWP – Unionization

This chapter builds upon the theoretical and historical outline and provides a detailed analysis of legal processes involving, or relevant to, SAWP workers. The main analysis here is of these workers' unionization in Canada. In order to perform this analysis, this chapter first examines the practical efficacy of SAWP workers' legal knowledge in unionization campaigns. These campaigns occurred during a period when several landmark Supreme Court of Canada decisions were issued relating to constitutionally protected collective bargaining rights and agricultural labour. They also took place within a context that makes SAWP workers' unionization unique.

The SAWP Employment Contract plays a prominent role in efforts to achieve a collective agreement in BC. The first collective agreement in BC covering SAWP workers, the agreement reached between Floralia Horticulture Ltd. and the UFCW, uses the SAWP Employment Contract as a baseline for negotiations. This chapter will provide an analysis of the collective agreement reached by Floralia and the UFCW.

The agricultural industry, generally opposed to farm workers' unionization, mobilized behind an application to the BC Labour Relations Board launched by Greenway Farms of Surrey, BC. Greenway's application questioned the applicability of provincial labour laws to SAWP workers in the province. The arguments in the Greenway challenge and the ultimate decision in favour of unionization play a pivotal role in the future of any unionization efforts directed at SAWP workers.

The data collected from interviews, legal submissions and Board decisions examined below illustrate the positions of the various parties during the process. It

reveals a deep split in attitudes towards unionization of SAWP workers. These attitudes were formed from conflicting priorities not only between the employers and the union, but also between some workers as well. The chapter maps out these processes and the outcomes of a very recent phenomenon – unionization of SAWP workers in Canada.

3.1 Legal knowledge and the SAWP worker

The common thread running through the theory and history outlined in the previous chapters is the concept of limited labour rights for certain workers. Part of this concept devolves from temporary migration of farm labour from Mexico and the Caribbean replacing permanent migration of European farm labour. The acquisition of legal rights for farm workers – including employment benefits and collective bargaining – were acquired *after* the end of federal and provincial involvement in transferring Canadian citizens and residents around the country to meet farm labour needs.

Direct government involvement in temporary migration thus occurred at a time when both migration and labour laws relating to farm workers were undergoing a fundamental shift. The elimination of explicitly racist provisions in Canada's immigration laws was designed to create a more equal system of migration regardless of ethnicity or race. The gradual accumulation of farm workers' legal rights was likewise intended to produce equality in workplace protections in Canada. In other words, both moves were designed to rectify a perceived injustice. However, both moves were paralleled by the creation and expansion of the SAWP. As Mexican and Caribbean immigrants gained entry and farm workers outside the program saw their rights slowly increase, the SAWP operated to limit the freedom of those within the structure of the program. Sociologists have noted that the legal requirements created by the SAWP

contract form an essential part of the "means of production" through which workers become "unfree."¹

Nevertheless, the immigration reforms of the 1960s, and the later acquisition of labour rights by farm workers, did open up opportunities to those who would previously have been denied options for migration to Canada. It is important to consider the legal and political realities within which SAWP workers operate and the choices that workers in Mexico and the Caribbean make when deciding to participate in the program.² Employers and governments participating in the SAWP still gain the nominal consent of workers to working conditions that are arguably exploitative.³ The paternalistic role of farmers in the SAWP contributes to gaining worker consent in the SAWP, as farmers generally view migrant workers as ignorant of Canadian labour law.⁴

This type of consent poses some questions about the types of freedoms SAWP

¹ Satzewich, *supra* Ch 2, note 101 at 42. This a contentious supposition located within Marxist theoretical discussions. See A Smith, "Legal Consciousness and Resistance in Caribbean Seasonal Agricultural Workers" (2005) 20:2 Can J of L & Soc 97 at 103; See also J Banaji, "The Fictions of Free Labour, Contract, Coercion, and So-called Unfree Labour" (2003) 11:3 Hist Materialism 69; T Brass, "Why Unfree Labour is Not 'So-Called': The Fictions of Jairus Banaji" (2003) 31:1 J of Peasant Stud 101. The phrase "unfree labour" is used in comparison with wage labour or free labour, concepts that in Marxist terms refer to economic compulsion. Marx did not use the term "unfree labour" in his work. The concept of "unfree labour" draws a line between workers based on notions of freedom and explains only part of the legal situation of SAWP workers in Canada. See Basok, *supra* Ch 1, note 97. It is a concept a bit too broad to explain the specific and complex relationships created through a program such as the SAWP. The relationships are based on many factors including concepts of unfree labour. But they also include labour migration that is based more on the new world of globalization than on the old notion of conceptualizing labour on a national level. The legal reforms to Canada's immigration laws in the 1960s opened a new "freedom" for non-European immigration to Canada. The large Caribbean community in Canada today, and indeed Canada's changing composition as a whole exists uneasily with the lack of freedom in a temporary non-white community outside of law's formal guarantee of equality.

² AA Smith, "Legal Consciousness and Resistance in Caribbean Seasonal Agricultural Workers" (2005) 20:2 Can J of Law and Soc 95 at 103.

³ The notion of "freedom" advocated in capitalist societies such as Canada and put forth eagerly by economists such as Milton Friedman were deconstructed by many of Friedman's contemporaries. For example, see CB Macpherson, "Elegant Tombstones: A Note on Friedman's Freedom" in CB Macpherson, *Democratic Theory: Essays in Retrieval* (New York: Oxford University Press, 1973) 143.

⁴ Basok, *supra* note 97 at 218.

workers can exercise when it comes to enjoying certain workplace rights. For example, does consent make SAWP workers able to assert their legal rights to collective bargaining in Canada? In order to do this, SAWP workers must “understand” that they are “denied legal rights” and possess certain communication skills in order to realize that there is a legal framework for seeking redress.⁵ As noted in the previous chapter, these legal rights exist within a historical framework that has consistently limited the acquisition of rights on the basis of race and economics.

In addition, does knowledge of legal rights translate into a practical ability for SAWP workers to be free to improve their position regarding collective bargaining?⁶ Beyond theoretical considerations of law and society - and specifically that knowledge of law translates into empowerment and a degree of resulting freedom – answering this question requires examining the ability of SAWP workers to actually use legal knowledge to better their workplace situation. Having some knowledge of established labour laws and ensuing legal rights would allow SAWP workers to resist, or at least begin resisting, the exploitative nature of farm working conditions in Canada.⁷ The idea

⁵ T Basok, “Post-national Citizenship, Social Exclusion and Migrant Rights: Mexican Seasonal Workers in Canada” (2004) 8:1 Citizenship Stud 47 at 50.

⁶ Educating SAWP workers in various aspects of law, with an expectation that this would result in increased collective bargaining activity, is an approach rooted in liberalism. In practical terms this means that the usefulness of a legal process such as collective bargaining to affect change is shaped by SAWP workers’ legal sensibilities and understanding of law formed in their home countries. For a general discussion of law as an interpretative concept, see R. Dworkin, *Law’s Empire*, (London: Belknap Press, 1986) at 410.

⁷ There is some indication that the spread of knowledge of Canadian labour laws among SAWP workers has led to increased resistance to exploitative working conditions. Recently, several types of worker resistance have been occurring at Canadian farms employing SAWP workers, including wildcat strikes, and departures from farms resulting in overstay. See Justicia for Migrant Workers, “Migrant Farm Workers Stage Wildcat Strike To Demand Thousands Of Dollars In Unpaid Wages: Employer Responds With Deportation”, (23 November 2010), online: < <http://j4mw.tumblr.com/post/1665403047/simcoe-on-migrant-farm-workers-stage-wildcat-strike>>. 116 SAWP workers from Mexico and Caribbean countries employed at Ghesquiere Plants Ltd staged a wildcat strike in November 2010 in part to obtain

that legal knowledge grants freedom relating to collective bargaining in part amounts to the level of awareness among SAWP workers about their legal rights. It also expects that unions in Canada – which have historically been absent in the farm labour discussion until very recently – will act as effective agents of education. This is made more complex by Canadian unions’ rather muted opposition to the expansion of guest worker programs in Canada and their historic ambivalence (until relatively recently) regarding SAWP workers in Canada.

3.2 SAWP workers’ legal voice

In 2006, a successful application for legal standing won the UFCW the right to represent SAWP workers in a legal challenge over Employment Insurance premiums that SAWP workers paid into but were unable to access.⁸ The Government of Canada brought a motion to strike this application on the grounds that the respondents on the motion, UFCW Canada National Director Michael Fraser on behalf of the UFCW, should not be granted public interest standing. The decision rejecting Canada’s motion acknowledged the precarious social and legal position of temporary foreign workers in Canada:

[116] In sharp contrast to refugees, foreign migrant agricultural workers are not a group who are readily and actively accessing the courts. **Foreign migrant agricultural workers have been wholly absent from the Canadian constitutional landscape.** Indeed, the UFCW contends, and the A.G. did not dispute, that they have not in fact initiated any court challenges or any constitutional challenges. **This is not a surprise given the realities of their social condition.**

[117] I have no hesitation in finding that the position of SAWP

approximately \$1000-\$6000 in unpaid wages. The workers also complained of “numerous human rights violations” including the cutoff of heat and electricity for some residents, and generally poor living conditions

⁸ *Fraser v. Canada* (2005) 51 Imm. L.R. (3d) 101, [2005] O.T.C. 1127 (Ont. S.C.J.).

workers on the outer margins of Canadian society constitutes a significant barrier to their participation in this litigation...

[118] ... **I am satisfied that there is sufficient evidence before me to establish that SAWP workers have told the UFCW that they fear participating in this application.** Indeed, I accept that this accounts for the lack of any more direct evidence before me about their concerns. While this might present problems when this application is heard on its merits, it is no basis to refuse to grant the UFCW public interest standing.”

[119] **Nor am I persuaded that the SAWP workers’ fears of reprisal are irrational** and should therefore be discounted or ignored. ... [all emphasis added]

This case thus established the legal standing of the UFCW to represent SAWP workers in Canadian courts. The UFCW subsequently launched a challenge to Ontario’s AEPA that dragged on for several years, illustrating some of the difficulties in pursuing a legal solution to a politically charged issue. In 2006, the Ontario Superior Court rejected the UFCW’s arguments and held that the AEPA did not violate *Charter* rights and was constitutional.⁹ The UFCW appealed and the Ontario Court of Appeal overturned this ruling in 2008, which held that the AEPA violated S. 2(d) of the *Charter*.¹⁰ The Ontario government appealed the ruling to the Supreme Court of Canada. On April 29, 2011, the Supreme Court of Canada issued its long-awaited decision, overturning the Court of Appeal’s decision and upholding the constitutionality of the AEPA.¹¹

The AEPA’s long, jurisprudential saga plays an important role in situating discussions of collective bargaining and the SAWP. First, by 2008 Ontario had a different government from the one that had brought in the AEPA as the Liberal Party had

⁹ *Fraser v. Ontario (Attorney General)* 79 O.R. (3d) 219, 263 D.L.R. (4th) 425

¹⁰ *Fraser v. Ontario (Attorney General)*, 92 O.R. (3d) 481, 301 D.L.R.(4th) 335.

¹¹ *Ontario (Attorney General) v. Fraser*, 2011 SCC 20 (“*Fraser*”).

defeated the Progressive Conservatives in the 2003 Provincial Election. With a new government eventually came the possibility of altering or even repealing the AEPA and the Liberals under Dalton McGuinty initially seemed to be somewhat more receptive to this than either of the previous Conservative governments.¹² However the McGuinty government's subsequent legal appeal to preserve the AEPA was supported by the Ontario agricultural industry¹³ which had lobbied hard for keeping the AEPA in place, arguing that the legislation was never given a fair chance to succeed.¹⁴ In response, in early 2009 the UFCW launched a complaint to the International Labour Organization stating that the AEPA violated international labour law ratified by Canada, resulting in a rare rebuke of Canada by the ILO.¹⁵

Second, the legal context changed dramatically in 2007 with the landmark Supreme Court of Canada ruling *Health Services and Support-Facilities Subsector Bargaining Association v. British Columbia*.¹⁶ The Supreme Court of Canada held in *Health Services* that s. 2(d) of the *Charter* “protects the capacity of members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues” and that “if the

¹² I Urquhart. “Liberals Feel Labour Pains As Farm Workers Dig In.” (27 June 2007) Toronto Star A18.

¹³ “Supreme Court Agrees to Hear Farm Workers Case” (7 April 2009), online: National Union of Public and General Employees <<http://www.nupge.ca/node/2186>>.

¹⁴ S Mann, “Decision on Agricultural Workers’ Bargaining Rights Still Months Away” (18 December 2009), online: <<http://www.betterfarming.com/online-news/decision-agricultural-workers%E2%80%99-bargaining-rights-still-months-away-2521>> (accessed 30 April 2011). The Chair of the agricultural industry’s Labour Issues Coordinating Committee, Ken Forth, publicly stated that the industry was in favour of freedom of association and negotiation for farm workers but not the “institutionalization” of a model of collective bargaining as part of provincial legislation.

¹⁵ UFCW, “Statement of Evidence to the Committee on Freedom of Association of the ILO against the Government of Ontario in respect of the Agricultural Employees Protection Act S.O. 2002, Ch. 16 submitted by the UFCW on behalf of Agricultural Employees in the Province of Ontario”, online: <http://www.ufcw.ca/Theme/UFCW/files/ILO/ILO%20PDF/UFCW%20Canada_%20ILO_Statement%20of%20Evidence_23March2009.pdf>

¹⁶ *Health Services and Support-Facilities Subsector Bargaining Association v. British Columbia*. [2007], 2 SCR 391, 2007 SCC 27. (“*Health Services*”)

government substantially interferes with that right, it violates s. 2(d) of the Charter.”¹⁷

The court framed its reasoning in basic human values:

The right to bargain collectively with an employer enhances the human dignity, liberty and autonomy of workers by giving them the opportunity to influence the establishment of workplace rules and thereby gain some control over a major aspect of their lives, namely their work... Collective bargaining is not simply an instrument for pursuing external ends...rather [it] is intrinsically valuable as an experience in self-government... Collective bargaining permits workers to achieve a form of workplace democracy and to ensure the rule of law in the workplace. Workers gain a voice to influence the establishment of rules that control a major aspect of their lives.”¹⁸

3.2.1 No right to a particular collective bargaining model

The ruling in *Health Services* was nonetheless not the complete victory that Canadian unions had hoped for. The right to collective bargaining was a “limited right” to protect a non-particular process, with non-guaranteed results:

The right to collective bargaining thus conceived is a limited right. First, as the right is to a process, it does not guarantee a certain substantive or economic outcome. Moreover, the right is to a general process of collective bargaining, not to a particular model of labour relations, nor to a specific bargaining method...Finally, and most importantly, the interference, as Dunmore instructs, must be substantial — so substantial that it interferes not only with the attainment of the union members’ objectives (which is not protected), but with the very process that enables them to pursue these objectives by engaging in meaningful negotiations with the employer.¹⁹

In other words, the Court outlined a right to a general process of collective bargaining, not a right to a particular model of labour relations, or to a specific bargaining method. The judgment was open to interpretation. It could be argued that Canada’s Supreme Court decided that collective bargaining was a fundamental freedom and that

¹⁷ *Ibid.* at paras 2 and 19.

¹⁸ *Ibid.* at para 82.

¹⁹ *Ibid.* at para 91

federal or provincial governments could not interfere with this basic principle. On the other hand, it could be argued that a specific model of collective bargaining was not enshrined as a constitutionally protected right. In any event the ruling had national ramifications and was immediately viewed as having potential ramifications on *prima facie* prohibitions on collective bargaining, specifically Ontario's ban on collective bargaining for agricultural workers.

The Supreme Court of Canada's *Fraser* decision is over 200 pages long and was immediately noted by labour lawyers as "one of the most significant labour and constitutional decisions in Canadian history."²⁰ The decision's conclusion is important but another interesting facet is an apparent split between the justices. Although a clear majority held that the provisions in the AEPA satisfied constitutional requirements established under the *Health Services* decision, the justices were divided over the meaning of *Health Services*, and the meaning of constitutional guarantees for employee-employer bargaining.

Much of the majority's opinion consists of considering various academic, historical and international law arguments relating to farm workers and unionization in Canada. The heart of the decision focuses on the main issue of the appeal – whether or not *Health Services* established a constitutional right to a particular model of collective bargaining. Specifically, the question was whether the *Health Services* ruling intended that the Wagner model of collective bargaining²¹ - the dominant collective bargaining model in

²⁰ Heenan Blaikie LLP, "Labour and Employment in the News" (29 April 2011), online: http://www.heenanblaikie.com/images/newsletter/enews/labour_and_employment/enews_labour-and-employment_2011-04-29a.html

²¹ The justices acknowledged the influence of American labour law on Canada's history, specifically mentioning that it "became an influential force when the United States passed the Wagner Act in 1935.

Canada - be enshrined as a constitutionally protected right throughout Canada. The Court clearly elaborated that this was not the effect of *Health Services*.

The Court of Appeal held that *Health Services* constitutionalizes a full-blown Wagner system of collective bargaining, and concluded that since the AEPA did not provide such a model, absent s. 1 justification, it is unconstitutional. The court appears to have understood the affirmation of the right to collective bargaining in *Health Services* as an affirmation of a particular type of collective bargaining, the Wagner model that is dominant in Canada. With respect, this overstates the ambit of the s. 2(d) right as described in *Health Services*.²²

The court then went on to explain the rationale in its previous decisions, which gradually expanded the general right to collective bargaining while defining that right to a “particular kind of collective bargaining”:

...the logic of *Dunmore* and *Health Services* is at odds with the view that s. 2(d) protects a particular kind of collective bargaining. As discussed earlier, what s. 2(d) protects is the right to associate to achieve collective goals. Laws or government action that make it impossible to achieve collective goals have the effect of limiting freedom of association, by making it pointless...However, no particular type of bargaining is protected. In every case, the question is whether the impugned law or state action has the effect of making it impossible to act collectively to achieve workplace goals.

It follows that *Health Services* does not support the view of the Ontario Court of Appeal in this case that legislatures are constitutionally required, in all cases and for all industries, to enact laws that set up a uniform model of labour relations imposing a statutory duty to bargain in good faith, statutory recognition of the principles of exclusive majority representation and a statutory mechanism for resolving bargaining impasses and disputes regarding the interpretation or administration of collective agreements. What is protected is associational activity, not a

Health Services, *supra* note 16 at para 43. The Wagner Model of collective bargaining stems from the *National Labor Relations Act (1935)*, Pub. L. No. 74-198, 49 Stat. 452 (“Wagner Act”); see also *San Diego Building Trades Council v. Garmon* 359 U.S. 256 (1959). The Wagner Act provided basic workers' rights in union organizing and collective bargaining, while prohibiting certain employer and union conduct that could make employment conditional on refraining from joining a union, or mandatory union membership. The Wagner Model generally refers to the type of collective bargaining engaged in trade union represented workers and the employer.

²² *Fraser*, *supra* note 11 at paras 44-45

particular process or result.²³

Finally, the Court addressed the Section 15 arguments, namely that the AEPA violated farm workers' equality rights under the Charter. The majority restated their "sympathy" for the vulnerable position of farm workers, first expressed in *Dunmore*, but then stated that the AEPA was Ontario's attempt to address those concerns.²⁴ The Court dismissed the arguments that the AEPA violated farm workers' S. 15 rights in a relatively brief section. The majority held that the S. 15 claim was "premature" and that "until the regime established by the AEPA is tested, it cannot be known whether it inappropriately disadvantages farm workers."²⁵

Some legal scholars have already criticized several aspects of the decision, stating that the Court seemingly refused to follow its own earlier logic in *Health Services* and *Dunmore* and "squandered the debatable promise" of its earlier judgments.²⁶ The fact that SAWP workers are uniquely vulnerable, disadvantaged and disenfranchised makes recognition of limited rights in this context a somewhat questionable legal exercise. In addition the Court followed a disturbing pattern of ignoring specific issues relating to migrant workers in this context. In *Dunmore*, Bastarache J., writing for the majority, made "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."²⁷ In *Fraser*, the Court again did not address the

²³ *Ibid.* at paras 46-48.

²⁴ *Ibid.* at para 114.

²⁵ *Fraser*, *supra* note 11 at para 116.

²⁶ Professor Allan Hutchinson, Osgoode Hall Law School, quoted by Kirk Makin, "Farm Workers Have No Right to Unionize, Top Court Rules" *Globe and Mail* (29 April 2011) A4.

²⁷ *Dunmore*, *supra* note 242 at para 103.

specific conditions of migrant farm workers in Canada, despite the fact that both parties, and several interveners, in their submissions, raised the issue of SAWP workers.

3.2.2 The SAWP and the parties' positions in *Fraser*

The Ontario government argued that the structure of collective bargaining under the *Ontario Labour Relations Act* was incompatible with the nature of agricultural production in the province.²⁸ Ontario stated that the collective bargaining model proposed by the UFCW emerged from an early 20th century “Fordist industrial model of production” that was incompatible with modern farm labour.²⁹ SAWP workers were specifically addressed in Ontario’s factum. SAWP workers were said to be protected by the *Employers and Employees Act*³⁰, *Human Rights Code*³¹, *Health Insurance Act*³² and *Canada Pension Plan*³³. The first two acts purportedly protect SAWP workers’ rights to enforce wage claims and protect them from workplace harassment and discrimination under the provincial labour code. The latter two respectively offer health insurance and pension plan benefits to SAWP participants. The province accused the UFCW of bad faith attempts to discredit the AEPA, which included the union allegedly disparaging it as “toothless”, “meaningless” and “ineffective” while discouraging workers from attempting to use provisions of the Act in negotiations with farm employers.³⁴ It also disputed the characterization of agricultural production in Ontario as dominated by “factory farms”,

²⁸ *Ontario Labour Relations Act*, SO 1994, c 1.

²⁹ Factum of the Respondents: *Fraser v. Ontario*, Ont Ct App C44886, at para 38.

³⁰ RSO 1990, c E-12.

³¹ RSO 1990, c H-19, s 5.

³² RSO 1990, c H.6, s 45 (a.1), (b) and RRO 1990, Reg 552, ss 1.1(1)(a), 3(4)14.

³³ RSO 1985, c C-8, s 6(2)(a).

³⁴ *Supra* note 29 at para 49.

noting that farm production has historically been organized “primarily through the family farm.”³⁵ SAWP workers were noted to comprise approximately 11% of the province’s farm workforce on a full-time equivalent basis.³⁶ The province further rejected the contention that agricultural workers suffer from a particular “socio-economic or political vulnerability”, contending that there was no evidence to support that farm workers were “exploited” through lower wages or were a uniquely disadvantaged group.³⁷

These last statements were meant to apply to agricultural workers in general, and not specifically to SAWP workers, who suffer discriminatory treatment through the program in labour mobility or general vulnerability through lack of national citizenship and permanent residency. The province seemed to take great exception to the UFCW’s production of certain academic witnesses who have written extensively on the nature of “unfree” farm labour in Canada.³⁸ It denounced those witnesses’ academic research and writings as “offensive and baseless...political opinions” that ignored the evidence supporting agricultural work as a “better alternative to other work available for comparable skill levels and education.”³⁹

Much of the Ontario government’s factum relating to SAWP workers focused on the benefits of the program to migrant workers:

³⁵ *Ibid.* at paras 50-51.

³⁶ *Ibid.* at paras 62-64.

³⁷ *Ibid.*

³⁸ *Ibid.* at para 65. In particular, the writings of Professors Victor Satzewich and Tanya Basok were singled out. Basok was described in the Province’s factum as a “sociologist and a self-described ‘advocate’ for foreign seasonal employees who conceded that her activism inextricably informs her empirical work.” Satzewich’s research was described as out-dated. “None of Professor’s Satzewich’s evidence is current, all of his research sources dating from 1974 or earlier.”

³⁹ *Ibid.* The income levels of the individual appellants’ was noted, along with their status as permanent immigrants with limited English skills. Agricultural work allegedly “dramatically improved their standard of living” and purchases of properties and a car were noted.

The Appellants raise issues concerning the alleged unfairness of a federal program, the SAWP, carried on in cooperation with certain foreign governments that is designed to assist Canadian farmers in meeting their needs for seasonal workers. The Appellants presented no evidence from any seasonal workers, nor is it clear how the issues raised with respect to the federal program would be addressed by inclusion in an LRA regime...SAWP participants earn substantially more for their work in Canada than they could for equivalent work in their home countries. Their pay also has more purchasing power in their home countries. As earnings are tied to the number of hours worked, SAWP workers generally seek to maximize their hours. Independent studies show that workers are generally pleased with the program although they do identify areas for potential improvement. The principal areas identified as needing improvement, particularly housing and statutory wage decisions, are not problems that relate to the availability of the LRA [Labour Relations Act] model. Participants have identified improvements in their families' well-being and standard of living as the primary benefit of the SAWP. Canadian-earned income is spent on household goods, children's education, health care and home improvements. Some employees use the money to move into self-employment.⁴⁰

Among the interveners supporting the Ontario government's position was the factum of the Federally Regulated Employers – Transportation and Communications (FETCO). FETCO submitted that the freedom of association guaranteed by the *Charter* should not impose “narrow and rigid limits” on provincial legislatures' ability to adapt labour laws to balance the interests of workers, employers and unions.⁴¹

The UFCW's factum for the Court of Appeal case specifically referenced that agricultural labour is increasingly composed of a “large proportion of immigrant and migrant workers...recruited specifically because of their vulnerability in the workforce.”⁴² The UFCW submitted that the agricultural workforce has historically been

⁴⁰ *Ibid.* at paras 72-77.

⁴¹ Factum of the Intervenor FETCO: *Fraser v. Ontario*, Ont Ct App C32968. FETCO also stressed that the federally regulated sector of employers is especially vulnerable to a “misinterpretation” of bargaining rights that would go against the “unique requirement” of labour relations legislation in federal areas such as transportation, communications and broadcasting sectors.

⁴² Factum of the Appellants: *Fraser v. Ontario*, Ont Ct App C44886 at para 12.

– and remains – “heavily dependent on a large foreign migrant work force that is legally restricted to working in agriculture.”⁴³ This was presented as part of a historical pattern of using “non-white” migrant labour speaking “little or no English” in a field with severely restricted labour rights.⁴⁴ The historical government intervention in agricultural labour was put forth as part as part of the “institutionalized” temporary migrant labour workforce that makes up a large part of Ontario’s agricultural workforce.⁴⁵

Justicia for Migrant Workers (J4MW) was granted intervener status in the *Fraser* case due to its long association with migrant farm workers.⁴⁶ The organization’s basic argument in its submissions was that “uncertain employment compounded by the lack of immigration status denies migrant workers the ability to exercise their rights.”⁴⁷ J4MW’s subsequent response to the ruling stated that the decision showed “utter contempt” for migrant workers through its refusal to acknowledge the racist history of Canada’s immigration laws and temporary foreign worker programs.⁴⁸ The Canadian Civil

⁴³ *Ibid.* at para 20.

⁴⁴ *Ibid.* at para 23. The workforce of Rol-Land Farms Ltd. the subject of the appeal, is comprised of 80% immigrant and migrant workers from Vietnam, China, Sudan, Cambodia, South and Central America, Portugal and the Middle East.

⁴⁵ *Ibid.* at para 25.

⁴⁶ J4MW describes itself as a “a volunteer run political non-profit collective” based in Toronto and Vancouver, and “comprised of activists from diverse walks of life (including labour activists, educators, researchers, students and youth of colour). J4MW strives to promote the rights of migrant farmworkers (participating in the Canadian Seasonal Agricultural Workers Program and the Low Skilled Workers Program) and farmworkers without status. Promoting workers rights entails fighting for spaces where workers themselves can articulate their concerns without losing their work or being repatriated. We start with workers’ knowledge and concerns and collectively devise strategies to make necessary changes. We see ourselves as allies and strive for a movement that is led and directed by workers themselves.” See J4MW, online: <http://www.justicia4migrantworkers.org/justicia_new.htm>.

⁴⁷ S Kullab, “Migrant Workers Have the Right to Unionize: Protestors”, (2010) 136:16 *The Varsity*, online: <<http://thevarsity.ca/2010/01/07/migrant-workers-have-right-to-unionize-protestors/>>

⁴⁸ J4MW, “Supreme Court Listened, They Ruled and They Failed! Migrant Workers Struggle to Continue Despite Recent Supreme Court Decision” (29 April 2011), online: <<http://www.justicia4migrantworkers.org/>>

Liberties Association (CCLA) had intervened as well to argue unsuccessfully that the Ontario legislation violated a constitutional right to collective bargaining in Section 2(d) of the Charter.⁴⁹ The CCLA argued that this right included elements not found in the AEPA, such as an “enforceable duty to bargain in good faith; a mechanism for resolving impasses in bargaining; and a democratic process for employees to choose a representative and a requirement that employers respect the results of employees’ democratic choices.”⁵⁰

Even before the Supreme Court of Canada’s final decision, several key points of the legal process illustrated its shortcomings for SAWP workers. Although the Court of Appeal’s decision illustrated that a Union can make a (temporarily) successful rights-based appeal for agricultural workers under Canada’s legal system, this method is very time-consuming. The legal process is subject to numerous appeals, procedural delays, and changes in the political environment. Ultimately, it may not work. More significantly, in its judgment the Supreme Court of Canada omitted any significant reference or account of temporary foreign farm workers. There was no consideration of the historical context of transfer and importation of farm labour or of the extensive arguments submitted by both parties in relation to SAWP workers. While there was consideration of the “historical context” of s. 2(d) *Charter* rights,⁵¹ there is no consideration whatsoever of the historical context of farm labour marginalization or the social arguments brought forth by J4MW. Despite its endorsement of *Health Services*,

⁴⁹ Factum of the Intervener CCLA: *Fraser v. Ontario*, SCC 32968.

⁵⁰ *Ibid.* at para 3.

⁵¹ *Fraser*, supra note 11 at para 206.

the Supreme Court of Canada put an interpretation on it that leaves SAWP workers in Ontario in their vulnerable position, and said nothing to address their unique status, effectively ignoring the large number of SAWP workers employed in the province's agricultural industry. The Court did not address any of the national citizenship or permanent residency issues in its decision related to immigration issues such as arbitrary repatriation of SAWP workers. These issues were raised by J4MW in their submissions that stated that, by their status as non-citizens, SAWP workers experience "systemic race and gender based discrimination in their workplace and local communities."⁵²

Canada's Supreme Court also did not address issues such as unequal access to provincial health care for foreign workers or problems with agricultural housing facilities for SAWP workers. In other words, the decision did not consider a discriminatory analysis under S. 15 of the *Charter* within the context of the SAWP. Part of this stems from many of the intervener submissions that grounded their *Charter* equality arguments on a principle of discriminatory treatment based on occupation rather than national citizenship.⁵³ In that argument, it is the occupation itself that forms a "discrete and insular minority...unable to change its occupation without great difficulty."⁵⁴

Following a great deal of effort on the part of the parties and the interveners, a favourable result for SAWP workers was not received. In this case, there were some compensatory factors in preparing for litigation. After its acceptance as an intervener, J4MW and another intervener, the Industrial Accident Victims Group of Ontario "jointly

⁵² Affidavit of Chris Ramsaroop (J4MW): *Fraser v. Ontario*, SCC 32968.

⁵³ *Supra* note 49 at paras 11-14.

⁵⁴ *Ibid.*

raised nearly \$5,000 to cover the cost of buses, food, and demonstration materials” while legal representation was provided on a pro bono basis.⁵⁵

3.3 Provincial farm unionization campaigns and SAWP workers

The UFCW’s national campaign to unionize agricultural workers took form outside of Ontario in two provinces that had long participated in the SAWP – Manitoba and Quebec. Later efforts would be concentrated in British Columbia while some provinces, such as Alberta, saw no unionizing activity at all due to the continuing existence of restrictive provincial laws regarding agricultural workers and unionization. The following sections examine and analyse unionization efforts of SAWP workers in these provinces.

Manitoba was an early site for union organizing efforts on farms. From 1999 to 2011 the province has had an NDP majority government heavily supported by trade unions. Premier Gary Doer’s labour reforms early in his first term made it easier for unions to obtain certification, generating some measure of opposition from Manitoba’s business community.⁵⁶ Doer may have been able to blunt opposition to unionization by the agricultural industry in Manitoba because many farmers saw his agricultural policies in a favourable light.⁵⁷ Manitoba was also active in addressing problems with the

⁵⁵ Kullab, *supra* note 47.

⁵⁶ D Kuxhaus, "Premier Tries To Placate Business Riled By Contentious Labour Law Changes" (2 August 2000) Winnipeg Free Press A1. Doer’s government raised the minimum wage by almost 50% in 9 years, generating more business opposition.

⁵⁷ Shortly after assuming office as Premier, Doer accompanied a multi-party delegation of western Premiers to Ottawa seeking a \$1.3 billion financial bailout for western farmers to help them survive an economic crisis in the agricultural sector. After describing an initial federal offer of \$170 in funding as “heartless” Doer was instrumental in negotiating a compromise federal bailout of \$400 million for Western farmers in February 2000. See V Lawton, "Farmers Get \$170 Million More In Aid" (5 November 1999) Toronto Star A5; B Laghi and D Roberts, "One-Time Cash Payout To Help Prairie Farmers With Spring Crop" (25 February 2000) Globe and Mail A4. Doer maintained a high level of support among farmers through his

temporary foreign worker program. In 2007 the province announced consultations aimed at regulating the unscrupulous behaviour of temporary foreign worker recruiters and abuses associated with recruiting foreign workers.⁵⁸ The first unionization efforts involving SAWP workers in Canada occurred in 2006 at Mayfair Farms in Portage La Prairie, Manitoba. UFCW Canada Local 832 applied to represent the bargaining unit in September 2006 but legal challenges by the employer delayed the certification vote until June 2008, when 93% of those who voted were in favour of a collective agreement.⁵⁹ The campaign was marred by claims from some of the Mexican SAWP workers alleging that they had been misled by the UFCW into signing union cards.⁶⁰ These forty-three Mexican workers were represented by legal counsel who alleged that the UFCW tricked the workers into signing union cards by promising legal representation to three of their co-workers in a criminal matter.⁶¹ The UFCW denied this stating that the workers may have been coerced into making the claims.⁶²

In its negotiations with Mayfair Farms the UFCW was also constricted by the

involvement in late 2004 in negotiating a \$50 million bailout package to western cattle farmers in response to an agriculture crisis caused by the discovery of Bovine Spongiform Encephalopathy (Mad Cow disease) in a Canadian cow and the subsequent closure of the American border to beef products produced in Canada. See M Rabson, "Border reopens to live cattle" (30 December 2004) Winnipeg Free Press A1.

⁵⁸ Government of Manitoba, "Province Announces Consultations To Better Regulate Immigration Recruiters And Modelling Agencies" (21 November 2007), online: <<http://news.gov.mb.ca/news/index.html?archive=2007-11-01&item=2662>> These consultations resulted in the *Worker Recruitment and Protection Act*, CCSM c W197.

⁵⁹ UFCW, "Ratification Of UFCW Canada First-Contract At Manitoba Farm Historic Breakthrough For Migrant Workers" (23 June 2008), online: <http://www.ufcw.ca/index.php?option=com_content&view=article&id=587&catid=5&Itemid=99&lang=en>

⁶⁰ CBC News, "Mexican migrant workers say they were misled into signing union cards", online: <<http://www.cbc.ca/news/canada/montreal/story/2007/01/31/migrant-workers.html>>

⁶¹ *Ibid.* The 43 workers who signed statements "accused the UFCW of telling them the union would provide them with a lawyer for three of their co-workers, who were arrested in connection with a sexual assault and the assault of a police officer while the workers were off duty."

⁶² *Ibid.*

farm's "fiscal realities" and the reality that the process could not "put farmers out of business."⁶³ Wages were just one issue for the union in the collective agreement negotiations. For SAWP workers, the issues of seniority, and a grievance procedure that protects temporary foreign workers who complain of workplace conditions from being arbitrarily repatriated were ones that took on major importance, particularly given the powers of the employer in the SAWP. The farm signed a three-year contract with UFCW Local 832 that was groundbreaking as it was the first successful attempt to create a bargaining unit including SAWP workers.

However, in August 2009, the workers at Mayfair farms voted to decertify their union. Prior to the vote, the Mexican consul had visited migrant Mexican farm workers at the farm and allegedly warned them in a closed door meeting that they could be prevented from ever coming to Canada again if they did not vote to decertify their union.⁶⁴ Workers were allegedly threatened with exclusion from the SAWP based on their support for unionization and "at least one strong union supporter [was] denied return to Mayfair Farms" in 2009.⁶⁵ Although the UFCW's unionization campaign in Manitoba continues, recent union efforts seem to be directed towards building alliances with local migrant worker advocacy groups.⁶⁶

In Quebec, the situation is complicated by the province's unique control over immigration. Under the *Canada-Quebec Accord*, the federal and Quebec governments

⁶³ *Ibid.*

⁶⁴ J deGroot, "How Clean Are Your Carrots?" (14 August 2009) *Winnipeg Free Press* A3.

⁶⁵ *Ibid.*

⁶⁶ UFCW, "UFCW CANADA Local 832 and Migrante Manitoba build on their work for migrant workers", online: <http://www.ufcw.ca/index.php?option=com_content&view=article&id=2386%3Aufcw-canada-local-832-and-migrante-manitoba-build-on-their-work-for-migrant-workers>

share jurisdiction with regards to immigration.⁶⁷ Section 1 of the Accord sets out its broad objectives. This includes the selection of persons intending to reside and/or work permanently or temporarily to Quebec. Any offers of agricultural employment to foreign workers of six days or more must be approved by both HRSDC/Service Canada and the Quebec Ministère de l'Immigration et des Communautés culturelles (MICC). A Quebec "Acceptance Certificate" valid for one season must be issued to MICC prior to arrival of any SAWP workers in the province. Under Jean Charest's Liberal government in power since 2003, the province was ambivalent towards the UFCW's initial attempts at unionizing SAWP workers at Quebec farms. The neo-liberal, more agri-business friendly attitude of the Quebec Liberal Party under Charest mirrored to some extent the approach previously taken by the Harris government in Ontario. In particular the Charest government's ambitious "Réingénierie de l'État" (Reengineering of the State) involved curtailing the power of Quebec's labour unions through reducing the number of bargaining units in the public health sector and abolishing the unions formed by domestic care workers as first steps towards more drastic changes in industrial relations.⁶⁸

As in Ontario, the UFCW and agricultural employers in Quebec became engaged in a legal battle that included union complaints to the Quebec Labour Relations Board (QLRB). A complaint to the QLRB culminated in a recent decision that dramatically

⁶⁷ *Canada-Québec Accord Relating To Immigration And Temporary Admission Of Aliens*, online: <http://www.micc.gouv.qc.ca/publications/pdf/accord_canada_quebec_immigration_anglais.pdf>; M Young, "Immigration: The Canada-Quebec Accord", online: <<http://dsp-psd.pwgsc.gc.ca/Collection-R/LoPBdP/BP/bp252-e.htm>>

⁶⁸ M Coutu and J Bourgault, "Freedom of Association in Québec since BC Health Services: The New Quiet Revolution?", (2011) 16:1 *Can Labour and Employment L J* 135. Although the Liberals won large support for these measures from employer's associations, Quebec unions responded fiercely through organizing large-scale protests, including a "national day of protest" on December 11, 2003 that resulted in the complete blockade of the ports of Montreal and Quebec City. http://www.usask.ca/law/sallows/papers/coutu_bourgault_revised.pdf

altered the situation for SAWP workers in the province, effectively nullifying a law that prevented the unionization of mainly migrant farm workers and granting a certification application for a unit of six Mexican migrant workers. In *Travailleurs et travailleuses unis de l'alimentation et du commerce, Section locale 501 v. Johanne L'Écuyer & Pierre Locas*⁶⁹ the Quebec Labour Relations Board struck down s. 21, par. 5 of the Québec Labour Code which stated that “Persons employed in the operation of a farm shall not be deemed to be employees [...] unless at least three of such persons are ordinarily and continuously so employed.” That section of the code effectively prevented migrant farm workers from unionizing as a minimum of three workers would need to be "continuously" employed at the farm in the proposed unit.

The Quebec government intervened in part to stress the differences among the migrant workers' status in Quebec. Quebec argued that Mexican farm workers in the province, under the SAWP, faced a different set of circumstances in employment conditions when compared to Guatemalan farm workers in the province under the low-skilled stream of the Temporary Foreign Worker program.⁷⁰ Information on both groups was part of the *Travailleurs* complaint, and the Quebec government essentially argued that the QLRB should ignore information presented on behalf of TFWP workers when applying the *Charter* to SAWP workers. The QLRB rejected this argument, noting that many sources of information can “permettent de tisser la toile de fond sur laquelle s'inscrivent les questions constitutionnelles débattues par les parties.” [“can help to weave the background fabric on which to view the constitutional questions discussed by the

⁶⁹ *Travailleurs et travailleuses unis de l'alimentation et du commerce, Section locale 501 v. Johanne L'Écuyer & Pierre Locas* 2010 QCCRT 0191 [“*Travailleurs*”]

⁷⁰ *Ibid.* at para 39.

parties.”]⁷¹ Finally, Quebec argued that if the labour code provision was found unconstitutional, the appropriate remedy would be for the Quebec legislature to design new labour code provisions for migrant farm workers –however, these new provisions did not necessarily have to incorporate a certain model of union certification.⁷²

The QLRB held that Quebec Labour Code provision violated the *Charter* by effectively preventing union representation for the largely temporary foreign migrant farm workers in the province, stating that s. 2(d) of the Charter guarantees the right to engage in collective bargaining, not just a theoretical right to join an association.⁷³ The QLRB specifically noted the circumstances of SAWP workers on Quebec farms, their vulnerability and discriminatory treatment prohibited under the *Charter*.

Le statut de travailleurs agricoles migrants constituerait un autre motif de discrimination prohibée par la Charte canadienne. Cette exclusion du régime général d'accréditation prévu au Code constituerait un désavantage et une distinction ayant pour effet de dévaloriser et marginaliser davantage des travailleurs particulièrement vulnérables. Cette vulnérabilité découle de leur condition de travailleur agricole migrant n'ayant aucun statut légal en tant que citoyen ou résident permanent du Canada.

[The status of migrant farm workers constitutes another ground of discrimination prohibited by the *Charter*. This exclusion from the system of certification under the Code would be a disadvantage and a distinction that has the effect of devaluing and marginalizing workers who are more particularly vulnerable. This vulnerability stems from their status as migrant farm worker with no legal status as citizen or permanent resident of Canada.]⁷⁴

The *Travailleurs* decision also contains large sections devoted to analysing the SAWP work contract, wages of Mexican and Caribbean workers in the province, and

⁷¹ *Ibid.* at para 59.

⁷² *Ibid.* at paras 402-403.

⁷³ *Ibid.* at para 341.

⁷⁴ *Ibid.* at para 24. English translation of the case quote provided by author.

their mobility and employment restrictions.⁷⁵ The QLRB noted that the Code provision affected a significant number of workers, approximately 6,000 SAWP and other temporary foreign agricultural workers from non-SAWP participating countries in Quebec each year. In striking down s. 21, paragraph 5 of the Quebec Labour Code, the QLRB determined that it must apply the labour code as if the impugned provisions did not exist.

The QLRB granted a certification application for a unit of six Mexican migrant workers. It refused the province's request to delay implementation of the decision or allow time for drafting of new legislation, on the basis that there had already been a 20 month delay in certification and the Board could not presume the province's intentions in applying for judicial review or in amending the labour code to extend some type of coverage to seasonal migrant workers.⁷⁶ The QLRB was also critical of the farm industry's arguments that it was, economically, uniquely fragile, noting that there was insufficient evidence to prove that the agricultural industry in Quebec was on the brink of economic failure. More specifically, the QLRB stated that there is no plausible link between the stated objective of protecting family farms and the denial of unionization to seasonal workers, pointing out that recognizing the right of farm workers to engage in collective bargaining is a prerequisite to industrial democracy.⁷⁷

The QLRB's consideration of SAWP workers in Quebec produced a positive outcome for the UFCW, and for SAWP workers seeking to unionize. This outcome was

⁷⁵ *Ibid* at paras 135-178.

⁷⁶ *Ibid.* at paras 411-412.

⁷⁷ *Ibid.* at para 302.

reached by adopting an approach that considered the historical context of SAWP workers in Canada, the nature of farm work, and the goals of workplace equality in a democracy. Significantly, it acknowledged the marginal position of the complainants, and rejected arguments that rights can be abrogated to protect certain economic interests. The QLRB's ruling potentially opened the door for eventual legal recognition of labour unions in Quebec that are composed of a majority of SAWP workers or temporary foreign workers in designated employers. More recently an agricultural unit at Produit VegKiss farms outside of Montreal, composed largely of Mexican SAWP workers and Guatemalans in the lower-skilled stream of the TFWP, was certified in Quebec in December 2011.⁷⁸

However, the QLRB did not guarantee that SAWP workers had the right to participate in the Wagner model of collective bargaining. It left open the possibility that an alternative model of collective bargaining could be enacted for Quebec farms, similar to the AEPA in Ontario. The legal process was also quite long and as of April 2012 is still filled with legal uncertainty. The *Travailleurs* decision came nearly two years after workers at the Mirabel-area farm voted for certification. Perhaps most importantly, the QLRB's decision was issued before the Supreme Court of Canada's *Fraser* decision.⁷⁹ A good deal of the QLRB's reasoning was based on Winkler J.'s Ontario Court of Appeal ruling in *Fraser* – much of which was later overturned by the Supreme Court.

Alberta remains the province with the most comprehensive exclusions for

⁷⁸ UFCW, "Seventh Agriculture Unit Certified in Quebec", online: <http://www.ufcw.ca/index.php?option=com_content&view=article&id=2600%3Aseventh-agriculture-unit-certified-in-quebec&catid=6%3Adirections-newsletter&Itemid=6&lang=en

⁷⁹ The Quebec Labour Board's *Travailleurs* decision was issued on April 16, 2010. Canada's Supreme Court issued the *Fraser* ruling on April 29, 2011.

agricultural workers and collective bargaining. There has been very little UFCW activity in Alberta, despite the fact that the province is host to a small number of SAWP workers. In 2010, the total number of Mexican SAWP workers in Alberta was approximately 850, representing a 3% decline from the previous year, and accounting for approximately 5% of the total number of Mexican SAWP workers in Canada.⁸⁰

The composition of SAWP workers in Alberta is almost exclusively Mexican and includes a majority of “name hires” (i.e. workers specifically requested by name), with slightly more than 10% of cases refused as name hires.⁸¹ The 15 complaints involving SAWP workers in Alberta in 2010 included 1 worker “sent home due to performance issues, 3 due to poor health, and 3 due to personal issues.”⁸² The average SAWP workers’ experience in Alberta consists of seasonal returns to Canada for a period of 6 years, with 118 Alberta farms using SAWP workers in 2010.⁸³

The province has made it easier for skilled temporary workers, entering the province through the federal Temporary Foreign Worker program, to apply for permanent residency. In 2011, the Alberta government announced that skilled temporary foreign workers that are certified in Alberta’s 31 optional trades can apply for permanent residency directly to the province, rather than going through their employer.⁸⁴ This

⁸⁰ Alberta Beekeepers, “Record of Service Canada meeting to discuss SAWP with Alberta Employers, Edmonton, Alberta” (27 October 2010), online: <<http://www.albertabeekeepers.org/documents/SAWPUpdateOctober2010.pdf>>. In addition to Service Canada, the meeting included representatives from the Mexico Consulate, HRSDC, WCB of Alberta, Alberta Health Services and Alberta Employment and Immigration Workplace Standards.

⁸¹ *Ibid.*

⁸² *Ibid.* The complaints represented a decline from 2009 figures.

⁸³ *Ibid.*

⁸⁴ “Alberta Foreign Workers Can Apply To Government For Permanent Residency” *Edmonton Journal* (14 March 2011), online: <<http://www.getintheknow.ca/news/article/201103/alberta-foreign-workers-can->

residency option is not applicable to SAWP workers, or workers entering the TFW program through the low-skilled stream.

SAWP workers are reliant on their federal employment contract protections since Alberta farm workers remain excluded from many legislative protections in the workplace. A voluntary Workers' Compensation Scheme for farm owners forces injured farm workers to resort to litigation, a route that SAWP workers are unlikely to pursue due to unfamiliarity with Canada's legal systems, and for fear of blacklisting.⁸⁵

Provisions in the *Alberta Employment Code* regarding minimum wages and wages relating to overtime and statutory holidays, and hours of work do not apply to temporary foreign agricultural workers – even some provisions restricting the employment of children do not apply to them.⁸⁶ The exemptions are similar to those in other provinces (Ontario, Saskatchewan and Prince Edward Island) and target farm workers “whose work is directly related to the primary production of eggs, milk, grain, seeds, fruit, vegetables, honey, livestock, game-production animals, poultry, bees or cultured fish.”⁸⁷ Workers on Alberta farms and ranches are also exempted from collective bargaining provisions in the

apply-government-permanent-residency>. The 31 optional trades are: Agricultural Equipment Technician, Insulator, Powerline Technician, Baker, Landscape Gardener, Power System Electrician, Bricklayer, Lather-Interior Systems Mechanic, Roofer, Cabinetmaker, Locksmith, Sawfiler, Carpenter, Machinist, Sawfiler, Communication Technician, Millwright, Concrete Finisher, Natural Gas Compression Technician, Cook, Outdoor Power Equipment Technician (OPET), Sprinkler System Installer, Electric Motor Systems Technician, Structural Steel and Plate Fitter, Floorcovering Installer, Tilesetter, Glazier, Painter and Decorator, Transport Refrigeration Technician, Glazier, Parts Technician, Water Well Driller, Instrument Technician. See Government of Alberta., “List of Compulsory and Optional Certification Trades”, (8 June 2011), online: <http://www.tradesecrets.alberta.ca/pdf/designated_trades_certification.pdf>

⁸⁵ B Barnetson, “The Regulatory Exclusion of Agricultural Workers in Alberta” (2009) 14 *Just Labour: Can J of Work and Soc* 50 at 53-54.

⁸⁶ *Alberta Employment Standards Code* (2000) c 9, pt 1, s. 2(3)(4). The Code does apply standards for farm workers in relation to minimum termination notice. Maternity and parental leave provisions are applicable as well.

⁸⁷ Barnetson, *supra* note 85.

Alberta Labour Relations Code if they are involved in these activities “or any other primary agricultural operation specified in the regulations under the Employment Standards Code.”⁸⁸ Alberta’s legislative exclusion is broader than Quebec’s exclusion before it was struck down in 2010. Following *Fraser*, it is unclear if a constitutional challenge against Alberta’s legislation would produce the same outcome as in Quebec. It is fairly clear however that SAWP workers remain completely excluded from collective bargaining in Alberta for the foreseeable future.

3.4 British Columbia legal case study – Greenway & UFCW

After British Columbia joined the SAWP in 2001 the UFCW increased its organizing efforts on BC farms. In 2006, UFCW Canada Local 1518 organized the sign-up campaign of SAWP workers at Surrey based Greenway Farms as part of the UFCW’s nationwide campaign to organize migrant farm workers in BC following the successful sign-up campaigns in Manitoba and Quebec.⁸⁹ The campaign was publicly advocated as a response to alleged “systemic problems” in the SAWP, such as the arbitrary repatriation of workers, and workplace safety and housing issues.⁹⁰ On August 7, 2008, a majority of workers at Greenway– including a majority of the SAWP workers at the farm - voted to join the UFCW.⁹¹ The Greenway certification represented the first successful vote in British Columbia that involved collectively organizing SAWP workers.

Greenway, supported by the Western Agricultural Labour Initiative and the British

⁸⁸ *Alberta Labour Relations Code*, c 1-1, ss 4(2)(e)(i)(ii).

⁸⁹ UFCW, “Seasonal Farm Workers in BC Go Union with UFCW Canada,” (8 August 2008) online: <http://www.ufcw.ca/index.php?option=com_content&view=article&id=593&catid=5&Itemid=99&lang=en>.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

Columbia Agricultural Council, applied to the BC Labour Relations Board to cancel the certification on the basis that the *Labour Relations Code*⁹² did not apply to migrant workers in the federally administered SAWP.⁹³ The *Dunmore* decision by the Supreme Court of Canada left the door open for this type of challenge through its explicit statement that the decision did not necessarily apply to SAWP workers.⁹⁴ The Greenway application involved examining the SAWP's Terms and Conditions, Employment Contracts and International Memoranda of Understandings negotiated by the Canadian Government, participating foreign governments, and representatives of the Canadian Horticultural Council. The objective was to determine if participation in the federally administered SAWP precluded the application of the *Labour Relations Code* provisions to SAWP workers.

Greenway's challenge was based on the premise that the SAWP operated as a self-contained structure. Within this structure both employee and employer rights were supposedly guaranteed by the Government of Canada and, in this case, the Government of Mexico. It argued that the terms and conditions of employment, defined in the SAWP Employment Contract, had to be completely clear to both employers and source countries as the costs for transporting migrant workers would have had to be determined in advance.⁹⁵ The SAWP Employment Contract for BC does indeed state that "no term or

⁹² *Labour Relations Code*, RSBC 1996, c 244.

⁹³ *Greenway Farms Ltd. and United Food and Commercial Workers International Union, Local 1518 and Attorney General of Canada and Attorney General of British Columbia*, (29 June 2009) BCLRB B135/2009 ["Greenway"].

⁹⁴ *Dunmore*, *supra* Ch 1, note 242.

⁹⁵ *2010 Employment Contract for Workers from Mexico in British Columbia*, online: HRSDC <http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/forms/sawpmcbc2010.pdf>

condition of this agreement shall be superseded, suspended, modified or otherwise amended, in any way, without the express written permission" of the Canadian government, other participating governments, and the employer and worker. Greenway submitted that this indicates that the Employment Contract reflects the whole of the terms of employment for SAWP workers in British Columbia.

At the core of Greenway's argument is the notion that migrant workers' rights are sufficiently protected in the SAWP so as to make the application of the *Labour Relations Code* redundant. It is also clear that the agricultural industry in BC felt that the application of the Code could interfere with the operation of the SAWP through the introduction of collective bargaining. Greenway explicitly stated in its submission that collective bargaining would "wholly undermine and negate" the SAWP structure established by the Canadian government through international agreements with participating countries.⁹⁶ It further argued that the SAWP represents an intention by the Canadian government to create a "multi-party, industry-wide, state-to-state agreement on terms and conditions of employment" that is incompatible with the "enterprise-based system of collective bargaining" envisioned by the *Labour Relations Code*.⁹⁷

The SAWP Employment Agreement also describes the role and responsibility of the designated foreign government agent (the "agent") in facilitating the Employment Agreement.⁹⁸ Agents are typically embassy or consular officials from the workers' home countries who are supposed to assist their nationals in the SAWP with problems encountered while working in Canada. Greenway submitted that application of the Code

⁹⁶ *Greenway, supra* note 93 at para 13

⁹⁷ *Ibid.* at para 15

⁹⁸ Agents in the SAWP scheme include Mexican or Commonwealth Caribbean consular officials.

and certification of a bargaining unit would obstruct the role of the agent from looking after the interests of nationals who are SAWP workers and also interfere with representing them in negotiations with employers.”⁹⁹

Greenway argued that because of certain constitutional doctrines that provided for exclusive federal jurisdiction in certain immigration matters, the *Labour Relations Code* was not applicable to SAWP workers in British Columbia. It submitted that the federal government's involvement with the SAWP represents "a valid exercise of federal jurisdiction over aliens pursuant to s. 91(25) of the *Constitution Act*, as well as over agriculture and immigration pursuant to s. 95."¹⁰⁰ The SAWP's Memorandums of Understanding between the concerned governments were portrayed as international agreements involving the exercise of Parliament's exclusive jurisdiction in the area of foreign affairs pursuant to its POGG powers. The impact of a provincial labour code extending certain collective bargaining rights to SAWP workers was submitted to be "incompatible with the federal government's purpose in establishing the SAWP program and thus the Code is rendered inoperative in relation to SAWP workers pursuant to the doctrine of federal paramountcy."¹⁰¹

Greenway also argued that federal law "includes the rights and obligations embodied in agreements made by the federal government with other states pursuant to which the citizen of those states are allowed to enter Canada to work."¹⁰² This argument rested on the proposition that the SAWP was "legislation" or "law" and that the definition

⁹⁹ *Greenway, supra* note 93 at paras 10 & 14.

¹⁰⁰ *Ibid.* at para 19. See explanation of Section 91, *supra* note 38.

¹⁰¹ *Ibid.* at para 20

¹⁰² *Ibid.* at para 56

of federal "law" could include a federal program that "encompasses the setting of mandatory terms and conditions of employment for the workers entering Canada" pursuant to the program.¹⁰³ Not treating the SAWP as "law" in Greenway's paradigm would lead to the demise of the entire program:

...the entire structure and operation of the SAWP program, including the Employment Agreement, is a product of negotiation and agreement between the federal government and the home country government, and cannot be altered without the express written permission of the Government of Canada and the home country government. This state to state agreement, which is the crux and essence of the SAWP program, cannot be brushed aside so easily. Put simply, if the Union is certified as the exclusive bargaining agent and the Employer is required by the Code to deal exclusively with the Union with respect to terms and conditions of employment, the state to state agreement is effectively destroyed.¹⁰⁴

The UFCW argued that application of the *Labour Relations Code* would not conflict with the operation of the SAWP, nor was the SAWP incompatible with collective bargaining. This argument rested on the principle that the SAWP Employment agreement creates certain minimal contractual obligations that do not conflict with a collective agreement that could provide additional rights to SAWP workers. In this paradigm the minimal rights spelled out in the Employment Agreement do not constitute the whole range of labour rights that would otherwise be available to agricultural labourers who are Canadian citizens or permanent residents. The UFCW argued that collective bargaining through inclusion in the *Labour Relations Code* was the most logical method for obtaining the total range of workplace rights and benefits for SAWP workers.

At the core of the Union's submission was the argument that the SAWP was not

¹⁰³ *Ibid.* at para 57

¹⁰⁴ *Ibid.*, at para 62

"law" and that the Code's application to SAWP workers in BC was thus not unconstitutional or a matter for federal jurisdiction. The Memorandum of Understanding between Canada and Mexico that forms the basis of the Mexican SAWP explicitly states that it is not a treaty, and both parties acknowledge it as an "administrative arrangement."¹⁰⁵ UFCW argued that the denial of a total range of SAWP workers' rights would not be consistent with the goals in the Memorandum of Understanding and its statement that SAWP workers are to be treated equally to Canadian workers performing the same type of agricultural work. The crux of the pro-unionization argument is that the SAWP in itself does not extend the normal range of workplace rights available to permanent residents or citizens. The Canadian government's role in the SAWP -- and indeed the role of the participating foreign governments -- focuses primarily on facilitating the orderly entry and documented exit of temporary foreign workers.

3.4.1 The BC Labour Relations Board's decision

The Board rejected Greenway's arguments. It held that the *Labour Relations Code* did apply to SAWP workers in the province. Collective bargaining was not incompatible with the SAWP, and that the federal government did not have exclusive jurisdiction over SAWP workers in British Columbia. The Board held that the Memorandum of Understanding that forms the SAWP is not an international treaty and more generally that the SAWP is not federal law. As the SAWP could not be considered "law" there is no actual legislation in conflict with the SAWP. In fact, the only federal law raised by

¹⁰⁵ *Ibid.* at para 77. The Board cites the 1974 *Memorandum of Understanding Between the Government of Canada and the Government of the United Mexican States Concerning the Mexican Seasonal Agricultural Workers Program*.

Greenway in its challenge was the *Immigration and Refugee Protection Act*¹⁰⁶ that, as the Union submitted, does not address the terms and conditions of employment of SAWP workers.¹⁰⁷

The Board held that the role of the Agent in the SAWP is clearly an administrative role similar to that performed by Canadian officials involved with the program and not, as Greenway contended, a role that encompassed the Agent becoming actively involved in representing SAWP workers, enforcing the terms of the Employment Agreement, and resolving disputes with workers in any way comparable to membership in a collective bargaining unit. The Board noted that the SAWP Employment Agreement plainly states that the Agent “shall be stationed in Canada to assist in the administration of the program.” It found this statement “to be inconsistent with the notion that, under the SAWP program, the Agent is intended to represent exclusively the interests of the workers.”¹⁰⁸

In its ruling, the Board also judged the UFCW to be able to “bargain collectively with the Employer, on behalf of SAWP workers, for alterations to those terms and conditions.”¹⁰⁹ Effectively, the Employment Contract represented a minimal outline of rights in the SAWP that did not preclude the granting of additional rights through collective bargaining. The Board went further and noted that even if the SAWP were to be considered federal “legislation”, the application of the *Labour Relations Code* to

¹⁰⁶ *Immigration and Refugee Protection Act*, SC 2001, c 27 (“IRPA”); *Immigration and Refugee Protection Regulations*, SOR/2002-227 (“IRPR”).

¹⁰⁷ Although not noted by the Board, the IRPA does mention temporary foreign workers within the context of the application and objectives of the Act. See *IRPA*, S.3(1)(g); Sections 27-31 of the IRPA also deal partially with temporary workers in Canada, but they are not applicable to the participants in the SAWP

¹⁰⁸ *Greenway*, *supra* note 93 at para 162

¹⁰⁹ *Ibid.* at para 147

SAWP workers "would not conflict with or frustrate the purposes of the SAWP such that the Code must be found to be constitutionally inapplicable to SAWP workers."¹¹⁰

With union certification came the possibility of labour disputes, strikes, and lockouts, all of which might hinder Greenway's farming operations and undermine the basis of the program. However, if the Board had denied the possibility of certification to SAWP workers, it would have confirmed that migrant workers had substantially fewer rights in the workplace than those constitutionally guaranteed to Canadian citizens and residents. The decision that collective bargaining rights can extend to SAWP workers represents a significant legal step towards the theoretical unionization of SAWP workers in British Columbia.

However, on 29 June 2009, the same day that the Board issued its decision allowing SAWP workers to unionize on its farm, Greenway farm workers filed to decertify their union. UFCW officials and organizers who had worked with the Mexican workers the previous season indicated that Greenway did not bring back many of the pro-union workers in 2009.¹¹¹ According to the UFCW, only twelve of thirty-five Mexican workers at Greenway who had been part of the organizing drive in 2008 were brought back in 2009, a number that was lower than regular SAWP retention levels. Instead, Greenway allegedly topped up its farm labour force with local Indo-Canadian workers.¹¹² During this time, the Abbotsford migrant worker support centre became aware of concerns circulating among SAWP workers in the Fraser Valley that employers would

¹¹⁰ *Ibid.* at paras 147-148

¹¹¹ T Sandborn, "Setback for Historic Effort to Unionize Guest Farm Workers" (29 June 2009) Tye, online: <<http://thetye.ca/News/2009/06/29/FarmUnionSetback/>>.

¹¹² *Ibid.*

use recall provisions in SAWP to exclude union supporters from SAWP work in Fraser Valley farms.¹¹³

The successful decertification vote occurred on 2 July 2009 amid the UFCW's complaints that another farm employer friendly with Greenway's owners had intimidated Greenway workers and led a campaign to "get rid of the union."¹¹⁴ The farm employer, who was not an employee of Greenway, denied this stating that he was "acting for the employees."¹¹⁵ The Board dismissed the UFCW's complaints, stating that Greenway's actions did not amount to unfair labour practices under the *Labour Relations Code*.¹¹⁶

The perception of the decision's fairness may have been tainted by accusations of bias leveled against the BC Labour Relations Board. The BC Supreme Court found that the vice-chair who ruled that Greenway's workforce could vote to decertify in 2009 had shown "actual bias" in a 2006 case involving claims of unfair labour practices towards another group of foreign workers.¹¹⁷ That decision was later overturned by the BC Court of Appeal, but the UFCW maintains that the Board had shown bias against temporary foreign workers.¹¹⁸

To those who paid close attention to the agricultural industry arguments during the

¹¹³ Interview with Lucy Luna, *supra* note 56.

¹¹⁴ J4MW, online: <<http://www.justicia4migrantworkers.org/bc/news.html>>.

¹¹⁵ T Sandborn, "Issues: Migrant Mexican Farm Workers Unionization Hopes Revived" (3 July 2009) *Abbotsford Today*, online: <<http://www.abbotsfordtoday.ca/?p=14196>>; *Labour Relations Code*, RSBC 1996, c 244, s 2(6)(1).

¹¹⁶ *Ibid.*

¹¹⁷ *Construction & Specialized Workers' Union, Local 1611 and SELI Canada Inc.* 2010 BCCA 335. The original 2006 case before the Board involved temporary foreign workers employed in the construction of the Canada Line. In 2006, the Construction and Specialized Workers' Union Local 1611 initiated complaints against Canada Line employers alleging that they were frustrating the collective bargaining process.

¹¹⁸ *Ibid.*

Greenway application, the farm's subsequent actions should not have been particularly surprising. In its application, Greenway made a critical point in admitting that the purpose of the SAWP - to ensure a sufficient labour supply for the participating farms to successfully cultivate and harvest their crops within the limited season available - was *not* compatible with the potential for labour disputes, strikes, and lockouts, stating that this would create a situation where "the very purpose of the program would be negated."¹¹⁹ This admission may not be surprising but, translated into plain language, an employer is essentially saying that it needs workers with restricted labour rights in order to make its business structure work. If one accepts this premise, then basic labour rights constitutionally guaranteed to Canadian citizens in this context would not be applicable to non-citizens in the SAWP.

3.5 Setbacks and success for unionization of SAWP workers at Floralia

Following its initial success at Greenway, the UFCW's next effort at unionization of SAWP workers in BC occurred in September 2008 at Floralia Plant Growers Ltd., a family-owned farming business in Abbotsford. The effort was complicated by the farm's layoff of 14 SAWP employees the day before the Union certification vote and their expulsion back to Mexico. In addition to the application for certification, the Union filed complaints with the BC Labour Relations Board, alleging that Floralia had violated the *Labour Relations Code* by improperly laying off the SAWP workers and that Floralia had engaged in "coercive and intimidating behavior" through holding a captive audience

¹¹⁹ *Ibid.* at para 16

meeting at which certain anti-union statements were allegedly made.¹²⁰

Floralia had participated in the SAWP since 2005, acquiring program workers through the Mexican Consulate in Vancouver. In 2008 Floralía had 30 employees, 29 of which were acquired through the SAWP. The exact chronology of both the layoffs and the certification efforts were critical to deciding the case, as both appeared to have occurred at approximately the same time period. The decision was complicated by inclement weather conditions and a serious crop failure that occurred at the farm at the end of August. Floralía contended that it had no choice but to lay off the 14 workers and return them to Mexico; that it acted solely because of the unavailability of sufficient work for the 14 SAWP workers and shortly before it learned of the Union's certification effort.¹²¹ The UFCW filed for union certification at Floralía on September 4, 2008, and the certification vote was scheduled for September 15. The UFCW argued that the workers were terminated on September 5 and “rushed to Vancouver International Airport” the next morning and “directed onto a plane” for repatriation back to Mexico.¹²²

The Union contended that the layoffs were motivated, at least in part, by anti-Union animus and it filed a complaint with the BC Labour Relations Board. The UFCW filed a second complaint based on a meeting called by one of Floralía's co-owners with all the farm workers, on the day of the Union certification vote. One of the Union's witnesses testified that one of the statements allegedly made by the Employer at that meeting was

¹²⁰ *Floralía Plant Growers Ltd v United Food and Commercial Workers International Union, Local 1518*, (October 8 2008) BCLRB B157/2008] [*“Floralía”*]

¹²¹ *Ibid.*

¹²² UFCW, “Farm Workers repatriated after exercising Human Rights” (14 September 2008), online: <http://www.ufcw.ca/index.php?option=com_content&view=article&id=596&catid=5&Itemid=99&lang=en>

that the workers "could be the group that could be re-elected for next season."¹²³ The Employer denied that this statement represented any form of intimidation and said that he was simply explaining the process to his workers.

The Board was required to examine the circumstances surrounding the layoffs, including the timing, the number laid off, and the individual employees selected for layoff. This entailed applying the relevant sections of the *Labour Relations Code*:

- 6...(3) An Employer or a person acting on behalf of an employer must not
- (a) discharge, suspend, transfer, lay off or otherwise discipline an employee, refuse to employ or continue to employ a person or discriminate against a person in regard to employment or a condition of employment because the person
 - i. is or proposes to become or seeks to induce another person to become a member or officer of a trade union, or
 - ii. participates in the promotion, formation or administration of a trade union,
 - (b) discharge, suspend, transfer, lay off or otherwise discipline an employee except for proper cause when a trade union is in the process of conducting a certification campaign for employees of that employer."¹²⁴

The burden of proof was on Floralia to prove on a balance of probabilities that it had laid off the 14 SAWP workers for legitimate business reasons and not in retaliation for the Union's certification drive.¹²⁵ Much of the Board's decision relied upon the testimony of the SAWP workers and Floralia's owners. In short, Floralia's owners contended that they had only received the certification package from the Board a short time after the decision had been made to layoff 14 SAWP workers and send them back to Mexico.¹²⁶

¹²³ *Floralia*, *supra* note 120 at para 59.

¹²⁴ *Labour Relations Code*, RSBC 1996, c 244, s 6(3).

¹²⁵ *Ibid*, s 14(7).

¹²⁶ *Floralia*, *supra* note 120 at paras 33-34.

The Board accepted nearly all of the owners' testimony, particularly in regard to the Employers' understanding of this part of the *Question and Answer* section of the Board's Employer Guide relating to Employer actions during an application for certification of a bargaining unit:

Q. Can I continue operating my business as usual while this is going on?

A. While an Application is pending you cannot, without the permission of the Labour Relations Board, change rates of pay or alter terms and conditions of employment. This restriction does not affect your right to suspend, transfer, lay off or discharge an employee for proper cause; however, you may be required by the Labour Relations Board to establish that you had proper cause.¹²⁷

However, where Floralia's owners were relatively consistent in their testimony, several of the Union's witnesses displayed some inconsistencies in their testimony. For example, all three Union witnesses testified that they were "not surprised" that Floralia was reducing its workforce, although two of them expressed surprise at the short notice of the layoffs.¹²⁸ The Board stated that "none of the Employees expressed any concerns that the Employer's actions were motivated by a desire to quickly remove Union supporters from the farm."¹²⁹

The Board found that Floralia had a legitimate business reason for laying off the workers, that it had made a decision to do so before learning of the Union's certification drive, and that the action was not motivated, even in part, by anti-Union animus. From the workers' testimony, the Board concluded that the Employers were motivated "by their economic interests and not by concern that the lay offs were motivated by anti-union

¹²⁷ *Ibid.* at para 37.

¹²⁸ *Ibid.* at paras 47-49.

¹²⁹ *Ibid.* at para 90.

animus." The Board resolved some of the conflicting testimony of the witnesses in favour of Floralia based almost entirely on placing more credibility on the Employers' straightforward denials of anti-union animus, rather than the Mexican SAWP workers' more nuanced testimony.¹³⁰ However, the Board did not consider the unique aspects of the SAWP, namely that the program countenances deportation of workers and blacklisting that could result from workers' openly expressing negative sentiments towards Floralia.

The Board determined from a previous ruling that both a shortage of work and a bona fide layoff were required to be demonstrated by the Employer to justify the SAWP workers' lay-offs.¹³¹ It found that Floralia clearly provided sufficient evidence that it suffered a "terrible growing season" and a shortage of work.¹³² The Board concluded that a terrible growing season would have resulted in a shortage of work if the layoffs had not occurred.

An important point in the layoffs is the *composition* of the group of 14 SAWP workers that were sent home. All 14 workers were first year SAWP participants. The Union argued that Floralia had chosen the most vocal Union supporters to be sent home and that those happened to be the newer workers. The Board stated that it felt there was

¹³⁰ In reconciling the conflicting testimony and credibility Floralia's owners and the SAWP workers, the Board cited the BC Court of Appeal decision *Faryna v. Chorny* [1952], 2 D.L.R. 354 (B.C.C.A.) at 357. The excerpt cited by the Board stated that "The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of the consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions."

¹³¹ *White Spot Ltd.*, BCLRB B437/93, 21 C.L.R.B.R. (2d) 146.

¹³² *Floralia*, *supra* note 120 at para 74.

"no evidence to indicate which employees were Union supporters and which were not."¹³³ This is not a surprising observation to make within the context of the SAWP, where workers are typically reluctant to publically voice any support for union activities. There was moreover no evidence before the Board to indicate that in the past Floralia had preferred more experienced SAWP workers to newer workers. The Board accepted that there was no clear historical pattern of experienced versus newer workers returning back to Mexico first. The Board admitted that the "number of employees laid off is unusually high."¹³⁴ Yet for no clear reason other than an arguably flawed assessment of witness credibility in the SAWP context, it accepted Floralia's argument that it preferred to keep experienced SAWP workers longer, and that this was the sole reason for the lay-off and expulsion of the newest SAWP workers.

The Board also accepted that the meeting held by the Employer with the workers regarding possible unionization was not coercive or intimidating. Its reasoning lay in amendments to the Code enacted by the new Liberal government of British Columbia in 2002 and Board decisions implying that these changes gave employers a broader scope in communicating with their employees during Union certification drives.¹³⁵ The Board referred to a previous ruling, which stated that communication that was biased, uninformed, or unreasonable must "still be considered in the entire context in determining

¹³³ *Ibid.* at para 80

¹³⁴ *Ibid.* at para 85.

¹³⁵ *BC Labour Relations Code*, s 8. Section 8 of the Code was amended by the BC Liberals after their election in 2002 to read "Subject to the regulations, a person has the freedom to express his or her views on any matter, including matters relating to an employer, a trade union or the representation of employees by a trade union, provided that the person does not use intimidation or coercion." This was widely interpreted by Employers as greatly broadening their freedom with respect to union certification and communication with employees. See BC Business Coalition, online: <http://www.coalitionbcbusiness.ca/pdf/lbr_code_report_05-2004.pdf>

whether they are coercive or intimidating."¹³⁶ Ironically, the Board then failed to apply the context of the SAWP in determining whether Floralia's behaviour was coercive or intimidating to foreign migrant workers.¹³⁷

The changes to the labour code broadening employer-employee communications effectively allowed the Board to ignore the precarious situation of the workers. The Board essentially ignored the possibility of coercion through the mere *holding* of an employer's meeting with SAWP workers on the day of the certification vote. For example, the Board did not consider whether Floralia had any opportunity to hold such a meeting more in advance of the certification vote, which would have allowed SAWP workers to get more information relating to the Employer's position. Instead, it accepted the entire account provided by Floralia that the Employer merely went over a document, translated into Spanish, outlining the Employer's position on unionization.

The Floralia legal saga occurred in the midst of the Greenway constitutional challenges at the Board. Two weeks after the decision affirming the expulsion of its SAWP workers, Floralia applied to have a declaration from the Board that the BC Labour Relations Code "cannot constitutionally apply to the foreign nationals working for the Employer in British Columbia under the SAWP."¹³⁸ Its application was based on the *Greenway* application. In addition, Floralia applied to obtain standing in *Greenway* and for the application for certification on its farm to be postponed pending the outcome of the constitutional issues raised in *Greenway*.

¹³⁶ *RMH Teleservices International Inc.* BCLRB B188/2005, 114 C.L.R.B.R. (2d) 128.

¹³⁷ There was an alleged statement from Floralia's co-owner to the SAWP workers voting in the union drive that they should think carefully because they "could be the group that could be re-elected for next season."

¹³⁸ *Floralia Plant Growers Ltd., & UFCW* BCLRB B165/2008.

The Board declined to postpone the certification vote at the Floralia farm, stating that the issues raised by Floralia in its application should have been raised during the earlier hearings on alleged unfair labour practices at its farm.¹³⁹ This illustrates, however, that Floralia was certainly more opposed to the certification process than was revealed at the earlier hearings. This brings into question the earlier decision that allowed the layoff and expulsion of the workers from Canada. Ultimately, despite the repatriation of some of its SAWP workers, the certification vote at Floralia proceeded and was successful.¹⁴⁰ Nearly a year later, on 21 September 2009, Floralia and the UFCW signed the first collective agreement covering SAWP workers as part of a bargaining unit in British Columbia.¹⁴¹

3.5.1 Analysis of the Floralia collective agreement

The Collective Agreement (“the Agreement”) signed by Floralia and the UFCW contains standard clauses relating to Union Recognition and Security, as well as Management Rights. Article 1 of the Agreement specifies the UFCW as the exclusive bargaining agent for all of Floralia’s farm employees in BC¹⁴² The Agreement includes protections for workers from unlawful discrimination or discharge for carrying out Union activities, provisions for collection of Union dues, appoint of Union representatives and stewards and notice to the UFCW of any termination of employees by Floralia. Article 8

¹³⁹ *Ibid.*

¹⁴⁰ UFCW, “Another BC Farm Goes Union with UFCW Canada” (14 October 2008), online: <http://www.ufcw.ca/Theme/UFCW/images/en/socialjustice/immigration_PDF/Resources_Immigr/UFCW%20BC%20Farm%20Unit%2014OCT2008.pdf>.

¹⁴¹ BCLRB, online: <<http://www.lrb.bc.ca/cas/WUK33.pdf>>. Although Greenway was the first bargaining unit formed in British Columbia composed of SAWP workers, a collective agreement between Greenway and its employees was never signed.

¹⁴² Exceptions were made for Floralia’s office workers and supervisors and other employees as may be excluded by the *BC Labour Relations Code*.

of the Agreement states that the BC Human Rights code applies to all workers in the bargaining unit including SAWP workers. This clause appears to have been inserted to end any speculation over the application of provincial human rights laws to temporary foreign workers. Provisions to prevent serious accidents like the one that involved Greenway's farm workers in 2010¹⁴³ are included in Article 16, and apply to the entire bargaining unit. Under Article 15 of the Agreement, SAWP workers are entitled to expanded bereavement leave to return to their home country due to a death in their immediate family. This leave, however, is to be paid for at the employee's expense. The Agreement also provides, in Article 20, basic storage facilities for SAWP workers at their own risk, so that those intending to return to Canada the following season can store items such as overalls, rain coat, rubber boots, jacket and a bike.

Floralia retained residual powers not limited in the Agreement, as well as powers not specifically modified by the Agreement, including: planning and operational control of its workforce; modifications to its crop production or method of operation; and hiring, firing, transferring and disciplining employees. Significantly Article 1.03 of the Agreement defines the term "employee" to include foreign workers in the bargaining unit, and specifically foreign workers hired under the SAWP. The same clause specified that should Floralia wish to hire foreign workers under another "Government Foreign Worker Program" the parties must meet to discuss and possibly negotiate changes to the Agreement. Although new employees covered by the Agreement were subject to a probationary period whereby they could be disciplined or discharged without recourse to grievance or arbitration provisions, this did not apply to SAWP workers who completed

¹⁴³ *Supra* note 12.

the probationary period in a prior season.

The number of workers necessary for Floralia in any given season was still to be decided by Floralia within the confines of the SAWP Program. In other words, there would still need to be a decision made by the Federal Government that an insufficient number of Canadian citizens or permanent residents were available to perform seasonal farm work. The Agreement retains the maximum working season of eight months for SAWP workers.

The Seniority provisions in Article 7 of the Agreement retained general principles of seniority applicable to accumulation of seniority time and subsequent hiring, layoff and recall of employees. The presence of SAWP workers in the bargaining unit led to a clarification in hiring preferences, whereby Canadian citizenship of workers took priority over foreign workers' seniority. This is in keeping with HRSDC and Service Canada requirements that employees who are Canadian citizens or permanent residents take precedence over the seniority of Foreign Workers in issues of obtaining and maintaining employment. Further, the prior work of transferred SAWP workers from one farm to another is not considered for purposes of seniority in the Agreement.

Article 10 of the Agreement expands on the SAWP Employment Contract's provisions for average work week hours. Clause I(4)(i) of the SAWP Employment Contract merely specifies that "the average minimum work week shall be 40 hours" for SAWP workers, and clause I(4)(ii) outlines that this shall be an average weekly income for the worker over the period of employment if unspecified "circumstances" prevent the fulfillment of a minimum 40 hour work week. Clause 10.01 of the Agreement expands on this, specifying weather and crop conditions feasible for farm work, lay-off provisions

that are in accordance with the Agreement, guaranteed work-week breaks of at least 1 day off each week, and daily work lunch breaks and rest periods. These provisions largely mirror those found in the SAWP Employment Contract, with the exception of the Schedule of Wages included in the Agreement.

The Grievance and Arbitration provisions outlined in Articles 13 and 14 of the Agreement make it clear that all relevant Arbitration provisions of the *BC Labour Relations Code* apply to all workers in the bargaining unit. Art. 14.02 covers grievance procedures dealing with terminated foreign workers subject to repatriation. This is a particularly sensitive area, given the repatriation of foreign workers just prior to the Union certification vote at Floralia's farm in September 2008. The Agreement outlines an expedited arbitration procedure where a foreign worker is terminated and subject to repatriation. During this period, the worker is allowed to continue to reside on the Floralia's premises unless he/she has been terminated for causing physical harm to any person or uttering threats or physical violence against any person.

The timelines in Art. 14.02 are

- within 24 hours of notice of termination, a grievance application for expedited arbitration must be processed;
- within five days of the request for appointment under The British Columbia Labour Relations Code, an Arbitrator must be available and willing to convene a hearing
- In such circumstances, the hearing must be completed within ten (10) days of the first day of hearing;
- and finally the Arbitrator shall issue an award within five (5) days of the completion of the hearing.

The terms for layoff in Article 20 of the Agreement are somewhat different for foreign workers when compared to others in the bargaining unit. In addition to reductions in the workforce due to economic or operational reasons, SAWP workers may

also be laid off if there is insufficient work available on the farm to complete a term of employment in a season under the SAWP. SAWP workers are entitled to notice or pay in lieu of notice in accordance with the *Employment Standards Act* if laid off for more than seven consecutive days.¹⁴⁴ SAWP workers may also be laid off (in reverse order of seniority) before part-time and full-time domestic workers. Unlike domestic employees, SAWP workers must also advise Floralia if they intend to return the following season within 30 days of a layoff notice. The provisions for recall are particularly important for SAWP workers, as under the program employers are permitted to submit a list of preferred workers. Article 20(d) outlines that a list of recalled SAWP workers must be organized in order of seniority:

(d) The Employer shall submit, as per the terms of any Foreign Worker agreement, to Human Resources and Skills Development Canada a recall request list. The list is to be in order of seniority (subject to ability and availability) of SAWP employees requesting return employment. The Union shall receive a copy of all requests. Where a substitution is made beyond the control of the Employer, the Employer will not be held to be in violation of the Agreement. If a requested employee is substituted in this manner, the Employer shall resubmit the missing named workers on subsequent recalls unless the Employer receives confirmation or information of termination as otherwise set out in this Agreement. An employee who declines recall shall be considered to have been permanently laid off for the remainder of the season.

This provision establishes a recall provision of SAWP workers based on seniority. It obviously aims to avoid situations similar to the Floralia case, where certain SAWP workers who were allegedly perceived to have pro-union biases were not recalled.

¹⁴⁴ *Employment Standards Act*, RSBC 1996, c 113. [“BC Employment Standards Act”]

3.6 The first exclusively SAWP bargaining unit: Sidhu & Sons

In February 2010, the BC Labour Board upheld the certification of a bargaining unit at Sidhu and Sons Nursery in Mission, British Columbia, consisting solely of SAWP workers.¹⁴⁵ The certification process was delayed and came only after the Board considered the appropriate bargaining unit structure for SAWP employees. In 2010, the Board issued three decisions considering this matter, which included a denial for *Sidhu & Sons* to appeal the certification.¹⁴⁶ A Labour Relations Board panel had initially dismissed a union certification application for a unit consisting solely of SAWP employees. The original panel had found that although the SAWP workers' terms and conditions of employment were quite different from resident workers, the proposed unit was not sufficiently "distinct" from other resident farm workers doing the same work.¹⁴⁷

A reconsideration panel overturned the original decision stating:

The argument regarding whether SAWP workers constitute a separate and distinct classification turns largely on whether the different employment status and terms and conditions of employment as compared to domestic farm workers are a relevant consideration. It is not disputed that foreign and domestic farm workers perform the same work at the same locations for the Employer. Rather, the point of distinction is the different employment status and terms and conditions of employment under the SAWP program for foreign farm workers as compared to the domestic workers. In our view, there is a serious question as to the correctness of the original panel's determination that the different employment status and terms and conditions of employment of the SAWP workers as compared to the domestic farm workers are essentially irrelevant in respect to the IML issues under

¹⁴⁵ *Sidhu & Sons Nursery Ltd. –and- United Food and Commercial Workers International Union, Local 1518 –and- Western Agriculture Labour Initiative (WALI) and British Columbia Agriculture Council (BCAC)* (9 February 2010) BCLRB B26/2010 [Leave for Reconsideration denied in No. B64/2010].

¹⁴⁶ *BC Labour Relations Board*, online: <<http://www.lrb.bc.ca/decisions/ALP2010.HTM>>.

¹⁴⁷ *Sidhu & Sons Nursery Ltd –and- United Food and Commercial Workers International Union, Local 1518* (14 October 2008) BCLRB B159/2008.

consideration. As a result, leave is granted.¹⁴⁸

The reconsideration decision agreed with the original decision however in noting that, although the SAWP employees have “identifiable differences” arising from their “employment status, unique terms and conditions of employment, and cultural, linguistic and social differences” these differences were “essentially irrelevant” to whether they constituted a separate classification of employees.¹⁴⁹ The difference in the SAWP workers’ interests arising from their unique employment status, terms and conditions were the central elements to be reconsidered, and the reconsideration panel sent the matter back to the original panel for a new decision. Following the reconsideration decision, the UFCW submitted that certification should be unconditionally granted to the SAWP workers, but in the alternative stated that certification with conditions be granted as the UFCW was prepared to engage in a “fluid and adaptable” collective bargaining relationship, i.e. one “not based on a strict work jurisdiction model but directed toward securing dignity and respect for SAWP workers.”¹⁵⁰ Sidhu & Sons, supported by interveners Western Agriculture Labour Initiative (WALI) and British Columbia Agriculture Council (BCAC) opposed any type of certification for the SAWP bargaining unit.

Upon further review, the Board panel expressed its concerns relating to any collective bargaining unit representing only SAWP workers.

... I am satisfied that if the Union were to represent SAWP employees, it would be asked by the SAWP employees to pursue demands related to

¹⁴⁸ *Sidhu & Sons Nursery Ltd. –and– United Food and Commercial Workers International Union, Local 1518* (26 March 2009) BCLRB B63/2009, at paras 66-69.

¹⁴⁹ *Ibid.* at para 71.

¹⁵⁰ *Sidhu & Sons, supra* note 145 at para 25.

obtaining more access to the preferred kinds of work for bargaining unit members. These would be important collective bargaining objectives for SAWP employees. While understandable, I find this goal would have significant negative consequences for industrial stability, productivity and possibly even the economic viability of the Employer's business. It is likely that there would be on-going work jurisdiction disputes and labour relations problems and disruptions as the group of represented SAWP employees strives to define the more preferable work as "bargaining unit work" to which they should have access or priority. Whereas currently all work is done interchangeably by all farm worker employees, SAWP and non-SAWP alike, this method of organizing the workplace could be seriously undermined if only the SAWP employees were in a bargaining unit and able to press demands with respect to what should be considered to be "bargaining unit work."

...Accordingly, I have a strong concern that a bargaining unit of SAWP employees only could have a significant negative impact on the workplace as a result of the process of defining what does and does not constitute bargaining unit work for purposes of collective bargaining and contract administration. It is not inconceivable that the domestic farm workers could end up doing the "grunt work" or less desirable jobs as a result of the SAWP workers' natural inclination to define bargaining unit work in a way that favours the interests of the members of the unit. Ultimately, such a redistribution of farm worker duties would cause tensions within the workforce and work jurisdiction disputes.

I also heard evidence that SAWP employees want to increase their hours of work, to maximize their earnings in as short a time as possible. Hence, SAWP employees have a strong incentive to seek to gain access to more of the available farm work, at least in the short term, to maximize their earning opportunities. This would be a potential source of work jurisdiction disputes between the SAWP and domestic farm workers, and again would tend to have negative impact on the conditions of employment of the domestic farm workers, whose interests the Union does not have to consider in bargaining with the Employer.¹⁵¹

The UFCW argued that if the Board required the SAWP workers and domestic farm workers to be in the same bargaining unit, competing interests would not be eliminated, but it would simply make that an issue that the Union would be "forced to

¹⁵¹ *Ibid.* at paras 66-68, 70-71.

resolve.”¹⁵² The Board decided that the SAWP employees were sufficiently distinct as a result of their unique status and terms of employment to be certified in a separate unit but did not accept the Union’s argument for unconditional certification.

To eliminate concerns over functional integration of the new bargaining unit and/or competing interests among unionized SAWP workers and non-unionized domestic workers, the Board ordered conditions to be imposed. These conditions limited collective agreement rights and protection for SAWP employees to “accommodation, rates of pay, benefits, access to medical care, transportation, repatriation, recall and name request, health and safety, discipline and discharge, and the like.”¹⁵³ The board further elaborated that “consistent with their unique interests, work jurisdiction-related provisions would be beyond the scope of collective bargaining (and grievance arbitration)” as would any other matters that SAWP employees hold in common with domestic farm workers.¹⁵⁴ The conditions would be lifted if the UFCW were to subsequently obtain a bargaining unit of all farm workers at Sidhu & Sons.

3.7 After Floralia and Sidhu

The negotiation of the *Sidhu* collective agreement covering only SAWP workers was seen by the UFCW as a potential template for future collective bargaining involving those workers.¹⁵⁵ Although it was not entirely satisfied with conditional certification, the union also indicated that the decision resulted from migrant workers exercising their

¹⁵² *Ibid.* at para 69.

¹⁵³ *Ibid.* at para 78.

¹⁵⁴ *Ibid.*

¹⁵⁵ UFCW, “Another UFCW Canada Victory for Migrant Agriculture Workers” (22 November 2010) online: <http://www.ufcw.ca/index.php?option=com_content&view=article&id=2151%3Aanother-ufcw-canada-victory-for-migrant-agriculture-workers>.

“Charter rights” to collective bargaining.¹⁵⁶ Still, further Board action occurred in relation to Sidhu farms. The UFCW sought an application in September 2010 to access the homes of SAWP bargaining unit members on farm property.¹⁵⁷ Sidhu & Sons had sent a letter to the UFCW, advising them that no union representatives could be present at SAWP workers homes, on farm property, without Sidhu & Sons’ express prior written consent.¹⁵⁸ It asserted in general that SAWP workers in the bargaining unit had a right to privacy in their homes and that employer property rights should be respected. The UFCW replied that it had a right to discuss union business with bargaining unit members and conditions could be imposed on any visits to workers’ homes. The Board recognized the SAWP workers status as temporary foreign workers and ruled that unauthorized and unsupervised visits were justified in the circumstances.¹⁵⁹

Following the *Sidhu* decision, the new bargaining unit at Sidhu could not bargain over work jurisdiction or other matters that SAWP employees hold in common with resident agricultural workers. The *Sidhu* decision resulted in a collective agreement and bargaining structure that purported to create a separate but functionally equal bargaining structure for SAWP workers only at the farm. Much of the Sidhu & Sons agreement contains similar provisions to the Floralia agreement, particularly in the procedures for

¹⁵⁶ *Ibid.* UFCW Canada President Wayne Hanley stated that "This is a great victory for the Sidhu workers who exercised their *Charter* rights to join a union and bargain collectively...and the *Charter* is not stopped by provincial borders."

¹⁵⁷ *Sidhu & Sons Nursery Ltd.*, (13 September 2010) BCLRB B154/2010.

¹⁵⁸ *Ibid.* at para 6.

¹⁵⁹ Conditions imposed on the visits included no more than more than two authorized representatives of the Union to approach and knock at a particular housing unit at one time, between 6:30 p.m. and 10:00 p.m., Monday to Friday, except when invited by employee residents to visit their homes at other times. Resident SAWP workers had the freedom to permit or not permit Union representatives into their living quarters.

launching grievances, paid breaks, increased vacation pay and a wage increase.¹⁶⁰ Certain provisions pertaining to recall rights and seniority were applicable only to SAWP employees.¹⁶¹

The relationship between Sidhu & Sons and the UFCW seemed somewhat strained after the agreement, reflected in comments made by a UFCW spokesperson for a *Western Producer* article that were interpreted as implying “harsh conditions” at the Sidhu farm after the collective agreement had been in place and punitive repatriations of complaining workers at the farm.¹⁶² Apparently this was a misstatement or misunderstanding, as the UFCW clarified that the spokesperson’s comments were not directed at the Sidhu farm, and also clarified other “inaccurate” statements attributed to the spokesperson, and to the Collective Agreement in place at Sidhu:

The article also inaccurately states that the SAWP Employees at Sidhu & Sons did not receive two paid 15 minute breaks during an eight hour shift until the Collective Agreement was in place. These breaks were indeed provided before the Collective Agreement. Sidhu & Sons has also informed the Union that the 6% vacation pay referenced in the Collective Agreement was also provided by Sidhu & Sons before the Collective Agreement was in place. ...Sidhu & Sons assures our Union that it values its SAWP Employees and has done so since well before the involvement of our Union. ... For the 2010 season, eighty percent of the SAWP Employees working at Sidhu & Sons had worked for Sidhu & Sons for four or more seasons.¹⁶³

The inaccuracies and miscommunication between the UFCW and Sidhu & Sons following the SAWP collective agreement, in addition to the complaint to the LRB about

¹⁶⁰ Make a Livin’, “Precedent-setting wage increase for Migrant Farm Workers in BC!”, (12 November 2010), online: <<http://www.livingwagebc.ca/news/precedent-setting-wage-increase-migrant-farm-workers-bc>>

¹⁶¹ *Ibid.*

¹⁶² UFCW, “Clarification regarding Collective Agreement for SAWP Employees At Sidhu & Sons Nursery Ltd.” (10 February 2011), online: <<http://www.ufcw1518.com/node/3716>>.

¹⁶³ *Ibid.*

preventing UFCW access to SAWP workers' homes, likely did not help the two parties' working relationship. There seemed to be no general change in the agricultural industry's almost uniform opposition to farm worker unionization.

In early April 2011, farm workers at both Floralia and Sidhu & Sons filed applications with the BC Labour Relations Board to decertify their unions. On April 19 & 28, the UFCW launched complaints to the BC Labour Relations Board regarding the decertification process underway at both farms.¹⁶⁴ Decertification votes had been held at both farms. As of March 2012, the vote remains sealed pending the outcome of the UFCW's complaint.¹⁶⁵ The complaint against Floralia specifically notes that since 2008, Floralia has been steadily decreasing its usage of SAWP workers; the most current numbers for 2011 listed 6 SAWP workers at Floralia plant growers.¹⁶⁶ The Union alleged that this was part of a pattern of decreasing the use of SAWP workers who were seen to favour unionization.

3.8 Foreign government involvement in SAWP unionization process

The union's complaints against both farms alleged a pattern of "collusion" between the two farms and the Mexican government in identifying and excluding pro-union SAWP workers from entering Canada under the program. The substance of the UFCW complaints alleged that Mexican employees in the Consulate assigned to Mexican SAWP

¹⁶⁴ Letter from Brett Mathews (Counsel for UFCW) to BC Labour Relations Board (28 April 2011).

¹⁶⁵ Email from Cara Johnson to Robert Russo, (18 July 2011). The email indicated that Sidhu & Sons had applied for a decertification and that the "issue is presently tied up at the Labour Relations Board." A subsequent follow-up email to Stan Raper, the national coordinator for the AWA, informed that the case at the BC Labour Board will be heard in February 2012. The first aspect the Board will deal with is the diplomatic immunity argument presented by the Mexico Government and Consulate. The tentative hearing date is February 20, 2012 with two weeks allotted. As of March 16, 2012 no decision has been posted on the BC Labour Relations Board website.

¹⁶⁶ Letter from Brett Mathews (Counsel for UFCW) to BC Labour Relations Board (28 April 2011).

workers were opposed to UFCW efforts to unionize their nationals' in Canada.¹⁶⁷ In essence the UFCW's submission regarding both Floralia and Sidhu & Sons states that:

"The United Mexican States ("Mexico") has violated the Labour Relations Code by refusing to allow Mexican workers they believe are pro-union to return to Canada. In particular, employers must have passed on information to the Consulado General de Mexico en Vancouver, or less likely the Vancouver Consulate performed its own investigations as to those workers who they believe are pro-union. The Vancouver Consulate then informs the SAWP officials in Mexico to ensure those workers are refused entry to Canada and in other instances, have refused to send them back to unionized workplaces, requiring them to work at non-union work sites."¹⁶⁸

In the amended complaint filed on April 28 with the BC Labour Relations Board and adding Floralia as a party, the UFCW alleged that the Mexican Ministry of Labour

...violated sections 6(1) and 9 of the Code when it instructed Honorio Corona Martinez, a worker enrolled in the Seasonal Agricultural Workers Program ("SAWP") and employed in Canada by Floralia, to initiate a decertification campaign at the farm and by expressly or implicitly threatening Mr. Corona that he would not be returned to Canada in future years if he failed to comply. The application filed by certain employees at Floralia on April 14, 2011 instigated by Mr. Corona must be dismissed pursuant to section 33(6) of the Code. Because of Mexico's improper interference a vote is unlikely to disclose the true wishes of the employees in the Floralia unit.¹⁶⁹

S. 6(1) of the Code prevents employers or anyone acting on behalf of employers from interfering with the selection of a trade union. Although Mr. Corona had a right to communicate his views on the union, the UFCW alleged that the Mexican government under threat of blacklisting from the SAWP was coercing him. S. 9 of the Code probates

¹⁶⁷ Letter from Brett Mathews (Counsel for UFCW) to BC Labour Relations Board (28 April 2011).

¹⁶⁸ *Ibid.*

¹⁶⁹ T Sandborn, "Mexican Government Union Busting in BC, Charges Union" (11 May 2011) *The Tyee*, online: <http://thetyee.ca/News/2011/05/11/MexicanUnionBusting/?utm_source=mondayheadlines&utm_medium=email&utm_campaign=160511>.

such conduct.¹⁷⁰

Canadian employers recruiting workers through the SAWP typically operate through the Consulates of the various countries involved in the program. Employers in southern BC generally work with the Mexican Consulate. The Mexican Consulate's actions in BC were similar to allegations of anti-union activity by Mexican consular officials in Manitoba described earlier in this Chapter.¹⁷¹ They also corroborate accounts from the Abbotsford migrant worker support centre indicating that since 2008, there have been many testimonies from SAWP workers on intimidation used by the Mexican government on SAWP workers perceived to be pro-union.¹⁷²

The UFCW alleged that similar events occurred at Sidhu & Sons farm designed to intimidate pro-union SAWP workers. At a public press conference in Vancouver on May 10, 2011, the UFCW presented translations of documents that appeared to be leaked official Mexican Labour Ministry reports, which commented on Mexican SAWP workers and union activity.¹⁷³ One document contains an entry dated Jan. 13, 2011 with the

¹⁷⁰ In 2002, the BC Liberals made some significant changes to Sections 6 and 8 of the BC Labour Relations Code, implementing what is commonly known as an "employer free speech" provision, and changing the language of these sections to effectively broadening the scope of employer communications relating to trade unions. See P Dickie, "The Crisis in Union Organizing under the BC Liberals" (21 November 2005), online:

<[http://www.labourlawoffice.com/_publications/4%20The_Crisis_in_Union_Organizing_under_the_BC_Liberals%20\(nov%202005\).pdf](http://www.labourlawoffice.com/_publications/4%20The_Crisis_in_Union_Organizing_under_the_BC_Liberals%20(nov%202005).pdf)>. Initial Labour Board decisions took a broad view of these changes, allowing any employer communications short of "deliberate lies or explicit threats." See *Convergys Customer Management Canada* BCLRB 111/2003 [Leave for Reconsideration of BCLRB No. B62/2003].

¹⁷¹ See *supra* note 64.

¹⁷² Interview with Lucy Luna, *supra* note 56. Certification efforts leading to intimidation by Mexican government officials subsequently led to initial sharp drops in migrant worker appearances at support centres. Ms. Luna indicated that after the certification campaigns and interference by Mexican Labour Ministry and Consular officials, attendance at her office dropped by 50% in 2009, but rebounded subsequently in 2010.

¹⁷³ Sandborn, *supra* note 169. The UFCW President of Local 1518, Ivan Limpwright, gave a press conference in Vancouver on the issue.

header “File Revision – Inadmissible Entry to Canada” and includes this comment:

A call is received from the Vancouver Consulate Office where we are told that this worker would not go to Canada because he is immersed in things of the union, pay attention he does not go out.¹⁷⁴

This is a very serious allegation as the SAWP operates through the various labour departments of the source countries. In Mexico, the Ministry of Labour determines which Mexican workers are enrolled in the SAWP each year and, therefore, which workers get to return to Canada. The UFCW alleged in its complaint that when Mr. Corona went to the Ministry of Labour in Mexico City in 2010, Ministry staff researched the decertification process for British Columbia, translated the information into Spanish and instructed Mr. Corona to initiate decertification proceedings upon his return to Canada.¹⁷⁵ On May 18, 2011, opposition legislators in the Mexican Congress, along with workers, academics and Mexican union leaders participated in a press conference organized by the UFCW liaison office in Mexico to support the UFCW’s complaint to the BC Labour Relations Board.¹⁷⁶ The Mexican legislators also presented a motion before the Mexican Congress demanding that the Mexican Foreign and Labour Ministers provide an explanation for their government’s anti-union activities against Mexican SAWP workers in Canada.¹⁷⁷ Protesters composed of community and labour activists held two protests to “Stop the blacklisting [of Mexican SAWP workers returning to Canada]” outside the Mexican Consulate in Vancouver in November 14, 2011 and on

¹⁷⁴ *Ibid.*

¹⁷⁵ Letter from Chris Buchanan (Counsel for UFCW) to BC Labour Relations Board, including the parties (28 April 2011).

¹⁷⁶ People’s Voice News Network, “Mexico Demands Answers About Anti-Union Activites Against Farm Workers in Canada” (31 May 2011), online: <<http://www.benzinga.com/pressreleases/11/05/m1121219/members-of-mexican-congress-demand-answers-from-government-about-allega.>>

¹⁷⁷ UFCW, online: <http://www.ufcw.mx/images/pdf/pa_campesinosmexicanos.pdf>.

International Migration Day on December 18, 2011.¹⁷⁸ Canadian unions have also accused the current Mexican government of engaging in a campaign of “heavy-handed government actions” against independent trade unions inside Mexico as well.¹⁷⁹

The Mexican government responded on August 19, 2011, arguing that the BC Labour Relations Board does not have jurisdiction to hear the union’s complaint. It claimed that under S.3 of the *State Immunity Act* the Board does not have jurisdiction over the actions of the Mexican government and its representatives in Canada towards Mexican citizens.¹⁸⁰ Mexico also argued that the Union is incorrectly attempting to extend application of the BC Labour Relations Code onto Mexico, and Mexican government officials.¹⁸¹ A lengthy UFCW response followed on September 6, 2011.¹⁸²

The reply in summary stated:

- (a) Mexico has waived any immunity that it might have by expressly including that the SAWP agreement is governed by the laws of Canada and British Columbia;

¹⁷⁸ Vancouver Province, “Migrant Workers Protest Alleged Worker Blacklisting” (14 November 2011), online: <<http://www.theprovince.com/news/Migrant+workers+protest+alleged+union+blacklisting/5708379/story.html>>; A second, larger protest at the Mexican Consulate was held on International Migrants’ Day (December 18). UFCW, “Vancouver Protest on International Migrants’ Day aimed at Mexico Blacklisting” (19 December 2011), online: <<http://www.ufcw1518.com/node/4061>>. Some provincial and federal opposition politicians were in attendance, including MLA Raj Chouhan and Senator Mobina Jaffer.

¹⁷⁹ Canadian Labour Congress, “Mexican Trade Unionists Suffer Under Heavy-Handed Government Action And Corporate Greed” (13 May 2010), online: <<http://www.canadianlabour.ca/news-room/publications/mexican-trade-unionists-suffer-under-heavy-handed-government-action-and-corporo>>.

¹⁸⁰ Letter from Peter Gall, Q.C., counsel for the United Mexican States to BC Labour Relations Board, including the parties (19 August 2011). The Mexican government and its consulate have claimed that the Board does not have jurisdiction because of the application of S. 3(1) of the *State Immunity Act*, RSC 1985, c S-18. Mexico cites several decisions in support its argument, including: a decision of the Ontario Human Rights Tribunal in *Bentley v. Consulate-General of Barbados/Invest Barbados* O.H.R.T.D. No. 2260, 2010 HRTO 2258 to support the proposition that the Mexican Consulate falls within the *State Immunity Act*’s definition of a “state”; and the Supreme Court of Canada’s decision in *Re Canada Labour Code*, [1992] 2 SCR 50 to support the proposition that the BC Labour Relations Board should be considered a “court” for purposes of the *State Immunity Act*.

¹⁸¹ *Ibid.*

¹⁸² Letter from Chris Buchanan (Counsel for UFCW) to BC Labour Relations Board, including the parties (6 September 2011).

- (b) Alternatively, immunity does not apply because the dispute involves commercial activity or damage or loss to property in Canada, both of which are exceptions to the grant of immunity under the *State Immunity Act*;
- (c) In the further alternative, immunity does not apply because Mexico's conduct constitutes a gross infringement of human rights and is inconsistent with the ratified treaty obligations of Mexico;
- (d) Finally, the Board is allowed to examine events outside of British Columbia to determine whether there has been unlawful conduct in British Columbia.

On February 1, 2012 the BC Labour Relations Board ruled that Mexico possesses state immunity from the proceedings although it also dismissed Sidhu's and Floralia's arguments that the Union had no *prima facie* case for its application. The Board held that evidence of Mexican government involvement in the decertification activities was relevant to the application.¹⁸³

Regarding farmers, accounts from the AWA maintain that they have continued to almost uniformly oppose UFCW unionization efforts.¹⁸⁴ The Sidhu farm owners strongly denied allegations of any coercion directed against workers, or of any anti-union collusion between farm employers and the Mexican government.¹⁸⁵ The Canadian government did not respond to repeated inquiries regarding the UFCW's allegations and did not intervene or officially comment on the matter.¹⁸⁶ The alleged arbitrary

¹⁸³ *UFCW & Sidhu & Sons & Floralia Growers & Certain Employees of Sidhu & Sons and Floralia & United Mexican States*, BCLRB No. B28/2012

¹⁸⁴ Interview with Lucy Luna, *supra* note 56. "Q (RR) : I know they've been resistant in general to it [unionization of SAWP workers] but have there been any exceptions where some you think you'd deal with who've been better, open to unions, or no?" "A (LL) : I am the person who had the honour to put the certification...and I can tell you none."

¹⁸⁵ Sandborn, *supra* note 169.

¹⁸⁶ Sandborn, *supra* note 169. I followed up with Mr. Sandborn on whether he had received any additional communications from the federal government on this issue. On January 10, 2012 Mr. Sandborn sent me an email indicating that "HRSDC was just as unforthcoming with me as they were you. No response to repeated requests for comment on the story." I sent six emails to HRSDC and Service Canada and CIC, two respectively to each organization on December 12, 2011 and again on January 4, 2012. I attempted to call

repatriations of Mexican SAWP workers in Ontario has made the federal government the target of a civil lawsuit launched in the Ontario Superior Court of Justice on November 17, 2011.¹⁸⁷ A group of SAWP workers from Mexico, employed at Tigchelaar Bear Farms in Vineland, Ontario, alleged that they had been improperly terminated and repatriated on August 30, 2010 and sued Canada and the farm claiming damages for breach of their rights under Section 7 of the *Charter*.¹⁸⁸ The workers allege that they were not notified of why they were being terminated and repatriated and were not paid in lieu of notice in accordance with provincial employment law.¹⁸⁹ The statement of claim alleges that the workers were entitled to a right under the *Charter* or under common law “to be informed of the allegations made against them and to be provided with a meaningful opportunity to respond to these allegations.”¹⁹⁰ The workers also claimed that in administering the SAWP, Tigchelaar was “exercising authority pursuant to the SAWP’s statutory framework and Tigchelaar was acting in pursuit of a specific objective of the Government of Canada.”¹⁹¹ In the alternative, they submitted that Tigchelaar was “indispensable to the Government of Canada” in carrying out the SAWP, effectively making the Federal Government a “joint participant” in the administration of the

the organizations but was directed to send an email instead outlining the specific request. I received no response from the organizations, other than an automated response by HRSDC on January 4, 2012 noting its receipt and thanking me for my inquiry.

¹⁸⁷ Ontario Superior Court of Justice Statement of Claim between: Esponzoza, Ruiz and Sosa (Plaintiffs) and Tigchelaar Farms, F.A.R.M.S., and HRSDC (Defendants), Court File No. OV-11-439746 (17 November 2011), online: <http://www.ufcw.ca/templates/ufcwcanada/images/directions11/nov/1148/statement_of_claim.pdf>.

¹⁸⁸ *Ibid.*; See *Charter, supra* note 241 at s 7. Section 7 of the Charter states: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*

program. Proving either point would make the farm subject to the *Charter*.¹⁹²

The government's public response claimed that "if migrant workers have a dispute with their employers, they should seek action through their home country... if they feel they've been unfairly treated or unjustly treated, [the workers' action] would be to make application through their country of origin to clear their name."¹⁹³ Defending the SAWP, the government added that it was working with employers to improve the system: "employers are much stronger in terms of... making sure that it's a clean and good process. This system's been around, you know, since the mid into late '60s [and] has been very, very successful in our country."

There was no allegation of union activity on the part of expelled workers, but the UFCW alleged that the program treats SAWP workers as "disposable commodities" while the federal government "turns a blind eye" to intimidation of SAWP workers who try to unionize.¹⁹⁴ The nature of the national citizenship and temporary residency of the SAWP workers makes them even more vulnerable to the types of intimidation and retaliatory actions seen in response to unionization. As noted above, the AWA operates a number of migrant worker support centres near farming areas in Canada. In August 2010 I interviewed Lucy Luna, the coordinator of the AWA Abbotsford migrant worker

¹⁹² The *Charter* offers protections against policies and actions that originate from the different levels of government in Canada. It does not apply to private activity.

¹⁹³ CBC News, "Mexican Farm Workers File Suit against Canada" (24 November 2011), online: <<http://www.cbc.ca/news/canada/story/2011/11/24/mexico-farm-lawsuit-government.html>>. The government's response was given by Rick Dykstra, the Parliamentary Secretary to the Minister of Citizenship and Immigration.

¹⁹⁴ UFCW, online: <http://www.ufcw.ca/index.php?option=com_content&view=article&id=2576%3Amexican-migrant-workers-file-charter-lawsuit-against-canadas-federal-government>.

support centre that deals mainly with SAWP workers.¹⁹⁵ The view at the Abbotsford centre - which has been involved in the SAWP unionization drive in BC - is that the problem lies with the workers' own governments:

Author: So, in general, when thinking about unions, just organizing SAWP workers as opposed to, let's say, other farm workers, what do you think is the biggest challenge?

Ms. Luna: I truly believe the biggest problem we have to organize the seasonal workers is their country of origin. Why? Because we have laws that, they are not being applied here, like in BC, in Canada, we have the law. It's written there...The problem is that the punishment doesn't come in Canada. It comes when they go back to their countries. What happens is that in Guatemala, they fear for their life. And in Mexico, they fear for their employment, because they might never be called back [to Canada].¹⁹⁶

The federal government has not intervened in what appears to be a practice of blacklisting pro-union workers. In response to inquiries about the alleged refusal of governments participating in the SAWP to recall workers who express pro-union sentiments, an official from Human Resources Social Development Canada (HRSDC) noted:

"It is ultimately the responsibility of the Mexican or Caribbean country's government to recruit and place the workers. This is done in consultation with the individual workers themselves, since HRSDC/Service Canada does not provide any input regarding the determination of which workers are chosen to participate in the SAWP or their placement."¹⁹⁷

Officials at Service Canada also declined requests to specifically discuss the alleged blacklisting of SAWP workers, noting that unionization of workers in BC falls under

¹⁹⁵ Interview with Lucy Luna, *supra* note 56. According to the center's coordinator, Ms. Luna, approximately 90% of the workers who come to the center for support are SAWP workers, with others coming from Guatemala through the TFWP.

¹⁹⁶ *Ibid.*

¹⁹⁷ T Sandborn, "Setback for Historic Effort to Unionize Guest Farm Workers...", online: <<http://thetyee.ca/News/2009/06/29/FarmUnionSetback/>>

provincial jurisdiction.¹⁹⁸ An official at the Migrant Worker Support Centre in Abbotsford noted that “Every time they [federal government] had the opportunity” to express any opinion on the unionization efforts “they chose not to.”¹⁹⁹ This is consistent with the near absence of any federal involvement with SAWP workers once they are in Canada. Though union officials and migrant worker support staff deal with municipal and provincial government officials “on a regular basis” (over issues such as employment standards and housing issues)²⁰⁰ federal officials remain distant from the day-to-day operation of the program, with most matters handled from offices in Ontario:

Ms. Luna: When we talk about Service Canada we deal with a unit that is called “Outside of Canada Claims” unit, when we are dealing with unemployment insurance. That one is based in Kingston, Ontario. When we have a [problem] with a ... specific case or a specific worker, we go [to] Service Canada but they are in Ontario...they make us make the phone call because the worker doesn’t speak English. Sometimes it takes hours and hours for us, they put us on hold for hours just waiting. It’s the same thing with Revenue Canada when we deal with them we, we deal with the International Tax Office ... which is in Ottawa so we cannot deal with the income tax cases arising here locally so it makes it just more difficult for us.

Since SAWP workers generally do not speak English, and cannot necessarily rely on their consular officials to always provide genuine representation and look out for workers’ interests first, many SAWP workers preferred to rely on AWA migrant worker support staff to act on their behalf in communications with Ottawa:

Author: So when, so you act kind of like as the go-between between the workers and the government then, so if you’re not involved, would the federal government itself be in the picture. . .because I guess they don’t monitor the program very closely, right, regularly?

¹⁹⁸ Email from Service Canada to Author (23 July 2011).

¹⁹⁹ Interview with Lucy Luna, *supra* note 56.

²⁰⁰ Interview with Lucy Luna, *supra* note 56.

Ms. Luna: No, not at all. When you say .. we were talking about the federal government?. Sometimes they are not even aware they are here. I have sat with agents in Service Canada here in BC [and] they have no idea we have these temporary workers working here.

A: The next question is they're not aware of problems generally going on?

Ms. L: No. No. No. Not really. Sometimes they don't even know where to look for their files...

SAWP workers' interaction with the provincial government was little better. The interaction there mostly involved Employment Standards complaints:

Ms. Luna: The provincial government? We are talking about Employment Standards? That is such a difficult office to deal with. They are not willing and sometimes I feel they are against temporary workers. Because when I send cases to them they send me back the case and say "this is not the office to deal with." Not even a letter of writing saying this is not the office, please go to this office or send them to this office they just send the package back "this is not the office to deal with."

Author: Where do they tell you to go? Like to another office?

Ms. L: They don't say anything. They don't say anything.

A: So they say that's not their jurisdiction, or they don't . . . because it's a federal program. . or because they're temporary workers?

Ms. L: You know, because they just send me the package ... just simply refusing to take the case. That's all.

A: And they didn't say any reason?

Ms. L.: No reason why ... so they don't help at all. I actually, I haven't been able to move forward one of my cases with Employment Standards.

Among the serious issues for many SAWP workers are problems related to worker housing. The SAWP Employment Contract has provisions for housing, but the enforcement of those provisions is left to Municipal authorities. For example, the Municipality of Abbotsford is responsible for the housing conditions of SAWP workers within its city limits:

Author: How about the City of Abbotsford? Do you ever deal with them? City government officials?

L: When we talk about housing here that falls on the lap of City of Abbotsford. Housing is a problem because under the SAWP it says that it is the [foreign] government agent in charge of approving the housing

conditions. That goes to their countries of origin. The problem is that ...Here in Abbotsford – I can speak for Abbotsford because this is my area – Here in Abbotsford [Employers] have a choice for housing inspections. They could get an inspector from the City, they could get a private inspector through the Mexican government agent. Ok, so 99% of the time employers choose a private inspector. A private inspector comes, inspects the house and releases a page – I have seen 2-3 pages about the conditions of this house and it's livable for so and so number of workers. He gives this to the Employer who faxes it to the Mexican consulate or to the Caribbean Consulate and they release an approval. In my opinion, they are leaving a very important decision [to] the [foreign] government invited into this country. These are diplomatic representatives of a country who says, "Yeah, [accommodation] is livable for this and that." And the problem with the housing inspection is that their country's agent never comes and actually inspects the house. And the inspection happens when the workers are not there, so sometimes when the workers arrive, they don't live in the house that was inspected. Or, the house that was inspected and was approved for 10 people, they put 24 people in it, and no - no check ups. Not the City, not the [foreign] government agent, and when the complaints come to us and we try to take it to the City of Abbotsford, they go, "oh, this is a federal program, sorry we can't help you."

Foreign government agents do not always investigate workers' complaints regarding poor housing; although the involvement of union affiliated workers may make consular officials more reluctant to get involved. Ms. Luna asserted that the Mexican consulate "was in limbo" whenever it came to responding to housing complaints or sub-standard living conditions. During the interview in the Abbotsford Migrant Worker Support Centre, the author was shown pictures of what was purportedly a converted refrigeration unit where numerous SAWP workers were housed while working in Canada. The pictures were appalling, but it is not clear if the federal government was aware of that situation, or responds to SAWP housing conditions. Ms. Luna claimed there is no federal response:

They [federal government] never come and inspect, they never check that, and I have had in 2007 people who have lived in tents outside of the farms, or people who sleeping in the barn on top of [bags of fertilizer]. They just put ...as the bed -- and they just put a mattress on top

and they're sleeping right there in there in barn, and that's here in Abbotsford.²⁰¹

The Migrant Worker Support Centre sent a letter to the City of Abbotsford complaining of unacceptable housing conditions for SAWP workers in the City.²⁰² The communications resulted in support centre staff meeting with the Abbotsford Mayor and city council members in fall of 2010. The City of Abbotsford agreed to receive anonymous complains from the migrant support centre and send out a bylaw officer to check the housing conditions for SAWP workers.²⁰³

3.9 The Michoacán migrant workers' pact

The UFCW's involvement in unionization efforts and SAWP workers eventually led to a dialogue between the union and Mexican and Caribbean governments involved in supplying SAWP workers. In 2007 the UFCW and the Mexican government began discussions designed to establish a continuing dialogue. The UFCW President led a delegation to the Mexican Congress Commission on Borders, Population and Migration in order to discuss the problems faced by Mexican SAWP workers in Canada and to present a brief on the issue.²⁰⁴ At the invitation of the UFCW, five Mexican Congressional Deputies from that Commission came to Canada in June 2007 to further discuss the issues presented by the UFCW in February. In addition to meeting with union officials, the Congressional Deputies met with academics, social service agencies, and

²⁰¹ *Ibid.*

²⁰² Email from Lucy Luna to Robert Russo (5 August 2011).

²⁰³ *Ibid.*

²⁰⁴ "UFCW Canada Report on the Status of Migrant Farm Workers in Canada, 2006-2007", online: <http://www.ufcw.ca/templates/ufcwcanada/images/awa/wp-content/uploads/2008/05/2006-7_report_english.pdf>.

Mexican SAWP workers in Canada.²⁰⁵ Subsequent to these meetings, a second Canadian delegation led by the UFCW travelled to Mexico to engage in further discussions with Mexican civil society organizations and government officials working with the SAWP.

The meetings were notable in that they involved a civil society institution attempting to form a dialogue with a foreign government in order to better protect that government's migrant workers under another state's jurisdiction. In order to provide more governmental oversight regarding the collective bargaining rights of Mexican SAWP workers in Canada, the meetings provided for several proposals, including convening regular meetings between representatives of UFCW Canada, Canadian Parliamentarians and Mexican Congressional Deputies to deal with several key problems in the SAWP identified by both the Mexican Government and the UFCW. Chief among these were the development of an independent appeals process regarding repatriated workers, and a review of the negotiation process for the SAWP, seeking to include workers and union representatives and to ensure the neutrality of the Mexican Ministry of Foreign Affairs in unionization campaigns.²⁰⁶

The union's involvement with SAWP workers in Canada also led to negotiations with the Mexican state of Michoacán on a Labour Co-operation Agreement to ensure not only recognition but enforcement of human and labour rights of SAWP workers from Michoacán while they work in Canadian fields and greenhouses.²⁰⁷ These negotiations

²⁰⁵ *Ibid.*

²⁰⁶ *Ibid.* Other issues discussed were raised by the UFCW and included the Mexican Government devoting more attention to its SAWP workers in Canada in the areas of access to health care, employer retention of documents, language and workers' compensation education.

²⁰⁷ UFCW, "Mexico State and UFCW Canada Sign Migrant Worker Protection Pact" (25 February 2010), online:

relating to extending extra-territorial rights to Mexican citizens working in Canada – conducted between a civil society organization and a state government - were the first of its kind in North America. The pact was signed on February 24, 2009 following negotiations involving work and consultations between Mexican executive and parliamentary authorities, Michoacán state authorities, and the UFCW.²⁰⁸

Under the Michoacán Pact, the UFCW will assist SAWP workers from Michoacán through the AWA and its migrant worker support centres. The Michoacán Pact codifies this assistance regardless of whether a particular farm working unit is certified to be represented by the UFCW. As part of the Pact, AWA migrant worker support centres will offer counseling and advocacy services to Michoacán SAWP workers' in Canada, assistance with health and medical claims, and with complaints relating to housing conditions, as well as other SAWP related work issues.²⁰⁹ The Pact also envisions a more educative role for the SAWP in offering Michoacán SAWP workers access to workshops and information on health and safety, and classes on French and English as second languages. The Pact also purports to guarantee basic needs such as translation services for SAWP workers from Michoacán, as well as free long distance telephone access.

3.9.1 Theoretical cooperation and practical reality

Although the agreement between the UFCW and Michoacán State is groundbreaking in legal style, the substance of it breaks no new legal ground. Most of the legal

<http://www.ufcw.ca/index.php?option=com_content&view=article&id=631&catid=5&Itemid=99&lang=en>

²⁰⁸ *Ibid.* The pact was signed by Wayne Hanley, the National President of UFCW Canada, and Governor Leonel Godoy Rangel of the State of Michoacán

²⁰⁹ *Ibid.* UFCW President Hanley noted that the Michoacán Pact will enable SAWP workers from Michoacán state to access information on their rights in Canada "with the clear understanding...that it is supported by their own state."

rights outlined in the Michoacán Pact are not new and, indeed, almost all are already supposedly guaranteed through provincial labour laws or through the SAWP itself. The Michoacán Pact - like the State-to-State labour cooperation agreements that preceded it, such as the NAALC - is an agreement that emphasizes cooperative action, dialogue and education in order to advance its goals.

There is good reason to be skeptical of the effectiveness of the Michoacán Pact in addressing the SAWP's flaws, particularly relating to collective bargaining. There is no detail provided in the Pact on how the Michoacán state authorities will provide preliminary support for SAWP workers before coming to Canada. The UFCW itself mentions that the work done to achieve the Michoacán Pact was primarily done by the UFCW, in Canada, over the last ten years.²¹⁰

The Michoacán Pact does nothing to address the issue of the lack of an independent process to deal with SAWP workers' grievances, nor does it specify any enforcement mechanisms to prevent the threat of employer reprisals to workers for engaging in collective bargaining, or for being in contact with the UFCW or with AWA migrant worker support centres. There may be some value in having the Michoacán state authorities endorse SAWP worker contact with the UFCW. SAWP workers from Michoacán may feel less intimidated to access services provided by the AWA migrant worker support centres. However, workers from Michoacán represent a small proportion of the total number of Mexican workers who come to Canada through the SAWP.²¹¹

²¹⁰ *Ibid.*

²¹¹ Global Workers Justice Alliance, "Migration Data and Labour Reights", online: <http://www.globalworkers.org/migrationdata_MX.html>. In 2009, approximately 2,500 Mexican workers came to Canada through the SAWP from the state of Michoacán, representing about 15% of the total Mexican SAWP workers in Canada.

There are some signs that the Michoacán Pact may at least be generating more interest by Mexican officials in the welfare of their citizens in Canada through the SAWP. In May 2009, Michoacán's Immigration Minister travelled to Canada and visited a migrant worker support centre in Leamington, Ontario with the aim of gauging the support given to Mexican SAWP workers through the AWA's migrant worker support centers.²¹² The visit seemed an implicit acknowledgement that protecting Mexican citizens' rights in the SAWP requires more information on workers' complaints that is disseminated first-hand to Mexican government officials.

However useful the collaboration of a Mexican state may be in furthering the understanding of rights of workers in Canada, the presence of SAWP workers in Canada ultimately means that multiple levels of governments in Canada are still responsible for the enforcement of SAWP workers' general rights. Extra-territorial enforcement of general labour rights against Canada has proven exceedingly difficult.²¹³ Collective bargaining rights remain under the jurisdiction of provincial governments but the exclusion of workers or workers' representatives from SAWP contract negotiations remains a federal government responsibility. The federal government also retains jurisdiction in immigration matters relating to SAWP workers and specifically with issues relating to the repatriation of Mexican workers. The exclusion of Canadian federal and provincial governments from the Michoacán negotiations limits the ability of the

²¹² UFCW, "Michoacán Minister visits AWA Centres" (18 May 2009), online: <http://www.ufcw.ca/index.php?option=com_content&view=article&id=1054&catid=24&Itemid=101&lang=en>.

²¹³ Enforcement of labour rights is particularly difficult when the enforcement of those rights originates from a developing country and is directed against a developed state. See R Russo, "A Cooperative Conundrum? The NAALC and Mexican Migrant Workers in the United States" (2011) 17:1 L & Bus Rev of the Amer 27.

Michoacán Pact to guarantee effective enforcement of workers' rights.

UFCW Canada has also begun to establish a dialogue and relationship with Caribbean governments participating in the SAWP, including Barbados, Trinidad and Tobago, and the Organization of Eastern Caribbean States. A separate dialogue was established with the Jamaican government. A representative from UFCW Canada participated in workshops hosted by the North-South Institute ("NSI") in Jamaica and Barbados with government officials from many of the SAWP sending countries also in attendance.²¹⁴ The NSI workshops presented an opportunity to involve employers, governments and civil society organizations in reviewing the strengths and weaknesses of the SAWP, focusing particularly on SAWP worker representation. The NSI tried to establish a balance between the interests of employers and workers and panel discussions addressed the concerns of the Ontario horticultural sector, workers' working and living experiences and ways to enhance workers' access to their rights including independent dispute-resolution mechanisms.

The Caribbean SAWP workers expressed concerns with the program similar to those expressed by their Mexican counterparts through the UFCW. Barbados SAWP workers concerns included workers' accommodation in Canada and wage deductions for benefits that workers do not receive. In the Jamaican workshop, SAWP workers raised similar issues but included more emphasis on collective bargaining rights.²¹⁵ Regarding Jamaican SAWP workers, a particular concern was the mandatory withholding of 25% of a worker's pay by the employer (to be paid to the SAWP worker once they are back in

²¹⁴ H Gibb, "Report on North-South Institute Workshops - 'Adding Value to Temporary Foreign Worker Programs'" (7-10 May 2007), online: <http://www.nsi-ins.ca/english/pdf/Report_Caribbean_HGibb.pdf>

²¹⁵ *Ibid.*

their home country).²¹⁶ Delays in receiving the pay are frequently reported, and there was a case of a farmer in Leamington who was facing severe “cash flow problems” with the result that the SAWP workers at the farm did not receive their full pay for over a year.²¹⁷ The withholding of workers’ wages while in Canada – no matter their immigration status – is legally problematic, although permissible under the SAWP Employment Contract that workers sign for Caribbean countries.²¹⁸

The involvement of agricultural employers and SAWP sending governments in the dialogue with the workers’ representatives provides an insight into the conflicting interests at work in the operation of the SAWP. Although farm employers were generally supportive in addressing many of the workers’ concerns, collective bargaining issues were resisted and some concerns were raised with some of the work performance and perceived “attitude” of some Caribbean SAWP workers.²¹⁹ The Barbados Labour Ministry claims that it is working with stakeholders in the SAWP to resolve these issues, but acknowledged that success was uneven.²²⁰ Nevertheless, it believes that a key social benefit for it from the SAWP lies in the remittances sent home, which it hopes will allow for improvement in the skills base of its workers and the continuing export of temporary workers to Canada in areas outside of the agricultural sector.²²¹ The Barbados

²¹⁶ *Ibid.*

²¹⁷ *Ibid.*

²¹⁸ The BC Employment Standards Act, for example, prohibits the withholding or deducting of an employee’s wages for any purpose “except as permitted or required by this Act or any other enactment of British Columbia or Canada.” See *BC Employment Standards Act*, *supra* note 144 at s 21(1).

²¹⁹ Gibb, *supra* note 214.

²²⁰ A Downes, “The Canadian Seasonal Agricultural Workers’ Program: The Experience Of Barbados, Trinidad & Tobago And The OECS” (June 2007), online: <http://www.nsi-ins.ca/english/pdf/CSAWP_Andrew_Downes.pdf>.

²²¹ *Ibid.*

government is thus caught between addressing the serious issues facing its citizens working in the SAWP while attempting to maintain the continuation and expansion of the Temporary Foreign Worker Program.

3.10 Conclusion

The legal analysis relating to this issue is crucial to answering the central questions of this thesis. The analysis is made complicated by the lack of clarity in judicial rulings on the issue. *Dunmore* for example contained a mixed message for unionization of farm workers. Despite the Supreme Court's noting that "without certain minimum protections" the freedom to collectively organize "would be a hollow freedom," the Court dismissed the more important part of the UFCW's claim that the constitutional freedom of association rights should include the freedom to collectively bargain.²²² The conditionality expressed by the Court in *Dunmore*, *Health Services* and *Fraser* also seems puzzling. For farm workers seeking to join the UFCW, a constitutionally protected freedom to organize would seem to mean little if there is no concomitant freedom to bargain. The reasoning in these decisions has continued to present difficulties for unionization of agricultural workers, and is an example of the shortcomings of a strategy based solely on litigation.²²³ More significantly for this analysis, the decisions only applied to permanent residents or citizens working in the agricultural industry. The Supreme Court again declined to address migrant workers' issues in *Fraser*.

My analysis of the federal SAWP Employment Contract involved examining the

²²² *Ibid.* at para 42

²²³ B Walchuk, "Ontario's Agricultural Workers And Collective Bargaining: A History Of Struggle" (2009) 14 *Just Labour: A Can J of Work and Soc* 150 at 153.

terms of the contract, its enforceability, and any differences existing with contracts obtained through collective bargaining. These documents were analyzed for a number of reasons but the analysis focused on the practical benefits obtained for SAWP workers through a union agreement. The contractual analysis provided a clear presentation of the various clauses in the union contracts and special protections intended for SAWP workers. The Greenway labour decision also provided a novel, compact and extremely relevant case study for this chapter.

One limitation in the interview research for this chapter was the inability to get specific information from government officials, who responded to specific information queries with general information about the program. This, however, is completely consistent with the federal government's hands-off approach to unionization matters and the SAWP. Employers were not receptive to requests for interviews regarding unionization. They had given numerous public statements regarding unions and SAWP workers and made statements in their challenges to the BC Labour Board that were utilized instead. Given the legal focus of the dissertation, and the various difficulties in approaching the SAWP workers themselves, they were not recruited as interview subjects.

The Floralia and Sidhu & Sons collective agreements were not the result of typical bargaining usually conducted between employers and employees in BC. In particular several of the provisions of each of the agreements illustrate the limitations of the bargaining process in the context of the temporary foreign migrant workers. The negotiated provisions also reflect the interest of the UFCW in several areas that may limit the benefits provided to SAWP workers.

The entire process of collective bargaining in relation to migrant workers was likely spurred by the growing human rights discourse in Canada, tying labour rights to general human rights. A number of Supreme Court challenges and reliance on Charter based rights discussed earlier in this Chapter prompted the UFCW's actions in relation to SAWP workers.²²⁴ The difficulty with this framework is that it generally assumed that the Supreme Court would interpret Charter-based arguments relating to SAWP workers in a manner that would satisfy rights-based concerns. Unfortunately, as demonstrated in this chapter, the Supreme Court has thus far hesitated in commenting on any aspects of agricultural based collective bargaining rights relating to SAWP workers.

The agreements themselves have several specific provisions that particularly benefit the UFCW but offer limited benefits to the workers. The Floralia agreement's clauses relating to Union Recognition guarantees exclusivity in representation for the SAWP workers, preserving the union's position as the sole bargaining agent for the certified unit. Although this clause is of course necessary for the union to represent the workers it also creates the potential for conflict with foreign government agents. In particular as noted above the Mexican government has increasingly adopted a hostile position towards unionization of its SAWP workers in Canada, raising questions of sovereign jurisdiction over its citizens.

Although the Floralia collective agreement contains provisions guaranteeing the application of the BC Human Rights Code to SAWP workers, this provision likely provides redundant protections, as there is no evidence that the Code would not apply to foreign migrant workers in BC. Similarly the Grievance and Arbitration provisions

²²⁴ *Ibid.* at 150.

outlined in the Agreement are somewhat redundant in that it has already been made clear in the Greenway decision that the *BC Labour Relations Code* does apply to SAWP workers.

The collective agreement also preserves the employer's position by allowing Floralia to retain residual powers that are not specifically limited in the agreement. A significant limitation of the agreement lies in its preservation of a probationary period for SAWP workers. During this period SAWP workers could still be discharged and expelled from Canada with the option of arbitration proceedings. This is a particularly serious shortcoming as the agreement's grievance provisions otherwise provide some measure of protection to SAWP workers in danger of being repatriated.

The Floralia agreement of course could not alter the basic structure of the SAWP. The maximum working season of eight months was maintained. There is no provision for extension of a continuous period beyond the eight months nor is there any new route to permanent residency for SAWP workers. The ultimate decision on the numbers of SAWP workers required in any given season was to be maintained by Floralia operating in conjunction with the Federal Government.

In terms of practical workplace benefits, the Floralia agreement provides immediate short-term benefits to SAWP workers mainly in the areas of workplace safety and worker retention. Articles 15 and 16 of the Agreement in particular provide some measure of protection to prevent workplace accidents in transportation similar to the accident that occurred at Greenway farms, and for appropriate bereavement leave to allow a worker to return to his or her home country in the event of a family-related death. However worker retention provides a focal point of tension in the agreement. The seniority provisions of

the agreement, and in particular the provisions applying to SAWP workers, had to conform to federal requirements to give priority to Canadian citizens in hiring preferences. A significant drawback of the agreement in this area is that the work experience of transferred SAWP workers (i.e. workers transferred from one Canadian farm to another) is not considered for seniority purposes.

The UFCW was largely unable to expand significantly upon the SAWP Contract of Employment in the area of workplace hours and wages, with the exception of wages provided for in the Floralia agreement. The union was unable to guarantee equal rights for SAWP workers relative to resident and Canadian workers in the area of employment dismissals. The layoff of SAWP workers remained tied to the basic operation of the program whereby the worker must have guarantee of sufficient work to complete a full season in Canada. Again, the provisions relating to notice and payment in lieu of notice merely reiterated protections available through the *Employment Standards Act*.

The UFCW however was able to link the important principle of seniority to SAWP workers. This was a significant achievement as the “naming” of workers permitted in the program otherwise allowed employers to circumvent worker seniority. The establishment of a recall provision based on seniority is an important step towards eliminating the de-facto blacklisting of workers through arbitrary recall provisions. However, the tensions evident in somewhat unequal benefits were reflected in the priorities for hiring resident or citizen workers over SAWP workers possessing greater seniority.

These tensions between SAWP workers and resident/citizen farm workers were perhaps best reflected in the outcome of the Sidhu negotiations. The protracted

negotiations and repeated recourse to the Labour Relations Board stemmed largely from concerns over the appropriateness of a separate SAWP worker bargaining unit. The separate and distinct nature of SAWP workers was ultimately grounded in their unique terms of employment rather than on their non-citizen status in Canada, although language and culture differences were also considered.

Interestingly, the UFCW's approach to these negotiations stressed flexibility towards securing a distinct SAWP bargaining unit. But the impetus for this stance seems to have resulted from the union's desire to avoid competing interests in the same bargaining unit.²²⁵ The admission that SAWP workers and resident or citizen farm workers may not necessarily have the same workplace interests puts the union in the uncomfortable position of advocating a separate structure that provided asymmetrical benefits to workers at the same worksite. The creation of a separate structure for SAWP workers also has the potential to create work jurisdiction disputes between resident and citizen workers and SAWP workers seeking to maximize work hours and earnings while in Canada.

The conditions imposed to try to limit these potentially competing interests ended up limiting SAWP workers' rights obtained through the collective agreement. Although important elements such as minimal housing standards, pay rates, worker recall and discipline were protected many of these benefits (with the exception of worker recall through seniority) were ostensibly already protected within the ambit of the SAWP itself. This puts further pressure upon the union adequate enforcement of these provisions within the context of the Labour Relations Board putting any work jurisdiction related

²²⁵ *Supra* note 145 at para 69.

issues beyond the scope of the collective agreement. Any workplace concerns deemed to be held in common by both resident and citizen workers and SAWP workers could not be the subjects of collective bargaining at Sidhu. The collective agreement's effectiveness could be expanded if the bargaining unit itself were expanded to include all workers at Sidhu. However, this seems exceedingly unlikely given the subsequent events following the negotiation of the Floralia and Sidhu agreements.

The conflicts between the UFCW and Sidhu following the agreement pointed to a strained relationship, despite the union's attempts to clarify misstatements regarding working conditions at the farm. Both Floralia and Sidhu apparently remained opposed to the unionization efforts involving SAWP workers. The subsequent attempts to decertify the agreements reveal an animosity towards collective bargaining and agricultural work that persists notwithstanding attempts to resolve the issue through the BC Labour Relations Board.

Although the Floralia and Sidhu agreements did result from successful tribunal actions and Supreme Court decisions affirming certain *Charter* rights, the protracted legal challenges at the Labour Relations Board, expulsions of workers and allegations of foreign government interference made these cases uniquely challenging to resolve in a timely fashion. The Supreme Court's *Fraser* decision further complicated the issue. On the one hand, SAWP workers apparently have the constitutional right to engage in a form of collective bargaining under provincial labour laws. On the other hand, the *Fraser* decision does not outline any right to a specific type of collective bargaining. This leaves open the possibility that other provinces may adopt the model Ontario has used with its AEPA, and offer farm workers alternatives to the traditional type of unionization put

forward by the UFCW.

In the context of unionizing SAWP workers, the union and employers were engaged in a simultaneously confrontational and cooperative relationship. The quixotic nature of this is illustrated by the repeated and lengthy recourse to labour tribunal boards and courts to resolve legal disputes over unionization, while the parties are engaged in a supposedly cooperative international dialogue. The UFCW's other efforts in developing networks and cooperative activities with foreign governments are important new developments outside the scheme of traditional collective bargaining. The Michoacán Migrant Workers Pact offers a template for future international agreements and cooperative activities to address the problems with the SAWP. It also provides an avenue to address foreign government interference with the collective bargaining process and SAWP workers in Canada.

This chapter has also shown the difficulty within this context is that the adversarial legal process in Canada tends to trump cooperative international efforts, setting back any progress that may be made in international forums. International labour agreements that stress cooperative activities to address labour law violations have a dubious track record, as witnessed in the NAFTA labour side agreement, the NAALC, and other labour cooperation agreements signed by Canada alongside free trade negotiations. The following chapters provide a comparative analysis of seasonal agricultural labour unionization in the United States in Canada and of the efficacy of cooperative international labour efforts in both countries.

4 - A Comparative Analysis of Temporary Seasonal Workers and Unionization: Canada and the United States.

The analysis in this Chapter focuses on complaints alleging violations of migrant farm workers' rights relating to the process of unionization in the United States. In order to compare the situation with SAWP workers in Canada, the Chapter first provides an overview of U.S. labour laws, including laws relating specifically to the hiring of foreign migrant workers. When using the United States as a site for comparison involving farm labour unionization and migrant labour, its different political history relating to union activism on farms involving migrant labour is notable. The role of American unions and nationally prominent leading organizing figures in providing the political impetus for farm labour unionization simply did not occur in Canada. The brief history of American farm labour unionization occurred at a time when the United States was undergoing a broader civil rights revolution that brought migrant labour into the forefront of political and legal struggles for civil rights. The historical overview is designed to provide a basis for a comparative qualitative analysis with Canadian labour and migration laws.

This chapter is located within the paradigm set by the previous chapters, and in my own previous research. In my prior work, I applied the “labour development” theory to legal difficulties caused, in part, as a result of tensions between economic globalization, and enforcement of international labour standards between the developed and developing

world.¹ Applying this framework to SAWP workers, and in particular in comparison with developments in the United States, serves to illustrate several points from the previous Chapters in this dissertation.

The main focus of the comparative analysis in this Chapter is to provide insight into the broader situation of temporary farm workers in the United States and Canada. The comparison illustrates that the legal situation of SAWP workers in Canada does not represent an exceptional situation. The historical and social context of farm labour and the use of a population with limited rights are not limited to a distinct Canadian farm history or racial attitudes towards using migrant farm labour. The legal problems encountered in applying collective bargaining principles to temporary migrant farm labour are likewise not limited to Canada's labour law structure, or to the broader Canadian legal consideration of the issue. They are related to the specific circumstances of the migration itself - its temporary nature, the vulnerability of the subjects, and its disproportionately unidirectional benefits to developed societies.

This chapter analyzes the responses to temporary labour migration and unionization in both countries in order to map out their differences and similarities. The analysis takes into account the respective country's relevant social and labour history and legal systems. The comparison here focuses specifically on analyzing the differences and similarities in collective organizing of migrant farm labour. It examines the responses generated by alleged violations of law relating to collective bargaining in the two countries. The "recent" history and responses in both countries are defined in comparative terms as

¹ The basis for this chapter, the explanatory passages and case studies regarding the NAALC were originally included as part of my LL.M. See Russo, *supra* Ch 1, note 89.

being after the end of the *Bracero* program in the United States, the beginning of the H2-A visa program, and the creation of the SAWP in the 1960s.

There are specific reasons for selecting the United States for a qualitative comparison with Canada, and for the relatively narrow focus of this chapter. In both Canada and the United States, Guest Worker Programs originated within their respective agricultural sectors. Although there is disagreement about application of law to temporary foreign workers in both countries, current migration scholarship reveals a near consensus that both systems contain legal responses that are inadequate to the alleged violations of collective bargaining rights.² Compared to Canada, the United States is witnessing a much broader debate over the presence and conditions of migrant workers within its territory. Their cause has been taken up by a variety of NGOs and public interest lawyers and the United States has witnessed greater international recourse by workers' advocates.

4.1 Jurisdictional division of labour law powers

Labour law in the United States consists of numerous state and federal laws. Unlike Canada, American federal law has general jurisdiction over workers' rights to collective bargaining, but there are exceptions to this rule. The source of federal legislative primacy in the United States arises from the Supremacy Clause of the U.S. Constitution.³ The basis for federal jurisdiction specifically relating to labour law lies in the Commerce

² See S Cleveland, B Lyon and R Smith, "Inter-American Court of Human Rights *Amicus Curiae* Brief: The United States Violates International Law When Labor Law Remedies Are Restricted Based on Workers' Migrant Status" (2002-2003) 1 Seattle J of Soc Just 795.

³ U.S. Const. art. I, cl. 6. It states that the "Constitution and the laws of the United States...shall be the supreme law of the land...anything in the constitutions or laws of any State to the contrary notwithstanding."

clause of the U.S. Constitution.⁴ This clause allows the U.S. Congress to enact legislation regulating commerce between American states. Federal labour law legislation is predicated on the theory that the federal regulation of labour-management relations is "necessary to diminish industrial strife that should disrupt interstate commerce."⁵ From the Supremacy and Commerce Clauses, U.S. courts have created a "doctrine of preemption" and a notion that certain federal legislation is intended to deprive U.S. states of jurisdiction in many labour law matters.⁶

Current federal US labour law is largely a product of New Deal labour reforms signed into law during the 1930s. The most important legislation to emerge from President Roosevelt's package of labour reforms was the *National Labor Relations Act of 1935* (NLRA) popularly known as the "Wagner Act."⁷ The Wagner Act provided basic workers' rights in union organizing and collective bargaining, while prohibiting certain employer and union conduct that could make employment conditional on refraining from joining a union, or mandatory union membership.⁸ Although at the time the U.S. Supreme Court had struck down a number of Roosevelt's New Deal initiatives, it upheld the constitutionality of the NLRA and the federal power to regulate labour relations by a 5-4 majority in *NLRB v. Jones & Loughlin Steel Corp.*⁹

⁴ U.S. Const. art. I, cl. 8.

⁵ W Gould, *A Primer on American Labour Law* (Cambridge, MA: MIT Press, 1993) at 28.

⁶ *Ibid.* at 32. U.S. Courts have referred to this deprivation of state jurisdiction over certain matters as Congress intending to "occupy the field" and avoid conflicting interpretations of a law by state courts that may frustrate the objective of the federal legislation.

⁷ *Wagner Act*, supra Ch 3, note 21; see also *San Diego Building Trades Council v. Garmon* 359 U.S. 256 (1959).

⁸ For a full listing of the protections offered by the NLRA, see Cornell University Law School, online: <http://www.law.cornell.edu/uscode/29/uscode_sup_01_29_10_7_20_II.html>.

⁹ *NLRB v. Jones & Loughlin Steel Corp.*, 301 U.S. 1 (1937); 57 S. Ct. 615

Section 7 of the NLRA is often described as the "heart" of the Act,¹⁰ offering the following protections to American workers:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection.

Section 8 of the NLRA also defines unfair labor practices applicable to both unions and employers. The U.S. Supreme Court has held that whenever either Section 7 or Section 8 "arguably" protects the issue in a labour case, state courts are deprived of jurisdiction.¹¹ The NLRA also created a federal administrative tribunal, the National Labor Relations Board (NLRB), to handle labour disputes.¹²

The NLRA does not apply to agricultural workers in the United States. Some arguments similar to those seen in the Canadian context for excluding farm workers from unionization appear in U.S. labour history.¹³ Apart from the NLRA, American labor laws have also generally excluded large groups of workers from coverage.¹⁴ More specifically, the exclusion of American agricultural workers from the NLRA had no

¹⁰ TC Kohler, "Major Acts of Congress", online: <<http://www.enotes.com/major-acts-congress/national-labor-relations-act>>.

¹¹ *NLRB v. Jones*, *supra* note 9.

¹² Gould, *supra* note 5 at 28-29. The NLRB focused on the development of a body of federal case law that was designed to govern the relationship between labor and management on a consistent basis throughout the United States. NLRB orders are not self-enforcing - enforcement of decisions is obtained through various U.S. Circuit Court of Appeals. Contempt proceedings take place before the Circuit Court of Appeals, but rarely result in civil and criminal penalties for non-compliance.

¹³ Some of these arguments include the ever present threat of communism expanding among apple-pickers in Washington state. See University of Washington, "Pacific Northwest Civil Rights and Labor History: Communism in Washington State", online: <<http://depts.washington.edu/labhist/cproject/grijalva.shtml>>.

¹⁴ See D Bok, "Reflections on the Distinctive Character of American Labor Laws" (1971) 84 Harvard L Rev 1394. There has also been considerable litigation in the U.S. over exactly what constitutes an agricultural employee for purposes of exemption from the NLRA. See *Cal-Maine Labour Farms* 307 NLRB No. 66 (1992); *DeCoster Egg Farms*, 223 NLRB 884 (1976); *Camsco Produce Co.* 297 NLRB No. 157 (1990)

"logical basis" other than the fact that they had "little political clout when the legislation was enacted."¹⁵ Interestingly, both the *1933 National Industry Recovery Act*¹⁶ (declared unconstitutional by the U.S. Supreme Court)¹⁷ and the initial version of the *Wagner Act* in 1934 had no statutory exclusions of agricultural workers under their respective collective bargaining provisions.¹⁸ Legislative hearings on the Wagner Act, conducted in 1934 in the House of Representatives and the Senate, "hardly discussed" farm workers.¹⁹ When Senator Wagner reintroduced the legislation in 1935, the Senate Report on the bill indicated that agricultural labourers had been excluded for "administrative reasons."²⁰ An attempt in 1935 to include farm workers under the Wagner Act was defeated by Congressional opponents, who expressed concerns over unionization's effects on American family farms.²¹

4.1.1 American state law and unionization of agricultural workers

Although the NLRA does not cover agricultural or domestic employees, several states have passed labour laws that offer protections to agricultural workers, including some collective bargaining provisions. New Jersey and Missouri have constitutional provisions that do not exclude agricultural workers from collective bargaining but

¹⁵ Gould, *supra* note 5 at 35.

¹⁶ 48 Stat. 195 (1933).

¹⁷ *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

¹⁸ A Morris, "Agricultural Workers and National Labor Legislation" 54 California L Rev 1939 at 1945-1951.

¹⁹ AN Read, "Let the Flowers Bloom and Protect the Workers Too", online: <http://www.friendsfw.org/Advocates/Protect_Workers_Too.pdf>. Some testimony apparently mentioned the need for farm worker protections under the Wagner Act. There was also some concern expressed over the ability of small family farm owners to continue functioning within the confines of the Wagner Act.

²⁰ Morris, *supra* note 18.

²¹ See Debates in the U.S. House of Representatives on s 58, 79 Cong. Rec. House 9668, 9720, et seq. (19 June 1935).

currently have no implementing legislation.²² Hawaii has both constitutional and legislative protections for agricultural workers and collective bargaining.²³

Both Maine and California have inclusive laws specifically aimed at regulating agricultural workers right to collective bargaining.²⁴ Maine has recently adopted specific agricultural legislation that protects collective bargaining rights, and has outlined related public policy rationales:

It is declared to be the public policy of this State and it is the purpose of this chapter to promote the improvement of the relationship between agricultural employers and their employees by providing a uniform basis for recognizing the right of agricultural employees to join labor organizations of their own choosing and to be represented by those organizations in collective bargaining for terms and conditions of employment.²⁵

The Maine farm labour legislation does not appear to exclude foreign migrant workers from its coverage in that it only applies to farm workers who are excluded from coverage under the NLRA.²⁶

California has long protected and regulated the unionization of farm workers within the state through its Agriculture Labor Relations Act (ALRA).

It is hereby stated to be the policy of the State of California to encourage

²² New Jersey Const., art. I, para. 19; Missouri Const., art. I, s. 29; See R Goldberg and R Williams, "Farmworkers' Collective Organization and Bargaining Rights in New Jersey: Implementing Self-Executing State Constitutional Rights" (1987) 4 Rutgers L J 729-732.

²³ Hawaii Const., art. XIII, s 1; Hawaii Rev Stat, t I, c 377.

²⁴ *California Agricultural Labor Relations Act* ("ALRA") (1975), CLC, ss1140-1166.3; Maine Rev Stat 26 MRSA, ss 1321, 1323. The Maine Legislation states that "Agricultural employees have the right to self-organize; to form, join or assist labor organizations; to bargain collectively through representatives of their own choosing; and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. Agricultural employees also have the right to refrain from such activities except to the extent that this right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 1324, subsection 1, paragraph B."

²⁵ Maine Rev Stat, *Ibid.* at ss 1321.

²⁶ *Ibid.* The legislation defines "Agricultural employee" or "employee" to mean "a person engaged in agriculture; however, this subsection may not be construed to include any person other than those employees excluded from the coverage of the National Labor Relations Act."

and protect the right of agricultural employees to full freedom of association, self-organization, and designation of representatives of their own choosing, to negotiate the terms and conditions of their employment, and to be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. For this purpose this part is adopted to provide for collective-bargaining rights for agricultural employees.²⁷

The ALRA also currently covers foreign migrant farm workers within California.²⁸

Wisconsin, Washington, Oregon and Pennsylvania have had judicial rulings confirming some protected workplace rights for agricultural workers, while falling short of full inclusion under their state versions of the NLRA.²⁹ This modified protection regime seems to mirror Ontario's approach to farm workers with its AEPA that was confirmed in the *Fraser* ruling.³⁰ Significantly, twenty-two U.S. states, including most southern states and many plains and western states that have a large proportion of seasonal migrant farm workers, have enacted "right-to-work" laws that severely limit the ability of unions to collect mandatory dues from employees.³¹

²⁷ ALRA, *supra* note 24 at s 1140.2.

²⁸ *Ibid.* at s 1140.4. The term "agricultural employee" or "employee" shall mean one engaged in agriculture, as such term is defined in subdivision (a). However, nothing in this subdivision shall be construed to include any person other than those employees excluded from the coverage of the National Labor Relations Act, as amended, as agricultural employees, pursuant to Section 2(3) of the *Labor Management Relations Act* (Section 152(3), Title 29, United States Code), and Section 3(f) of the Fair Labor Standards Act (Section 203(f), Title 29, United States Code).

²⁹ Wisconsin Stat Ann, ss 103.51-62; Regarding Washington State, see *Garza v. Patnode*, 65 Lab. Cas. para 52,570 (1971) which held that Washington state protections extend to farm workers, *Bravo v. Dolsen Cos.*, 888 P.2d 147, 155 (Wash. 1995) (which held that the Washington State Labor Act and state public policy gives farm workers the right to strike and engage in other organized activities relating to working conditions, without employer retaliation, but also see *International Union of Operating Engineers v. San Point Country Club*, 519 P. 2d 985, 988 (Wash. 1974) which held that there was no employer duty to bargain in Washington state; Oregon Rev. Stat., ss. 662.010-130 (1997); *Pennsylvania Labor Relations Act*, 43 P.S., ss 211.1-211.3.

³⁰ *Supra*, note 101.

³¹ Gould, *supra* note 5 at 48. "Right-to-work" legislation is a controversial issue. Those in favor of "right-to-work" legislation generally argue that the guarantee of freedom of association under the U.S. Constitution should prohibit any mandatory requirement to join a union as a condition of employment.

4.1.2 Federal law and unionization of agricultural workers

Some U.S. labour activists have argued that extending NLRA coverage to include agricultural workers in the U.S. would be the best avenue to take to address collective bargaining issues.³² For a variety of reasons however, expanding the NLRA to include agricultural workers is not a practical option. First, the "overwhelming political power" of the agricultural lobby in Congress makes it difficult to imagine a successful vote in Congress, at least for the foreseeable future.³³ Second, any federal intrusion into this area has the potential to "undercut" gains in farm worker unionization made by American unions through relatively progressive state labor legislation such as the ALRA.³⁴ Finally, many American labour lawyers familiar with the NLRA complain that it offers inadequate protections to those workers that it does cover.³⁵

There are two other significant Federal labour laws that apply to farm workers in the United States. The *Migrant and Seasonal Worker Protection Act* (MSPA) adopted in 1983 offers extensive workplace protections to agricultural workers.³⁶ However, the

Proponents also argue that such legislation is necessary to counteract the "special privileges" that previous American law has accorded unions. See T Carney, "A Strong Argument in Favour of Right-to-Work (Featuring F.A. Hayek)" (23 February 2011) Washington Examiner, online: <<http://washingtonexaminer.com/blogs/beltway-confidential/2011/02/strong-argument-favor-right-work-featuring-fa-hayek>>; Those against "right-to-work" legislation argue that the term itself is misleading, as such legislation encourages lower wages and poorer workplace safety conditions, is anti-union by encouraging employees to refrain from paying union dues while enjoying union benefits, and is essentially a product of large corporate and business interests with little actual worker participation. See D Partridge, "Virginia's New Ban on Public Employee Bargaining: A Case Study of Unions, Business, and Political Competition", (2007) 10:2 Employee Responsibilities & Rights J 127.

³² *Supra* note 19.

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ See H Levy "The Agriculture Labor Relations Act of 1975" (1975) 15 Santa Clara L Rev 783. The *Wagner Act* contains no definition of "agricultural labourer" which has led to litigation to determine exactly which employees on U.S. Farms are excluded from the act.

³⁶ 29 U.S.C. § 1801 *et seq* (2003)

MSPA also specifically exempts H-2A workers from its protections, excluding them from its definitions of both “seasonal agricultural worker” and “migrant agricultural worker.”³⁷ The *Fair Labor Standards Act* (FLSA) is federal legislation designed to provide for certain minimum federal standards of employment to almost all workers in the United States.³⁸ Unlike the MSPA, the FLSA does apply to migrant farm workers. The FLSA covers minimum wages and workers’ deductions to insure that migrant workers are not paid below the federal minimum wage.³⁹ States are free to set their own minimum wage laws, and in case of any conflict between state and federal wage laws, the higher rate would apply.⁴⁰ The FLSA operates independently from the H-2A seasonal worker program.⁴¹ American officials have admitted to difficulties in enforcing certain aspects of the FLSA, particularly with regard to migrant farm workers, and have mainly attributed this to a lack of available resources and funding from the federal government.⁴² In

³⁷ *Ibid.* Title V, Sec. 3. The MSPA's definition of "migrant agricultural worker" or "seasonal agricultural worker" does not include "any temporary nonimmigrant alien who is authorized to work in agricultural employment in the United States under sections 101(a)(15)(H)(ii)3 and 214(c) of the *Immigration and Nationality Act*."

³⁸ 29 U.S.C. § 213(f) *et seq* (1937). The FLSA defines "agricultural worker" as including the "harvesting of horticultural commodities."

³⁹ K Bales, et al., "Hidden Slaves: Forced Labor in the United States" (2005) 23 Berkeley J of Int L 47 at 63. The federal minimum wage in the United States has been \$7.25/hour since July 24, 2009.

⁴⁰ Certain States with large migrant farm worker populations, notably California, Florida, Illinois and Washington state, have minimum wage laws higher than the federal rate. Interestingly, the five states that have no minimum wage laws are all located in the southern United States. See U.S. Department of Labor, "Minimum Wage Laws in the States" (1 January 2011), online: <<http://www.dol.gov/whd/minwage/america.htm>>.

⁴¹ U.S. Department of Labor, online: ><http://www.dol.gov/whd/regs/compliance/whdfs26.htm>>. For example, The H-2A program provides for reimbursement costs incurred for inbound transportation and subsistence not previously advanced or otherwise provided, to the worker once the worker completes 50% of the work contract period. The FLSA prohibits migrant farm employees from incurring costs that are primarily for the benefit of the employer if such costs take the employee’s wages below the FLSA minimum wage. Upon completion of the work contract, the employer must either provide or pay for the covered worker’s return transportation and daily subsistence.

⁴² *Ibid.* at 64.

contrast, Canada has no federal legislation specifically relating to employment standards or collective bargaining of migrant workers in its territory. The Canadian government refers all questions regarding SAWP workers and employment standards to separate provincial departments.⁴³

4.2 Mexican migrant farm workers and H-2A visa program

From 1942-1964, the United States acquired Mexican farm labour through the *Bracero* Program. Although Mexican farm labourers had long been working on American farms, the Bracero Program is generally acknowledged as the first “major” American temporary foreign farm worker program.⁴⁴ It was meant to address the perceived problem of a surge of undocumented Mexican migrant workers entering the United States in the 1930s and early 1940s and acted in conjunction with the mass round-ups of undocumented Mexican migrant workers in the early 1950s.⁴⁵ Many scholars have emphasized the needs of the American agricultural sector as the prime motivation behind the Bracero program, with lax enforcement of minimum wages and employment and

⁴³ HRSDC, "Temporary Foreign Worker Program: Hiring Agricultural Workers in Canada", online: <http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/sawp.shtml>.

⁴⁴ U.S. Department of Homeland Security, “Fact Sheet: H-2A Temporary Agricultural Worker Program”, online: <http://www.dhs.gov/xnews/releases/pr_1202308216365.shtm>. The program was named for the Spanish term *bracero* derived from the term *brazo* or “arm.” *Bracero* translates into “one who works with his arms.” Mexican migrant workers had been active in the U.S. agricultural sector since the late 19th century. Early Mexican migrant labour was seasonal and many Mexicans returned home after the farming season had completed. This pattern changed dramatically with the onset of the Second World War. A large shortage of American labour caused U.S. immigration policy to become more attuned to preventing Mexican migrants from permanently occupying American jobs. There was also a racial element in preventing the permanent residence of Mexican Migrants. See generally P Kirstein, *Anglo over Bracero: a History of the Mexican worker in the United States from Roosevelt to Nixon* (San Francisco: R & E Research, 1977).

⁴⁵ For a history of “Operation Wetback” and the Bracero program, see JR Garcia, *Operation Wetback: The Mass Deportation of Mexican Undocumented Workers in 1954* (Westport, CT: Greenwood Press, 1980).

housing conditions responsible for the relative expansion of the program in the 1950s.⁴⁶ The Bracero program was officially ended in 1964.

The American Department of Homeland Security summarized the Bracero Program as a “success” in “expanding the farm labour supply” but attributes its demise to “depressed wages” for farm workers in the south-western United States.⁴⁷ In reality, there were many more problems with the Bracero Program, including sub-standard housing conditions, dangerous employment conditions, and continuing lawsuits over deductions of worker wages that were never repaid.⁴⁸ In 2008, former Bracero workers reached a settlement agreement with the Mexican government over unpaid wages and a fund was set up to pay class members a cash settlement.⁴⁹

The problems with the Bracero program and the continuing entry of undocumented Mexican workers spurred the growth of the agricultural union movement. In particular the ending of the Bracero program has been noted as the beginning of the modern problems surrounding undocumented Mexican labour migration to the United States. “The problem of Mexican illegal immigration is born at the moment that the Bracero

⁴⁶ See generally E Galarza, *Farmworkers and Agri-business in California: 1947-1960* (Notre Dame, IN: University of Notre Dame Press, 1977).

⁴⁷ U.S. Department of Homeland Security, “Fact Sheet: H-2A Temporary Agricultural Worker Program” (6 February 2008), online: <http://www.dhs.gov/xnews/releases/pr_1202308216365.shtm>.

⁴⁸ K Morgan, “Evaluating Guest Worker Programs in the U.S.: A Comparison of the Bracero Program and President Bush’s Proposed Immigration Reform Plan” (2004) 15 Berkeley La Raza L J. 125; O Scruggs, “Texas and the Bracero Program: 1942-1947” (1963) 32:3 Pacific Hist Rev 251; Several class-action lawsuits were also filed beginning in the late 1990s against the American and Mexican governments, as well as banks, “seeking the return of \$30 to \$50 million in forced bracero savings, plus punitive damages of \$500 billion.”

⁴⁹ As a result of the Settlement, the *Braceros Relief Fund* was established, offering class members a one-time payment of 38,000 pesos. See United States District Court For The Northern District Of California, “If You Worked In The Bracero Program Between 1942 And 1946, Or If You Are The Surviving Spouse Or Child Of Such A Bracero, And You Are Living In The United States, You Could Get An Award From A Class Action Settlement.”, online: <<http://portal.sre.gob.mx/seattle/pdf/NotificacionBracerosIng.pdf>>.

program ends... they [Mexicans] keep coming, because the demand [for labour] is still there.”⁵⁰ This increasing number of undocumented Mexican migrant farm labourers in the United States led unions to focus their attention on advancing collective bargaining rights for American citizens employed in the agricultural industry.

In 1964, the H2 Visa program replaced the Bracero Program, and allowed American employers to hire foreign workers “for both agricultural and non-agricultural jobs in locations with a shortage of domestic workers.”⁵¹ Although some legal gains were made by guest workers through the H2 program, many of the problems faced by Bracero workers continued and the program itself became the subject of wider immigration reforms enacted during the 1980s.⁵² In 1986, the *Immigration Reform and Control Act* (IRCA)⁵³ was enacted dividing H-2 workers into foreign temporary/seasonal agricultural workers (the H-2A visa), and foreign temporary non-agricultural workers (the H-2B visa).⁵⁴ A so-called amnesty provision in the IRCA allowed certain undocumented workers to legalize their status in the U.S., provided that they could prove that they worked for 90 days on an American farm from May 1, 1985 to April 30, 1986.⁵⁵ Nearly three million undocumented Mexican farm workers in the U.S. obtained permanent

⁵⁰ Jorge Domínguez, Madero professor of Mexican and Latin American politics and economics, quoted in Harvard Magazine, “Uneasy Neighbors: A Brief History of Mexican-U.S. Migration” (June 2007), online: <<http://harvardmagazine.com/2007/05/uneasy-neighbors-a-brief-html>>.

⁵¹ *Supra* note 47.

⁵² R Tripathi, “The H-2B Visa: Is This How we Treat a Guest?” (2008) 11 Scholar 519.

⁵³ *Immigration Reform and Control Act (1986)*, Pub L 99-603, 100 Stat 3359.

⁵⁴ *Supra* note 47.

⁵⁵ *Ibid.* The IRCA also provided for additional “replenishment agricultural workers to enter the United States as temporary residents between 1990 and 1993 if there was a shortage of farm workers during that time.”

residency status under the amnesty program.⁵⁶ The Department of Homeland Security statement on the H-2A visa program echoes the general Canadian government statements on the SAWP:

Employers in the United States have often faced a shortage of available domestic workers who are able, willing and qualified to fill seasonal agricultural jobs. The H-2A program was instituted to meet this need for seasonal and temporary labor, without adding permanent residents to the population.⁵⁷

The Immigration and Nationality Act⁵⁸ authorizes the establishment of the H2-A visa and outlines entrance. Three federal agencies manage the H-2A program:

- Department of Labor (DOL) issues the H-2A labor certifications and oversees compliance with labor laws;
- U.S. Citizenship and Immigration Services (USCIS) adjudicates the H-2A petitions, and
- Department of State (DOS) issues the visas to the workers at consulates overseas.⁵⁹

In addition the Department of Homeland Security oversees any security issues related to the admittance of foreign migrant workers.

4.2.1 Duration of residency for H-2A workers

Nationals of a broad range of countries may apply for an H-2A visa.⁶⁰ There is no

⁵⁶ L Haus, "Openings in the Wall: Transnational Migrants, Labor Unions and U.S. Immigration Policy" (1995) 49:2 Int'l Migr 285 at 287.

⁵⁷ *Ibid.*

⁵⁸ 8 U.S.C. 1101(a)(15)(H)(ii)(a) sec. 101(a)(15)(H)(ii)(a). This section authorizes the H-2A Visa program.

⁵⁹ *Supra* note 47.

⁶⁰ U.S. Citizenship and Immigration Services, online: <<http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=889f0b89284a3210VgnVCM100000b92ca60aRCRD&vgnnextchannel=889f0b89284a3210VgnVCM100000b92ca60aRCRD>>. "Effective January 18, 2011, nationals from the following countries are eligible to participate in the H-2A and H-2B programs: Argentina, Australia, Barbados, Belize, Brazil, Bulgaria, Canada, Chile, Costa Rica, Croatia, Dominican Republic, Ecuador, El Salvador, Estonia, Ethiopia, Fiji, Guatemala, Honduras, Hungary, Ireland, Israel, Jamaica, Japan, Kiribati, Latvia, Lithuania, Macedonia, Mexico,

current limit on the number of foreign agricultural workers admitted under the H-2A visa program. Similar to the Canadian process with the SAWP, there is a process whereby employers must verify that no U.S. citizens or permanent residents are available to perform the required work, and also certify that the proposed wages and employment conditions satisfy the applicable state employment standards and do not result in depressed wages for American agricultural workers doing similar labour.⁶¹ Entrance under the H-2A visa is generally authorized for less than one year, but the visa may be extended for "qualifying employment" in increments of less than one year, up to a maximum continuous stay of three years.⁶² A foreign seasonal worker who has been in the United States on an H-2A visa for three years is required to leave the United States and remain outside U.S. territory for a consecutive 3 month period before seeking readmission under an H-2A visa.⁶³

H-2A workers can, under certain conditions, apply for permanent residency in the United States. H2-A workers can apply for permanent residency status, or a Green Card, through following the US Family Based Immigration stream of the *Immigration and Nationality Act*.⁶⁴ This would require the H2-A worker to have close relatives who are

Moldova, Nauru, The Netherlands, Nicaragua, New Zealand, Norway, Papua New Guinea, Peru, Philippines, Poland, Romania, Samoa, Serbia, Slovakia, Slovenia, Solomon Islands, South Africa, South Korea, Tonga, Turkey, Tuvalu, Ukraine, United Kingdom, Uruguay, and Vanuatu. Of these countries, the following were designated for the first time this year: Barbados, Estonia, Fiji, Hungary, Kiribati, Latvia, Macedonia, Nauru, Papua New Guinea, Samoa, Slovenia, Solomon Islands, Tonga, Tuvalu, and Vanuatu."

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ *Ibid.*; See Title 8, Code of Federal Regulations (Non-Immigrant Classes) S. 214.2(h)(5)(viii)(C) for further details regarding the H-2A visa and departure requirements.

⁶⁴ *Immigration and Nationality Act* (8 USC); U.S. Department of State: Travel-State-Gov, "Family Based Immigrant Visas", online: <http://travel.state.gov/visa/immigrants/types/types_1306.html>.

U.S. citizens or U.S. permanent residents.⁶⁵ These relatives would file an immigration petition for an H2-A worker to attain permanent residency immigration status and a Green Card. It is also theoretically possible for an H-2A worker to attain a Green Card by having an employer sponsor him or her - but in practice this would be quite difficult.⁶⁶

The H2-A program has been criticized as more flawed than the SAWP. Employers receive more control over worker selection and placement. The program has been condemned as "deeply flawed" and giving "too much control to employers" when compared to Canada's SAWP.⁶⁷ It has been noted to amount to "slavery" and "government bondage" and workers pay high fees for visas, job placement, and poor quality housing and food.⁶⁸ The program stimulates the development of a recruitment and contracting industry. Unregulated private recruiters tend to charge exorbitant job placement fees and frequently mislead workers about job opportunities and benefits.⁶⁹ Contractors and crew bosses manipulate time cards to underpay workers. Workers do not receive adequate medical care for injuries and illness, and they are threatened out of consulting with legal service providers or talking to activists who try to inform the

⁶⁵ Close relatives are defined by the INA to include parents, unmarried minor children and spouses.

⁶⁶ The employer of the H-2A worker would need to sponsor them for a position "requiring a skill set that no ready, willing and available U.S. worker would have" and that the H-2A worker would have to have "specific experience with not gained through the same employer." See "Doctors, Lawyers, Answers" online: <<http://www.avvo.com/legal-answers/can-i-get-my-permanent-residence-through-my-employ-432012.html>>.

⁶⁷ B Jensen, "Should the World Trade Organization Set Migration Policy?" (10 July 2006), online: <<http://www.queensu.ca/samp/migrationresources/Documents/LaborMobility.pdf>>.

⁶⁸ Southern Poverty Law Center, "Close to Slavery: Guest Worker Programs in the United States", online: <http://www.splcenter.org/sites/default/files/downloads/Close_to_Slavery.pdf>.

⁶⁹ *Ibid.*

workers of their rights.⁷⁰ These serious problems have not prevented the program from expanding and, similar to the SAWP, the H-2A program has grown exponentially in recent years. The number of workers in the United States on an H-2A visa increased from 6,445 in 1992 to approximately 37,149 in 2006, and peaking at 64,404 in 2008.⁷¹

4.3 Union organizing on American farms

Unionization efforts on American farms bear many similarities to their Canadian counterparts, but also contain important differences. The United Farm Workers often used full-time organizers to spread information regarding collective bargaining, mirroring efforts by other American unions in the industrial sector.⁷² The NLRA formed the basis of legal regulation for collective bargaining in the private sector. Following its enactment, American labour unions increasingly criticized the exclusion of agricultural labour from the NLRA, and targeted farm workers for unionization. Individual farm labour contracts tended to undermine the protection of exclusive representation, and legal enforcement of employers' obligation to bargain with farm workers.⁷³

The Bracero program, centred on unrepresented foreign workers entering into individual contracts, represented another challenge, as unions also saw it as an obstacle to

⁷⁰ *Ibid.*

⁷¹ A Bruno, "CRS Report for Congress: Immigration: Policy Considerations Related to Guest Worker Programs", online: <<http://fpc.state.gov/documents/organization/48603.pdf>>. See also U.S. Department of State, online: <http://travel.state.gov/visa/statistics/graphs/graphs_4399.html>

⁷² For an overview of the difficulties and potential pitfalls with utilizing paid union organizers in collective bargaining campaigns, see generally WB Gould, "Taft-Hartley Revisited: The Contrariety of the Collective Bargaining Agreement and the Plight of the Unorganized" (1962) 13 Lab L J 348.

⁷³ The U.S. Supreme Court has held that individual employment contracts outside of a collective bargaining scheme could serve as an obstacle to organization and permit an employer to "divide and conquer." See *J.I. Case Co. v. NLRB*, (1944) 321 U.S. 332.

their efforts to improve working conditions and wages for local farm workers.⁷⁴ Many of the justifications for using *Braceros* on American farms mirrored the racist stereotypes of Mexican and Caribbean workers seen in Canada, outlined above in Chapter 2.⁷⁵ The key differences in the American responses to this situation stem from several factors. Discrimination in American society has been deeply rooted in the legacy of slavery and addressed openly in American society. This has prompted a much more robust federal legal response through instruments such as the *Civil Rights Act* of 1964.⁷⁶ "Public-interest labour law" is a highly developed field of litigation in the U.S., with the most litigated area in this field being employment discrimination.⁷⁷ The *Civil Rights Act* also established the Equal Employment Opportunity Commission, which prohibits discrimination in employment based on race, colour, sex, national origin or religion. Second, the post-1945 period in general witnessed a general engagement of American unions with agricultural workers on a scale not seen in Canada at least until the 1990s or into the new millennium. Much of this was due to charismatic and influential labour leadership in the agricultural sector, of which Cesar Chavez was in the forefront.

⁷⁴ S Ferris and R Sandoval, *The Fight in the Fields: Cesar Chavez and the Farmworkers Movement* (New York: Harcourt Brace, 1997) at 56-60. Legendary organizer Cesar Chavez was among those union officials who became convinced that the Bracero program was "evil" and pitted local workers against Mexican migrants forced into conditions of virtual indentured servitude through the Bracero Program.

⁷⁵ *Ibid.* at 109. "Stupid" and "Racist" were some of the comments union allies directed at American politicians who supported the Bracero Program, such as U.S. Senator George Murphy, who had commented that "Mexicans are built close to the ground" and are naturally suitable for farm work. Other criticisms were directed against farmers who generally exploited Mexican and Mexican-American farm labour alike. An October 1964 comment from a young radical Mexican-American civil rights worker summed up the feeling: "Reactionary, fascist gringo farmers through the California Growers Association refuse to pay Mexicans slaving in the fields the minimum wage necessary for the survival of their families."

⁷⁶ *Civil Rights Act of 1964*, Pub.L. 88-352, 78 Stat. 241, enacted July 2, 1964. The Civil Rights Act outlawed racial discrimination throughout the United States, including major forms of discrimination in the workplace.

⁷⁷ Gould, *supra* note 5 at 187.

Chavez was a giant in the American farm labour union movement and a full examination of the man and his work would far exceed the ambit of this Chapter.⁷⁸ For my purposes here, though, Chavez's significance lies in his background coming from a family of Mexican migrant farm workers, and in his signature accomplishment was in his founding, with Dolores Huerta, of the National Farm Workers Association, which later became United Farm Workers Union. Born in Yuma, Arizona to Mexican migrants, Chavez's experience began in San Jose, California in 1950 with his own personal involvement as a Mexican-American farm worker enduring often brutal and low wage employment. His subsequent efforts involved decades of community organizing and interaction with the political and legal complex.⁷⁹ It involved forming alliances with other immigrant groups besides Mexicans working on American farms and in particular the Filipino farm worker community.⁸⁰ Chavez, and the American farm labour movement, hit a critical period in early 1966 culminating in a historic march of California grape pickers for higher wages, and workers marched almost 400 kilometres from the

⁷⁸ Chavez's skills at effectively promoting farm worker causes, while also advocating non-violence, as well as the national labor movement's eagerness to promote Hispanic workers and gain new members among the community, helped to vault him to national prominence in the United States. The Hispanic community in particular sees Chavez as having been the first of their community to effectively promote their agenda to national politicians. His signature phrase "Si, se puede!" (translated to "Yes, it's possible!") was an inspiration to President Barack Obama's 2008 campaign slogan "Yes, we can!" (Spanish translations of the Obama campaigns slogans often acknowledged Chavez as well). Chavez died in 1993, and his birthday is a State holiday in 8 U.S. states. For a fuller appreciation of Chavez's life, and his effect on the American labour movement and farm workers in particular, see JE Levy, *Cesar Chavez: Autobiography of La Causa* (New York: Norton, 1975).

⁷⁹ C Chavez, "The organizer's tale," (July 1966) Ramparts Magazine at 43. A particularly telling passage from this article has Chavez relating the initial suspicion that greeted farm organizing efforts. Even allies in the community organizing effort viewed Chavez as a possible Communist threat, accusations that he always vigorously defended against.

⁸⁰ LR Salomon, *Roots of Justice* (San Francisco: Josey-Bass, 2003) at 10.

small farming town of Delano to the state capitol in Sacramento.⁸¹ The striking farm workers earned the support of several influential U.S. politicians, including then Senator Robert F. Kennedy.⁸² Organizing movements sprang up across the southwestern and midwestern United States.⁸³

It was through many efforts similar to these that by the 1960s in the U.S., a critical mass of workers led by effective labour leadership had brought the issue to the forefront of politics in several large states. During this period a large number of American unions had joined forces to urge the U.S. government to dissolve the Bracero program, and to attempt to divide the "alliance between ranchers" and "government bureaucrats" that ran the Bracero Program.⁸⁴ Bracero was essentially a system of temporary contract labour that viewed Mexican farm workers as unable to contribute to American society outside of the harvest season.⁸⁵ Chavez echoed the general arguments of U.S. organized labour and was deeply opposed to the Bracero program, not only because of the program's racist and

⁸¹ See generally K Krull and Y Morales, *Harvesting Hope: The Story of Cesar Chavez* (Houghton Mifflin, 2003).

⁸² RFK, American Experience, Public Broadcasting System (1 July 2004), online: <http://www.pbs.org/wgbh/amex/rfk/peopleevents/p_chavez.html>.

⁸³ See generally Wendy Jepson, "Spaces of Labor Activism, Mexican-American Women and the Farm Worker Movement in South Texas Since 1966" (September 2005) 37:4 *Antipode* 679; Wisconsin Historical Society, "The Founding of a Migrant Farm Workers' Union", online: <<http://www.wisconsinhistory.org/turningpoints/search.asp?id=1698>>; Farm Labor Organizing Committee, "The Story of FLOC", online: <<http://www.floc.com/floc%20history.htm>>. In 1966, the UFW led a similar march of farm workers in Texas and Chavez's activities also inspired the creation of two farm workers' unions in the Wisconsin and Ohio.

⁸⁴ S Ferris and R Sandoval, *The Fight in the Fields: Cesar Chavez and the Farmworkers Movement* (New York: Harcourt Brace, 1997) at 54, 65, 70. Some of the unions involved in this campaign included the (as it was known then) National Farm Laborers Union (later renamed the National Agricultural Workers Union; the Agricultural Workers Organizing Committee (sponsored by the AFL-CIO) led strikes in the Imperial Valley of California in the late 1950s and early 1960s in support of domestic farm workers. Cesar Chavez also led large protests in the early 1960s against the working conditions for American farm workers, and the U.S. Labor Department's administration of the *Bracero* program.

⁸⁵ See MS Zatz, "'Using and Abusing Mexican Farm Workers: The Bracero Program and the INS,'" (1993) 27 *L & Soc Rev* 851

economically exploitative elements and often degrading treatment of migrants, but also on the grounds that the program hurt domestic American farm workers by keeping farm labour wages low and hindering the formation of unionized farm labour through the availability of cheap, non-resident migrant farm labour.⁸⁶ This position was in line with the general historical position of most American unions prior to the twentieth century, a position that largely excluded new migrants from organizing activities.⁸⁷

In 1972, Chavez went on a hunger strike in an attempt to stop Arizona from passing a bill that would ban farm workers from striking during the harvest season, a move that would effectively gut the power of their union.⁸⁸ Although his hunger strike was unsuccessful in stopping the anti-union legislation it raised the plight of non-unionized farm workers to the widespread attention of Americans.⁸⁹ By the 1980s, with free trade negotiations and international labour issues becoming more prominent political issues, American unions had shifted their position to supporting migration of foreign workers "when such measures [helped to] facilitate organization of foreign-born workers."⁹⁰ The efforts to unionize farm workers also led unions to adopt a more "inclusive approach" to

⁸⁶ See K Calavita, *Inside the State: The Bracero Program, Immigration and the INS* (New York: Routledge, 1992)

⁸⁷ G Mink, *Old Labor and New Immigrants in American Political Development: Union, Party and State, 1875-1920* (Ithaca, NY: Cornell University Press, 1986) at 165-166.

⁸⁸ UFW, "History of 'Si Se Puede!'", online:
http://www.ufw.org/_board.php?mode=view&b_code=cc_his_research&b_no=5970&page=1&field=&key=&n=30.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*; L Haus, "Openings in the Wall: Transnational Migrants, Labor Unions, and U.S. Immigration Policy" (1995) 49:2 *Int'l Org* 285 at 293. The transition from primarily organizing skilled industrial workers to unskilled workers led American unions to adopt a more inclusive approach to counter the increased vulnerability and lack of job mobility for these workers. For a comparison of organizing techniques for skilled and unskilled workers in the United States, see G Marks, *Unions in Politics: Britain, Germany, and the United States in the Nineteenth and Early Twentieth Centuries* (Princeton, N.J.: Princeton University Press, 1989).

organizing in the 1990s.⁹¹

4.3.1 Collective bargaining and H-2A workers

The UFW created its "Guest Worker Program" in 2006 to respond to the inability of H2-A workers to obtain union representation in the United States.⁹² The UFW's traditional approach had been to advocate for eliminating the H2-A program due to its "highly exploitative nature."⁹³ The UFW's criticisms of the H-2A program and unionization of H-2A workers mirrors that of the UFCW in Canada. The UFW alleges that H-2A workers in the United States have faced blacklisting and intimidation whenever discussions of union representation have arisen.⁹⁴ Like the UFCW in Canada the UFW has worked with foreign governments on migrant farm worker issues, including the Government of the Mexican state of Michoacán and signed an agreement with that state to "ensure the integrity of H-2A recruitment" for Mexican H2-A workers in the U.S.⁹⁵

The UFW campaign resulted in a collective bargaining agreement including H-2A workers being signed with Growers Labor Services, a federally licensed farm worker contractor. The agreement provided for "seniority rights for workers; a binding issues resolution process; wages above the federally required minimum; and minor medical coverage for non-work related injuries or illnesses and discharges only in the case of just

⁹¹ Haus, *Ibid.* Haus notes that "Unions may seek to organize these [foreign] workers to advance the interests of American workers. Absent organization, foreign-born workers may undercut unionized American workers."

⁹² United Farm Workers, "Guest Worker Program: Statement of July 29, 2008, online: <http://www.ufw.org/_board.php?mode=view&b_code=org_key_back&b_no=4532>.

⁹³ *Supra* note 92.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

cause."⁹⁶ The Growers Labor Service (GLS) collective agreement also includes "all rules and regulations related to the H-2A program" in order to facilitate direct enforcement of H2-A provisions "without depending on State or Federal agencies."⁹⁷ This provision addresses the problems American state and federal officials face with enforcement of both H-2A regulations and labour legislation. The UFW has thus moved away from advocating abolishment of the H-2A temporary farm worker program to a model of reform and collective organization temporary foreign farm workers. It has also increased its advocacy work for H-2A workers in communicating with state and federal agencies.⁹⁸

However, the first collective bargaining agreement in the United States to include H-2A workers was signed prior to the GLS agreement and involved the Farm Labor Organizing Committee (FLOC), a farm workers' advocacy group founded in the mid-1960s and inspired by many of the goals that motivated Chavez and the UFW.⁹⁹ The FLOC is primarily active in the mid-west and North Carolina. It was in North Carolina in the late 1990s that the FLOC became engaged with H2-A workers complaining of poor wages and working conditions at a pickle company called Mt. Olive.¹⁰⁰ The FLOC

⁹⁶ United Farm Workers, "More about the advocacy the UFW is involved in at both the State and Federal level on H-2A - July 29, 2008", online: <http://www.ufw.org/_board.php?mode=view&b_code=org_key_back&b_no=4534>. Within its advocacy work for H-2A workers, the UFW filed a Freedom of Information lawsuit in December 2007 against the U.S. Department of Labor to acquire timely copies of H-2A applications, launched a petition to opposed the Bush Administration's proposed 2007 changes to the H-2A program (lowering wages for both H-2A and domestic farm workers, and supporting domestic workers laid off as a result of the improper use of foreign farm workers under the H-2A program).

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ Grassroots Global Justice Alliance, "FLOC: Winning Collective Bargaining for Farm Workers", online: <<http://www.ggjalliance.org/node/796>>. FLOC was founded in the mid-1960's by Baldemar Velásquez, a tomato farmworker in Northwest Ohio, "who started out by convincing a small group of migrant farmworkers to come together for their collective good."

¹⁰⁰ *Ibid.*

"organized a 5-year boycott and won a collective bargaining agreement with both Mt. Olive and the North Carolina growers association in 2004."¹⁰¹ The FLOC described the win as "historic" not only "because it was the first ever collective bargaining agreement for agriculture workers in the South, and the first in the history of the H2A program" but also because it opened the door for FLOC organizers to target other North Carolina growing operations for H-2A worker unionization.¹⁰² The tobacco industry was selected, primarily because of the continuing significance of tobacco in the North Carolina economy even in the face of declining tobacco farming.¹⁰³

The FLOC focused its collective bargaining efforts on R.J. Reynolds American, the largest tobacco company in the United States, as well as the largest non-unionized tobacco company in the U.S. and a major user of H2-A workers.¹⁰⁴ In September 2007, the FLOC launched a letter-writing campaign, followed by attendance at shareholders meetings, and pressure on lenders designed to force the company to negotiate a contract including H2-A workers and domestic farm workers at Reynolds' tobacco farms in North Carolina.¹⁰⁵

R.J. Reynolds responded to the allegations with an open letter addressed to

¹⁰¹ *Ibid.* FLOC organizers in North Carolina have been administering the contract since 2005.

¹⁰² *Ibid.* A FLOC organizer noted that the organization "was going after cucumber growers but we got more than we bargained for... We also got workers harvesting tobacco, sweet potato and over 30 other crops covered because of the agreement with the NC growers association. But this was only a foot in the door to organize southern agriculture." The contract with North Carolina Growers covers approximately 6,000-8,000 farmworkers at 600 farms, from a total of approximately 100,000 farmworkers in the state.

¹⁰³ T Capehart, "Trends in Tobacco Farming", U.S. Department of Agriculture, online: <<http://www.ers.usda.gov/publications/tbs/nov04/tbs25702/tbs25702.pdf>>.

¹⁰⁴ *Supra* note 99. The FLOC also noted that it targeted R.J. Reynolds because of its "long history of using racism and red-baiting to destroy union efforts."

¹⁰⁵ *Ibid.* As part of the campaign, FLOC targeted Chase, Reynolds' biggest lender, to "demand that they cut off their credit line to them." According to FLOC, "Chase went as far as contacting Reynolds to ask them to speak with FLOC" but maintained financing for Reynolds.

"Those interested in farm labor issues."¹⁰⁶ The letter complained of inappropriate efforts to "pressure" Reynolds into negotiations for a collective bargaining agreement for H2-A workers:

What may not be clear to many who have contacted R.J. Reynolds, urging the company to negotiate with the union, is that FLOC has had a collective bargaining agreement with the N.C. Growers Association (NCGA) for the last four years. All guest H2A workers who are interested in union representation have been and continue to be free to sign up for membership with FLOC. ...Neither RAI nor R.J. Reynolds is the appropriate party to negotiate any collective bargaining agreement with FLOC. As the sponsoring organization for the H2A workers, the NCGA is the appropriate body to negotiate such an agreement – and they have done so.¹⁰⁷

The Company claimed that employed H2-A workers were not "employees" of R.J. Reynolds and that therefore any collective bargaining arrangement would have to be made with the sponsoring agency, the North Carolina Growers Association:

Many of the farmers R.J. Reynolds contracts with employ workers to assist them in growing and harvesting the tobacco. Workers are employed by those farmers; they are not employees of either R.J. Reynolds or RAI; so neither company is an appropriate or necessary party to a collective bargaining agreement for farm workers...If farm workers want to be represented by a union, the workers and their employer should negotiate with the union – not RAI or R.J. Reynolds. The North Carolina Growers Association has a collective bargaining agreement with FLOC, and the farms with whom R.J. Reynolds contracts are free to join the association and participate in the collective bargaining agreement if they so choose. Many do, and thus, some of the workers on farms with whom R.J. Reynolds contracts are already FLOC members.¹⁰⁸

Finally, Reynolds noted that the “real issue” appeared to be getting new sources of revenue for the union, and in particular accused FLOC of singling out Reynolds using

¹⁰⁶ The Leadership Teams of Reynolds American Inc. and R.J. Reynolds Tobacco Company, "An Open Letter to Those Interested in Farm Labor Issues", online: <<http://www.floc.com/documents/RAI%20statement%20on%20FLOC.pdf>>.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

deceptive tactics and inaccurate information:

FLOC's actions against our companies to this point lead us to believe that this is an issue of revenue for the union. According to the N.C. Growers Association, FLOC membership among H-2A workers has dropped from 4,000 to 640. FLOC's membership is plummeting; workers may be cancelling their membership because they are not receiving benefits they believe were promised by the union. RAI and its operating companies will not be party to efforts to pressure workers into rejoining the union they have voluntarily left...FLOC has been accused of using deceptive tactics to recruit membership. The Consulate of Mexico has contacted the N.C. Growers Association regarding concerns they have that FLOC is not delivering on its promises to members. Approximately 800 workers have filed complaints about FLOC with the Consulate....It should be noted that R.J. Reynolds is not the largest purchaser of tobacco in North Carolina or any other state where tobacco is grown. Yet R.J. Reynolds is the only tobacco company being targeted for protests and boycotts by FLOC...The issues surrounding migrant workers are national, longstanding and involve the production of a number of crops – but for unspecified reasons FLOC has singled out tobacco, farms in North Carolina and R.J. Reynolds in this matter. Reynolds American and R.J. Reynolds support efforts to ensure that workers in all industries have a safe work environment. Guest H-2A workers in North Carolina who are interested in joining FLOC can do so, and they would then be party to the collective bargaining agreement already in place with the N.C. Growers Association. Absolutely nothing prevents them from doing so today.¹⁰⁹

FLOC offered a point-by-point rebuttal to Reynolds letter repeating that it only asked for a meeting with company officials, not negotiations.¹¹⁰ The letter conceded that Reynolds does not employ the workers but repeats that Reynolds "maintains ultimate responsibility" as the contractor with growers who hire the farm workers.¹¹¹ It objected to Reynolds' claim that the North Carolina Grower's Association is responsible for any

¹⁰⁹ *Ibid.*

¹¹⁰ FLOC, "FLOC's Response to Reynold's 'Open Letter to Those Interested in Farm Labor Issues'", online: <<http://www.floc.com/documents/RAI%20Statement%20Response%2006-09.pdf>>.

¹¹¹ *Ibid.* FLOC maintains that when "Reynolds contracts with its growers who hire the farm workers, its contract requirements sets the parameters for what the grower and his employees can or cannot accomplish in regards to housing, wages, the legal status of the farm workers, and other conditions of employment." Another FLOC member attending the meeting as a legal proxy was "wrestled to the floor" by off-duty police hired by Reynolds, and escorted out of the building after attempting to raise a point of order about shareholders being prohibited from asking questions to board members running for re-election.

collective bargaining negotiations with the UFW claiming that according to a "best guess...merely 20% of their growers are members of the NCGA."¹¹² FLOC denied organizing a boycott against Reynolds stating that it was targeting the tobacco industry in general - not just Reynolds - as other tobacco companies would be approached and Reynolds was merely the first because of its dominant position in the industry.¹¹³ Finally, FLOC noted that Reynolds' "Corporate Social Responsibility" program included many interviews and focus groups on workers' and employers' issues, involving all stakeholders in the industry and the H-2A program - except for the farm workers themselves.¹¹⁴ The dispute between FLOC and Reynolds resulted in FLOC working with Oxfam America and the United Church to present an assessment of human rights conditions on tobacco in fields to a Reynolds' shareholders meeting on May 6, 2008.¹¹⁵ FLOC shareholders of Reynolds attended the 2009 Shareholders' Meeting to attempt to press their concerns over a number of issues, including, H-2A worker conditions.¹¹⁶

Despite the successes noted above, unionizing H-2A workers in the United States remains difficult. During fiscal year 2009, employers filed 8,150 labour certification applications requesting 103,955 H-2A workers for temporary agricultural work. The Department of Labor certified 94 percent of the applications submitted for a total of

¹¹² *Ibid.*

¹¹³ *Ibid.*

¹¹⁴ See Reynolds American, "Responsibility", online:
<<http://www.reynoldsamerican.com/responsibility.cfm>>.

¹¹⁵ FLOC, "FLOC Goes to the 2008 Reynolds America Shareholders Meeting", online:
<<http://supportfloc.org/2008ShareholderMeeting.aspx>>.

¹¹⁶ 43 "Reynolds Represses Shareholders, Refuses to Hear Farm Workers", online:
<<http://supportfloc.org/2009ShareholderMeeting.aspx>>. FLOC commented that Reynolds chief executives "were arrogantly repressive of any voice other than their own. Shareholders, for example, were not permitted any voice on matters of corporate governance, including election of Directors, approval of the financial statement, and approval of an Omnibus Plan for executive compensations."

86,014 workers.¹¹⁷ Even accounting for FLOC's organizing efforts in North Carolina the percentage of H-2A workers unionized in the United States remains at approximately 12-15% but are nevertheless proportionately larger than the less than 1% of unionized SAWP workers in Canada.¹¹⁸

Most employers involved in the H-2A program continue to oppose the UFW organizing efforts. Legal counsel for H-2A employers have recently warned agricultural employers that

The UFW is continuing its efforts to force H-2A workers to join a union...Unions want to be the gatekeepers of the H2-A program in their desperation to grow their membership. The UFW's involvement with the recruitment of H2-A workers from Mexico will impact employers.¹¹⁹

The UFW was also criticized for its agreement with the State of Michoacán:

In April 2008 the UFW signed an agreement with the state of Michoacán, Mexico to bring H-2A workers into the US who would automatically join the UFW. According to the UFW, their involvement with the H-2A program will reduce corruption in the recruitment of workers and protect their rights in the US. It will also conveniently provide the UFW with more members who will have no choice in union membership.¹²⁰

The advent of the FLOC in the 1960s some ways mirrors the efforts of the UFCW in Canada in the 2000s. Both attempted to address issues unique to migrant farm

¹¹⁷ USA Green Card Lottery: Official Government Entry Program, "Rules for H-2A Temporary Agricultural Worker Program Announced", online: <<http://www.usadiversitylottery.com/news/immigration/green-card-dv2012-immigration-news-mar052010.php>>.

¹¹⁸ Labor Notes, "8000 Guest Workers Join Farm Union in North Carolina", online: <<http://labornotes.org/node/939>>. The percentage figures are extrapolated from the number of H-2A workers unionized by the UFW and FLOC in the United States, based on fiscal 2010 totals of H-2A workers in the U.S., compared to the number of SAWP workers currently unionized in Canada by the UFCW, based on fiscal 2009 totals of SAWP workers in Canada.

¹¹⁹ MC Saqui and AP Raimondo, "The UFW's Continuing Efforts to Recruit H-2A Workers", online: <http://www.growershipper.com/uploads/UFW_H-2A_Mexico.pdf>. The authors note that "It is critical that employers carefully examine the labor contractors they intend to work with and to consult with qualified immigration and labor counsel as they put together their H-2A programs."

¹²⁰ *Ibid.*

workers, and to legal issues resulting from alleged abuses in the H2-A and SAWP. However, there are some key differences between the two. FLOC was created as a bottom-up organization or grassroots organization by a farm worker raised in a Mexican migrant worker family. The key strength of such an organization is its ability to channel direct and practical concerns on the ground into political power.¹²¹ The FLOC was and remained keyed to regional concerns in the mid-west and mid-Atlantic regions (witness the persistent efforts against R.J. Reynolds in North Carolina). Although it became affiliated with the national American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) labour union in 1992 it did so partly to “build relations” with international farmworkers groups, and has opened an office in Monterrey, Mexico to provide information and assist H2-A workers coming to the United States.¹²² In comparison with the FLOC, which has been in operation for over forty years, the UFCW’s organizing efforts on Canadian farms began in earnest in the early 2000s. Although there were some earlier attempts at organizing, efforts directed towards SAWP workers only began in earnest after the *Dunmore* decision in 2002. The most analogous grassroots organization in Canada directed towards migrant farm workers would be the AWA. But the AWA is a farm workers’ advocacy group and not an actual union, and does not generally engage in legal challenges. The AWA and its workers do engage in some discussions with employers and different levels of government on behalf of SAWP workers, but it does so in its capacity and as a UFCW affiliate and advocacy group.¹²³

¹²¹ See L Staples, *Roots to Power: A Manual for Grassroots Organizing* (New York: Praeger, 1984)

¹²² FLOC, online: <<http://supportfloc.org/FLOCTimeline.aspx>>. The AFL-CIO is a national American trade union center and the largest federation of unions in the United States.

¹²³ *Supra* note 56.

4.4 Conclusion

The sheer number of workers in the United States relative to Canada is clearly important in any relative comparison with Canada. In the area of documented and temporary foreign agricultural workers, the numbers narrow somewhat as they are approximately twice the number of H-2A visa workers entering the U.S. in recent years in comparison with foreign workers coming to Canada through the SAWP. However, equally as important as the consideration of the differences in size between the two countries is the history of the two countries' respective labour movements in this area is a critical consideration in this analysis.

Organizing migrant farm labour takes time - and time is a key element in any comparative analysis between the United States and Canada involving migrant farm labour and collective bargaining. The comparatively recent legal engagement with unionizing agricultural workers in Canada is clearly responsible for much of the delay in efforts to unionize these workers. The delay in resolving the issue through Canada's Supreme Court is another problem. Canada's labour laws and legal labour structure, along with the advent of the *Charter* in 1982 and subsequent court challenges to violations of workers' *Charter* rights, also played critical roles in the relatively later development of a migrant farm labour consciousness in Canada.

The information from this Chapter reveals that the relative delay in Canadian legal activity is only one part of the problem in unionizing SAWP workers. This chapter provided background to collective organizing efforts directed at farm labour in the United States, and information from the U.S. H2-A program relating specifically to documented temporary agricultural workers. A comparison with Canada's own context and the

SAWP demonstrates the historical use in both countries of populations with limited labour rights to engage in farm labour and the difficulties and resistance encountered in unionizing documented temporary foreign agricultural workers.

American labour law structure and greater federal involvement has led to enactment of federal laws specifically directed at protecting migrant workers' rights. Although the United States has lower union density in general when compared to Canada¹²⁴ some U.S. states have allowed for farm labour collective bargaining that has led to a greater level of agricultural unionization activity within those jurisdictions. The comparison also illustrates differences among jurisdictions within both countries. The largest U.S. state, California, (with the largest migrant worker population and arguably the most relevant for Mexican H2-A workers) has long offered extensive legislative protections and seen large-scale civil rights and political protest related to migrant workers. The largest Canadian province, Ontario, (with the largest percentage of SAWP workers) continues to argue for limited organizing rights for farm workers. This state of affairs exists while both Canada's Supreme Court and the federal government largely ignore or understate the difficulties SAWP workers face in Canada. Some other jurisdictions in the U.S. and Canada, such as Alberta and many U.S. southern states, are notable in their similarity for banning agricultural unionization efforts. The American legislative protections to address violations are balanced out by employers' greater control in the H2-A program over recruitment and less government regulation relating to the program itself. Politically, there are some key differences as well. Federal politics relating to H-2A

¹²⁴ Economist's View (Blog of M Thoma, Professor of Economics, University of Oregon), online: <<http://economistsview.typepad.com/economistsview/2011/02/public-sector-unions-the-us-vs-canada.html>>

workers under recent Democrat administrations in the United States rely less on the support of southern states in federal elections, and therefore may have less political reasons to fear pro-union reforms in the H-2A program. Recent federal Conservative governments in Canada have strong political support from the two provinces most resistant to farm worker unionization: Alberta and Ontario.

Both the U.S. and Canada share a racist past in aiming to procure "suitable" temporary farm labour from the developing south. Although the United States never explicitly rationalized the H2-A program as a form of aid to developing states, it defends it as being in line with international labour goals of fair wages and equal treatment for migrant workers.¹²⁵ But many U.S. states use the term "development" in conjunction with the H2-A program only to refer to the development of their own employment sectors.¹²⁶ The use of temporary populations with limited freedoms to alleviate farm labour shortages may allow the destination country to focus on its own workforce development in other sectors. But it dispels the notion that the H2-A program is in place to promote economic development in Mexico. Similarly, the SAWP viewed as a "labour development" program or a form of development aid, cannot redress the equalities and labour disruptions caused by economic globalization.

Perhaps most significantly the extension of more legal protections has failed to prevent widespread abuses within the H2-A program. In contrast with the Canadian

¹²⁵ Farmworker Justice, "Federal Court Rejects Agribusiness Attack on Obama Administration Rules on Agricultural Guestworkers" In January 2009, the Obama administration issued regulations restoring wage, housing, transportation, and other workplace regulations removed from the program by the previous Bush administration.

¹²⁶ See State of Iowa Workforce Development, "H2A Process for Seasonal Temporary Workers", online: <<http://www.iowaworkforce.org/centers/alc/h2a.htm>>.

SAWP experience, the situation in the United States demonstrates that governmental deregulation of the operation of a temporary foreign worker program, even in the context of increased formal legal workplace protections, results in more employer control. Less governmental oversight results in increased challenges for unionization, and increased potential for abuses of foreign workers' rights. This occurs even when law is extended to provide nominal protections for these workers. As this chapter has shown, the practical benefits of American law for H2-A workers are impeded through a variety of means: lack of federal and state resources and powerful corporate interests being two of the prime factors.

Finally, it is striking in some ways to note that at a time when there is finally increased unionization activity on farms and directed towards SAWP workers in Canada, Ottawa appears to be moving towards a deregulated temporary foreign worker model. As noted in the introduction to this dissertation, Canada's unskilled TFWP program for non-SAWP countries has even less purported regulation and government oversight than the SAWP. This is also occurring at a time when Canadian unions are increasing their transnational contacts, building networks with American counterparts and other international unions. American unions have typically tried to apply greater international pressures towards state and federal governments, and the following chapter shows that they have accessed the mechanism of the NAFTA labour side agreement to initiate complaints against the United States far more frequently than their Canadian counterparts. The following two chapters look at a comparative analysis of domestic law complaints filed transnationally in the United States and Canada, and subsequently towards the application of international law to SAWP workers in Canada.

5 - An Examination of NAALC Complaints Relating to Collective Bargaining between Canada and the United States

The framework for the following analysis is the North American Agreement for Labour Cooperation (NAALC), popularly known as the labour side-agreement to the NAFTA. As with the NAFTA, the United States, Canada and Mexico are all parties to the NAALC. The case studies include complaints lodged through the NAALC mechanism against either Canada or the United States, regarding violations of domestic labour laws within their respective territories. Both the United States and Canada are subject to the NAALC's complaints mechanism, and as demonstrated in the previous chapter both countries share somewhat similar histories and legal contexts relating to unionizing migrant farm labour. However, this chapter does not perform a quantitative comparative analysis, in the sense that Canada has not experienced the same level of activity within the NAALC framework. The analysis remains qualitative and comparative in that, in addition to examining NAALC complaints against the United States related to migrant workers in its territory, it also examines the absence of NAALC activity in Canada and the efficacy of an existing NAALC complaint relating to collective bargaining rights in Canada. At the heart of the analysis lies the inequality visible in the NAALC process. The fact that the agreement was signed largely as a result of pressure from the United States' unions foreshadowed its usage as a mechanism to protect labour rights in Mexico, but has not prevented its usage against the United States with respect to migrant workers on its territory.

This chapter provides a comparative examination of farm labour unionization in both countries; the efficacy of international complaints relating to migrant workers in the United States; and the lack of complaints directed against Canada for the treatment of its migrant worker population. The legal measures analyzed in Chapter 3 relating to SAWP workers were the result of domestic pressures and although several of the cases in that chapter could have been the result of a NAALC complaint, none was filed. Why has there been so little activity concerning Canada within the NAALC framework? Part of this chapter is meant to address this question.

5.1 Why the NAALC?

The NAALC was chosen as a separate framework for analysis for several reasons. First although the NAALC is an international agreement it is not international law. The agreement does not establish new international labour legislation. There are no binding international labour standards incorporated within the agreement that could be interpreted as international law. It is included in this chapter, and not in the subsequent international law analysis, because the agreement merely provides for a mechanism to monitor and potentially influence the enforcement of existing domestic labour laws in each of the three countries. The legal comparison of NAALC cases analyzes the recent responses to alleged violations of respective domestic law regarding temporary migrant workers in the United States and Canada. It will also provide an insight into the relative lack of complaints filed against Canada under the agreement.

Second, the NAALC is a relatively succinct agreement, occupying a recent and relatively compact time period from the early 1990s to the present. This chapter does not look at every NAALC complaint filed against the United States or on subsequent labour

cooperation agreements signed with other countries by the United States and Canada. The comparison in this chapter is narrowly focused and will only map out the differences and similarities in responses to NAALC complaints generated by recent alleged violations of law relating to temporary foreign workers or collective bargaining in the two countries.

Third, the selected cases represent a cross section of matters involving collective bargaining, labour rights, and migrant farm workers legally entering the United States through the H2-A visa program. Within the U.S. context, this chapter focuses on problems and responses regarding *documented* migrant farm workers in the United States.¹ The NAALC analysis focuses more on current American responses in the context of the agreement and the H2-A visa program. Regarding Canada, the situation is different as there have been no international complaints to the NAALC regarding SAWP workers. There have been few NAALC complaints in general directed against Canada regarding violations of domestic workers' labour rights. Part of the chapter's discussion thus focuses on the possible reasons behind the lack of NAALC complaints directed against Canada.

5.2 Free trade: collective bargaining and migrant workers

One of the issues during the negotiation of the NAFTA was the effect it would have on Mexican migrant workers crossing into, primarily, the United States. Indeed, these issues have been amplified by consistent and somewhat incongruous themes of "national security" and "cheap [migrant] labour" that tend to dominate the immigration discourse in

¹ This chapter excludes consideration of undocumented farm labour migrants in the United States because the focus of the NAALC complaints has been on documented migrant workers in the United States under the H-2A program. Also, as indicated below in this Chapter, the American government only views the potential application of the NAALC towards documented migrant workers in the United States.

the United States.² Unions on both side of the border were opposed to the NAFTA but Mexican unions also opposed the idea of enumerating "workers rights" within the agreement, primarily on the basis that it "threatened the basis of corporatist bargaining in Mexico."³ Mexican negotiators strongly resisted incorporating labor standards into the NAFTA itself, arguing among other points that Mexico would not "harmonize" its labour legislation to comply with collective bargaining legislation in place in the United States and Canada.⁴ The negotiations were split into separate "side-agreements" for labour and environmental issues primarily on this issue, and the desire to avoid a strong dispute settlement mechanism in any labour agreement.⁵

The NAALC was one of the first attempts to incorporate a minimum standard of labour regulation into trade negotiations. In 1993, the newly elected Democrat Administration of Bill Clinton feared that due to growing pressure from unions – unions that had largely backed the Democrat Party in the 1992 Presidential election - it would be unable to pass the NAFTA through Democratically controlled Congress without some substantial concessions respecting labour and environmental concerns.⁶ Although it was

² MJ Robbins, "Free Trade's Refugees: Mexico's Migrant Workers at Home and Abroad", online: <<http://briarpatchmagazine.com/articles/view/free-trades-refugees-mexicos-migrant-workers-at-home-and-abroad>>.

³ MA Cameron, BA Tomlin, *Making of NAFTA: How the Deal was Done* (New York: Cornell University, 2000) at 191.

⁴ *Ibid.* The Mexican negotiators pointed out during the negotiations that Mexico, as a developing country, was entitled to differential treatment regarding labour laws in order to remain competitive with developed economies. The Mexican side also pointed out that as of 1990 Mexico had ratified nearly three times the number of ILO Conventions adopted by the United States and Canada.

⁵ *Ibid.* The labour and environmental negotiations themselves were divided along separate tracks after it became clear that the labour side agreement would contain an extremely weak enforcement mechanism, and U.S. negotiators wanted any environmental side-agreement to contain a stronger dispute resolution mechanisms.

⁶ L Compa, "NAFTA's Labour Side Agreement Five Years On: Progress and Prospects for the NAALC" (1999) 7 *Can Lab & Emp L J* 1

more receptive to organized labour than the previous Republican administration that had negotiated the NAFTA, the Clinton administration voiced no support for renegotiating the NAFTA to include labour provisions into the text of the agreement and there was, in any event, no support from either Canada or Mexico for such a move. Instead, Clinton promised unions that had supported the Democratic Party a labour side agreement “with real teeth.”⁷ The talks on incorporating labour issues into the NAFTA framework resulted in the signing of the NAALC on September 13, 1993.

The NAALC incorporated the principle of effective enforcement of domestic labour law as an objective parallel to, but not part of, the NAFTA. Mexico, Canada and the United States undertook to provide and effectively enforce their own labour laws. Labour laws in all three countries must incorporate the eleven principles outlined in the NAALC, including the protection of migrant workers and related issues, such as the rights to strike and bargain collectively, prohibition on forced labour, non-discrimination in employment, and child labour protections.⁸ Since the dispute resolution process involved international actors, the NAALC essentially “internationalized” domestic labor standards in the three parties to the NAALC.⁹

5.3 NAALC principles on collective bargaining, migrant workers

The NAALC does not create opportunity for extraterritorial enforcement by one state with another state’s territory. Article 42 of the NAALC clearly states that nothing in the Agreement empowers a Party's authorities to undertake any activities relating to

⁷ “Labor Leaders Denounce Side Agreements to NAFTA” (Aug 16, 1993) 156 Daily Lab Rep 4.

⁸ UFW, online: <<http://www.ufw.org/NAALCbg.htm>>.

⁹ TJ Manley & L Laredo, “International Labor Standards in Free Trade Agreement of Americas” 18 Emory Int'l L Rev 85 at 104.

labour law enforcement in the territory of another Party to the Agreement. However, there is opportunity for “supranational” enforcement of labour standards under the NAALC through the use of dispute resolution and penalties for failure of a state to carry out its obligations under the agreement.¹⁰ The NAALC’s Annex 1 also contains eleven “guiding principles” that the Parties are “committed to promote, subject to each Party’s domestic law, but do not establish common minimum standards for their domestic law.”¹¹

Principles 1-3 provide for workers freedom of association and collective bargaining:

1. Freedom of association and protection of the right to organize
The right of workers exercised freely and without impediment to establish and join organizations of their own choosing to further and defend their interests.
2. The right to bargain collectively
The protection of the right of organized workers to freely engage in collective bargaining on matters concerning the terms and conditions of employment.
3. The right to strike
The protection of the right of workers to strike in order to defend their collective interests.

Principle 11 deals with Migrant Workers:

11. Protection of migrant workers
Providing migrant workers in a Party’s territory with the same legal protection as the Party’s nationals in respect of working conditions.

In cases where parties to an agreement fail to fulfill their obligations, the NAALC contains an incremental approach to resolve labour disputes. First, there are provisions for the use of labour ministerial consultations to resolve complaints, then the formation of a committee of experts to produce an evaluative report to the secretariat, then the use of

¹⁰ Compa, *supra* Ch 1, note 19.

¹¹ Commission for Labor Cooperation, “Annex 1: Guiding Principles”, online: <<http://new.naalc.org/index.cfm?page=219>>.

an Arbitral Panel, in certain instances, that can impose trade sanctions and fines.¹² Significantly though, the latter two remedies are limited to issues dealing with an “alleged persistent pattern of failure by the Party complained against to effectively enforce its occupational safety and health, child labor or minimum wage technical labor standards.”¹³ The principles dealing with collective bargaining cannot be enforced through a NAALC arbitral panel ruling issuing fines and/or trade sanctions. If the complaint is related to freedom of association or collective bargaining, the NAO can only recommend that the Ministers of Labour hold a consultation on the subject.¹⁴

The only avenue left for complaints under the NAALC that deals with unionization or migrant workers’ specific treatment is through ministerial consultations or an evaluative committee report by experts. The three NAALC parties created several institutional mechanisms to deal with the investigation and enforcement of complaints. Individuals or organizations can submit a complaint to the National Administrative Office (NAO) that each state party has created within its own labour department. A complaint against one NAALC party must be made in the NAO office of either (or both) of the other parties. Complaints, termed “public communications,” can be made to the NAO of any of the other NAALC parties that is not the object of the complaint.

As of February 2012, the most current information on the NAALC Commission’s website lists the last public communication as being filed in 2011 in the Canadian NAO

¹² Commission for Labor Cooperation , “Part Five: Resolution of Disputes” online: <http://new.naalc.org/naalc/naalc-full-text/part_five_resolution.htm>.

¹³ *Ibid.*

¹⁴ Commission for Labor Cooperation, “Levels of Treatment Under the NAALC”, online: <<http://www.naalc.org/english/infocentre/whatis/whatis8.htm>>.

and accepted in January 2012.¹⁵ From 1994-2008, there were 36 complaints submitted to the three NAO's in each NAALC party.¹⁶ National unions or workers' associations were involved in initiating 26 of these complaints.¹⁷ Of these complaints, 22 were directed against Mexico, eleven concerned the United States, and only two complaints were directed against Canada.¹⁸ During this period there were 20 complaints to the NAALC that dealt either entirely or partially with workers' freedom of association/right to organize and 10 communications that involved collective bargaining (either filed with or distinguished from workers' general right to organize).¹⁹ Of these complaints, 3 were not accepted for NAALC review as they were not deemed to deal with the appropriate domestic labour legislation of the NAALC party.²⁰

NAALC Principle 11 makes no clear distinction between legal or illegal migrant workers, only referring to migrant workers "in a Party's territory." The United States

¹⁵ HRSDC, "Public communication CAN 2011-1 Accepted for review", online: <http://www.hrsdc.gc.ca/eng/labour/labour_globalization/ila/ialc/CAN_2011-1.shtml>. The Canadian NAO accepted the public communication on January 13, 2012. The communication "was submitted to the Canadian NAO on October 27, 2011 by 80 unions from across North America, including several Canadian unions. It alleges that the Government of Mexico has failed to meet its obligations under the NAALC. Specifically, the submitters of CAN 2011-1 allege that through its actions surrounding the events in 2009 at Luz y Fuerza del Centro, a state-owned electricity company, the Government of Mexico has violated the basic labour rights of the Sindicato Mexicano de Electricistas (the Mexican Union of Electrical Workers) and its members." Unfortunately, NAALC public communications are not frequently updated on the Commission website, and there is conflicting information on various national labour department websites. See Commission for Labour Cooperation, "NAALC Public Communications and Results, 1994-2008" online: <<http://new.naalc.org/userfiles/file/NAALC-Public-Communications-and-Results-1994-2008.pdf>>. National websites of the respective Labour Departments in the U.S. and Canada are even less current. The American Department of Labor was last updated in October 2007.

¹⁶ *Ibid.* HRSDC incorrectly lists on its website that there have been 23 public communications received under the NAALC since its entry into force. See HRSDC, online: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/side.aspx?lang=en&menu_id=36&view=d>.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.* One complaint involving the Right to Strike principle was not accepted for review.

²⁰ *Ibid.*

government interprets the customary international law definition of “migrant worker” to exclude undocumented migrants, and legal arguments on the issue reached the U.S. Supreme Court.²¹ The NAALC complaints referenced in the two case studies further below refer only to migrant workers inside American territory under the H-2A program, analogous to the situation of SAWP workers legally inside Canada. From 1994-2008, there were 8 complaints filed with NAOs against the United States dealing with the NAALC Principle on the Protection of Migrant Workers. The most significant of these was a 1998 complaint filed against the United States (NAALC Public Communication: Mexican NAO 1998-02) dealing with Mexican Migrant workers in the apple picking industry in Washington state, and involving a number of NAALC principles including the right to collectively organize. A more recent NAALC complaint against the United States (NAALC Public Communication NAO 2003-01) also dealt with the rights of Mexican migrant workers employed in North Carolina.

5.3.1 Mexican NAO 98-02 – Washington state apple pickers complaint

In May 1998, several NGOs and unions submitted a public communication to the Mexican NAO complaining of the treatment of migrant workers in the Washington State apple picking and packing industry. The complaint specifically alleged violations of a number of the NAALC principles, including failures of state labour laws to ensure migrant workers’ right to organize collectively and to adopt occupational health and

²¹ *Hoffman Plastic Compounds, Inc. v. NLRB*. 535 US 137 (2002); *Immigration Reform and Control Act of 1986*, 8 U.S.C. §§ 1101; *Wagner Act*, *supra* note 21. In his dissent, Justice Stephen Breyer noted that the legislative history of the IRCA indicated that the Congress, in 1986, had clearly not intended to strip illegal aliens of all protections available under federal employment statutes.

safety standards relating to hazards prevalent in agricultural work.²² A similar complaint was filed to the Mexico NAO on behalf of Mexican farm workers in Maine in August 1998, and was bundled with the apple pickers' complaint in the subsequent review.²³ The Washington state complaint was accepted for review on November 28, 1998 and in August 1999 a report was issued recommending Ministerial Consultations between the U.S. and Mexican Secretaries of Labor on these issues.²⁴ The ministerial consultations resulted in a Joint Declaration on May 18, 2000 that addressed a number of complaints raised by the NGOs.

The Joint Declaration was deemed to apply to situations possibly existing in Canada as well, and was subsequently signed by Canada's Minister of Labour on July 6, 2000.²⁵ The Joint Declaration called for several meetings of Mexican and U.S. government officials to discuss the issues raised by the migrant workers' complaints. Canada was not included in these meetings. Among the Joint Declaration's specific recommendations were several "public outreach sessions" for migrant workers in the United States to inform them of their workplace rights, public forums specifically targeting migrant farm workers' issues in Washington State and Maine, and an "Action

²² Commission for Labor Cooperation, online: <http://www.naalc.org/english/summary_mexico.shtml>. The communication was submitted on May 27, 1998, by the Unión Nacional de Trabajadores (UNT), Frente Auténtico del Trabajo (FAT), Frente Democrático Campesino (FDC), and the Sindicato de Trabajadores de la Industria Metálica, Acero, Hierro, Conexos y Similares (STIMACHS), assisted by the International Labor Rights Fund.

²³ Mexican NAO-98-02. See Commission for Labor Cooperation, online: <new.naalc.org/index?page=228>.

²⁴ *Ibid.*

²⁵ *Ibid.* The other complaints, numbers Mexican NAO-9801 and 9803, also dealt with similar issues regarding Mexican migrant workers in the United States and Canada.

Plan” to provide a tri-national guide on migrant workers.²⁶

The Washington State apple pickers/packers case could have been a particularly important milestone for the NAALC for two reasons. First, there was the unusually broad nature of the complaint and of the issues involved. It went beyond violations of collective bargaining rights, alleging violations of Washington state occupational safety and health laws, which could trigger arbitration and sanctions under the NAALC. Secondly, this complaint, along with two others filed in the same year, represented the first instance in which the United States had its labour laws and enforcement policies subject to examination under the NAALC process. The Executive Director of the International Labor Rights Fund (ILRF) based in Washington D.C. referred to the case as “an important step for scrutinizing labour law enforcement in the United States, where there are severe problems of discrimination against workers who try to form unions and where migrant workers face widespread labor and human rights violations.”²⁷

The apple pickers case raised the possibility of international investigations of alleged violations of migrant workers’ rights in the United States.²⁸ An independent Mexican labour union stated that the issue deserved international exposure because of the nature of the problem, “with companies tripling their profits by violating [Mexican]

²⁶ *Ibid.* There was a meeting of the U.S. and Mexican NAO’s in Washington, D.C. on May 23 and 24, 2001, with a follow-up session in Mexico City the week after, to deal with the issues raised in this complaint. The U.S. NAO also organized public forums in Yakima, Washington, on August 8, 2001, and in Augusta, Maine on June 5, 2002.

²⁷ Laboris, “Faulting U.S. Labor Laws, Mexican Unions File Broadest Nafta Labor Complaint On Washington State Apple Industry” (27 May 1998), online: <<http://laboris.uqam.ca/anact/applepress.htm>>.

²⁸ American University, “Apple Pickers Rights” online: <<http://www.american.edu/projects/mandala/TED/picker.htm>>.

workers' rights."²⁹ Prior to this case, the U.S. had not publicly even acknowledged the existence of a problem in this area.

The public forums in this case were thus regarded as a particularly important event since this was the first time that a "broad, industry-wide complaint under the NAALC has come to public forum in the United States" with workers being able to voice their concerns regarding violations of their international labour rights, as well as lack of enforcement of U.S. labour laws.³⁰ In particular, the farm workers' concerns, in addition to collective bargaining and occupational safety and health issues, involved broad human rights concerns such as racial discrimination and subsistence wages in a particularly dangerous occupation.³¹ These were issues that that U.S. government had previously been reluctant to discuss in an international forum.

However, hopes that this case would result in the first use of the NAALC's more coercive measures of enforcing labour standards would remain unfulfilled. The International Labour Relations Fund optimistically stated that the Mexican NAO was only a "first stage" in the NAALC complaint process and that the NAO review could "lead to fines or loss of NAFTA tariff benefits for Washington State apple exports to Mexico."³² Even among labour unions, however, there was no unanimous consensus on the need to utilize the NAALC's stronger enforcement measures. In particular a large American union, remarking on the potential harm a trade war would have on both

²⁹ *Ibid.*

³⁰ United Farm Workers, *supra* note 8.

³¹ *Ibid.*

³² International Labor Rights Fund, "Mexico Announces Review of Washington State Apple Workers Complaint Under NAFTA Labor Side Agreement" (15 July 1998), online: <<http://www.laborrights.org/press/apple071598.htm>>.

migrant and American workers, expressed the hope that the case “never reaches the stage of economic sanctions.”³³ The lack of consensus among labour groups may have made it easier to avoid the punitive route in this case, which was doubtful from the beginning as even the Mexican government never took steps to push for stronger measures against the United States. Despite being included in the Joint Declaration, Canada remained largely on the sidelines of this process.³⁴

Despite the lack of any coercive measures to ensure U.S. compliance in this case, the recommendations outlined in the Joint Declaration did result in the production of education material that tried to address the central issues in the complaint. In 2001 the NAALC published the first comprehensive guide to North American laws affecting migrant workers, the *Guide to Labor and Employment Laws for Migrant Workers in North America* (“*Migrant Worker’s Guide*”).³⁵ The *Migrant Worker’s Guide* addressed issues faced by Mexican migrant workers in the U.S., including racial discrimination and rights to collective bargaining, freedom of association, and a workplace that met minimum standards with respect to occupational health and safety.³⁶

³³ UFW, “U.S., Mexican Officials to Hear Workers' Claims in Trade, Labor Rights Dispute under NAFTA; Sanctions Could Result”, online: <<http://www.ufw.org/NAALCpr.htm>>. Guadalupe Gamboa, Regional Director of the United Farm Workers of America union, remarked “Migrant workers in Washington State care about the health of their communities and their industry. We hope to work cooperatively with the state and federal governments to reach a model of labor relations in which fair returns to growers are coupled with fair protection of workers’ collective bargaining rights, rights with respect to labor standards, and their health and safety.”

³⁴ During this period, Canada was embroiled in a long-standing NAFTA and WTO dispute with the U.S. over softwood lumber. See Department of Foreign Affairs and International Trade, “Canada’s Response to Request for Arbitration”, online: <http://www.international.gc.ca/controls-controles/assets/pdfs/softwood/Canada_ResponsetoRequestforArbitration.pdf>.

³⁵ Commission for Labor Cooperation, “Guide to Labor and Employment Laws for Migrant Workers in North America” (2001), online: <http://www.naalc.org/migrant/english/mgtab_en.shtml>.

³⁶ *Ibid.*

5.3.2 Mexican NAO 2003-1 – migrant workers’ North Carolina complaint

The issue of the U.S. H-2A Non-Immigrant Visa Program became the subject of a public communication filed in February 2003 by two farm workers’ advocacy groups, who alleged that the H-2A program was discriminatory, and that North Carolina employers exploited migrant workers through denial of freedom of association rights, blacklisting of workers who communicated with unions and non-payment of overtime wages and workers’ compensation benefits.³⁷ In September 2003, the Mexican NAO accepted the public communication for review and two weeks later requested cooperative consultations with the U.S. NAO.³⁸

The petition alleged that conditions for many Mexican migrant workers in the United States have not substantially improved since the demise of the Bracero program.³⁹ The petition claimed that the H-2A visa “extended the realm of guest work past the end of the Bracero era” but that the U.S. Congress also made a variety of guarantees to Mexican guest workers through H-2A protections to basic labour rights including

³⁷ Commission for Labor Cooperation, online: <http://www.naalc.org/english/summary_mexico.shtml> The communication was submitted on May 27, 1998, by the Unión Nacional de Trabajadores (UNT), Frente Auténtico del Trabajo (FAT), Frente Democrático Campesino (FDC), and the Sindicato de Trabajadores de la Industria Metálica, Acero, Hierro, Conexos y Similares (STIMACHS), assisted by the International Labor Rights Fund. The two farmworkers’ advocacy groups who filed the complaint were the Washington, D.C.-based Farmworker Justice Fund and the Mexico-based farmworker advocacy group *Central Independiente de Obreros Agrícolas y Campesinos*.

³⁸ *Ibid.*

³⁹ The Farmworkers’ Website, “The Bracero Program” online: <<http://www.farmworkers.org/bracerop.html>>. In August 1942, the governments of the United States and Mexico instituted the Bracero program largely to respond to crop failures and insufficient agricultural employment in Mexico during the late 1930s and early 1940s. This situation coincided with a demand for cheap manual labour brought about the entry of the United States into the Second World War. The Bracero Program suffered from criticism that it countenanced racism and harsh labour conditions for Mexican workers in the U.S. The head of the U.S. Department of Labor, Lee G. Williams, famously described the Bracero Program as a system of “legalized slavery.” See AR Schmidt-Camacho, *Migrant Imaginaries: Latino Cultural Politics In The U.S.-Mexico Borderlands*, (New York: New York University Press, 2008 at 110. The Bracero Program was terminated in 1964.

freedom of association.⁴⁰ It alleged that unscrupulous growers used the structure of the H-2A program to openly warn H-2A workers away from unions or to enforce contractual bans against visitors to the fields or labour camps that keep workers from talking to union organizers.⁴¹ The complaint alleged that the H-2A program regulations do not explicitly prohibit (or protect) unionization but instead “operate in a way that discourages it.”⁴²

In response to the petition, the U.S. Department of Labor conducted its own investigation in 2004 and found that North Carolina had been enforcing its laws properly.⁴³ This case was seen by some American trade organizations as Mexico’s attempt to impose through the NAALC its views on immigration issues relating to its citizens working in the United States. This view apparently extended even to the U.S. DOL and the U.S. National Advisory Committee on the NAALC. The Advisory Committee heard from the DOL Director in May 2004 and in turn Committee members “cautioned that Mexico has a separate agenda in its investigations of the treatment of migrant workers. Rather than just the enforcement of current laws, Mexico wants to see changes in those laws.”⁴⁴ The DOL Director agreed with the Committee stating that the complaint went “went way beyond the objectives in the NAFTA accord” and that cooperative programs are in place to deal with workers’ complaints.⁴⁵ Both departments avoided any discussion of punitive measures, or of changes to any U.S. labour laws to

⁴⁰ J Gordon, “Transnational Labor Citizenship” 80:503 Southern California L Rev 503 at 554

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ “Mexico Seen Using NAFTA Labor Deal to Press Immigration Issues” (2004) 24:19 Washington Tariff and Trade Letter 1 at 2-3. The article states that workers’ representatives in the complaint alleged that the number of H-2A workers has increased 700-800% in the last decade.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

comply with NAALC rulings.

In November 2007, the Mexican NAO issued an "immediate call for answers to questions on the progress in gaining collective bargaining rights for public sector workers" in North Carolina."⁴⁶ The Mexican NAO sent a six-page query to the U.S. NAO, asking for a progress report. This followed a rebuke of North Carolina by the ILO's Freedom of Association Committee, which stated in March 2007 that the failure to comply "with freedom of association principles in North Carolina has resulted in grievous working conditions for many public sector workers."⁴⁷ The ILO's Committee on Freedom of Association referred specifically to "Conventions 87, 98, and 151" and stated that "although these Conventions have not been ratified by the United States," the ILO's Declaration on Fundamental Principles and Rights at Work obligates the American government to "respect, promote and realize the principles embodied in these Conventions regardless of ratification."⁴⁸

Mexican Trade Unions, especially the *Frente Autentico del Trabajo* (FAT), pressured the Mexican government for more information from the U.S. on Mexican workers in North Carolina.⁴⁹ The Mexican NAO specifically asked its U.S. counterpart: "What have the governments of the United States and North Carolina done in respect to

⁴⁶ International Federation of Chemical, Energy, Mine and General Workers' Union, "Mexican Government Calls Foul on North Carolina Union-Busting" Press Release (5 November 2007), online: <<http://www.alternet.org/story/66965/>>.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ *Ibid.* FAT was acting "on behalf" of ICEM affiliate United, Electrical, Radio, Machine Workers of America. FAT's Mexican petition, and one by the UE to the US government, has 53 co-signers, ranging from community organizations to labour groups, including Global Union Federations ICEM and Public Services International (PSI).

the recommendation of the ILO Freedom of Association Committee?"⁵⁰

In early 2010, the U.S. Labor Department published new H-2A regulations designed to strengthen the labour certification process, and to allow for greater enforcement of protections for H2-A workers.⁵¹ Additionally, through its Wage and Hour Division, the department enforces the terms and conditions of the labor certification and enforces worker protections. The alterations to the H2-A regulations were the result of “policy decisions underlying a previous revision of the H-2A regulations” published in 2008 under the previous Republican administration.⁵² The final rule included “stronger mechanisms for enforcement of the worker protection provisions required by the H-2A program” including increased wages and greater access to the domestic American labour market.⁵³

5.4 The NAALC and Canada – An unconsummated relationship

During the nearly two decade long existence of the NAALC, only two complaints have been filed against Canada. Although both complaints dealt with collective bargaining rights, neither complaint dealt with the protection of migrant workers within Canadian territory.⁵⁴ Since the NAALC’s inception all complaints regarding the

⁵⁰ *Ibid.*

⁵¹ USA Green Card Lottery: Official Government Entry Program, "Rules for H-2A Temporary Agricultural Worker Program Announced", online: <<http://www.usadiversitylottery.com/news/immigration/green-card-dv2012-immigration-news-mar052010.php>>. The rule came into effect on 15 March 2010.

⁵² *Ibid.* The U.S. Labor Department noted that the “department's review focused on the process for obtaining labor certifications, the method for determining the H-2A Adverse Effect Wage Rate, and the protections afforded to both the temporary foreign workers as well as the domestic agricultural workforce.”

⁵³ *Ibid.* The new rule was designed as much to protect domestic workers as well as H-2A workers. According to the U.S. Labor Department, the new Rules “ensured that U.S. workers in the same occupation working for the same employer, regardless of date of hire, receive no less than the same wage as foreign workers; provides more transparency by creating a national electronic job registry where job orders will be posted through 50 percent of the contract period; and protects against worker abuses by prohibiting cost-shifting from the employer to the worker for recruitment fees, visa fees, border crossing fees and other U.S. government mandated fees.”

protection of migrant workers have been directed against the United States. This is not due to the comparatively huge documented migrant worker population in the United States. In 2008, there were approximately 64,000 H-2A workers in the United States.⁵⁵ Comparing the data to the U.S. population in 2008, H-2A workers made up less than 1/50 of 1 percent of the U.S. population. In a comparable period in 2008 there were approximately 26,000 SAWP workers in Canada representing less than 1/10 of 1 percent of the country's population.⁵⁶

One of the reasons for the lesser NAALC activity relative to Canada involves the structure of Canada's federal system and labour law jurisdiction. A labour agreement such as the NAALC requires verification in the form of a federal-provincial agreement in order for it to be fully implemented. The federal government and provinces can accede to Intergovernmental Agreements regarding the implementation of the NAALC and other Labour Cooperation Agreements, and providing for joint provincial/territorial and federal participation in any public communications and cooperative activities.⁵⁷

⁵⁴ NAALC Public Communication US NAO 98-03 was filed by International Brotherhood of Teamsters, Teamsters Canada, Fédération des travailleurs et travailleuses du Québec, Teamsters Local 973 (Montreal), International Labor Rights Fund. It dealt with the right to collectively bargain and was withdrawn after officials from Quebec and U.S. met with union officials; NAALC Public Communication US NAO 98-04 was filed by Organization of Rural Route Mail Carriers and other labor organizations in Canada, Mexico and the U.S. It alleged violations of Canadian rural route mail carriers' right to protection under Canadian collective bargaining and occupational health and safety laws. The U.S. NAO declined to accept the submission on the basis that the mail carriers were mail contractors, not employees entitled to these rights under the law.

⁵⁵ "H-2A Reengineering, Braceros" (2009) 15:1 *Rural Migration News*, online: <http://migration.ucdavis.edu/rmn/more.php?id=1408_0_4_0>.

⁵⁶ HRSDC, online: Temporary Foreign Worker Program - Labour Market Opinion (LMO) Statistics, online: <http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/stats/archive/annual2005-2008/table10a.shtml>

⁵⁷ HRSDC, "Archived - Provincial and Territorial Involvement in Labour Cooperation Agreements", online: <http://www.hrsdc.gc.ca/eng/labour/labour_globalization/ila/niila/ptilca.shtml>.

The federal government underscored the importance of the Intergovernmental Agreements as a mechanism for implementing the NAALC:

Labour Cooperation Agreements (LCAs) that Canada signs with its international trading partners respect the provinces ' and territories ' jurisdictional responsibility in the area of labour. Federal, provincial and territorial governments have developed a concrete set of practices for provincial and territorial participation in the negotiation of LCAs, as well as a shared understanding of the objectives that Canada will pursue in negotiating these. Canadian intergovernmental agreements have also been developed to provide for a mechanism by which provinces and territories can participate in the implementation of Canada's LCAs.⁵⁸

However, current information on the HRSDC website lists only four provinces that have signed intergovernmental agreements with Ottawa, along with their signatory dates - Alberta (1994), Manitoba (1997), Quebec (1997) and Prince Edward Island (1998).⁵⁹ Early scholarly analysis of the NAALC warned that if the agreement were not "fully activated" by obtaining provincial consent, Canada's "influence and involvement in the agreement will be minimal."⁶⁰ As Ontario has not signed an Intergovernmental Agreement, this scenario may be particularly relevant to SAWP workers located disproportionately within that province. Even relatively positive scholarly appraisals of the NAALC and its ability to foster dialogue between civil society, governments, employers and unions, notes that this process is essentially a move towards a "harmonized social policy" requiring time and deliberative effort.⁶¹ The fact that

⁵⁸ *Ibid.*

⁵⁹ HRSDC, "Signatories to the Canadian Intergovernmental Agreement", online: <http://www.hrsdc.gc.ca/eng/lp/spila/ialc/nao/03signatories_canadian_intergovernmental_agreement.shtml>. As of January 2012 Ontario, with the largest foreign migrant population, has not signed an Intergovernmental Agreement with Ottawa.

⁶⁰ DM Helfeld, "NAALC in the Eyes of the Beholder" (1994-1995) 10 Connecticut J of Int'l L 365

⁶¹ M Abbott, "Labour Side Agreements Involving Canada: Current Practices and Comparative Effectiveness" in F Reid, et al, eds. *Trade and Labour Protection: Can the Two be Made to Work Together?* (Saint Nicolas, Quebec: ACRI/University of Laval, 2003)

substandard employment is theoretically "brought out onto the public stage" by this process is belied by the importance placed on economic integration and free trade over "social obligations associated with workers' rights."⁶²

In addition, the comparatively fewer NAALC complaints against Canada relates to the agreement's perceived efficacy by Canadian unions, or lack of it, in resolving collective bargaining issues. Both of the NAALC public communications that concerned Canada occurred in 1998 and were submitted, in part, by organized labour. The complaint that was not accepted for review, US NAO 98-04, was submitted on December 2, 1998. It concerned the issue of whether federal legislation "denying rural route mail carriers employed by the Canada Post Corporation the rights to unionize and bargain collectively" violated NAALC principles 1-3.⁶³

The complaint against Canada that was accepted for review, US NAO-98-03, was filed in the U.S. on December 18, 1998 by the International Brotherhood of Teamsters, Teamsters Canada, Fédération des travailleurs et travailleuses du Québec, Teamster Local 973 (Montreal), and the International Labor Rights Fund. It involved the Freedom of the Right to Organize and to Collective Bargaining in Quebec. It alleged that the province failed to provide an "effective remedy" for anti-union behaviours such as unwarranted plant closures and delays in union certification processes.⁶⁴ Quebec also limited union

⁶² *Ibid.*

⁶³ Commission for Labor Cooperation, online: <<http://new.naalc.org/index.cfm?page=229>>. The communication was submitted by the Organization of Rural Route Mail Carriers, Canadian Union of Postal Workers, American and Mexican postal unions, Canadian Association of Labour Lawyers and other labor organizations in the Canada, the United States, and Mexico. The U.S. NAO declined to accept the complaint "on the basis that the rural route mail couriers are mail contractors, not employees entitled to collective bargaining rights under Canadian law."

⁶⁴ *Ibid.*

certifications to single-employer bargaining units, and the complaint alleged this made it “unduly difficult for workers in nonstandard employment (part-time, casual, contractual work) to organize unions.”⁶⁵ The complaint was related to attempts to organize workers at a McDonald's restaurant in St. Hubert, Quebec, Canada.

The McDonald's certification drive was part of an effort by the Canadian Auto Workers union in the late 1990s to unionize McDonald's workers across Canada. In August 1998, workers at a McDonald's in the town of Squamish, BC conducted a successful certification vote, joining CAW Local 300 and becoming the first unionized McDonald's in North America.⁶⁶ One year later workers at the same McDonald's voted to decertify, with “dissatisfaction” with CAW Local 3000 cited as the main reason.⁶⁷ Although the results here sound similar to the outcome at Greenway farms in BC, this decertification vote was not the reason behind the NAALC complaint.

The NAALC complaint resulted from two actions taken during the certification process. First, the shutting down of the St. Hubert's McDonald's facility during the certification process in February 1998, after the owner claimed that the restaurant was “no longer profitable” seemed like a clear violation of NAALC principles.⁶⁸ The other reason behind the complaint lay in the process of a contemporary certification drive

⁶⁵ Laboris, “Public Communication on Labor Law Matters Arising in Canada (Québec)”, online: <<http://laboris.uqam.ca/anact/mcdonald.htm>>.

⁶⁶ Canadian Auto Workers, “Negotiations Begin Today in Squamish McDonald's” online: <<http://www.caw.ca/en/sectors-negotiations-begin-today-in-squamish-mcdonalds.htm>>.

⁶⁷ Foodservice & Hospitality, “Squamish McDonald's quits union”, online: <<http://www.faqs.org/abstracts/Travel-industry/Squamish-McDonalds-quits-union-Spain-in-the-glass.html>>.

⁶⁸ M Hamstra, "Unions Seek Momentum from Canadian McDonald's Certification." Nation's Restaurant News (7 Sept. 1998), online: <http://findarticles.com/p/articles/mi_m3190/is_36_32/ai_50325352/>.

conducted at a McDonald's in Montreal. In late 1997, workers there filed with the Quebec Labour Bureau for accreditation following a majority of workers signing accreditation cards to join the Teamsters union⁶⁹. The process under Quebec's Labour Code took over a year and, by the time a vote was ordered by the Labour Bureau in January 1999, few of the workers who had originally signed the accreditation cards remained employed at the McDonald's, and the certification vote was defeated.⁷⁰ A high turnover rate is the norm in fast-food work but in this case the Teamsters charged McDonald's with "playing dirty" in coercing workers to vote against unionization.⁷¹

The union's submission to the NAALC stated that the difficulties in unionization resulted from the nature of the employment relationship, an "atypical one", and in defining a bargaining unit in the context of these atypical employment relationships:

Difficulties in the certification process in this new economic context may stem from the nature of the employment relationship, and the fact that workers in atypical forms of employment do not meet criteria for the definition of employees in labor laws. Problems may also arise when defining the bargaining unit, as was the case with St-Hubert McDonald's.⁷²

The complaint was filed with the U.S. NAO, which then requested information from the Canadian NAO regarding processes in Quebec relating to plant closures related to union certification drives. On January 29, 1999 the Canadian NAO issued an "invitation" from the Quebec Labour Bureau to officials from the U.S. NAO and union representatives, whereupon it was "agreed that a Quebec government council would

⁶⁹ M King, "Flippin' Union?: Labour Commissioner Orders Vote to Settle Accreditation at McDonald's." (8 January 1999) Montreal Gazette A6.

⁷⁰ *Ibid.*

⁷¹ A Norris, "Employees Reject Union: Managers Played Dirty, Teamsters Boss Charges." The Gazette (Montreal) 23 Feb. 1999: A3.

⁷² *Supra* note 65.

commence a study of sudden anti-union plant closures.”⁷³ On April 21, 1999, the U.S. NAO issued a press release stating that “the labor groups submitting the communication had asked that the review end, and that the file be closed.”⁷⁴

Canadian labour’s recourse to the NAALC was arguably less successful than the efforts of their American counterparts. At least the UFW was able to produce educational material and, more importantly, raise the political profile of the issue with U.S. legislators. The complaints relating to unionization attempts at the St. Hubert McDonald’s and other McDonald’s restaurants across Canada offer a sobering glimpse into the capacity of international pressure, or at least international pressure coming through the NAALC, to enable enforcement of Canadian labour law relating to collective bargaining rights.

The complaints did not succeed largely due to the nature of the Agreement, which has an extremely limited practical ability to influence provincial labour laws. In the McDonald’s complaint, the solution – a reform of Quebec’s Labour Code to allow for speedier certification of vulnerable employees – was beyond the scope of the NAALC’s powers. The complaint urged Quebec to adopt a legal process similar to that in place in BC that allowed the Squamish workers to successfully unionize, but it failed to take into account that the NAALC cannot act as an instrument to change national labour laws or even be seen to be advocating such change. On another level, the McDonald’s unionization campaign in Canada reveals a deeper problem, as the outcome in Squamish revealed that even a successful certification drive could be overturned. The Teamsters

⁷³ Commission for Labor Cooperation, online: <<http://new.naalc.org/index.cfm?page=229>>.

⁷⁴ *Ibid.*

subsequently abandoned the national campaign to unionize McDonald's workers until legal reforms relating to collective bargaining could be achieved in the provinces. These types of labour reforms could be achieved through political pressure that the NAALC seems ill-situated to provide.

5.5 Conclusion

The process outlined in this chapter provides some insights into the operation of laws protecting collective bargaining, migrant workers' rights and the engagement of various actors into the legal process. Participation through the NAALC allows for the inclusion of NGOs, unions, public-interest lawyers groups and individuals through various complaints processes. NGOs and individual workers have played an important role through the NAALC in raising complaints with respect to migrant workers against all three parties to the NAFTA agreement.

In the United States, NGOs have raised the treatment of migrant workers in several complaints that have led to public hearings and seminars involving, employers, workers, and governments on the general topic of migrant workers' rights. This acts to engage non-governmental actors such as individual workers and human rights groups into international legal processes, and to publicly acknowledge problems in national programs designed to deal with migrant workers. The problem in Canada lies in engaging civil society - NGO's, unions, public-interest lawyers groups and other individuals - into a complaints process. Much of this is due to a generally higher level of public interest lawyering existing in the United States that has been behind many of the NAALC

complaints directed against the U.S.⁷⁵ But the political issue of migrant workers is also simply not on the Canadian public's radar given the amount of political or media attention given to the issue in Canada when compared to media coverage in the United States, particularly during American election campaigns.⁷⁶

The content of the NAALC case studies is thus somewhat less important than the fact that they were filed in the first place and brought some public attention to the issues raised and possibly affected some type of change. The use of such an instrument by labour unions, civil society groups and individual workers demonstrates alliances between the groups that extend beyond national boundaries. One of the lessons from the information presented in Chapter 4 that it took years of grassroots activism by unions and farm migrant labour in the United States before such pressure began to produce practical legal changes in the unionization environment. Until the last decade, this type of activism was largely absent from Canada.

The NAALC activities reveal relatively few similarities between the two countries, although they are important ones. Both countries have seen determined resistance on the part of employers to unionization of temporary foreign agricultural workers. A legal analysis of the situation reveals that in the United States, a larger corporate interest such as R.J. Reynolds is actively involved, involving federal courts. By comparison in Canada comparatively smaller interests are generally involved in legal action in provincial labour tribunals. However, in the United States several different unions are involved in major

⁷⁵ CM Selinger, "Public Interest Lawyering in Mexico and the United States" 27:2 *Inter-American L Rev* 343

⁷⁶ The 2012 campaign for the Republican Presidential nominee is a case in point of the importance of immigration in general and illegal immigration and foreign workers in particular, to a large segment of at least the Republican electorate.

legal actions involving temporary agricultural workers, while in Canada SAWP workers' legal arguments are brought forth primarily by the UFCW.

The United States has a much more extensive federal legislative framework defining collective bargaining rights, although as in much of Canada agricultural workers remain excluded from a general collective bargaining framework. Several U.S. states also have specific laws relating to collective bargaining rights for migrant workers in the H-2A visa program. Despite these specific laws protecting migrant workers, an analysis reveals that, because of the operation of the H-2A program, such laws do not always offer collective bargaining protections to H-2A workers. This is particularly the case when one examines collective bargaining complaints launched through the NAALC regarding migrant workers in the U.S. and domestic workers in Canada.

The fact that no NAALC complaints have been launched against Canada regarding migrant workers on its territory is revealing in itself, inasmuch as the Canadian government has always insisted that its domestic labour laws offer sufficient protections to SAWP workers in Canada.⁷⁷ The reason for the lack of complaints is at least partially attributable to Canadian unions' skepticism towards the NAALC, and awareness that the agreement contains significant limitations. The agreement's inability to effectively enforce its objectives has helped entrench its image as a toothless instrument. Even where subsequent changes occurred in state laws relating to seasonal foreign agricultural workers, the data is inconclusive on whether these public communications inspired any subsequent changes in state labour laws, although some U.S. states that have received

⁷⁷ See Canadian Government Submission, "Juridical Condition and Rights of the Undocumented Migrants" Inter-American Court of Human Rights, Advisory Opinion Oc-18/03 (17 September 2003).

NAALC complaints have subsequently altered their labour legislation.⁷⁸

The more extensive legislative framework and greater engagement of U.S. civil society likely led to greater recourse to the NAALC by still-skeptical American unions. Canada has remained largely untouched on this front, but the experience with unionization of McDonald's workers and the NAALC reveals a similar pattern of resistance to international intervention on the issue of unionization. Complaints to the NAALC also challenge its bureaucratic inertia. The NAALC process is in many cases inexcusably slow moving, the result of bureaucratic delays and political considerations, reflecting many international institutions including the ILO. It reflects a "cooperative" approach even though in the majority of cases, the process tends to be led by Canada or the U.S.⁷⁹ The limitations of this approach illustrate the unwillingness of a developed country to subject itself to measures that could result in legislative or policy changes originating from Mexican complaints. Both Canada and the United States consistently oppose what is viewed as coercive action from a developing country meant to alter its labour legislation or policies. Officials in the United States in particular have made the political calculation that they could not be seen by their domestic constituencies to be

⁷⁸ For example, Maine's new migrant farm worker friendly labour legislation was enacted over 10 years after the filing of the NAALC complaint. The public policy rationale examined for this legislation in Chapter 4 could fit in with NAALC objectives, but it could just as likely be the result of differing political objectives by a new Maine state government. However, North Carolina represents the opposite case. For background on Maine, see NAALC complaint Mexican NAO-9803, which alleged that the U.S. government failed to ensure equal protection of Mexican migrant workers resulting from the alleged mistreatment of the Mexican workers occurred at the DeCoster Egg Farm plant in Maine. The complaint was filed alongside the Washington Apple Pickers complaint, and as a result public forums were held in both Washington and Maine in 2002. See *supra* note 26.

⁷⁹ R Russo, "A Cooperative Conundrum? The NAALC and Mexican Migrant Workers in the United States" 17:1 L & Bus Rev of the Americas 27.

altering domestic labour laws to comply with Mexican demands.⁸⁰ The United States and Canada have avoided engaging conflictive aspects of the Agreement, as this would have the potential of prompting changes to comply with a developing state's demands.

Such a course of action would also entail a reversal of decades of policy whereby a western industrialized country would actually adopt reforms of its labour laws to comply with demands originating from a developing nation. Instead, the cooperative approach allows the United States and Canada to avoid this scenario and also allows the Mexican government to claim some sort of gains under the agreement while precluding the necessity of more coercive measures. For practical purposes however, the NAALC as an instrument continues to fall short on expanding collective bargaining rights to migrant workers.

The main lesson here is that the engagement of civil society with governments and employers must build upon a solid political and legal foundation. This foundation must provide the impetus for political action and the legal framework necessary to enact unionization of these workers. In Canada, both elements have been absent for decades, despite Canada's membership in international forums that could subject it to political pressure, and despite being a party to several international law instruments that could provide the basis for legal changes to migrant farm worker unionization.

⁸⁰ *Supra* note 43.

6 - International Law – Theoretical Applications and Practical Relevance for SAWP Workers and Collective Bargaining

This chapter focuses on the unionization of SAWP workers within an international legal framework. The subjects of the collective bargaining efforts here are non-citizens of Canada. The previous chapters largely addressed SAWP workers as *farm workers* in Canada. Principally, this is due to domestic legal considerations in Canada, and the reluctance of Canada's Supreme Court to bring international law into the debate over unionization of farm workers. Therefore, although SAWP workers migratory status has certainly come into play in unionization efforts, their identity as farm workers has formed the basis of SAWP worker unionization efforts. This chapter addresses SAWP workers' status as *migrant workers* in Canada as this has possibilities for the application of certain international labour laws. In particular, I focus on exactly what kind of international law emerges in this paradigm and whether this law could be a practical solution to problems associated with collective bargaining in a program such as the SAWP.

The international agreements that form part of the SAWP are basically administrative arrangements but they are also international in scope. This chapter outlines the international legal framework in relation to SAWP workers. It examines Canada's interpretation and application of international commitments within domestic legal and political considerations and Canada's limited accession to international treaties affecting migrant workers or collective bargaining. The analysis in this chapter involves identifying and analyzing potential legal and political obstacles to fulfilling Canada's

international obligations to migrant workers within its territory, which may include a right for SAWP workers to unionize. The theoretical considerations here help to highlight the basis for Canadian politicians' and jurists' reluctance to apply international standards where Canadian labour laws or constitutional "protections" are already in place.

International human rights law, constitutional interpretation and concepts of humanitarianism in migration law have all been analyzed in the Canadian context.¹ The analysis in this chapter takes a new approach in analyzing the responses to challenges of unionizing foreign workers participating in a managed, temporary scheme of seasonal migration. This international legality has parties (national governments, the International Labour Organization, unions, and employers) and interested observers who might remain outside the process (the WTO, quite possibly individual workers). The victorious western allies largely created this system after the Second World War. It is a product of industrial relations conceived by developed countries. It has endorsed concepts of economic development coinciding with temporary labour migration theories that are supposed to generate economic development in source countries. It countenances punitive actions when international economic treaties are violated while generally allowing only for non-punitive measures relating to labour rights. Developed countries often opt out of an international labour law when convenient and ignore others, citing their own national protections as sufficient. The international labour regime may have democratic and inclusive elements, but it is a fundamentally unequal system.

¹ See GV LaForest, "The Expanding Role of the Supreme Court of Canada in International Law Issues" (1996) 34 *Can Yearbook of Int'l L* 89; C Dauvergne, "Amorality and Humanitarianism in Immigration Law" (1999) 37 *Osgoode Hall L J* 597

The argument in this chapter is that the international labour law framework is a product of historic inequality between developed countries that created the system and developing countries that supply migrant labour. The nature of farm labour, and farm labour migration to Canada was discussed above and revealed that the SAWP was not a scheme born out of equality between Canada and the Caribbean Commonwealth, nor did it promote equal treatment in countenancing discriminatory hiring practices. Canada's courts purposefully limited legal rights to collective bargaining in favour of protecting the agricultural sector's economic interests. This inequality is reflected by the preeminence of economic interests over labour rights in neo-liberal globalization. It is also illustrated practically on the ground by the unequal position in law of the individual migrant worker in this system.

6.1 Law, globalization and migrant workers

The preeminence of economic imperatives over labour rights in neo-liberal globalization traces its origins to the establishment of the free market economy in Europe. The concept of this self-regulating market was based on three "commodity fictions" of land, labour and money – social economist Karl Polanyi termed the extension of this market to all of the economic institutions of society as "market utopianism."² This concept of the market's function is a complex one, but at its basic core his analysis determined that a self-regulating market "could not exist for any length of time without annihilating the human and natural substance of society."³ The "stark utopianism" of the self-regulated markets of the 19th century eventually gave rise to broadly based

² K Polanyi, *The Great Transformation The Political and Economic Origins of Our Time* (Boston: Beacon Press, 2001).

³ *Ibid.* at 3.

opposition movements.

This argument was unique for its time because it contended that society, vital to humans, was incompatible with the self-regulating market. A good society is a society capable of producing goods, and a necessary condition of life in such a society is that human beings and nature are not treated as commodities. The unsustainable nature of self-regulating markets created a natural “protective reaction” by “a variety of social groups, including a portion of the elite” within nation-states.⁴ This protective reaction included, among other things, the enactment of national laws regulating labour standards and collective bargaining rights for workers.

Unfortunately, this protective reaction provides less of a defence against international markets that, unlike national markets, are comparatively unregulated. Further, the functioning of a program such as the SAWP acts to interrupt the cyclical nature of the development of working class consciousness. Temporary workers in the SAWP who attempt to make efforts to unionize threaten the program’s use of flexible workers, and consequently often find themselves facing deportation threats from employers or blacklisting from officials of their own home country.⁵ The SAWP itself was created to provide for such flexibility in the acquisition of seasonal labour for Canadian farms.

Another reason the Canadian government provided for the SAWP’s establishment was its supposed functioning as a temporary development aid program to the developing

⁴ *Ibid.*

⁵ National Union of Public and General Employees, “Mexican Consul Tampered with Migrant Farm Vote” (17 August 2009), online: <<http://www.nupge.ca/node/2490>>.

economies of the Caribbean.⁶ Labour migration in general, and SAWP migration from the Caribbean in particular, has also been seen to be historically rooted in an on-going process of third world labour exploitation.⁷ Of course, one analyst's description of a process as labour "exploitation" may be described by another analyst as economic "development."

In theory the economic development generated in the source country would eventually make temporary labour emigration to Canada unnecessary. In particular the remittances sent home and the skills acquired by the returning workers were thought to engender development in the source countries. After 45 years of such development aid through the SAWP, one would have expected Caribbean and Mexican seasonal farm migration to Canada to have leveled off by now. In reality, the inequalities of economic globalization mean that this process is mirrored by "multiple geographies."⁸ Uneven benefits result from the outward flow of migrant workers to economically developed states. For migrant workers' source countries, generally developing economies, the benefits of remittances sent home by migrant workers are spread unevenly, exacerbating rather than alleviating income disparities in the home country.⁹

Harvey argues that this uneven development has existed and spread globally along

⁶ Findeis, *supra* Ch 1, note 96.

⁷ I Andre, "The Genesis and Persistence of the Commonwealth Caribbean Seasonal Agricultural Workers Program In Canada" (1990) 28:2 Osgoode Hall L J 245; NR Sharma, "Birds of Prey and Birds of Passage: The Movement of Capital and the Migration of Labour" (1997) 30:1 Labour Cap Soc 8.

⁸ P Dicken, *Global Shift: Mapping the Changing Contours of the World Economy*. (New York: Guilford Press, 2011) at 8.

⁹ *Ibid.* at 362.

with market capitalism.¹⁰ A compelling case can be made that the neo-liberal state is a single-minded entity pursuing a “good business climate” despite the human and/or social costs to workers.¹¹ Regarding the SAWP in particular, Canada’s embrace of the neo-liberal global order and free trade beginning in the 1980s and accelerating in the 1990s and 2000s, has had significant implications for Canadian labour migration law and policy.¹² New and more stringent requirements and enforcement procedures for family sponsorship were introduced while cuts were made to language training programs and other permanent settlement services. Refugees were increasingly portrayed as victims of human smugglers and potential security threats to be dealt with by the Minister of Public Safety and not the Minister of Immigration.¹³ Meanwhile temporary foreign migration was seen as an increasingly valuable economic resource but one that had to be constrained within a legal black hole that could allow for the denial of collective bargaining rights.

6.2 The post-modern problem of the SAWP

Post-modernism is a very broad concept having a potentially wide-ranging application. Relating it specifically to my discussion of the SAWP, economics and labour migration it refers to the “dominant cultural logic of late capitalism” or capitalism

¹⁰ D Harvey. *Spaces of Global Capitalism: Towards a Theory of Uneven Geographical Development* (London, Verso, 2006) at 71-75.

¹¹ Theorists such as Polanyi have put forward variations on this before, but Harvey rejects the notion of a simple minded “export” of the neo-liberal state from some hegemonic centre in New York or London, while accepting the notion of a hegemonic order that naturally spawns the neo-liberal state in the course of reproducing itself through manufactured crises. Contemporary manufactured crises including Chile under Pinochet, and a bankrupt Mexico in the 1980s.

¹² S Arat-Koc. “ Neo-liberalism, State Restructuring and Immigration: Changes in Canadian Policies in the 1990s” (1999) 32:2 J of Can Stud 31

¹³ R Russo, “Security, Securitization, and Human Capital” (2008) 4:3 Int’l J of Soc Sci 417

as it existed following the end of the Second World War.¹⁴ The SAWP raises issues that are “post-modern” in many aspects. The program’s operation challenges basic conceptions of labour and economics and, in particular, the generally accepted conventions of migrant worker remittances enabling economic development. The inherently unequal relationship between employer and employee in the program, and governments’ roles in perpetuating this system, challenges basic conceptions of industrial relations in place for most of the past century. The SAWP poses problems that are not simply binary in nature. Within the program’s context, it is not just employee vs. employer, but involves a consideration of a range of national and international actors with a variety of differing interests. The program poses problems that prove elusive to address through traditional legal tools such as collective bargaining.

This situation was made more difficult through international law’s practical absence. Law is of course formally everywhere in most societies and increasingly present internationally as well. Yet the pervasiveness of law and its practical relationship to globalization is a problematic one. Globalization fundamentally challenges traditional conceptions of legal theory and jurisprudence that forms the basis for this theoretical examination. Jurisprudential scholars have argued that the heritage, ideology and activity of such jurisprudence must be analyzed in order to determine the adequacy of its response to globalisation.¹⁵ Sociological analyses of law illustrate the need for a profound

¹⁴ F Jameson, *Postmodernism, or, the Cultural Logic of Late Capitalism* (Durham: Duke University Press, 1991). EXPLAIN AND SOURCE The term “Late capitalism” refers to the period of capitalism beginning in 1945 and generally covers the beginning of what is described as “neo-liberal economic globalization.” See E Mandel, *Late Capitalism*, (New York: Verso, 1978).

¹⁵ Twining, *supra* Ch 1, note 71 at 81.

theoretical reconstruction of the notion of legality based on locality and nationality.¹⁶ This is part of what Santos calls “oppositional postmodernism” or the search for answers to problems that have no modern solutions.¹⁷

In the current context of economic globalization, SAWP workers represent a post-modern problem and a focal point of tension between national and transnational forces. Temporary foreign workers reflect the “social and political tension” present between “national and transnational perspectives.”¹⁸ In this way they also represent a challenge to efforts to “regularize” their status in order to acquire certain benefits accorded to resident workers, including the practical ability to join a union. Part of the separation of SAWP workers from concepts such as full collective bargaining rights is due to the current era of globalization and the ongoing shift from developing permanent domestic labour to maintaining pools of temporary foreign labour.¹⁹ This change in labour dynamics spawns an increased need to maintain controls over temporary foreign labour in things such as collective bargaining rights.²⁰ This is particularly relevant within the SAWP framework and the nature of agricultural labour in Canada as any loss of control over seasonal migrant workers would render the program far less effective.

6.3 The International Labour Organization

Canada is a state party to several international instruments that guarantee workers the right to join a trade union. It is a member of the Organization of American States

¹⁶ *Ibid* at 82.

¹⁷ De Sousa Santos, *supra* Ch 1, note 69.

¹⁸ *Ibid.*

¹⁹ Hardt, *supra* note 29.

²⁰ *Ibid.* at 27-30.

(OAS), and is subject to the obligations of the OAS American Declaration, which guarantees the right to organize unions.²¹ The *United Nations Universal Declaration of Human Rights* also guarantees “everyone” the “right to form and join trade unions.”²² The UN’s *International Covenant on Civil and Political Rights*, to which Canada is a party, guarantees the right to form trade unions.²³

The obvious site for international law in relation to labour is the international organization historically responsible for regulating international labour, the International Labour Organization (ILO).²⁴ The ILO is the oldest surviving international institution, created in the aftermath of the First World War as part of the Treaty of Versailles. The Commission that drafted its Constitution was led by the leader of the American Federation of Labour (AFL) in the United States, and composed of representatives from nine European countries and Japan.²⁵ The ILO's principal goals are embodied in its calls for social justice and the statement that "universal peace can only be established if it is based upon social justice." The preamble to the ILO’s constitution also recognized principles or “areas of improvement” for member states, among them the “Recognition of

²¹ Organization of American States, *American Declaration of the Rights and Duties of Man* (2 May 1948), online: <<http://www.unhcr.org/refworld/docid/3ae6b3710.html>>. Article 22 of the Declaration deals with Right of Association, and states that “every person has the right to associate with others to promote, exercise and protect his legitimate interests of a political, economic, religious, social, cultural, professional, labor union or other nature.” Canada joined the OAS as a full member in January 1990.

²² *Universal Declaration of Human Rights* (10 December 1948) U.N. Doc. A/810 UNGA Res 217 A (III), online: <<http://www.unhcr.org/refworld/docid/3ae6b3712c.html>>. Article 23(4) states that “Everyone has the right to form and to join trade unions for the protection of his interests.”

²³ *International Covenant on Civil and Political Rights*, 999 UNTS 171, 1057 UNTS 407. Adopted by General Assembly 16 December 1966, in force as of 23 March 1976, ratified by Canada on 19 May 1976.

²⁴ C van den Anker, “Cosmopolitan Justice and the Globalization of Capitalism: The UNDP and ILO Proposals Globalizations” (2005) 2:2 *Globalizations* 254

²⁵ The nine members of the Commission were: Belgium, Cuba, Czechoslovakia, France, Italy, Japan, Poland, the United Kingdom and the United States.

the principle of freedom of association.”²⁶ Human rights have been noted as being at the epicentre of the ILO’s existence, particularly following the Second World War.²⁷ The ILO’s principal method of promoting human rights is through labour standard-setting.²⁸

The ILO was created as a “tripartite organization,” the first international organization to bring together the representatives of governments, workers and employers.²⁹ The organization’s structure is touted as a means to facilitate “social dialogue” between trade unions, governments and employers that are designed to be reflected in its labour Conventions and in the national laws and policies of member states.³⁰ The International Labour Conference (ILC), comprised of government, worker and employer delegates to the ILO and sometimes described as an “international parliament of labour”, meets annually to set the ILO’s policies.³¹ The ILC creates and adopts international labour standards. States are represented in the ILC by delegations consisting of two government delegates (usually Labour Ministers or high-ranking Labour officials), and respective employer and worker delegates, nominated “in agreement with the most representative national organizations of employers and workers.”³² The ILC operates through consensus, meaning that although worker and employee delegates are free to vote against their government, or against each other, this

²⁶ ILO, “About the ILO”, online: <<http://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm>>.

²⁷ F Wolf, “Human Rights and the ILO” in T. Meron, ed. *Human Rights in International Law: Legal and Policy Issues* (Oxford: Clarendon Press, 1984) at 273.

²⁸ VA Leary, “Lessons from the Experience of the ILO” in P Alston, ed. *The United Nations and Human Rights: A Critical Appraisal* (Oxford: Clarendon Press, 1992) at 580.

²⁹ *Supra* note 26.

³⁰ *Ibid.*

³¹ ILO, “How the ILO Works”, online: <<http://www.ilo.org/global/about-the-ilo/how-the-ilo-works/international-labour-conference/lang--en/index.htm>>.

³² *Ibid.*

“does not prevent decisions being adopted by very large majorities or in some cases even unanimously.”³³

The ILC issues legally binding Conventions as well as Recommendations, which do not have legal force. Following a required number of voluntary member state ratifications, an ILO Convention becomes a treaty under international law (and a recognized International Labour Standard). This imposes a legal obligation on states that have ratified the Convention to apply its provisions. Member states detail their compliance with ratified Conventions through reports submitted to the ILO. Every year the ILC’s Committee on the Application of Standards examines a number of alleged breaches of international labour standards. The consensual “international law” established by the ILO has been of a peculiar variety containing few enforcement mechanisms. The ILO has however developed a regular system of supervision on the application in law and practice of ratified labour standards. Two ILO labour conventions, 87 and 98, deal with workers’ freedom of association and collective bargaining.

6.3.1 Derivation of ILO Conventions

ILO Conventions 87 and 98 stem from a model of industrial relations regulation based on American and British patterns of industrialization.³⁴ This type of labour regulation was enacted on an economic rather than a human rights basis. The 1935 U.S. *Wagner Act* is a good example of a landmark American labour law that was premised on

³³ *Ibid.*

³⁴ For a history on the involvement of British Trade Unionists in the development of ILO Conventions 87 and 98, see R Lowe, “Hours of Labour: Negotiating Industrial Legislation in Britain 1919 – 1939” (1982) 35 *Econ Hist Rev* 260.

economic rather than human rights considerations.³⁵ The *Wagner Act* enshrined the principle in the United States of independent, autonomous unions being subject to government tribunals acting as ultimate arbiter and protector of worker/employee relations.³⁶

The Supreme Court of Canada cited some of the *Wagner Act*'s objectives in its landmark *Health Services* ruling on collective bargaining:

1. Industrial Peace: By encouraging collective bargaining, the Act aimed to subdue “strikes and other forms of industrial strife or unrest,” because industrial warfare interfered with interstate commerce; that is, it was unhealthy in a business economy. Moreover, although this thought was not embodied in the text, industrial warfare clearly promoted other undesirable conditions, such as political turmoil, violence, and general uncertainty.

2. Collective Bargaining: The Act sought to enhance collective bargaining for its own sake because of its presumed “mediating” or “therapeutic” impact on industrial conflict.

3. Bargaining Power: The Act aimed to promote “actual liberty of contract” by redressing the unequal balance of bargaining power between employers and employees.

4. Free Choice: The Act was intended to protect the free choice of workers to associate amongst themselves and to select representatives of their own choosing for collective bargaining.

5. Underconsumption: The Act was designed to promote economic recovery and to prevent future depressions by increasing the earnings and purchasing power of workers.

6. Industrial Democracy: This is the most elusive aspect of the legislative purpose, although most commentators indicate that a concept of industrial democracy is embedded in the statutory scheme, or at the least was one of the articulated goals of the sponsors of the Act. Senator Wagner frequently sounded the industrial democracy theme in ringing notes, and scholars have subsequently seen in collective bargaining “the means of establishing industrial democracy, . . . the means of providing for the workers’ lives in industry the sense of worth, of freedom, and of participation that democratic government promises them as citizens.”³⁷

³⁵ See *Wagner Act*, supra Ch 3, note 21.

³⁶ *Ibid.*

³⁷ *Health Services*, supra Ch 3, note 16; see also KE Klare, “Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941” (1978), 62 *Minnesota L Rev* 265 at 281-84.

Unionism emerged in the United Kingdom much earlier than in the United States. In general, its early development followed a pattern of legal decisions confined by judicial doctrines of individualism and class bias.³⁸ In summary, the development of unions in both Britain and the United States was predicated on existing legal assumptions in those societies regarding class and society and – in the United States in particular – on government’s role in regulating labour.

The *Wagner Act* had profound implications on the expansion of the federal American government, and British trade unionism became a dominant political force following the Second World War. This was during the time period when both the United States and United Kingdom were instrumental in drafting ILO Conventions 87 and 98. In fact, the British government heralded Convention 87 as “an edifice of international legislation relating to freedom of association which will be a blessing to mankind.”³⁹

6.3.2 ILO Conventions 87 and 98, 143

Canada has ratified *ILO Convention 87: Freedom of Association and the Right to Organize of 1948*.⁴⁰ However, ILO Convention 87 makes no explicit reference to collective bargaining, referring only to workers’ rights to establish and join “organizations”:

³⁸ MJ Klarman, “The Judges vs. The Unions: The Development of British Labour Law, 1867-1913” (1989) 75:8 Virginia L Rev 1488.

³⁹ T Novitz, “Freedom of Association and ‘Fairness at Work’—An Assessment of the Impact and Relevance of ILO Convention No. 87 on its Fiftieth Anniversary” (1998) 27:3 Industrial L J 169; ILO, “Record of Proceedings” (1947) International Labour Conference, 30th Session. The United Kingdom along with most EU states has ratified ILO Convention 98.

⁴⁰ *ILO Convention 87: Freedom of Association and the Right to Organize of 1948*, 68 U.N.T.S. 17; G von Potobsky, “Freedom of Association: The Impact of ILO Convention 87 and ILO Action” (1998) 137:2 Int’l Law Rev 195

Article 2

Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization.

...

Article 10

In this Convention the term *organization* means any organization of workers or of employers for furthering and defending the interests of workers or of employers.

Some labour law scholars and unions have interpreted Convention 87 as at least inferring a human right to collective bargaining.⁴¹ However other scholars have pointed out that the absence of the explicit phrase “collective bargaining” in Convention 87 is relevant.⁴² The right to collective bargaining is explicitly addressed in *ILO Convention 98: The Right to Organize and Collective Bargaining Convention of 1949*.⁴³

Article 1

1. Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.
2. Such protection shall apply more particularly in respect of acts calculated to--
 - (a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership;
 - (b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours.

Of 35 member states in the Americas, only 3 have not ratified ILO Convention 98: Canada, the United States, and Mexico.⁴⁴ Globally, Canada is one of only 29 countries

⁴¹ Potobsky, *Ibid.*

⁴² T Novitz, “Freedom of Association and ‘Fairness at Work’—An Assessment of the Impact and Relevance of ILO Convention No. 87 on its Fiftieth Anniversary” (1998) 27:3 *Industrial L J* 169

⁴³ *ILO Convention 98: The Right to Organize and Collective Bargaining Convention of 1949*, 96 U.N.T.S 257.

⁴⁴ ILO, “Ratifications of the Fundamental human rights Conventions by country in The Americas”, online: <<http://www.ilo.org/ilolex/english/docs/declAM.htm>>.

that have not ratified ILO Convention 98.⁴⁵ Canada's failure to ratify that Convention is the subject of long-standing discussions with the ILO. The 1998 *Declaration on Fundamental Principles and Rights at Work* established an annual review process, with each country issuing baseline reports on compliance with freedom of association and collective bargaining rights.⁴⁶ From 2001-2008, Canada repeatedly submitted to the ILO that it was engaged in discussions with provincial authorities regarding the possible ratification of ILO Convention 98.⁴⁷ Canada indicated to the ILO in 2009 that its inability to ratify the Convention is related to ongoing discussions with provincial and territorial governments in the light of the Supreme Court of Canada's decision in *Health Services*.⁴⁸ The Canadian Labour Congress, representing Canadian Workers in the ILO's Committee on Freedom of Association, requested that the federal government clearly express its intentions to ratify ILO Convention 98 and to convene a meeting with social partners in Canada prior to 2013 to address the impediments to ratifying the Convention.⁴⁹ Canada responded to these concerns by noting that while there is a "high degree of conformity with the principle of collective bargaining in Canada" there are nevertheless "some differences between national legislation and specific provisions" of

⁴⁵ National Union of Public and General Employees, "Canada ratifies ILO Convention on Maritime Labour", online: <<http://www.nupge.ca/content/3426/canada-ratifies-ilo-convention-maritime-labour>>. The last ILO Convention Canada ratified was the "Convention on the Worst Forms of Child Labour" in 1999.

⁴⁶ See ILO, "Declaration: Home Page", online: <<http://www.ilo.org/declaration/lang--en/index.htm>>. The ILO describes the declaration, adopted in 1998, committing member states to "respect and promote principles and rights in four categories, whether or not they have ratified the relevant Conventions." These categories are: freedom of association and the effective recognition of the right to collective bargaining, the elimination of forced or compulsory labour, the abolition of child labour and the elimination of discrimination in respect of employment and occupation."

⁴⁷ ILO, "2011 Annual Review Under The Declaration Follow-Up", online: <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_091262.pdf>.

⁴⁸ *Ibid.* It remains to be seen how the April 2011 *Dunsmuir* ruling will affect Canada's position.

⁴⁹ *Ibid.*

ILO Convention 98.⁵⁰

In response to ILO inquiries regarding the recognition of the principles and rights of freedom of association and collective bargaining, Canada responded that the *Canadian Charter of Rights and Freedoms* “provides for freedom of assembly and association” and also noted that “freedom of association” in Quebec is provided for by that province’s *Charte des droits et libertes de la personne*.⁵¹ In terms of policy to implement the principles, in 2003 Canada expressed “interest in exploring the use of ILO communication products”⁵² in relation to promoting the 1998 *ILO Declaration on Fundamental Principles and Rights at Work*.⁵³ Two years later, Canada stated that ILO technical advisory assistance was “valuable” in a workshop involving government representatives from federal and provincial/territorial levels dealing with “issues pertaining to Canada’s international labour obligations and the ILO’s supervisory mechanisms and the *Declaration of Fundamental Principles and Rights at Work*.”⁵⁴ The ILO was not advised of any new legislative initiatives to enact freedom of association or collective bargaining principles. Instead, Canada annually repeated to the ILO that the *Charter* and provincial labour legislation “recognizes and provides a [legislative] framework for collective bargaining for employees and employers within their respective jurisdictions.”⁵⁵

⁵⁰ *Ibid.* The differences stem at least partly from the interpretation of ILO Convention 98 by the ILO Committee of Experts.

⁵¹ *Ibid.* at 36.

⁵² *Ibid.* at 37 and 43.

⁵³ For a summary of the Declaration, see *supra*, note 46.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.* at 37.

This legislative framework, however, provides for certain exemptions to collective bargaining rights. In 2001 and again in 2008, the International Confederation of Trade Unions raised issues with the ILO regarding exemptions under Canadian law to agricultural workers and collective bargaining.⁵⁶ In both instances, the federal government's response conceded that in "some jurisdictions" in Canada, seasonal agricultural workers are excluded from provincial/territorial collective bargaining provisions, but added that these workers are "nevertheless entitled to negotiate with their employers on a voluntary basis."⁵⁷

6.3.3 ILO Committee on Freedom of Association

The failure of some states to ratify ILO Convention 98 caused the ILO to organize a supervisory procedure to ensure that non-ratifying members nevertheless complied with the principles of workers' free association and collective bargaining.⁵⁸ In 1951 the Committee on Freedom of Association (CFA) was created to examine complaints regarding violations of freedom of association, "whether or not the country concerned

⁵⁶ *Ibid.*

⁵⁷ *Ibid.* at 43.

⁵⁸ The ILO considers the obligation to report a duty on all member states, regardless of whether they have ratified a particular ILO Convention: "International labour standards are universal instruments adopted by the international community and reflecting common values and principles on work-related issues while member States can choose whether or not to ratify any conventions, the ILO considers it important to keep track of developments in all countries, whether or not they have ratified them. Under article 19 of the ILO Constitution, member States are required to report at regular intervals, at the request of the Governing Body, on measures they have taken to give effect to any provision of certain conventions or recommendations, and to indicate any obstacles which have prevented or delayed the ratification of a particular convention. On the basis of article 19, the Committee of Experts publishes an in-depth annual General Survey on member States' national law and practice, on a subject chosen by the Governing Body. These surveys are established mainly on the basis of reports received from member states and information transmitted by employers' and workers' organizations. They allow the Committee of Experts to examine the impact of conventions and recommendations, to analyse the difficulties indicated by governments as impeding their application, and to identify means of overcoming these obstacles." See ILO, "General Surveys", online: <<http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/general-surveys/lang--en/index.htm>>

had ratified the relevant conventions.”⁵⁹ This means that although Canada has not ratified Convention 98, the CFA could still handle a complaint made against it regarding violations of collective bargaining rights.

The CFA is composed of a chairperson and three representatives each of governments, employers, and workers. Workers’ or employers’ organizations may make complaints to the CFA against member states. Governments found to be in violation of freedom of association or collective bargaining principles are engaged in a “dialogue” with the committee, which ultimately issues a report with recommendations to resolve the dispute and requests for members states’ follow-up in addressing the recommendations.⁶⁰ A Committee of Experts handles legislative aspects of referred cases when a country has ratified the relevant Convention. Regarding Canada, as it has ratified ILO Convention 87, complaints over worker Freedom of Association could be referred to the Committee of Experts. Since 1960, the CFA has examined over two thousand cases with more than 60 states acting on recommendations issued by the Committee on freedom of association and collective bargaining.⁶¹ The CFA has also stated that in certain cases when a collective bargaining process is linked to strike action, there is an implied right to strike under ILO

⁵⁹ ILO, “Committee on Freedom of Association”, online: <<http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-on-freedom-of-association/lang--en/index.htm>>.

⁶⁰ *Ibid.* The ILO’s website also indicates that the CFA may “also choose to propose a ‘direct contacts’ mission to the government concerned to address the problem directly with government officials and the social partners through a process of dialogue.”

⁶¹ *Ibid.* The ILO cites the case of Indonesia in 1994 as a successful case of CFA intervention. In 1994, the International Confederation of Free Trade Unions (ICFTU) and the World Confederation of Labour (WCL) filed a complaint against the Government of Indonesia for violations of trade union rights, including the denial of the workers’ right to establish organizations of their own choosing. In the years since then Indonesia has taken significant steps to improve protection of trade union rights, and has ratified all eight fundamental conventions, making it one of the few nations in the Asia-Pacific region to have done so. (Note 2) The case of Dita Sari is not unique. In the last decade alone, more than 2,000 trade unionists worldwide were released from prison after this ILO committee examined their cases.

Convention 87.⁶²

In 1998, the ILO issued its “Declaration on Fundamental Principles and Rights at Work” which defined “freedom of association and collective bargaining” as one of four “core principles” embodied in ILO Conventions 87 and 98.⁶³ The ILO links together concepts of freedom of association and collective bargaining:

Collective bargaining, as a way for workers and employers to reach agreement on issues affecting the world of work, is inextricably linked to freedom of association. The right of workers and employers to establish their independent organizations is the basic prerequisite for collective bargaining and social dialogue...The exercise of the rights to freedom of association and collective bargaining requires a conducive and enabling environment. A legislative framework providing the necessary protections and guarantees, institutions to facilitate collective bargaining and address possible conflicts, efficient labour administrations and, very importantly, strong and effective workers’ and employers’ organizations, are the main elements of a conducive environment.⁶⁴

6.3.4 ILO Convention 143 and the UN Migrant Workers Convention

ILO Convention 143, in force as of September 12, 1978, deals specifically with Migrant Workers.⁶⁵ Article 10 of Convention 143 under “Equal Treatment” references migrant workers’ membership in trade unions and declares that

Each Member for which the Convention is in force undertakes to declare and pursue a national policy designed to promote and to guarantee, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, of social security, of trade union and cultural rights and of individual and collective freedoms for persons who as migrant workers or as members of their families are lawfully within its territory.

⁶² B Gernigon, A Odero, H Guido, *Principles Concerning the Right to Strike* (Geneva, International Labour Office, 2000) at 33.

⁶³ *Supra* note 59.

⁶⁴ *Ibid.*

⁶⁵ *Migrant Workers (Supplementary Provisions) Convention, C143* (24 June 1975), online: <<http://www.unhcr.org/refworld/docid/3ddb6ba64.htm>>.

The *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* was adopted by the U.N. General Assembly in 1990.⁶⁶ It entered into force on July 1, 2003 following the required threshold of 20 ratifications by member states.⁶⁷ The *Migrant Workers Convention* was the product of years of debate in the UN and ILO over the nature of migratory labour and human rights violations, and the nature of labour and globalization. The jurisdictional battle over the appropriate forum for the Convention – the UN or the ILO – related to the competencies of both organizations with respect to migration.⁶⁸ The ILO was generally seen to have jurisdiction over migrants as workers and the UN was to have jurisdiction over their status as aliens.⁶⁹ The UN expressed concern with migrant workers’ rights beginning “in earnest” in the early 1970s through a series of resolutions condemning incidents involving illegal transportation and exploitation of migrant workers.⁷⁰

Dubbed the “culmination of an evolutionary process”, the *Migrant Workers Convention* has been touted as part of the development of “universal standards protecting the rights of non-nationals.”⁷¹ The UN frames it as an extension of the founding principles of both organizations:

“The primary objective of the [Migrant Workers] Convention is to foster

⁶⁶ *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, U.N.T.S. vol. 2220, p. 3 (“Migrant Workers Convention”)

⁶⁷ UNESCO, “UN Convention on Migrant Workers Rights”, online: <<http://unesdoc.unesco.org/images/0014/001435/143557e.pdf>>.

⁶⁸ A result of a 1947 agreement by the ILO and UN on the issue of migration. See R Cholewinski, *Migrant Workers in International Human Rights Law* (Oxford: Clarendon Press, 1997) at 138.

⁶⁹ *Ibid.*; M. Hasenau, “ILO Standard on Migrant Workers: The Fundamentals of the UN Convention and their Genesis” (1991) 25 Int’l Migr Rev 687 at 693.

⁷⁰ *Ibid.*

⁷¹ Cholewinski, *supra* note 68 at 137; A Helton, “The New Convention from the Perspective of a Country of Employment: The US Case” (1991) 25 Int’l Migr Rev 848

respect for migrants' human rights. Migrants are not only workers, they are also human beings.”⁷²

The preamble to the *Migrant Workers Convention* also references the “vulnerability” of migrant workers owing to their “absence from their state of origin and to the difficulties they may encounter in the State of Employment.” The UN notes that the Convention does not aspire to create “new rights” but rather seeks to ensure equal treatment for migrant workers and state nationals performing similar labour.⁷³ Article 25.1 of the Convention states that

“Migrant workers shall enjoy treatment not less favourable than that which applies to nationals of the State of employment in respect of remuneration and other conditions of work and terms of employment.”

Despite the idealistic pronouncements, the *Migrant Workers Convention*, for a number of reasons, owes its creation substantially to a “constellation of political power relationships” at the UN and ILO.⁷⁴ First, there was sharp division between developed and developing countries over the appropriate forum for the new *Migrant Workers Convention*. Developed countries preferred the ILO, while developing countries preferred the UN.⁷⁵ The ILO claimed jurisdiction over the matter as the “agency with specific constitutional responsibility for this question.”⁷⁶ However developing countries defeated a Swedish proposal to allow the ILO more time to reform existing instruments

⁷² *Supra* note 67.

⁷³ *Supra* note 67.

⁷⁴ R Bohning, “The ILO and the New UN Convention on Migrant Workers: The Past and Future” (1991) 25:4 Int’l Migr Rev 698.

⁷⁵ Cholewinski, *supra* note 68.

⁷⁶ *Ibid* at 141; ILO, Governing Body, 212th Session, Geneva, February-March 1980, Role and Place in the Restructured UN System, ILO Doc. GB 212/IO/I/8, 5, para 17.

or develop new ones relating to migrant workers.⁷⁷ This essentially took the matter out of the ILO and the guiding hands of North America and Europe, and placed it squarely into the UN General Assembly where developing countries could control the shaping of the new *Migrant Workers Convention* through their absolute majority.

Secondly, the ILO is not a “state forum” like the UN, and developing countries’ positions on issues related to migration would be subject to challenge from employers’ and workers’ representatives, in particular the trade union “voice” which was noted as being “less acceptable” to developing nations.⁷⁸ Lastly, developing countries were opposed to expanding trade unions’ to gain rights for migrant workers’ trade union membership.⁷⁹ Some developed states on the other hand opposed the *Migrant Workers Convention* on the grounds that a UN instrument was unnecessary given existing ILO Conventions, and also because a UN resolution might even undermine certain existing protections through lack of ratifications among the broader UN membership.⁸⁰

In its final form, the *Migrant Workers Convention* defines migrant workers as

“a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.”⁸¹

This definition is narrowed by dividing “migrant workers” into eight sub-classifications, including that of “seasonal worker”:

⁷⁷ Bohning, *supra* note 74; Cholewinski, *supra* note 71 at 141

⁷⁸ Cholewinski, *supra* note 68 at 141.

⁷⁹ Another concern for developing countries was the possibility of reduced remittances sent back to countries of origin from undocumented migrant workers. Bohning, the former chief of the ILO’s International Migration for Employment Branch, has stated his belief that developing countries rejected the ILO in drafting the Migrant Workers Convention primarily for these reasons. See Bohning, *supra* note 74; Cholewinski, *supra* note 68.

⁸⁰ Cholewinski, *supra* note 68 at 142.

⁸¹ *Migrant Workers Convention*, *supra* note 66 at Art. 2.2.

The term "seasonal worker" refers to a migrant worker whose work by its character is dependent on seasonal conditions and is performed only during part of the year.⁸²

In Article 59 the *Migrant Workers Convention* extends protections to Seasonal Migrant Workers, contingent upon their temporary status within the host country:

1. Seasonal workers, as defined in article 2, paragraph 2 (b), of the present Convention, shall be entitled to the rights provided for in Part IV [Other Rights Of Migrant Workers And Members Of Their Families Who Are Documented Or In A Regular Situation] that can be applied to them by reason of their presence and work in the territory of the State of employment and that are compatible with their status in that State as seasonal workers, taking into account the fact that they are present in that State for only part of the year.

2. The State of employment shall, subject to paragraph 1 of the present article, consider granting seasonal workers who have been employed in its territory for a significant period of time the possibility of taking up other remunerated activities and giving them priority over other workers who seek admission to that State, **subject to applicable bilateral and multilateral agreements.** [emphasis added]

The Migrant Workers Convention is directed largely at developed countries. The rationale for the convention notes that “workers’ rights are defended by unions” but also explains that “these do not always include migrant workers.”⁸³ Articles 26 and 40 of the Convention deal with migrant workers and their participation in trade unions:

Article 26

1. States Parties recognize the right of migrant workers and members of their families:
 - (a) To take part in meetings and activities of trade unions and of any other associations established in accordance with law, with a view to protecting their economic, social, cultural and other interests, subject only to the rules of the organization concerned;
 - (b) To join freely any trade union and any such association as aforesaid, subject only to the rules of the organization concerned;
 - (c) To seek the aid and assistance of any trade union and of any such

⁸² *Ibid.*, Art. 2.2(b)

⁸³ *Supra* note 67.

association as aforesaid.

2. No restrictions may be placed on the exercise of these rights other than those that are prescribed by law and which are necessary in a democratic society in the interests of national security, public order or the protection of the rights and freedoms of others.

...

Article 40

1. Migrant workers and members of their families shall have the right to form associations and trade unions in the State of employment for the promotion and protection of their economic, social, cultural and other interests.
2. No restrictions may be placed on the exercise of this right other than those that are prescribed by law and are necessary in a democratic society in the interests of national security, public order or the protection of the rights and freedoms of others.

The *Migrant Workers' Convention's* Article 22 also provides extensive protections against what it considers to be arbitrary or unfair expulsions of migrant workers. Although not directly related to collective bargaining, Article 22 could provide some additional protection against arbitrary expulsions during the collective bargaining process.⁸⁴

As of May 2012 Canada has not ratified either ILO Convention 143 or the *Migrant Workers Convention*. An examination of the ratifications for the *Migrant Workers Convention* reveals that it is comprised primarily of source countries for migrant workers.⁸⁵ Canada belonged to the group of worker destination states that resisted creation of a new United Nations sponsored *Migrant Workers Convention*, as the ILO

⁸⁴ The SAWP contains some protections against arbitrary expulsions but the Migrant Workers Convention goes further in prohibiting arbitrary group expulsions. Art. 22(I) of the Migrant Workers Convention prohibits collective expulsion, indicating that each case of expulsion must be examined individually. Article 22(4) provides migrants facing expulsion with the right to submit reasons against their expulsion and to have the case reviewed by a competent judicial authority. Art. 22(5) provides for compensation in certain cases of expulsions that are later annulled.

⁸⁵ UNESCO, "Present state of ratifications and signatures of the UN Migration Convention", online: <<http://www.unesco.org/new/en/social-and-human-sciences/themes/social-transformations/international-migration/international-migration-convention/present-state-of-ratifications-and-signatures/>>.

was the preferred forum for dealing with the issue.⁸⁶ The government has consistently maintained to the ILO that Canada's own national laws adequately protect SAWP workers and other Temporary Foreign Workers in Canada. Officials from HRSDC have referred inquiries on the subject to the department's website, which states:

Temporary foreign workers have the same rights as Canadian workers. Ninety percent of occupations are provincially/territorially regulated and employment and labour standards for those occupations are the responsibility of the provincial and territorial governments. The other 10 percent of occupations are federally regulated and the employment and labour standards fall under the Canada Labour Code. Standards vary between provinces and territories.⁸⁷

6.4 The Charter, international law and the IACHR

Canada's position on migrant workers within its territory was first clarified in 2003, when the Inter-American Court of Human Rights (IACHR) heard a request for an opinion brought by Mexico regarding the mistreatment of its migrant workers in several U.S. states.⁸⁸ As a member of the Organization of American States (OAS), Canada was entitled to submissions in the matter, and accordingly submitted its comments to the IACHR on January 10, 2003. In its submissions to the Court relating to migrant workers within its territory Canada stated that:

The term "migrant" is not generally used in Canada. However, the term "migrants," as understood in the international context, covers three categories of person. The first category corresponds to permanent residents...The second category corresponds to refugees...The third category corresponds to

⁸⁶ Cholewinski, *supra* note 68.

⁸⁷ HRSDC, "Roles and Responsibilities", online:
<http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/ei_tfw/rr_tfw.shtml>.

⁸⁸ Inter-American Court of Human Rights, "Advisory Opinion on Juridical Condition and Rights of the Undocumented Migrants" (17 September 2003), online:
<<http://www.unhcr.org/refworld/docid/425cd8eb4.html>>. The Court stated that "In the area of labor law, the United States does not treat irregular migrants with equality before the law... This discriminatory treatment of irregular migrants is contrary to international law. Using cheap labor without ensuring workers their basic human rights is not a legitimate immigration policy."

temporary residents who arrive in Canada for a temporary stay. There are several categories of temporary residents according to the Immigration and Refugee Protection Act: visitors (tourists), foreign students and temporary workers.

Although temporary workers do not enjoy the same degree of freedom as Canadian citizens and permanent residents on the labor market, their fundamental human rights are protected by the *Canadian Charter of Rights and Freedoms*, enacted in 1982 as part of the 1982 *Constitution Act*. This *Charter* applies to all government legislation, programs and initiatives (federal, provincial, territorial and municipal). Most of the fundamental rights and freedoms protected by the *Canadian Charter of Rights and Freedoms* are guaranteed to all individuals who are in Canadian territory, irrespective of their migratory status or citizenship. ...

There are some exceptions, because the *Canadian Charter of Rights and Freedoms* guarantees some rights only to Canadian citizens, such as: the right to vote, and the right to enter, remain in and depart from Canada. The right to travel between the provinces, and the right to work in any province is guaranteed to citizens and permanent residents. Many of these guarantees reflect the right of sovereign States to control the movement of persons across international borders...

Canada's submission defended the principle of differential treatment, based on regularized status:

States may establish distinctions in the enjoyment of certain benefits between its citizens, aliens (with regular status) and aliens whose situation is irregular. Nevertheless, pursuant to the progressive development of norms of international human rights law, this requires detailed examination of the following factors: 1) the content and scope of the norm that discriminates between categories of persons; 2) the consequences that this discriminatory treatment will have on the persons prejudiced by the State's policy or practice; 3) the possible justifications for this differentiated treatment, particularly its relationship to the legitimate interest of the State; 4) the logical relationship between the legitimate interest and the discriminatory practice or policies; and 5) whether or not there are means or methods that are less prejudicial for the individual and allow the same legitimate ends to be attained.

The statement then went on to promote Canadian guarantees of equality for migrant workers under Section 15 of the *Charter*. Canada draws the Court's attention to the 1989

Supreme Court of Canada decision, *Andrews v. Law Society of British Columbia*⁸⁹, which established that the equality right includes substantive rather than just formal equality:

Substantive equality usually refers to equal treatment of all individuals and, on some occasions, requires that the differences that exist be acknowledged in a non-discriminatory manner...In order to demonstrate that section 15 of the *Canadian Charter of Rights and Freedoms* has been violated, a person alleging discrimination must prove: 1) that the law has imposed on him a different treatment from that imposed on others, based on one or more personal characteristics; 2) that the differential treatment is due to discrimination based on race, national or ethnic origin, color, religion, sex, age, mental or physical disability, or nationality; and 3) that discrimination in the substantive sense exists, because the person is treated with less concern, respect and consideration, so that his human dignity is offended.

Canada then referenced the Supreme Court's decision in *Lavoie v. Canada*⁹⁰ which stated that preference given to Canadian citizens in competitions for employment in the federal public service discriminates on the grounds of national citizenship, and therefore violates section 15(1) of the *Charter*. Curiously, in its reference to *Lavoie*, Canada's submission to the Inter-American Court did not indicate that the decision also upheld the discriminatory treatment under Section 1 of the *Charter*. In fact, the *Lavoie* decision specifically referenced the international context in upholding the public service policy of job preference for Canadian citizens.⁹¹

Both *Andrews* and *Lavoie* dealt with equality and law. In addition to the outcome in *Lavoie*, which clearly permitted discrimination against non-citizens in terms of public service staffing, it is important to note that *Andrews* did not prohibit possible

⁸⁹ *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, (1989), 10 C.H.R.R. D/5719 (S.C.C.) [*Andrews*"]

⁹⁰ *Lavoie v Canada*, [2002] 1 SCR 769, 2002 SCC 23 [*Lavoie*"]

⁹¹ *Lavoie* at para 101.

discriminatory treatment in certain circumstances⁹² nor did it comment at all on temporary foreign workers' rights in Canada. The *Andrews* decision rejected a “pressing and stringent” application of equality provisions noting that many “benefits associated with social and economic legislation” could justify differential treatment. As noted the *Lavoie* decision actually upheld such discriminatory treatment on the basis that federal hiring practices had a minimal discriminatory impact on non-citizens and that there was merit in having a law that encouraged naturalization and increased the value of national citizenship. The Inter-American Court took a more stringent approach to equality and held that “States may not subordinate or condition observance of the principle of equality before the law and non-discrimination to achieving their public policy goals, whatever these may be, including those of a migratory character.”⁹³

Finally, Canada's submission to the IACHR defended the right of states to the tie migration and labour policies together as legitimate state objectives that may restrict some rights, subject to a variety of conditions:

The elaboration and execution of migratory policies and the regulation of the labor market are legitimate objectives of the State. To achieve such objectives, States may adopt measures that restrict or limit some rights, provided they respect the following criteria: 1) some rights are non-derogable; 2) some rights are reserved exclusively for citizens; 3) some rights are conditioned to the status of documented migrant, such as those relating to freedom of movement and residence; and 4) some rights may be restricted, provided the following requirements are met: a) the restriction must be established by law; b) the restriction must respond to a legitimate interest of the State, which has been explicitly stated; c) the restriction must have a “reasonable relationship to the legitimate objective”, and d) there must not be “other means to achieve these objectives that are less onerous for those affected.... Bearing in mind the development of international human rights law and international labor law, it

⁹² These exceptional circumstances are described in S. 1 of the *Charter* as being “demonstrably justified in a free and democratic society.”

⁹³ *Ibid.*

can be said that “there are a series of fundamental labor laws that derive from the right to work and are at the very center of it.”

Despite its concerns over some of its provisions, Canada nevertheless commented that the *Migrant Workers Convention* overall is a “positive” development in the field of international labour rights.⁹⁴

6.4.1 The IACHR decision

The fundamental labor laws referred to in Canada’s submission were also argued by Mexico to include migrant workers’ rights to join a trade union, irrespective of migration status.⁹⁵ The IACHR held in a majority opinion in favour of Mexico’s complaint, specifically noting that “non-compliance” by a State party with the “general obligation to respect and ensure human rights, owing to any discriminatory treatment, gives rise to international responsibility.”⁹⁶ The opinion further noted that the “migratory status of a person cannot constitute a justification to deprive him of the enjoyment and exercise of human rights, including those of a labor-related nature.”⁹⁷ Finally, the IACHR dismissed arguments that immigration and labour priorities could circumvent these considerations, stating that state parties “may not subordinate or condition observance of the principle of equality before the law and non-discrimination to achieving their public policy goals, whatever these may be, including those of a

⁹⁴ *Supra* note 88.

⁹⁵ *Ibid.* Mexico’s argument may seem ironic and even somewhat perplexing in the context of the subsequent anti-union allegations made against Mexican government officials in Canada. The clearest explanation for Mexico’s actions here is that they involved the large Mexican expatriate population in the United States, including a significant percentage of undocumented workers. Concern over that large, particular community has strong political support in Mexico.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.* at Part X.173.8

migratory character.”⁹⁸

The ILO affirmed the ruling, stating that it “clearly reinforces the application of international labour standards to non-national workers” further noting in particular that it applied even to migrant workers of “irregular status.”⁹⁹ The basic underpinning for these international labour standards is the notion of equal treatment and application of the same standards to migrant workers as those “applied to nationals of the State of employment.”¹⁰⁰ In its seminal 2004 public report on migrant workers and globalization - *Towards A Fair Deal For Migrant Workers In The Global Economy*, the ILO specifically referenced the *Migrant Workers Convention*, stating that the basic human rights related to migration and labour included collective bargaining rights.¹⁰¹

Developed states’ fundamental opposition to the *Migrant Workers Convention* is, at its core, premised on the Convention’s lack of distinction in certain areas between *regular* and *irregular* migration.¹⁰² Many member states of the EU, for example, have resisted implementing the Convention because they fear that it gives undocumented workers too many rights, potentially discouraging legal migration and even encouraging

⁹⁸ *Ibid.* at Part X.173.11

⁹⁹ ILO, *Towards A Fair Deal For Migrant Workers In The Global Economy* (Geneva: International Labour Office, 2004) at 79.

¹⁰⁰ *Ibid.* at 42.

¹⁰¹ *Ibid.*

¹⁰² R Plaetevoet, M Sidoti, “Ratification of the UN Migrant Workers Convention in the European Union Survey on the Positions of Governments and Civil Society Actors.” (18 December 2010), online: <http://www.december18.net/sites/default/files/final_version_survey_-19_jan_2011.pdf>. The Convention, however, maintains a clear distinction between migrants in a regular or in an irregular position, dedicating part III to the human rights of all migrants workers, and part IV to other rights of migrant workers that are documented, or in a regular position. Part III establishes just a few new rights specific to the condition of migrant workers (e.g. the right to transfer remittances, art. 32, or to have information on the migration process, art. 33).

“irregular” migration.¹⁰³ Of course, this argument somewhat contradicts itself, as legal scholars have argued that the core international human rights instruments – including those already ratified by Canada – apply to *all* human beings, regardless of migratory status.¹⁰⁴

Similarly, an argument that the *Migrant Workers Convention* would be incompatible with Canada’s national and provincial labour laws is not convincing. The *Migrant Workers Convention* was drafted to allow for a “certain flexibility” and often uses phrases such as “in accordance to national laws”, “states may”, if states “consider necessary” or “deem appropriate” in prefacing its various articles.¹⁰⁵ The provisions relating to collective bargaining in the Convention in particular contain similar wording, and would not seem to be in conflict either with Canadian labour laws or with the *Canadian Charter of Rights and Freedoms*.¹⁰⁶ Article 59 of the Convention relating to seasonal migrant workers even contains a “subject to” clause that would seem to exempt SAWP workers from invoking its provisions for employment recall.¹⁰⁷

¹⁰³ *Ibid.* A concern to protect “basic human rights led UN member states to similarly overcome developed world opposition and abandon the distinction between documented and undocumented migrants in ILO Convention 143. See. S.Y. Kneebone and J.F. Debeljak, *Transnational Crime and Human Rights* (New York: Routledge, 2012) at 39.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ The wording in Articles 26 & 40 relating to collective bargaining and trade unions contains the following caveat: “No restrictions may be placed on the exercise of these rights other than those that are prescribed by law and which are necessary in a democratic society in the interests of national security, public order or the protection of the rights and freedoms of others.”

¹⁰⁷ The wording in Article 59 urges states to “consider granting seasonal workers who have been employed in its territory for a significant period of time” the possibility of other types of work or priority over other migrant workers, which could contradict some provisions of the SAWP, particularly those that prohibit workers from seeking other types of employment. However, this provision is made “subject to applicable bilateral and multilateral agreements” which would provide for a flexible interpretation in the context of the SAWP.

In the 2011 *Fraser* decision¹⁰⁸ a majority of justices on the Supreme Court of Canada restated and clarified their position from the *Health Services* decision. Canada's obligations under international law support a right to collective bargaining under S. 2(d) of the *Charter*, though not a right to a specific model of collective bargaining.¹⁰⁹ The specific instruments affirmed by the Court included the *International Covenant on Economic, Social and Cultural Rights*¹¹⁰, the *International Covenant on Civil and Political Rights*¹¹¹, and *ILO Convention 87*.¹¹² In long reasons concurring with the majority's decision, Rothstein J. takes issue with the entire reasoning of *Health Services*, and sometimes appears to be writing a dissenting opinion. He takes issue with the majority's affirmation of *Health Services*, arguing that the decision was erroneously decided, that S. 2(d) does not protect *any* process of collective bargaining, and that *Health Services* should be overturned.¹¹³ Going further, Rothstein J. writes that even ILO Convention 98 (which has not been ratified by Canada) in his opinion does not guarantee a duty for "good-faith" collective bargaining.¹¹⁴

¹⁰⁸ *Fraser*, supra Ch 3, note 11.

¹⁰⁹ *Ibid.* at para 93.

¹¹⁰ 993 U.N.T.S. 3.

¹¹¹ 999 U.N.T.S. 171.

¹¹² 68 U.N.T.S. 17.

¹¹³ *Fraser*, supra Ch 3, note 11 at paras 119-296.

¹¹⁴ *Ibid.* at para 249. Abella J., the lone dissenting opinion, agreed with the majority's affirmation of the right to a process of collective bargaining from *Health Services* – but disagreed that the AEPA satisfied that requirement. She largely accepted the arguments of the UFCW and other farm worker support groups. The AEPA's scheme not only did not satisfy constitutional requirements for a process of collective bargaining, but it could not be saved under S. 1 of the *Charter* either. To be saved under that provision would require a minimal impairment of rights, and her opinion is that "the complete absence of any statutory protection for a process of collective bargaining in the AEPA cannot be said to be minimally impairing of the s. 2(d) right." See *Ibid.* at para 368.

6.5 The “L” in ILO does not stand for law

Some theorists argue that international law hampers the Organization’s principal goal and loosens the ties that actually bind member states together in the ILO.¹¹⁵ Attempts to invoke the ILO’s legality in Canada have not met with great success. In response to the Ontario’s government’s appeal of the Court of Appeal ruling against the AEPA, in early 2009 the UFCW launched an international complaint to the International Labour Organization stating that the AEPA violated ILO Convention 87.¹¹⁶ The Ontario government in reply asked the ILO’s Committee on Freedom of Association to defer consideration of the complaint until after the Supreme Court of Canada rendered its decision. In the meantime Canada’s Supreme Court heard arguments in December of 2009. The long delay in the legal process - a process the ILO noted began in 2004 - led the ILO to issue an interim report on the matter in November 2010. In its interim report the ILO rejected what it described as the Ontario government’s contention that “nothing in the AEPA impairs any collective bargaining between employees’ associations, including trade unions, and farm employees.”¹¹⁷ It noted further that “the absence of any machinery for the promotion of collective bargaining of agricultural workers constitutes an impediment to one of the principal objectives of the guarantee of freedom of association – the forming of independent organizations explicitly capable of concluding

¹¹⁵ B Langille, “What is International Labor Law For?” (2009) 3:1 L & Ethics of Human Rights 47

¹¹⁶ UFCW, “Statement of Evidence to the Committee on Freedom of Association of the ILO against the Government of Ontario in respect of the *Agricultural Employees Protection Act*” (March 2009), online: <http://www.ufcw.ca/Theme/UFCW/files/ILO/ILO%20PDF/UFCW%20Canada_%20ILO_Statement%20of%20Evidence_23March2009.pdf>.

¹¹⁷ ILO Case No. 2704, “Interim Report: Complaint against the Government of Canada, (November 2010), online: <Lancaster House <<http://onlinedb.lancasterhouse.com/images/up-ILO2704.pdf>>

collective agreements."¹¹⁸ The report called for the Ontario government to "[put] in place appropriate machinery and procedures for the promotion of collective bargaining in the agricultural sector" and requested it to "keep [the ILO] informed of the progress made in this respect."¹¹⁹ The UFCW welcomed the ILO's report, noting that Canada had signed ILO Convention 87 on Freedom of Association and Protection of the Right to Organize.¹²⁰ The Agricultural industry described the ILO's report as "premature" and stated that the ILO had only listened to "one-half" of the issue.¹²¹ In the end, the decision from Canada's Supreme Court referred to ILO Convention 87 and a previous statement by the ILO Committee on Freedom of Association in supporting its decision to uphold the AEPA.¹²²

The view that an activist ILO, oriented more towards social justice than international legality, could achieve more practically effective results seems somewhat optimistic. At best, this view is based on the idealistic premise that most states will willingly accept that there is no tradeoff between social justice and economic efficiency. At worst, it is a cruel joke on the SAWP worker who might find scant comfort in the fact that Canada is allowing an ILO Principle to be violated as he is put on a plane back to Mexico for participating in collective bargaining efforts.

Since the Second World War the ILO has gradually evolved to become less of an advocate for social justice. Indeed, formed by European and North American states -

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² *Health Services, supra* Ch 3, note 16 at paras 94-95.

intent on forming a new global economic and labour order –the ILO reflects this order even as it attempts to ground its legitimacy in purportedly universal human rights values.¹²³ The economic theory of labour migration such as the balanced growth approach, likening labour migration to free trade, features prominently in the ILO’s recent policies.¹²⁴ The Organization has increasingly acted less as a regulator and more like a facilitator for changes in global social relations caused by economic globalization. Well before the SAWP’s creation the ILO encouraged developing countries to facilitate temporary labour migration as a form of economic development aid:

Encouraging international labour migration has become a common approach for many poor countries to alleviate unemployment and to work out from poverty. These countries are generally characterized by soaring unemployment, low economic development, and high population growth rate. Remittances and skills gained from working abroad are thought to be the crucial outcomes of migration, which will have profound impact on economic development and the welfare of the individual migrant family, community and the nation.¹²⁵

This has been particularly the case in the Western Hemisphere, and the concepts I am referring here to development aid and the ILO apply primarily to the North American context. This is not to say that globally the ILO as an institution has abandoned its principles, or that it has abdicated its role in advancing labour rights in developing countries.¹²⁶ But nevertheless, the ILO in this paradigm expresses itself through a new

¹²³ *Ibid.* The 2003 Core Rights Declaration was grounded in international human rights law.

¹²⁴ R Cox, “Labour and Hegemony” (1977) 31:3 *Int’l Organization* 385

¹²⁵ ILO, “Migrant Worker Remittances and their Impact on Local Economic Development” online: <http://www.ilo.org/asia/whatwedo/publications/lang--en/docName--WCMS_110240/index.htm>. The World Bank has also long provided empirical evidence of the scale of migrant worker remittances sent back to source countries. See World Bank, *Global Development Finance* (Washington, World Bank Publications, 2004). Current figures and analysis from the Bank show remittances sent home by migrant workers to be the second most important source of external funding for developing countries.

¹²⁶ See for example S.Y. Kneebone, “The Governance of Labor Migration in South-East Asia” (2010) 16:3 *Global Governance* 381

form of domination, one in which the production of - and labour for - goods is removed from their original contexts and organized through legal devices to serve the globalized world economy. The ILO has acknowledged the negative effects of this, and through various initiatives such as the 1998 *Declaration on the Fundamental Principles and Rights at Work* and more particularly the 2002 *Decent Work Agenda* has attempted to put the burden on receiving countries to address the social and legal implications related to migrant labour.¹²⁷ However ILO *Conventions* are problematic in addressing collective bargaining rights of migrant workers as the Organization is still perceived by many countries as advocating a European and American labour model.¹²⁸ Moreover it is nearly impossible to achieve an international consensus on union membership and migrant workers when there is no universally accepted model of collective bargaining. The ILO, for all of its recent efforts at inclusion and transparency, still operates largely behind closed doors - and when the operation of power is masked solutions through law are made less probable.¹²⁹ Within this paradigm the concept of building a bridge between international economic law on the one hand, and human rights and environmental law on the other, is a difficult project to conceive in reality.¹³⁰ Even within the context of current international law, national citizenship or migratory status remain the dominant legal markers for defining labour rights.

A global system of limited human rights law is respected by democracies, for

¹²⁷ ILO "Decent Work Agenda", online: <<http://www.ilo.org/global/about-the-ilo/decent-work-agenda/lang--en/index.htm>>; Cholewinski, *supra* note 68 at 98.

¹²⁸ S Silbey, "'Let them Eat Cake": Globalisation, Postmodern Colonialism, and the Possibilities of Justice', (1997) 31:2 L and Soc Rev 207

¹²⁹ *Ibid.*

¹³⁰ Russo, *supra* note 79.

example, until it “goes too far out of line with a prevailing domestic democratic consensus.”¹³¹ The key words here are “domestic” and “democratic.” Undemocratic states place themselves outside of the reach of this limited system, unless compelled to comply by external forces. In democratic countries, human rights legislation in general can be difficult to apply to the labour sphere because of competing interests, which can be magnified in the international sphere.¹³² The Supreme Court of Canada has engaged with international law for several years yet the incorporation of ILO labour standards regarding collective bargaining into domestic Canadian jurisprudence remains elusive.

6.6 Conclusion

The main points of this chapter’s analysis lie in the theoretical applications of international law to practical realities in the context of SAWP workers. International labour law coexists uneasily with the historical and legal structures of agricultural labour migration to Canada. Contemporary globalization is unlikely to alter this structure or erode the power of the state in shaping international labour law but it is increasingly altering the relations between states.¹³³ These mutual relations depend to a certain extent on reproduction of the current social and economic structure.¹³⁴ Labour markets reflect that hierarchy and contribute to its preservation and reproduction. In the context of temporary labour migration, regulation of migrant workers is the process through which programs such as the SAWP are not merely able to match workers with jobs, but are also

¹³¹ AM Slaughter, *A New World Order* (Princeton: Princeton Univ, 2005)

¹³² “Competing interests” defined as Governments, Unions, Corporations, NGOs, among others.

¹³³ D Held, “Globalization, Corporate Practice and Cosmopolitan Social Standards” (2002) 1:1 *Contemporary Pol Theory* 59.

¹³⁴ H Bauder, “Brain Abuse’ or the Devaluation of Immigrant Labour in Canada” (2003) 35:4 *Antipode* 699.

able to sustain and reproduce a social structure that minimizes collective bargaining rights.

Some scholars have linked economic globalization and reproduction of the existing social structures to the emergence of a corporate form of state, manifesting itself differently in developed and underdeveloped countries.¹³⁵ In a developed country such as Canada, some labour theorists have argued that organized labour essentially strikes a deal with corporate management and the government for joint control of the economy.¹³⁶ This form of tripartite structure implicates union leadership and members alike, who share in the benefits inside of the hegemonic structure while those outside of the unions have no secure status outside of this structure. It also implicates an organization such as the ILO as it provides the space for governments, trans-national corporations and international unions to interact.

The practical realities of international labour law and migrant workers – reflected through ILO Conventions and the UN Migrant Workers Convention – highlight the difficulties of situating SAWP workers and collective bargaining within an international legal framework. Canada’s national legal framework formally incorporates ILO Convention 87, which is of limited use to SAWP workers attempting to unionize. Canada’s failure to ratify ILO Convention 98 and the *Migrant Workers Convention* severely limits their practical utility to SAWP workers. Their ratification would provide legal support for SAWP workers and unions seeking collective bargaining rights as well as an additional avenue of redress for SAWP workers facing arbitrary repatriations during

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

the bargaining process.

Canada's explicit justification for its refusal (or delay) in ratifying ILO Convention 98 and the Migrant Workers Conventions rely primarily on the sufficiency of existing constitutional protections. The main claim is that Canada's *Charter* and labour laws make any resort to international law superfluous. The Tigchelaar Bear Farms lawsuit launched in Ontario in late 2011 alleging violations of SAWP workers' *Charter* rights will test this proposition.¹³⁷ But Canada's avoidance of being subject to international law coincides with governmental priorities in expanding the use of temporary foreign workers.¹³⁸

Finally, even if conventions offering collective bargaining provisions were ratified, they include numerous exceptions and subject to clauses that reduce their practical utility in Canada. The bilateral agreements that form part of the SAWP could arguably be exempted under the Migrant Workers Convention's collective bargaining provisions.¹³⁹ Canada's interpretation and application of its international commitments is further hampered by differing labour standards across provincial jurisdictions. Even if the federal government was obliged to accept some international commitments regarding collective bargaining and SAWP workers, it would be difficult to reconcile that with some provincial labour statutes. More significantly, given Canada's insistence that SAWP workers are adequately protected under existing laws and the *Charter*, this could

¹³⁷ *Supra* Ch. 3, note 187.

¹³⁸ And it helps governmental priorities in expanding the use of temporary foreign workers in international legal submissions when the government – accurately – notes that the term “migrant worker” is not generally used in Canada. This helps reinforce the impression that international laws such as the *Migrant Workers Convention* are indeed foreign in origin and alien to Canadian customs.

¹³⁹ See in particular Article 59 of the Migrant Workers Convention, *supra* note 66. Guarantees to freedom to collectively bargain may be interpreted under that provision as being subject to existing bilateral and multilateral arrangements.

cause political difficulties with provinces over jurisdictional issues.

The performance to date of the *Migrant Workers Convention* does not support any strong ability to influence the outcome of collective bargaining and SAWP workers. It is relevant to the debate, but apart from the obvious issues of nation-state sovereignty, primacy of national laws and, in Canada's case, the federal-provincial jurisdictional issues, any greater relevancy for the *Migrant Workers Convention* would require several new international elements. First, it would require a common starting point among international actors and that is not present here. Canada in particular views itself as offering the needed protections to migrant workers through its own domestic laws and constitutional protections. Second, the ILO views itself as the leading international institution for this field but it has adopted the same economic theories regarding temporary foreign workers and economic development that have been shown to be ineffective, at least in so far as SAWP workers are concerned. By association with developed states, the ILO has been implicated in promoting as development a form of economic globalization and temporary labour migration that has led to an erosion of workers' rights. The ILO had done this for over 50 years although, as this chapter has shown, it has recently come to slowly acknowledge the enormous social upheavals and negative impacts due to this policy.

The SAWP has not generated economic development in Mexico or the Caribbean on the scale envisioned by the ILO, nor is there significant human capital developed in the SAWP worker. The historical and theoretical conceptions surrounding migrant farm labour reveal the fallacy that these programs are fundamentally designed to promote economic development in developing source labour countries. The SAWP or the

American equivalent viewed as a “labour development” program or a form of development aid cannot redress the inequalities and labour disruptions caused by economic globalization. Any international law that begins from this starting point runs the risk of creating law that is falsely predicated on a precarious notion of legal empowerment. It would erroneously assume that SAWP workers would gradually obtain the ability to accrue human capital through participation in the program, turn that capital into legal knowledge, and use that knowledge to avail themselves of better working conditions and collective bargaining rights. Returning again to answer the question posed at the beginning of this chapter, the legal struggle over collective bargaining and SAWP workers will be decided upon considerations based less on such a concept of international law and rather overwhelmingly steeped in Canadian law and history.

In one sense Canada’s *Charter* has become a constitutional crutch, allowing the Supreme Court of Canada to subordinate thoughtful considerations of international law to mechanical *Charter* analysis. It also allows the Court to ignore individual actors or groups who might be particularly subject to international legal protections. This will continue until such time as Canada’s Supreme Court allows international labour law to play more than a relatively minor supporting role in its deliberations. Moreover it is simply astounding that in the hundreds of pages of reasoning provided for the *Fraser* decision - including a comprehensive decision with dissenting opinions and with the consideration of various briefs from both parties arguing the important issues relating to SAWP workers - the Court saw fit not to make one substantial reference to these workers in its decision. International law figured prominently in the arguments and in the intervener briefs. But it appeared to be mainly summarily considered and largely politely

dismissed as well.

All of the information above points not just to an inherently unequal system but one that is, at its core, essentially unfair to the most vulnerable people here – the migrant workers. It is a system of international labour law that is relatively inclusive for employers and unions yet remains subordinated to global economic priorities. It is a product of developed world notions of industrial relations. Yet it has been made to bend and twist in the holy grail of neo-liberal economics that its utility as a practical means to help individual migrant workers has been rendered redundant.

7 - Conclusion

Collective bargaining involving SAWP workers lies within a framework encompassing national and international labour and migration laws. Consequently this dissertation addressed a fundamental question: in the absence of Canadian citizenship or permanent residency, how does law and unionization affect SAWP workers in Canada? The working hypothesis - that the SAWP prevents program workers from realizing the full benefits of unionization - has been confirmed. The corresponding inference that unionization of SAWP workers is not a fully satisfactory response to violations of SAWP workers' rights is borne out. It became clear throughout the research for this dissertation that the overarching legal framework of the SAWP combined with the nature of the work prevents the subjects of the collective bargaining from receiving effective protections earned in earlier domestic labour movements. The remaining questions revolved around the degree of protection unionization offers to SAWP workers, and the impact of collective bargaining on these individuals. This dissertation fills the previous gap in scholarship in this area. In particular an analysis sets the significant developments of the past 2-3 years within their legal and theoretical context.

7.1 Synthesis of research findings

The resulting findings from this research filled this gap in existing scholarship in several aspects. In conducting a thorough legal analysis of unionization and other legal responses related to the situation of SAWP workers in Canada, the research focus was on the practical benefits of law and the process of collective bargaining to these workers.

This dissertation adopted a historical and legal approach to these considerations. It has drawn from several theoretical traditions, including theories such as Marxism or Liberalism that may unusually juxtaposed. However, as I have stated this dissertation's purpose was to utilize these theories in the service of making a judgment on the value of a legal process – collective bargaining – to insuring the protection of SAWP workers' legal rights. In the end the conclusions reached relate more to substantive law than theory.

This project's findings stem from the fact that it was an essentially normative undertaking. The dissertation's findings relating to collective bargaining and SAWP workers were contrasted with the legal research and analysis in an attempt to offer a meaningful way forward to address the concerns of those workers. It has considered the distinctiveness of this group of farm workers and it has situated these subjects within the paradigm of economic globalization. Indeed, the more than forty-five year existence of the SAWP cannot be viewed in isolation when addressing fundamental concepts of human rights. This dissertation therefore addresses important legal questions that have been neglected in studies of temporary migrant workers in Canada.

However, several other important questions arose during the research for this dissertation regarding the types of industrial rights denied to SAWP workers. It became clear that both federal and provincial governments, along with employers and even international institutions such as the ILO, operate within a Canadian structure where unions have obtained rights for Canadian workers akin to industrial citizenship. Distinct from national citizenship, within the Canadian labour sphere, the concept of industrial citizenship goes beyond considerations of formal political rights and has historically

meant the rights acquired through work.

The gradual acquisition of these rights has formed a protective structure for Canadian citizens and permanent residents. Those outside of this protective structure, such as non-unionized SAWP workers, are effectively denied the benefits of industrial citizenship. These benefits encompass social rights that were infused onto a welfare state through Keynesian post-war social and economic conceptions that provided “an ever-widening net of social policies that provided each citizen with a modicum of economic security and opportunities for social mobility.”¹ The advent of a market based-citizenship – a type of citizenship that derives its notions of rights from neo-liberal concepts of the free market - is plainly at odds with industrial citizenship as it evolved in Canada, and indeed through much of the liberal democratic world.

Throughout the research for this thesis, it became clear that the SAWP is premised on notions of a market-defining citizenship. The program’s denial of full workplace rights fundamentally contradicts the notion of industrial citizenship. Examining collective bargaining reveals the basic reasons why the SAWP worker is effectively denied certain legal rights under this market-based paradigm. One of the reasons is due partly to the reality of provincial jurisdiction over the labour domain in Canada. But it is also due to the fact that the relationship between the industrial citizen and state regulation is one that is governed by power. The fact that SAWP workers are in a field that is heavily weighted towards the labour needs of a particular economic sector leaves them in an extremely vulnerable position with respect to both Canada’s and employers’ exercise

¹ J Fudge, “After Industrial CitizenshipMarket Citizenship or Citizenship at Work?” (2005) 60:4 *Industrial Relations* 631 at 634; J Brodie, “Citizenship and Solidarity: Reflections on the Canadian Way” (2002) 6:4 *Citizenship Stud* 377 at 378.

of overwhelming power. What protection can domestic or international law, or unionization, offer within this paradigm?

There are many examples of the problematic notions of law and different conceptions of citizenship – national, industrial and market-based among them. The disturbing debate on “illegality” and the “illegal” person are concepts that arise out of migration law label and codify a human being based on legal status alone.² In the second chapter I outlined how the SAWP arose out of an economic need, much as the Wagner model of collective bargaining arose out of the economic circumstances of the era. The SAWP Contract itself can be viewed as an example of market-based citizenship. A SAWP Worker is “legal” so long as he adheres to the Employment Contract and becomes “illegal” the moment he breaks that contract and attempts to “over stay” in Canada. The concept of lawful status assists the legal discrimination against migrants based on migration selection processes in programs such as the SAWP.

I have argued that temporary farm labour migration is an integral feature of both the evolving notions of industrial citizenship (within an expanding global capitalist system) and a process that serves to "drain off" labour previously employed on farms as part of a process of capitalist accumulation.³ Industrial citizenship in a globalizing world involves extending the privileges, rights and responsibilities of national citizenship beyond sovereign borders. A true global notion of industrial citizenship would coexist uneasily with the denial of labour rights to SAWP workers.

These workers do not possess the human capital to profit from economic

² C Dauvergne, *Making People Illegal* (New York: Cambridge University Press, 2008) at 11.

³ P Richardson, and S Marks. *International Labour Migration: Historical Perspectives*. (Hounslow: M. Temple Smith, 1984) at 6-8; Satzewich, *supra* note 101 at 81-82.

globalization and are denied workplace rights yet in many countries they fuel economic development. This is another illustration of globalization's paradox and a variation of the "us-them" paradigm.⁴ Even though SAWP workers are inside Canadian borders they are still viewed as a "them" despite the development they engender in the agricultural industry. The "us" is symbolized through the greater inclusion and wealth of "skilled" and privileged Canadians, or those allowed into a queue to become Canadian. This paradox lies at the heart of globalization's resulting inequality and it is particularly evident in a program such as the SAWP. It also implies that a nation state such as Canada retains its governance over its civil society despite the post-nationalist arguments that economic globalization has subverted the effective power of the nation state.

Decades of farm labour shortages in Canada led governments and farmers to view temporary migrant labour as the solution to problems relating to obtaining and retaining seasonal agricultural work. SAWP labour is the essential element in this policy. Racial prejudices and stereotypes played a prominent role in using non-white temporary farm labour. Circumscribed temporary entry restrictions and increased employment restrictions for Caribbean farm workers replaced entry restrictions for European farm labour. This effectively meant that for an entire group temporary work abroad and return "home" replaced the prospect of permanent immigration to Canada. The explicit restrictions did not involve "the entry of people of colour" (as witnessed by large-scale Caribbean family-sponsored permanent immigration to Canada) but to "their access to

⁴ Dauvergne, *supra note 2* at 113-118.

certain jobs, programs and protections once inside Canada.”⁵ The restrictions also precluded the prospect of remaining permanently in the country. In order to rationalize this outcome, Canada has tended to portray SAWP workers not as individuals, but rather as abstract labour constituting economic expediency and a form of developmental aid policy.⁶

There is a tendency to dismiss racial prejudices in Canada, and to point to the new immigration policy adopted in the 1960s as proof that Canada has shed its exclusionary and racist attitudes towards immigration. That of course is a fundamental problem with passing a new law to correct an old problem. Governments subsequently have good political reasons to claim that the present has been rectified, the “land is strong” and that the past must be forgotten.⁷ However, one of the most persistent obstacles facing non-white immigrants is not so much overt discrimination, which was eliminated with the adoption of the points system. A type of “aversive racism” - the kind of racism that simply ignores groups of migrants and refuses to recognize them as “authentic Canadians” - continues to persist in Canada.⁸ Racial prejudices and serious societal tensions tend to be glossed over and explained away in banal statements and

⁵ N Sharma, “Immigrant and Migrant Workers in Canada: Labour Movements, Racism and the Expansion of Globalization.” (2002) 21:4 *Canadian Woman Studies* 18 at 25.

⁶ Referring to migrants, migration analysts have observed that “The rest of their selves are not seen as integral to society” since they are “eternal throwaway people.” Alison Crosby, “The Boundaries of Belonging: Reflections on Migration Policies in the 21st Century” (2006) 7 *Inter Pares Occasional Paper Series*, online: <http://www.interpares.ca/en/publications/pdf/boundaries_of_belonging.pdf>.

⁷ “The Land is Strong” is a reference to the Liberal Party’s campaign slogan in the 1972 federal election.

⁸ H Barratt, “West Indians in Canada: Adapting to the Host Society” in BD Tennyson, *Canada-Caribbean Relations, supra* Ch 2, note 140 Barratt cites the 1986 example of a Chinese-Canadian pulled over for speeding and questioned on his Canadian citizenship. See “RCMP Questioning of Minority Groups Ruled Discrimination” (13 December 1986) *Globe and Mail* A4

descriptions.⁹ Marginalization and ignorance of the social conditions of West Indians immigrants in Canada remains widespread - and this is with regard to *permanent black* migrants, many of whom are skilled workers.¹⁰ What does this say about Canadian attitudes towards temporary migrants, who are dismissed by the immigration system as unskilled and essentially recyclable with no prospects of permanent residency or Canadian citizenship?

This dissertation's third chapter can be viewed as organized labour's attempt to extend certain industrial citizenship rights to non-citizen temporary workers. Many scholars have noted that the selection processes of temporary foreign worker programs, such as the “granting or withholding of citizenship rights through immigration policy”, serve the interests of states in regulating class, racial and gender distinctions through a neo-liberal framework.¹¹ Law’s discriminatory aspects are clearest when examining the dichotomy in immigration selection between skilled and unskilled workers. Skilled immigrants to Canada are subjected to *some* discriminatory pressures.¹² There also appear to be more formal institutional barriers to highly skilled immigrants' integration as

⁹ Such as: “[The] increasing contacts between Caribbean blacks and a predominately Canadian population lacking exposure to different races has not been devoid of misunderstandings and tensions.” L Kavic, “Canada and the Commonwealth” (January 1975) *The Roundtable* 44.

¹⁰ J Walker, *A History of Blacks in Canada* (Ottawa: Canadian Government Publishing Centre, 1980) at 160.

¹¹ Preibisch & Santamaria, *supra* note 3 at 421.

¹² Bauder, *supra* Ch 6, note 134 at 708. Discriminatory pressures supported by the widespread perception among many skilled immigrants that a powerful political lobby is blocking access to the most skilled positions in Canadian society through discriminatory professional regulatory policies. There are many reasons for these barriers, including provincial regulation of professional occupations that is not harmonized with federal immigration policy. Examples that come to mind are Law Societies, the Canadian Medical College, and various other Engineering, Architectural and Professional associations.

educational requirements become more strenuous in the Canadian labour market.¹³ But skilled workers are clearly not subjected to the types of institutional and legal discrimination through immigration selection that unskilled workers face. Moreover, such action is perfectly in accordance with international law, which sanctions some discriminatory treatment of migrant workers while leaving selection discretion in the hands of sovereign states.

Discriminatory practices through immigration selection are also premised on the value of economic privilege to maintaining national competitiveness in the face of economic globalization. The challenges posed to state sovereignty, and to immigration policy in particular, from economic globalization can be clearly seen from the changing nature of labour force development and immigration policy. A global “space of flows” has arisen challenging the primary space of the nation-state and temporary labour migration has been a key component in global flow currents.¹⁴ Although state sovereignty has been challenged, part of the response has been to alter the legal framework of labour migration.

Labour migration in this context becomes fluid, boundary crossing and often circular in its path, rather than the unidirectional immigration patterns seen before contemporary patterns of economic globalization began to emerge. The state, with an eye on its declining authority, reasserts itself by “shaping the life world of the immigrant” through a legal definition, and economic policy has informed this legal definition through

¹³ J Reitz, “Tapping Immigrants’ Skills: New Directions for Canadian Immigration Policy in the Knowledge Economy”, online: <http://migration.ucdavis.edu/rs/more.php?id=161_0_2_0>.

¹⁴ D Ley, “Seeking Homo Economicus: The Canadian State And The Strange Story Of The Business Immigration Program” (2003) 93:2 *Annals of the Assoc of Amer Geographers* 426.

the preference of human capital in Canada's immigration queue.¹⁵ The "historical contract" between immigrants and Canada - a relationship historically based on the mutual self-interest of human capital traded for Canadian citizenship - is being persistently undermined by economic globalization.¹⁶

Measured in this paradigm, immigrants with the highest human capital also have the greatest mobility. SAWP workers represent the opposite end of the scale as they essentially came into being at a time when neo-liberal economic globalization gathered pace in the latter half of the 20th century. Scholars have noted that the latter half of the 1960s represented the start of a rapid increase in the pace of economic globalization.¹⁷ This was a period when increasing urbanization made farm work ever more unappealing and decolonization made labour migration a more complex issue. In reaction to these events the state has sought to place itself in front of globalization through attracting the product of globalization's labour flows while attempting to limit the permanent status of those it views as less desirable migrants, who may nevertheless be suitable for temporary labour.

The possibility of unionizing these foreign migrant workers provided a novel case study for an analysis of unions' and employers' responses to globalizing pressures. Globalization has provided the opportunity for unions to dramatically expand their international networks and, in the process, to transform their relationship with temporary

¹⁵ *Ibid.*

¹⁶ D Ley, "Canada as a competitor in the global market for immigrants" (2006) 9:2 Horizons 67.

¹⁷ See G Shangquan, United Nations Department of Economic and Social Affairs, "Economic Globalization: Trends, Risks and Risk Prevention", online: <http://www.un.org/esa/policy/devplan/cdpbackgroundpapers/bp2000_1shangquan.pdf>.

migrant workers.¹⁸ International unions' strategies are increasingly formulated through networks that offer a less centralized approach to coping with the challenges of temporary labour migration. This mirrors the general network process underway in human relations, where more skilled workers are increasingly working internationally outside of a hierarchical structure, in teams or networks with disaggregated labour relations.¹⁹ However, union decision making relating to a program such as the SAWP remains largely centralized in the hands of a relatively few at "headquarters" and in this way it too resembles the pattern of global enterprises, which become worldwide networks that nevertheless are driven by decisions taken in London, New York or Tokyo.²⁰ The forming of global networks by unions however is critical to addressing the challenges presented by temporary labour migration. Where unions in Canada once opposed extending rights to migrant workers – in an attempt to protect domestic employment levels²¹ – they have now formed transnational relationships that have transformed their attitudes towards these workers.²²

Globalization has also allowed for the Canadian horticultural industry to expand dramatically and the use of temporary foreign workers is a key part of this expansion.

¹⁸ For a discussion on the changing role of trade unions and the International Labour Organization within economic globalization see R Blanpain, et al. *The ILO and the Social Challenges of the 21st Century : the Geneva Lectures* (Boston: Kluwer Law International, 2001).

¹⁹ R Blanpain, et al. *Comparative Labour Law and Industrialized Relations in Industrialized Market Economies* (The Hague: Kluwer Law International, 1998) at 196.

²⁰ R Blanpain, *Confronting Globalization: The Quest for a Social Agenda, Geneva Lectures* (The Hague: Kluwer Law International, 2005) at 211.

²¹ See R Laxer, et al., *Canada's Unions* (Toronto: Lorimer, 1967) at 14 and generally for an extensive discussion of labour and Canadian nationalism resulting from nationalist trade policies in Canada-U.S. economic relations in the 1970s.

²² See D Wells, *Building Transnational Coordinative Unionism* (Kingston, ON: Queens University, 1998).

The fact that Canada is a net exporter in 6 of the 7 main commodities employing SAWP workers shows that this is a key part of Canada's agricultural trade policy.²³ No farmer or representative of the agriculture industry would advocate ending the use of seasonal agricultural migrant labour. For the foreseeable future, most stakeholders in the program as a practical approach do not generally view terminating the SAWP. It may not even be desirable from the point of view of migrant workers' advocates, as the program might be replaced by less regulated unskilled migrant labour through the TFWP.

Going beyond Canada's boundaries, this dissertation also added to the literature in this field through its analysis of international law and its treatment of the SAWP as a symptom of the post-modern problems presented by globalization. Within the framework of extending certain rights to SAWP workers, I analyzed international labour and migration agreements to which Canada is a part, and applied the corresponding relevance of international protections for SAWP participants in Canada.²⁴ International law has proved inadequate in responding to the challenges of economic globalization and market-based citizenship. Integrating this dissertation's research of ILO and UN conventions in Chapter 6 within the historical-structural framework outlined in Chapter 2 illustrates that the difficulties in applying international law today are intertwined with the origins of the SAWP and of farm labour migration to Canada.

Agricultural labour migration to Canada is not a new phenomenon. In particular it is not a result of neo-liberal economic globalisation. Nor are the farm labour shortages

²³ K Preibisch, "Local Produce, Foreign Labour" (2007) 72:3 Rural Soc 418 at 435. However, Preibisch notes that farmers' average net incomes have not increased during the last half-century – in fact, they have decreased - and this is an important part of the pressures that results in the use of the SAWP.

²⁴ Taran, *supra* note 77.

that justified the creation of the SAWP the resulting of globalizing pressures. What is new is the temporary nature of the migration, which runs counter to historical patterns in Canada. SAWP workers are allowed to temporarily migrate to Canada only inasmuch as their labour has value. Migration outside of this period is not permitted.

Canada justified its policy to import temporary Caribbean farm workers partially on the basis that it acted as a form of temporary development aid to the Commonwealth Caribbean.²⁵ The policy has not turned out to be temporary and its efficacy as a form of development aid is also highly contentious. In addition to the controversy over the effectiveness of migrant worker remittances in alleviating poverty, the most effective development programs are arguably those that generate local centres for consumption and production, i.e. those that encourage worker literacy and training so as to reduce dependency on external economic forces.²⁶ By definition, such programs cannot be introduced as yet another form of labour exploitation amounting to a new cultural or economic imperialism.²⁷

From its origins, the SAWP has failed as a development program on all of these fronts. It has consistently failed to produce any strong evidence of encouraging local development in source countries.²⁸ It is a program that utilizes law to restrict

²⁵ Findeis, *supra* Ch 1, note 96.

²⁶ AL Schneider, "Grass Roots Development in the Eastern Caribbean" in BD Tennyson, *Canadian-Caribbean Relations*, *supra* Ch 2, note 140 at 174.

²⁷ See Tully, *supra* note 90.

²⁸ In addition, underdevelopment in the Caribbean agricultural sector is at least partially due to a declining labour force, partially a result of other Canadian development and investment programs that stress market development over labour force development. See CIDA, "Caribbean Program: Thematic Focus" online: <<http://www.acdi-cida.gc.ca/acdi-cida/ACDI-CIDA.nsf/Eng/JUD-327123545-NMX>> Increasing participation in global and regional markets is one of the main focuses of CIDA current development strategy.

employment rights in order to help maintain a critical sector of the Canadian economy. Instead of encourage the development of collective bargaining knowledge among workers (in line with general ILO policies) SAWP government agents have instead been accused of coercing and threatening workers in the program who seek to unionize.

Laws governing temporary migrants can be seen as a tipping point in the battle between state sovereignty and economic globalization. These laws – national and international – lie at the intersection of a variety of disciplines outside law: history, economics, geography, political science, sociology are a few of the areas touched. The study of the legal response to temporary migration thus offered an original contribution to the literature attempting to reconcile law and temporary migration with existing theories of knowledge, particularly in relation to economic globalization.

It is evident that the SAWP itself is something of a paradox: a development program built upon internationally accepted theories that has provided questionable benefits to source communities; a temporary labour program that in many cases has seen workers returning for much of their working lives; a program that itself was designed to be temporary that now seems accepted as the norm. The paradoxical nature of the program reflects the larger paradox of economic globalisation. Canada's increasing use of lower skilled workers with limited labour and mobility rights, for example, is occurring at a time when highly skilled workers have achieved an unprecedented degree of labour mobility. Yet law's guarantees of formal equality seem superficial when applied to this paradigm.

Returning to considerations of law and globalization, the research for this dissertation confirms that no international migration regime has been able to reconcile the

conflicting notions of international human rights law applicable to non-citizens with the principles of territorial sovereignty. The conflict is evident in the UN and ILO Conventions on migrant workers, which sanctions discriminatory treatment against undocumented migrants. Unable to keep workers out, a seasonal worker program attempts to regulate their movement into and out of the country, thereby re-establishing sovereign controls.

As noted in the introductory Chapter, Santos largely directed his theories on globalization and labour towards undocumented workers. Part of this dissertation was directed at applying these theories to documented SAWP workers that are subject to national labour laws, regulation and, potentially, collective bargaining. In this way the SAWP represents migration and labour controls reflecting a shift from modernity to post modernity. This is occurring during the current era of globalization that might be better understood as a shift from civil to post civil societies.²⁹ In labour practices, the shift has been from the dominant paradigm of factory work to a postindustrial one and, with respect to immigration practices, an ongoing shift from permanent to increasingly temporary forms of migration. In this world, labour has become increasingly disaggregated. The Marxist “formal subsumption of labour” that Hardt wrote of furthers the general contention that “democratic and/or disciplinary institutions of civil society, the channels of social mediation, as a particular form of the organization of social labour, have declined and been displaced from the centre of the scene.”³⁰ Discipline of the citizen has been replaced by control, with mobility and speed being central to this form of

²⁹ M Hardt, “The Withering of Civil Society” (1995) 45 Soc Text 27

³⁰ *Ibid* at 27-30.

control. However, previous analysis understated the continued presence of organized labour and its relationship to new forms of migration and labour controls.

This dissertation forged new ground in analyzing the response of organized labour as part of global civil society, centering on new aspects of legality.³¹ The fact that many (although by no means all) civil society groups have concentrated on procedural legitimacy issues (such as accountability, openness, and transparency) may adversely affect any ability to fundamentally change the system itself. It remains to be seen whether the development of trans-national union networks is a reflection of this a new international legality. But the process is hampered by Canada's reluctance to adhere to basic international legal precepts relating to migrant workers.

Indications of this Canadian reluctance to embrace international labour norms lie in seemingly innocuous areas, such as the use of certain legal terms in government publications. The term "migrant worker" which has international legal meaning does not appear anywhere on the Canadian government's official publications or website in relation to the SAWP. In order to address this dissertation's consideration of international law, I situated the international legal term "migrant worker" within the context of the SAWP in order to examine and analyze the international protections available to SAWP workers attempting to unionize. This dissertation went beyond analysis of efforts to address the procedural difficulties inherent in the SAWP program and addressed the historical causes of the temporary farm worker migration to Canada.

³¹ Part of this research touches on aspects of "cosmopolitan legality." Buchanan has argued that "cosmopolitan legality" has fuelled recent episodes of civil society's engagement with international organizations such as the WTO and in reality reflects a common understanding between many of the supposed adversaries on the nature of the world that we live in (if not exactly on how that world is to be governed). See R Buchanan, "Perpetual Peace or Perpetual Process: Global Civil Society and Cosmopolitan Legality at the World Trade Organization" (2003) 16 *Leiden J of Int'l L* 673

The resulting analysis formed the basis for the dissertation's original consideration of international agreements and international law within the framework of SAWP worker unionization.

The fact that both employers and governments portray the SAWP as a benevolent structure offering opportunity and development hinders attempts to reform the program. But it should not obfuscate the fact that SAWP workers are not totally "unfree" at least in the sense of having no agency in the choices available to them. This view would equate a choice with the legal ability to act itself, and interpret some degree of freedom within a very constrained environment. The fact that the past decade has seen the commencement of the legal battle on unionizing SAWP workers does provide evidence that those workers now have some extremely limited freedom to challenge a limiting structure. In this field, it does give them a very limited choice to participate in the program and exercise a very limited degree of labour rights. But it is inherently not the same type of employment choices that Canadian citizens or residents have when choosing to participate in agricultural work. The choice involves accepting a limitation on labour rights and employment choices that Canadian citizens and permanent residents would find unacceptable.

Whether or not this actually constitutes a "choice" in the practical sense or a course of action an SAWP worker must take simply to survive is arguable. Clearly if one equates labour freedom with true employment choices then the SAWP remains a program dependent on labour with restricted workplace and residency rights. But this should not obscure the important fact that a legal "choice" within the context of collective bargaining is also a very difficult course of action for SAWP workers, and a challenge for

the other parties involved in the program. History has shown that the SAWP was constructed with a workforce that was racially in line with stereotypes of the time, and generally docile because of the economic incentives offered through participation in the program. Migrant farm workers must now confront both the benefits and potential pitfalls of unionization within the SAWP framework. When faced with an unacceptable employment situation, or simply to improve their employment situation, they must decide on whether or not to exercise their rights and risk retribution or remain silent.

The recent developments in British Columbia seem to point towards the full force of the Mexican government coming down upon those SAWP workers who begin to speak out and challenge the existing structure of the program. Whether or not the SAWP functions adequately as a development program, it is clear that the Mexican government sees the program as an investment that must be preserved, and that the continued existence of the program trumps the rights of its own citizens to exercise rights available to them as workers in Canada. While certain levels of government (notably municipal government) have been receptive to some problems arising from the SAWP, provincial governments remain subject largely to political considerations. The current Liberal government of British Columbia, for example, admitted the province into the SAWP after the previous NDP government had kept the province excluded from the program. The Conservative party that has dominated Alberta politics has made unionization in that province for SAWP workers a non-starter. The Quebec government touts the SAWP while the province's judicial structure has at least considered the historical context of migrant and farm labour in recent labour board judgments. The largest province utilizing SAWP workers, Ontario, has swung politically in the past two decades from a pro-labour

NDP government, to a Conservative government that strictly limited farm workers' collective organizing rights, to a Liberal government that has muddled the issue, granting some rights, challenging others, while continuing to expand the province's involvement in the program.

The federal government has brought in some limited reforms but these have been mostly facilitated towards deregulating the use of temporary foreign farm workers. The aim seems to be to create a less regulated, parallel structure outside the SAWP for the use of "low-skilled" temporary foreign workers from countries outside the program. The federal government seems to view its role increasingly as one of a detached administrator. Ottawa is also subjected to the same political considerations as its provincial counterparts. The fact that the current Conservative government's parliamentary majority is based on large electoral support from Alberta and Ontario – two provinces with the strictest limitations on farm labour unionization – does not bode well for prospects of immediate reform of the SAWP.

Employers are faced with the choice of working with the UFCW and facing the potential economic consequences of collective bargaining or engaging in selective hiring practices and worker expulsions that may be alleged to be anti-union. There are other options available to farmers and to the Canadian agricultural industry. Perhaps it is time to revisit the entire need for the SAWP and the rationale for utilizing temporary foreign workers in the Canadian agricultural industry. At the very least, a more robust attempt to recruit and place domestic workers within the agricultural industry would reduce the need to expand SAWP recruitment. This could be combined with a pilot project to allow entry of agricultural workers on a permanent basis.

The UFCW is operating in a difficult economic environment that has seen an exponential growth in the use of temporary foreign workers in Canada. The union is also faced with the new problem of potentially reconciling the sometimes conflicting demands of foreign and domestic farm workers. All levels of government in Canada - in particular provincial governments - must confront the issue of unionization and the resulting pressure for governments to become more engaged in regulating SAWP working and living conditions.

7.2 Focus for possible future research

All of the factors mentioned above coalesce into a complex web containing the SAWP. As the research for this dissertation progressed, I realized that the SAWP contains many problems and reflects many issues that traditional collective bargaining may be ill equipped to address. The most pressing issues involved the effective enforcement of current workplace legislation. The comparisons between the United States and Canada in Chapters 4 and 5 reveal that there are insufficient resources dedicated to enforcing existing legal protections relating to migrant workers and collective bargaining. In Canada, the lack of adequate regulation, monitoring, and enforcement of workplace safety issues and labour code standards has been cited as one of the SAWP's major flaws.¹ In the United States, the Department of Labor cannot adequately investigate or prosecute allegations of abuse in markets as large and diverse as the domestic workers and agricultural fields.² The failure to devote sufficient resources

¹ D Fairey, et al., "Cultivating Farmworker Rights Ending The Exploitation Of Immigrant And Migrant Farmworkers In BC" online:
<http://www.policyalternatives.ca/documents/BC_Office_Pubs/bc_2008/bc_farmworkers_full.pdf>.

² Bales, supra Ch 4, note 39 at 64-65. More recently, President Barack Obama has failed to usher in comprehensive reforms to the H-2A program, or offer increased resources to combat the abuses in the

to deal with the problem continues, despite much evidence pointing to large scale labour rights violations of seasonal migrant workers in the United States. This is in line with evidence noted in Chapter 1 possibly suggesting similar problems in Canada's SAWP as well.

The information obtained from interviewing AWA migrant support workers, along with research of case law and the SAWP Employment Contract revealed the benefits of unionization to solve some of these problems as well as its limitations. More research into the developing relationship between the AWA and SAWP workers could prove useful in determining the efficacy of union outreach efforts. There are challenges to union certifications remaining before the BC Labour Relations Board. A further examination of the lasting effects of SAWP workers' unionization is necessary since there will be need for continuing research into the decertification process underway at several farms with unionized SAWP workers. The need for more legal research lies with the recentness of the decisions in this area. The landmark *Fraser* decision was issued in April 2011. The issue of agricultural labour unionization is one that may be revisited again by Canada's Supreme Court. As of May 2012, the applications to decertify unions at Floralia and Sidhu and Sons are still pending before the BC Labour Relations Board. The complaints relating to Mexican government interference with the collective bargaining process in BC were before the BC Labour Relations Board in February 2012. Most of the labour board decisions referenced in the third chapter occurred in the last two years, with some occurring within the last six months. Many of these decisions are open

program. An analysis of forced labour conditions existing for migrant workers in the Florida citrus industry indicated the prevalence of coercive measures taken against primarily immigrant agricultural workers from Mexico and Guatemala, who often worked for wages far below minimum wage.

to challenges and appeals.

There may be a need to analyze any new collective agreements that may be secured to take into account these challenges. The effect of new collective agreements on the future direction of the SAWP and the capacity for them to influence possible reform of the program needs to be studied. The existing collective agreements include wage benefits, selection of returning workers based on seniority, and protections against arbitrary repatriation as punishment for workplace complaints or union organizing. But they have not prompted governments to alter the basic structure of the SAWP. Employer selection of returning workers and repatriation of workers remains permitted in many circumstances. Moreover, the agreements do not change the fact that SAWP workers cannot apply for permanent residency or Canadian citizenship. The history at the BC Labour Relations Board illustrates that procedural fairness for SAWP workers can be a difficult legal struggle fraught with unique problems, such as blacklisting and repatriations that do not apply to Canadian citizens or resident workers.

More research relating to legislative reforms and review of the SAWP, and their relationship to fundamental issues of labour rights, is needed. As indicated in the fourth chapter, the United States has made some reforms to its H-2A program. Most Caribbean governments seem to indicate that a legislative review of the SAWP by Canada is an essential step to deal with their issues relating to access to employment insurance funds and worker compensation for its citizens in Canada through the program. A vehicle currently exists through the SAWP Annual Review meeting, where governments have the opportunity to amend the program as needed. The SAWP remains a very substantial source of income to workers participating from Trinidad and Tobago and its government

has produced separate, detailed guides for employers and workers that are updated annually. This could be extended as a model for Mexico and all other Caribbean governments participating in the SAWP.

In light of high levels of unemployment among women in the Caribbean, there needs to be more research to the specific needs of women SAWP workers, and the impact of future collective bargaining efforts on them. Due to the recruitment practices inherent in the program, most of the small numbers of women in the SAWP are made up of single mothers and breadwinners supporting their families back home. Similar to males in the program, work in Canada does provide these women with the opportunity to earn a proportionately higher wage compared to more educated women in many of their home countries, but it raises questions as to who can care for any dependents left behind in their home countries. Work in Canada may give these women the ability to reach a certain degree of economic independence. There is also some evidence to indicate that greater female participation in labour migration can play an important role in directing and utilizing remittances gained from migrant work to reduce poverty and improve issues of food security and health.³ More research is needed to see if increased female participation in the SAWP could heighten this effect, giving women the chance to not only utilize remittances sent back from their partners, but also to use funds directly earned from the work in the program. There is somewhat less evidence that any shift in the traditional patterns of gender roles could occur through direct female participation in migrant work, or that it would lead to more sustained gender equality in Mexico or the

³ UN Women, “Integrating Migration and Remittances into LDC National and Regional Development Planning, Including Through a Gender Perspective”, online: <<http://www.unwomen.org/2011/05/integrating-migration-and-remittances-into-ldc-national-and-regional-development-planning-including-through-a-gender-perspective/>>.

Caribbean.⁴ There is a need to fill this gap in empirical evidence of the effects of women participating directly in the SAWP and on the changes necessary to the program to guide governments in developing structural changes to enable more female participation in the program and, by extension, more female worker participation in collective bargaining efforts.⁵

There is a need for more research into the amount of information available to many newer SAWP workers in their home countries regarding the Canadian communities they will be living and working in. There is currently very little in the way of employer disclosure requirements to SAWP workers on day-to-day realities of farm work in Canada. Experienced SAWP participants could be utilized as resources or contacts for those newer SAWP workers who have very little conception of working and living in Canada. Caribbean countries sending workers in the SAWP could support this by having government liaison officers work with church-based organizations, community groups and employers in Canada to promote the social integration of SAWP workers and cross-cultural understanding in the workplace. Most Caribbean countries have a system whereby returning SAWP workers and the respective Labour Ministry are able to discuss individual experiences and problems in the SAWP.⁶ Problems at particular Canadian farms are ostensibly discussed with the worker at that time. Chief among returning St. Lucia workers' complaints with the SAWP was a widespread fear of making complaints

⁴ J Carling, "Migrant Remittances and Development Cooperation", online: <http://www.prio.no/files/file46220_carling_2005_migrant_remittances_and_development_cooperation.pdf>.

⁵ The roots of collective bargaining in Canada lie in a male-dominated process, constructed under norms that predate both temporary labour migration and widespread female participation in the union movement.

⁶ North-South Institute, *supra* note 205. Gregor Brathwaite (St. Lucia), Anthony Sanchez (Trinidad and Tobago), Carston States (OECS) offered perspectives from Caribbean labour ministries on the program.

about working conditions, and the need for an independent dispute resolution body through which workers could feel safe in making complaints.⁷ The Organization of Eastern Caribbean States (OECS) has a liaison office in Toronto and its representative has met with Ontario SAWP employers on accommodations and employment issues. The OECS Ministry of Labour, like Trinidad and Tobago, provides its own fact sheets for workers. Interestingly, the OECS notes that this is due to the perceived inadequacy of the Guide to Labour and Employment Laws for Migrant Workers in Canada produced through the auspices of the NAALC.

Government agents, who act as labour liaison officials between SAWP workers and their governments, play a positive role in some OECS countries providing some information to workers and administering the program. However they are also subject to the same conflicting interests that affect Agents from other SAWP governments in that they have a dual role to secure the maximum number of placements in the SAWP for their country's workers while attempting to act as the representative for SAWP workers.⁸ A possible avenue for further research is how the SAWP encourages competition between Consulates from the participating Caribbean countries to obtain the maximum number of places for their respective workers in the program. This competition may lead to difficulties in enforcing SAWP Employment Contracts and in joining collective bargaining efforts as fears can be created about replacing workers from other SAWP countries.

Those who work most closely with SAWP workers indicated that more attention is

⁷ *Ibid.* Brathwaite described this data from the results of a survey of SAWP workers returning home conducted by the St. Lucia Department of Labour.

⁸ Veema, *supra* Ch 2, note 180.

needed into options to change the structure of the SAWP, perhaps expanding residency options to migrant agricultural workers. The lack of residency and the structure of the program were two key flaws cited by those who work with SAWP workers, who specifically noted problems both with enforcing existing terms of employment contracts and with the lack of permanent residency options.⁹ The option put forth by an AWA official is to apply a standard similar to that which currently exists for Filipina domestic workers (under the Live-in Caregiver Program), whereby following a two year period (or equivalent) of work in Canada, an application for residency is an option.¹⁰ However, many Filipina workers' advocates have strongly criticized the Live-in Caregiver program itself and its delayed residency options.¹¹ The trend towards utilizing more agricultural workers outside the SAWP framework within the TFWP leads to a different path, away from any potential route to Canadian citizenship for temporary foreign agricultural workers.

There are several implications of unionization within the growth of Canada's SAWP and the Temporary Foreign Worker Program (TFWP) in general, which now

⁹ Interview with Lucy Luna, *supra* note 56.

¹⁰ *Ibid.* Ms. Luna: Talking about the SAWP...what I think the Federal Govt is doing is bad. [It's] bad enough as it is, but it still has a little bit of rights for the workers...very tiny little bit...but I think they think that's too much, so they are moving away from the seasonal program to the other just to strip more rights from the workers...and make it more difficult for us to unionize people. That's why I think they are doing this.

¹¹ Lawyers advocating on behalf of Filipina domestic workers have called for changes to the program to include more effective addressing of abuses to workers in the program and to allow for immediate permanent residency in Canada for caregivers. The federal government views such changes as potentially endangering the existence of the program. Immigration Minister Jason Kenney expressed the view that these changes would result in caregivers leaving their sponsoring employers resulting in the program being "shut down." See CBC News, "Live-in Caregivers Subject to Abuse: Critics" (23 September 2009), online: <<http://www.cbc.ca/news/canada/toronto/story/2009/09/23/caregiver-program.html>>. Former caregivers appearing with advocates from the Philippine Women Centre of BC have urged Ottawa to scrap the program, calling it "racist" and "exploitative." See CanWest Global Service (Kelowna.com), "Ottawa Urged to Scrap Live-in Caregiver Program" (27 April 2010), online: <<http://www.kelowna.com/forums/topic/ottawa-urged-to-scrap-live-in-caregiver-program>>.

includes the SAWP under its umbrella. Canada's expanding use of temporary foreign workers in the TFWP had led to three other sectors featuring prominently in recent migrant worker policy discussions, including: hospitality (e.g. hotels, seasonal resorts); transportation (i.e. trucking); and light manufacturing (food processing, plastics and other consumer products). This has implications not only on the rights of migrant workers in these sectors but if expanded significantly will have broader effects on other economic sectors as well. Reforming the SAWP, within the context of effective unionization, can be an alternative consistent with Canada's history of permanent agricultural immigration and its international human rights obligations. Research for this alternative would be necessary to see if it would be a realistic option, and one preferable to SAWP workers' rights advocates to the expanding use of the TFWP, which is generally seen as a less regulatory scheme.

Reforming the SAWP could include building an independent, objective and fair dispute resolution mechanism to ensure the amicable resolution of worker employer disputes. A dispute resolution process could include a number of informal processes similar to mediation or an Alternative Dispute Resolution (ADR) system leading to a formal and binding process if the dispute cannot be resolved by other means. Any dispute resolution system should be reviewed to ensure procedural fairness and basic requirements of natural justice and enforcement of the program's various regulations and any ADR or other process must of course be cost-effective and lead to rapid results, since SAWP workers are in Canada for a short period and agricultural production should not be endangered. The first stages of dispute resolution should involve negotiation and mediation, perhaps under federal or provincial auspices, before moving on to a formal

hearing process if necessary. This arrangement could include worker and employer representatives along with a few prominent persons in the community who are familiar with the program.

Consistent with an independent dispute resolution mechanism, research would be needed to explore alternatives into more inclusive management of the SAWP. The UFCW advocated one proposal to establish a tripartite management structure for the SAWP, involving governments, employers and workers' representatives.¹² This option would likely duplicate the ILO's systems of operation in some respects. The UFCW has already expressed its view that the union should be a "full partner in the operation of the SAWP."¹³ A model for this approach could be seen in the Michoacán Pact negotiated between the UFCW and Mexico. Although offering the benefit of worker input into the administration of the SAWP, this also risks inviting some of the same criticisms previously leveled at the ILO's similarly tripartite structure.¹⁴

This dissertation has focused on SAWP workers as both farm workers and temporary migrant workers but it is their non-resident, non-citizen status that has formed the study's focus. Thus it may be expected that the study placed excessive weight on the theoretical capacity of international law to aid collective bargaining efforts in Canada. However, the findings indicate a need for Canada's highest court to take into account the internationalization of collective bargaining efforts involving SAWP workers. Such considerations include considering Canada's international legal obligations beyond

¹² Veema, *supra* Ch 2, note 180.

¹³ *Supra* Ch 3, note 214

¹⁴ Within the context of the SAWP, criticisms against unions for participating in the ILO's tripartite structure would be mirrored by criticisms against the UFCW for participating in an unreformed SAWP structure, thereby facilitating the continuation of the program.

considerations of *Charter* rights within a domestic context only.

How would such a judicial consideration affect SAWP collective bargaining negotiations? Would Canada's ratification of ILO Convention 97 or the Migrant Workers Convention provide the tipping point for favourable judicial intervention? This dissertation has provided a preliminary analysis. The seemingly prolonged and possibly endless government consideration of ILO Convention 97 seems like a case of bureaucratic obfuscation. This is aided by Canada's jurisdictional division of labour, jurisprudential uncertainty relating to collective bargaining rights, and a lack of political will in Ottawa likely spurred by an absence of successful pressures from labour and civil society politics on the issue. For the immediate future, federal reform of the SAWP or federal intervention on the side of international law relating to ratifying collective bargaining or migrant workers' rights seems unlikely. Meanwhile the issues are being fought locally through ongoing challenges to the few successful certifications involving SAWP workers.

How do these findings relate to the effects of unionization in relation to the SAWP? Again, this dissertation has only come to initial findings. It is true that both employers and employees have won victories in this collective bargaining context. What seems beyond doubt is that the power dynamic, always a consideration in collective bargaining efforts, is skewed in the employers' favour by the non-citizen, temporary status of the collective bargaining subjects. This conclusion would be far more tentative if based on a single episode, such as the *Greenway* decision. This dissertation's consideration of other national and international theoretical and practical perspectives was therefore justified.

Lastly, although considerations of the historical context and legal theory relating to SAWP workers form an important component of this dissertation's analysis, the inspiration for this research derived fundamentally from a commitment to legal praxis. Interpreting this dissertation's theory and research on a practical level, I would return to the incidents and history mentioned in the introduction. Would unionization have prevented the injuries and deaths of temporary foreign workers in Canada? Will unions involving SAWP workers destroy the program or drive Canadian farmers out of business? This dissertation might be interpreted as a plea to devote more academic and jurisprudential consideration to local issues involving international subjects. There is of course an understandable tendency in law to segregate law's subjects from law, often removing them from consideration when applying issues of basic humanity. The danger with that course of action here is that the international subjects appear invisible in the eyes of law, politics and wider Canadian society. Whether SAWP workers remain non-unionized, citizens or forever temporary, they are entitled to legal consideration in Canada based on who they are and not as abstract constructs conveniently constructed for economic purposes.

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