The Status of Migrant Farm Workers in Canada

UFCW Canada and the Agriculture Workers Alliance (AWA)

www.ufcw.ca/awa
Executive Summary

Over the past hundred years, laws have been developed to protect and promote the safety and rights of workers in Canada. Yet, for the tens of thousands of men and women working in the agriculture sector, these rights are essentially as ignored as they were in the 19th century.

So while most agriculture has evolved into a large scale, industrial enterprise, those who do the backbreaking work to support Canada’s agriculture sector remain effectively powerless in the face of a system that often treats agriculture workers more like commodities than human beings.

Why do agriculture workers continue to be exploited and their rights abused, including the tens of thousands of migrant workers who have become essential to the agriculture sector? Exploitation and abuse happen because of systematically degraded work environments that restrict labour mobility, and which deny workplace protections, entitlements, and the ability to effectively organize and bargain collectively like other workers in Canada. Altogether, these constraints have created a vastly unequal relationship between the agriculture industry and migrant agriculture workers – increasing the chance of unreported abuse and foregone entitlements on Canada’s farms.

Workplace and immigration laws work hand-in-hand to produce and maintain the inequity, making migrant farm workers among the most vulnerable workers in Canada.

Over the past three decades, UFCW Canada (the United Food and Commercial Workers union) has assisted thousands of migrant agriculture workers navigate and enforce their current legal rights and entitlements while standing with them to improve their circumstances.

We have been their allies and advocate in the workplace, in the courts, and in the public and legislative arenas. Over the past decade, we have also reached out to the countries where migrant agriculture workers come from and established a number of mutual assistance agreements with government and civil society organizations to prepare and inform their citizens about their rights as migrant workers in Canada.

Since 2002, through our support program under the Agriculture Workers Alliance (AWA) banner, UFCW Canada has also funded and staffed AWA migrant worker support centres across the country. During this period, more than 60,000 case files have been handled by the centres, with service supplied in the language of the workers.

The centres provide information and assistance on a wide range of issues that touch on immigration and workplace regulation, including Canada Pension Plan (CPP), Employment Insurance (EI), and Worker Compensation entitlements. The centres also provide assistance with health insurance claims, workplace health and safety training, and English-as-a-Second-Language (ESL) training.

We also assist in the event of reported workplace abuses, and connect workers with the appropriate legal services or directly advance the issue.

But the existing suite of protections, rights, and entitlements are grossly inadequate. As a result, UFCW Canada has taken a multifaceted approach to advance reform to meaningfully improve the lives of Canada’s migrant agriculture workers. This includes partnering with community groups, local labour leaders, faith-based groups, and academics to increase public
awareness of the inequities that migrant agriculture workers face in Canada.

We are a voice for legislative reform to include agriculture workers in provincial collective bargaining and health and safety statutes across the country. We have met with provincial and federal legislators and their staff, consular officials of sending countries and representatives of agricultural employers.

For this report we have drawn on the expertise of our staff across the country, academic research, and the experiences of the more than 13,000 migrant agriculture members of the AWA, which is today North America's largest agriculture workers organization.

We are using this opportunity to address long-standing issues and recent developments, while pushing reform that would result in fairer treatment of migrant agriculture workers.

UFCW Canada continues to advocate for changes to Canada's Seasonal Agricultural Worker Program (SAWP) and Temporary Foreign Worker Program (TFWP) that would diminish the extreme worker vulnerability constructed by Canada's law of migration. Migrant farm workers should have the option to apply for permanent residence under provincial nominee programs and their work permits should be opened, permitting work across a sector in a region.

Employment insurance (EI) reform also remains a priority for migrant agriculture workers, who have paid into the EI system since 1966, but are ineligible to access general unemployment insurance benefits and have restricted access to EI special benefits. In 2014, UFCW Canada commissioned and released a research report, The Great Canadian Rip-Off, critiquing the federal government’s move to curtail migrant farm workers access to EI special benefits, and demonstrating the economic harm this policy causes both to workers and the Canadian economy.

We also continue to advocate in the public and legislative spheres to alert Canadians on migrant agriculture worker issues, and to pressure provincial governments to reform provincial legislation to include all migrant workers in the full spectrum of workplace rights and protections.

And we continue to remind all provincial governments that occupational health and safety laws are unresponsive to the heightened vulnerability and employment insecurity of migrant agriculture workers. Health and safety inspections must be broader and more frequent to protect migrant farm workers.

The protection of labour rights is also paramount. In British Columbia, where agriculture workers can unionize, the Mexican government was found guilty of interfering with the worker’s constitutional right to freely associate, engaging in illegal labour practices with an eye to decertifying UFCW Canada agriculture bargaining units. We successfully challenged the Mexican government’s illegal activities at the British Columbia Labour Board and BC Supreme Court.

In Quebec, UFCW Canada represents migrant agriculture workers at a number of locations. Collective bargaining agreements have effectively addressed many of the vulnerabilities that migrant farm workers face, and bettered their terms and conditions of employment. But collective bargaining is still prohibited on Quebec’s farms that have less than three full-time ordinary employees, effectively excluding farms where the majority of workers are SAWP workers. We advocate for legislative changes to extend the
There are protections of collective bargaining to all of Quebec’s farm workers.

The blockade of effective agriculture worker unions in Ontario is also an issue and impediment to the human and labour rights of all agriculture workers in that province.

In 1993, Ontario’s NDP government enacted the Agricultural Labour Relations Act (ALRA), which gave agriculture workers a fair and meaningful collective bargaining statute. However, in 1995, the Progressive Conservative government repealed it.

In 2002, the UFCW launched a successful constitutional challenge to Ontario’s complete exclusion of agriculture workers from the labour relations regime. The government of Ontario responded with the enactment of the Agricultural Employee Protection Act (AEPA).

The AEPA has proved to be a completely ineffective collective bargaining statute, keeping agriculture workers in effectively the same circumstances. As a result, UFCW Canada challenged the constitutionality of the AEPA. Unfortunately, the Supreme Court of Canada upheld the Act in 2011, but subsequent rulings point to the need for redress.

Concurrent to the Supreme Court application, a complaint had been filed with the International Labour Organization (the ILO) alleging that the AEPA contravened the Freedom of Association and Protection of the Right to Organize Convention (No. 87) which Canada has ratified. In 2012, the ILO ruled that the AEPA contravened Canada’s international commitment to freedom of association.

Subsequently, a trilogy of cases decided by the Supreme Court of Canada in 2012, read freedom of association to encompass the right to job action and to a meaningful collective bargaining process.

The recent Supreme Court of Canada’s jurisprudence on freedom of association combined with the ILO ruling strengthen the call to put Ontario’s agriculture under the Ontario’s Labour Relations Act, or for the revival of the ALRA. The AEPA continues to infringe Ontario’s agriculture workers’ constitutional right of freedom of association. As a matter of justice and equity and human rights, the law must be revised.
Overview and the Need for Reforms:

UFCW Canada is Canada’s leading private sector union. We count 1.4 million members internationally and more than 250,000 members in Canada. Our members work throughout the food industry—from the farm to the table.

Some of these members include migrant and temporary foreign workers at a number of agriculture operations in Canada.

Since the 1990s, UFCW Canada has helped migrant agriculture workers protect their rights and enforce their entitlements, while advocating for changes to the laws which currently contribute to worker vulnerability and employment insecurity.

The number of positions Employment and Services Development Canada (ESDC) has made available for migrant agriculture workers has more than doubled since 2005. In 2005, ESDC permitted the Canadian agriculture industry to hire 13,590 migrant farm workers. In 2012, that number had risen to 39,700.

The Seasonal Agricultural Worker Program (SAWP) facilitates most migrant farm workers entry into Canada; however, the industry is increasingly using the agricultural and low skilled streams of the Temporary Foreign Worker Program (TFWP) to employ migrant agriculture workers.

Migrant farm workers entering Canada through the SAWP are subject to the terms and conditions of the program, which is negotiated between the participating governments. However, the terms and conditions of employment as well as other workplace rights and entitlements for agriculture workers are subject to provincial workplace legislation.

However, the labour and workplace rights of agriculture workers are far too often expressly excluded. The unfortunate irony is that migrant agriculture workers are more vulnerable than the general Canadian workforce, yet their legal rights and entitlements are fewer. As a result, Canada’s migrant agriculture workers work in conditions where exploitation and abuse are all too common.

Fair treatment of Canada’s agriculture workers requires a number of legal reforms to both federal and provincial legislation:

1. Provide a transparent, impartial process of appeal available to all workers before any decision to repatriate is made, including appointment of a representative from UFCW Canada to fully participate in this appeal process on behalf of the workers.

2. Immediately make public the statistics used by ESDC to determine the yearly wage rates to be paid to migrant farm workers.

3. Enforce the provisions of SAWP and the TFWP to ensure that workers in these programs are paid at least as much as the provincial seasonal average wage rate.

4. Create national standards for the provinces to accredit, monitor and discipline if necessary both domestic and offshore recruiters of foreign workers. Provinces that fail to meet these standards would be denied access to workers under the SAWP and TFWP.
5. Inspect all workers’ housing prior to and following their occupancy. Frequent and random inspections should also be mandated and occur regularly throughout the season. Employers who are found to be in non-compliance with standards for adequate housing should be terminated from the SAWP. Immediately ban the practice of housing workers above or adjacent to greenhouses in recognition of the obvious dangers associated with living in buildings housing chemicals, fertilizers, boilers, industrial fans and/or heaters. These conditions should also apply to housing rented to TFWs by employers.

6. Make it mandatory that all written materials, instructions and signage—particularly regarding workplace health and safety issues and chemical/pesticides use and application—be provided in English, French, Spanish, Thai, Punjabi and other native languages as necessary. In addition, an orientation on employment standards, and health and safety legislation should be conducted for migrant and temporary workers in their native language before they start their employment. A complete, language-friendly information package on the above should also be provided to each worker.

7. Immediately terminate from the SAWP and TFWP any employer found to be holding the personal documents, particularly passports and health cards, of migrant workers. Amend the program to ensure that this is a direct contravention of the program whether the withholding of the documents is done by the employer or through consular or liaison officers.

8. If an employer is removed from SAWP for violating the agreement, including unfair labour practices such as blacklisting a worker, the employer should be banned from participating in any other federal or provincial foreign temporary worker program.

9. Ensure that workers are given a free medical exam before they return to their home country, to confirm they are healthy and free from workplace illness or injury.

10. Provide financial support to the Agriculture Workers Alliance and the UFCW Canada for effective, on-the-ground representation for seasonal agricultural workers.

11. Ensure that employers remit a credible Labour Market Opinion based on much more substantial evidence than currently required, allowing the hiring of workers under SAWP and TFWP.

12. Canada must not wait any longer to sign the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which has been adopted by the United Nations General Assembly.

13. The closed work permit should be replaced with a sectoral work permit that allows migrant labourers to change employers within the agricultural sector in a given region.

If this is not the case, ensure that worker compensation claims are duly filed.
14. Migrant agriculture workers should be given a pathway to permanent residence in every province under the provincial nominee programs.

15. SAWP workers should gain full access to the employment insurance program that they have paid into since 1966, and the barriers for access to special benefits, created in 2012, should be removed.

16. Greater resources should be allocated to provincial health and safety departments to increase the breadth and frequency of inspections of farm equipment, transportation, and housing.

17. We call upon the federal government to reorganize SAWP so that recalled SAWP workers receive their visa directly from Citizenship and Immigration Canada to prevent foreign government interference with domestic rights.

18. Bill 8 should be repealed in Quebec; all agriculture workers should be fully included in Quebec’s Labour Code without exception.

19. Repeal Ontario’s Agricultural Employees Protection Act. The Labour Relations Act should be amended to include agriculture workers, or the Agricultural Labour Relations Act should be revived.
Agriculture Workers and the Factory Farm

Workplace law excludes agriculture workers from some protections and entitlements available to most other Canadian workers. These exclusions responded to the economic realities of agricultural production following World War II, but have been slow to adapt to a rapidly changing agricultural workplace.

The protection of the family farm drove the exclusion of agriculture workers from collective bargaining statutes and health and safety legislation. And the seasonality of production excluded farm workers from overtime entitlements under employment standards statutes, and partly justified the exclusion of migrant farm workers from full employment insurance benefits.

But the family farm is largely a relic of the 19th and early 20th centuries. Agricultural production has been scaled and intensified. At the same time, the industry has used technology to augment the seasonality of production, increasing the growing season and allowing year-round production in greenhouses and other facilities.

To perpetuate these workplace myths is to work an injustice for agriculture workers who suffer from a legally degraded workplace environment. And to be sure, large scale, factory-style, agricultural production represents a dominant share of the agricultural sector, and the trend continues to expand in that direction.

In Ontario, for example, the number of small farms was reduced by half between 2001 and 2011, while very large industrial-scale agriculture operations almost doubled over the same period.

This trend toward fewer small-scale farming operations to more large-scale operations is occurring across the country.

The data also suggests that the seasonality of production has been augmented—either the length of the growing season has been extended or production occurs year round.

Figure 1. This graph charts the number of family farms in four revenue classes from 2001 to 2011. The revenue classes from smallest to largest are between $10,000 and $99,999, $100,000 and $249,999, $250,000 and 499,999, and over $500,000.1


2Ibid. See table for farm scale trends in all provinces.
Employment Services and Development Canada (ESDC) tracks the number of agriculture workers that hold a valid work permit on December 31st of each year.

This snapshot excludes SAWP workers because their residency visa expires on December 15. The data captures only migrant farm workers entering Canada through the low-skilled stream of the TFWP. These migrant workers are typically employed in non-seasonal, year-round, agricultural production.

The data shows a substantial increase in the number of valid work permits on December 31st from 2004 to 2013. In 2004 there were only 437 valid work permits for agriculture workers, but that number increased to 8338 in 2013—a twenty-fold increase.

Large farms typically resemble the industrial workplace. They have adapted modern technology, deploy a large workforce, and have a greater division of labour. For that reason, there is no principled reason to maintain the exclusion of agricultural workers from an effective labour relations regime, health and safety legislation, or overtime pay under provincial employment standards legislation.

Figure 2. This graphs the number of agricultural workers with valid work permits on December 31st, which excludes all SAWP workers because their residency permit expires December 15th.3

Agricultural Migration

Migration onto Canada’s farms has become an increasingly complex affair. The Seasonal Agricultural Worker Program (SAWP) provides a migration pathway for foreign workers to Canada’s seasonal farms, and the low skill stream of the Temporary Foreign Worker Program (TFWP) provides continuous migrant labourers for year-round agricultural production.

The SAWP began in 1966, when Canada entered a series of bilateral agreements with several Caribbean countries. Currently, 11 Caribbean countries are party to the program. In 1973, the federal government expanded the program to include Mexico.

The SAWP fills a structural, but cyclical, need for agricultural labour. Because the SAWP is intended to provide labour for seasonal agricultural production only, it is restricted to specific seasonal commodity sectors. Under the SAWP, migrant workers are permitted to work in Canada for a maximum of 8 months in a year, but can be selected to return in subsequent years without limit. The 8-month restriction does not square with non-seasonal intensive agricultural production. Year-round production requires longer periods of work in Canada.

In 2002, the low-skilled stream of the Temporary Foreign Worker Program (TFWP) was introduced to supply farms that operate year-round with long-term migrant labourers. Under the low-skill TFWP, migrant farm workers can reside and work in Canada for a maximum of 48 months.

The SAWP and the TFWP are administered differently. Under the SAWP participating foreign governments are required to recruit and select the workers they intend to send to Canada, and they must appoint representatives to assist workers in Canada. Citizenship and Immigration Canada (CIC) and Employment Services and Development Canada (ESDC) jointly administer the TFWP. Foreign governments have no role in the program.

Under both the SAWP and the TFWP, a neutral or positive Labour Market Impact Assessment (LMIA) must be issued for every position that an employer intends to fill with foreign workers. An LMIA is issued when ESDC determines that there is a bona fide labour or skills shortage. The LMIA attempts to protect the integrity of the domestic labour market—employing migrant workers only when no Canadians are willing or able to fill those positions.

ESDC publishes data on the number of positive or neutral LMIA’s issued from 2005-2012 for agricultural positions. Since 2005 the number of LMIA’s issued has more than doubled. In 2012 39,700 LMIA’s were issued.

The national commodity list includes apiary products, fruits, vegetables (including canning/processing of these products if grown on the farm), mushrooms, flowers, nursery-grown trees, pedigree canola seed, sod, tobacco, bovine, dairy, duck, horse, mink, poultry, sheep, and swine.
The number of neutral or positive LMIAs issued for agricultural positions is the ceiling for foreign hires. It is the number of positions that ESDC Canada believes satisfies the labour or skills shortage.

ESDC also publishes data on the number of valid work permit holders in agriculture from 2004 to 2013. In 2013 the number of work permit holders in the agricultural sector was 41,700. This number better reflects the number of migrant farm workers in Canada.

Figure 3. In 2004 the number of agricultural workers that held work permits was 20,052. That number was 41,700 in 2013.  

5 Supra note 6 at 29.
Canadian corporate agriculture increasingly relies on migrant labour for production. The reason for the increased reliance is complex. Operators complain that the domestic labour market is unable to supply their farms with sufficient labour, but more accurately, the labour market is unable to supply farms with a sufficient number of cheap labourers.

Canada’s industrial agriculture sector operates in a business environment that promotes the use of cheap labour. Since Canadians are unwilling to do agricultural work for the wages offered, Canadian operators have looked abroad to source their labour needs.

Labour is cheap when the worker has few or no alternatives and the employer has many. These two conditions also create the context for abuse and exploitation because the power imbalance between the worker and the employer is vastly unequal. The worker needs the job much more than the employer needs the worker.

The law, not the market, simultaneously restricts the worker’s alternatives and expands the employer’s. The SAWP and the TFWP open up access to foreign labour markets, but restrict the labour mobility of the workers who arrive to Canada’s workplaces through a closed work permit that binds a worker exclusively to one employer. Should the worker arrive in Canada under the SAWP, there is no pathway to permanent residence. If, however, the worker arrives under the low-skilled stream of the TFWP, then there is an option to apply for permanent residents in some provinces. But notably, Ontario and Quebec have no such option.

And the ability of employers to repatriate migrant farm workers under the SAWP during the life of a valid work permit, or refuse to call the worker back the next season, builds even greater insecurity into the employment relationship.7

The result is a legally constructed captive workforce that provides cheap labour and silences worker grievances.

The atmosphere of fear increases the chance that human rights violations will go unreported and entitlements will be foregone because workers worry about job loss.

Our staff at the migrant worker support centres often report incidences of untreated illness and injury because of the fear associated with accessing medical benefits that could signal to their employer possible productivity losses, and trigger repatriation.

Migrant workers are especially vulnerable. Yet, the legal regime that regulates the workplace does not recognize the heightened risk of abuse, and the special difficulties detecting it.

To address these structural vulnerabilities, UFCW Canada makes two recommendations:

**Recommendations:**

- The closed work permit should be replaced with a sectoral work permit that allows migrant labourers to change employers within the agriculture sector in a given region.
- Migrant agriculture workers should be given a pathway to permanent residence in every province under the provincial nominee programs.

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4 Fay Faraday, Made in Canada: How the Law Constructs Migrant Workers’ Insecurity (Toronto: Metclaf Foundation 2012) at page 31. Professor Faraday elaborates on work permit restrictions, which have two limits. The first limit is an occupational limit and the second restricts employment to a single employer. In other words, a work permit for a migrant labourer only authorizes specific work for a specific employer.

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7 Ibid at 74. Professor Faraday notes that under SAWP migrant farm workers depend on the good will of their employer to name them in subsequent recruiting cycles. The SAWP contract, which is standardized and established between participating governments, allows employers to terminate SAWP workers without notice, and workers have no right of appeal.
Employment Insurance

For migrant farm workers participating in the SAWP, Canada’s Employment Insurance (EI) regime is a modern equivalent to the 19th century head tax. But rather than an upfront payment, the tax is levied as a mandatory payroll deduction for the duration of employment. And at the end of the day, these workers cannot become permanent residents.

EI is a federal program administered by the Government of Canada through Service Canada. It is an insurance regime and a safety net that provides income support when employment income is interrupted. The purpose of EI is to provide members of the active labour force with a measure of economic security.

EI has both regular and special benefits. Regular benefits are available to anyone who qualifies following the termination of employment. Special benefits—parental, maternity, and compassionate care benefits—arise in special circumstances that impact the employee’s ability to work.

Whether a migrant farm worker has access to EI benefits depends on the program that facilitated their migration. Migrant farm workers under the low-skilled TFWP have access to the full spectrum of EI benefits. The SAWP workers, on the other hand, are effectively denied access to the general unemployment insurance benefit and there are barriers to access special benefits.

The interaction of SAWP’s administration and EI’s eligibility criteria make it effectively impossible for SAWP workers to access general unemployment benefits. Despite not being able to access the EI regime, SAWP workers and their employers pay an estimated $21.5 million in annual EI premiums.

Subsection 18(1) of the Employment Insurance Act disentitles workers from general unemployment benefits if the worker is not capable of and available for work. This requirement has been interpreted to require Canadian residency. SAWP workers cannot reside in Canada past December 15, and often leave for practical reasons much sooner.

Migrant agriculture workers have both a residency document and a work document. The residency document

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*ibid.*

*Employment Insurance Act, RSC 1996, c 23 s 18(1).*
permits temporary residence in Canada while the work permit sanctions employment.

If the SAWP facilitated the agricultural worker’s migration, then typically temporary residency status will outlive the work associated with the permit. Residence is permitted until December 15th, but the farm may cease production months earlier.

Should a migrant worker remain in Canada during the window of time between the cessation of work and the expiration of temporary residence, general unemployment benefits would theoretically be available.

The trouble is that SAWP workers generally do not remain in Canada after harvest season. SAWP workers live on the farm, and their employer arranges their transportation home. As a result, migrant agricultural workers typically return to their country of origin soon after their labour is no longer needed. Once outside Canada, they are ineligible for unemployment benefits.

Effectively barred from the general employment insurance benefit, SAWP workers also became eligible for parental, maternity, and compassionate care benefits—otherwise known as EI special benefits—in 2003. But in 2012, the Harper government severely curtailed access to these benefits by requiring a valid work permit and a social insurance number. 10

El parental benefits are available to parents who care for a newborn or newly adopted child. Parental benefits are available for a maximum of 35 weeks. In 2012, Diane Finley, in her role as Minister of Employment Services Development Canada (ESDC), amended the regulations to require a valid work permit and social insurance number to collect special benefits.

These changes make it more difficult for SAWP workers to access EI special benefits because SAWP workers must leave the country by December 15th of a given year, and their work permit may expire sooner. Our staff assists migrant farm workers applying for EI special benefits and report low success rates.

UFCW Canada takes this opportunity to reinforce our position that it is unjust for SAWP workers to pay into a program that they cannot effectively access. And so we echo our previous recommendation that access to EI special benefits, particularly parental benefits, should be restored.

Recommendation:

• SAWP workers should have access to the employment insurance program that they have paid into since 1966, and the barriers for access to special benefits, created in 2012, should be removed.

Occupational Health & Safety

Agricultural work is not only amongst Canada’s most precarious, but also amongst Canada’s most dangerous. Agriculture workers face a range of biological, chemical, mechanical, physical, and psychological hazards, and have reported injury rates above provincial averages.\textsuperscript{11}

Currently, in every province besides Alberta, provincial occupational health and safety legislation covers agriculture workers. Between 1985 and 2010, Alberta counted 471 farm-related deaths, and just last year, 24 deaths.\textsuperscript{12}

Alberta’s former Progressive Conservative government maintained the exclusion of agriculture workers from Alberta’s health and safety legislation to protect the ‘family farm’ from increased compliance costs associated with more complex regulation.\textsuperscript{13} But again, the family farm occupies an ever-shrinking share of the agricultural sector of the economy.

We welcome Alberta’s newly elected NDP government’s pledge to include agriculture workers under workplace safety laws. Inclusion will help protect Alberta’s agricultural workers from illness and injury. But as Alberta’s government catches up with the rest of Canada on the issue, it is important to highlight the additional occupational health and safety challenges that migrant farm workers face because having access to health and safety legislation is only the first step.

It is important that all provincial health and safety legislation develop industry specific regulations. Effective health and safety legislation must address the realities of agricultural work. Heat stress, working in confined spaces, and operating heavy farm equipment are issues that health and safety regulations should address. And it is important to have definition of dangerous work that captures agricultural realities.

Additionally, an effective occupational health and safety regime for migrant farm workers must respond to the extreme imbalance in the employment relationship and the impact that has on the enforcement of their rights.


\textsuperscript{13}Ibid.
Increased vulnerability breeds a climate of fear wherein migrant workers are unlikely to exercise their right to refuse dangerous work or seek medical attention.

In 2014, a study was released that documented the impact of migrant farm worker vulnerability and employment insecurity has had on occupational health and safety risks, and their willingness to seek medical attention and enforce their rights.

There is evidence that employers sometimes terminate and arrange for the deportation of ill or injured migrant workers, which has a chilling effect on complaints.¹⁴

In this climate of fear migrant farm workers report unsafe workplaces, transportation and housing to trusted community advocates under the protection of anonymity. Migrant farm workers describe workplace risks of falling from heights, cuts from dull knives, and injury from machinery. They also complain of unmaintained equipment.¹⁵

A Mexican migrant farm worker was quoted saying, “You don’t want to stop working because you think maybe they [employers] won’t ask for me [next year] if they see me complain and because I’m hurt.”¹⁶ Another worker said, “I’m still in pain, but I’ve decided not to say anything because I’m ashamed [and] afraid the boss will send me back to Mexico.”¹⁷

Employer-provided transportation also carries occupational health and safety risks. Migrant farm workers are sometimes transported between farms to harvest throughout the growing season. One migrant worker reported, “it was common knowledge in the field that contractors did not offer their workers adequate seat belts, the van was overloaded, and it was being driven too fast.”¹⁸

And employer-provided housing too often fails to meet appropriate standards. Mexican workers at our Simcoe migrant worker support centre reported that there are periods in the growing season where housing is severely overcrowded because workers have been transferred from one farm to another. But government inspections took place before the migrant workers arrived in Canada.

Inclusion into provincial health and safety legislation is only the first step. There must also be a reduction in worker insecurity through sectoral work permits, access to permanent residence, and effective organization rights. Absent fear, workers are more likely to advocate for their rights.

However, until migrant worker insecurity is reduced we continue to call on provincial governments to strengthen the proactive arm of provincial health and safety departments.

**Recommendation:**

• **Greater resources should be allocated to provincial health and safety departments to increase the breadth and frequency of inspections of farm equipment, transportation, and housing.**
Unfair Labour Practices

On March 4, 2010 the British Columbia Labour Relations Board (BCLRB) certified UFCW Canada as the exclusive bargaining agent for a bargaining unit comprised of SAWP employees employed by Sidhu & Sons Nursery Ltd.

Following Board certification, UFCW Canada received evidence that Mexican officials had identified SAWP workers that had expressed union support. Once identified the Mexican government prevented their return to Canada under the guise that Canadian visa officers refused these workers visas when Citizenship and Immigration Canada, in fact, had not.

Mexican officials could block union supporting workers from returning to Canada because of their role in the administration of the SAWP.

Mexico’s role in the program gave it the power to blacklist workers that expressed interest in organizing, blocking their return to Canada in subsequent years, and reconstituting the workplace with fewer union supporters.\(^{19}\)

The blacklist also indirectly changed the workplace dynamic. Fearful of retaliation, other workers were less likely to express their wish to unionize. Reflecting on one of the blacklisted and blocked SAWP workers, the BCLRB arbitrator recognized this effect:

“I also find the blocking of Victor Robles, who was identified by Mexican authorities as a supporter of the Union, when viewed objectively, would have a dramatic chilling effect on the Union’s members.”

So it was unsurprising that in 2011, a de-certification vote was called at Sidhu & Sons Nursery Ltd. UFCW Canada took issue with the Mexican government’s interference with Canadian workplace rights, and moved to enforce those rights on behalf of the migrant farm workers.

The Mexican government took the position that state immunity ousted the jurisdiction of the BCLRB to adjudicate the conduct of a foreign state vis-à-vis its citizens under domestic law regardless of whether the remedy is imposed on the foreign state.\(^{20}\)

The issue was taken to the British Columbia Court of Appeal, which decided that the BCLRB could review the Mexican government’s actions for the purposes of the British Columbia Labour Relations Act, but no remedy could be imposed on Mexico.

The BCLRB found that the Mexican government interfered with the decertification vote, preventing the workers from expressing their true wish with respect to unionization. As a remedy, the board declared no force or effect to the vote.\(^{21}\)

While we believe that the decisions in B.C. on this issue were the right ones, we recommend further measures to prevent this type of employer interference.

Recommendation:

- We call upon the federal government to reorganize the SAWP program so that recalled SAWP workers receive their visa directly from Citizenship and Immigration Canada to prevent foreign interference with domestic workplace rights.

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\(^{19}\)It is likely that Mexican officials interfered with SAWP worker’s right to organize in fear that management would select workers from other countries to avoid unionization, which would diminish the flow of remittances to Mexico.

\(^{20}\)The Mexican Government relies on the State Immunity Act to avoid adjudication on the allegation of interference with workplace rights see State Immunity Act, RSC 1985, c S-18.

\(^{21}\)United Food and Commercial Workers International Union, Local 1518 v Sidhu & Sons Nursery Ltd. 2014 CanLII 12415 (BCLRB).
Quebec’s Unionized Farms

Historically, Quebec farms with three or more full-time ordinary workers could be unionized. If there were fewer full-time ordinary workers, unionization was illegal.

UFCW Canada challenged the law. The UFCW organized a farm with two full-time workers and sixty seasonal farm workers and challenged the law in court. The Quebec Supreme Court ruled in favour of the UFCW, ruling that the prohibition was unconstitutional.

But in 2014, the provincial government enacted Bill 8, excluding farms with less than three full-time ordinary workers from the full suite of rights labour relations regime. Under Bill 8 workers can form associations for the purpose of making representations to their employer that must be heard in good faith. This basically precludes collective bargaining.

Instead of access to a statutory collective bargaining vehicle, seasonal farm workers at locations that fall to less than three workers in the off-season, only have the right to form associations and make representations to their employers that must be heard in good faith. No collective agreements have been struck at these workplaces.

At other locations with more than three full-time year-round workers UFCW has a number of bargaining units; primarily at greenhouses and packaging sites. Importantly, these farms continue to operate, and operate profitably.

Nearly all of our members on these farms are low-skilled migrant farm workers arriving in Canada through the low-skilled stream of the TFWP. As a result, these workers are allowed to live and work in Canada for a total of 48 months.

Once the maximum is reached, the worker must wait four years before they’re again eligible for a work permit. Unfortunately, Quebec’s equivalent to the provincial nominee programs does not provide a pathway to permanent residence for low skilled workers. We are proud to report that UFCW Canada has negotiated a series of wage improvements and improvements for migrant agriculture workers, including a right-to-stay provision in the collective agreements to protect migrant farm workers from early termination.

The right-to-stay provision requires the employer to continue to employ a migrant agriculture worker for the duration of their first contract. For year round operations, the first contract is typically 1 year.

22This leaves Quebec’s seasonal agricultural workers in exactly the same legal position as all of Ontario’s agricultural workers under the Agricultural Employees Protection Act (AEPA). As the UFCW continues its campaign to have the AEPA declared unconstitutional, we believe that the Bill 8 amendments to Quebec’s Labour Code will be scrutinized for compliance with the Charter.

23The 48-month limit combined with no access to permanent residence results in increased training costs for employers. Some of our members have reported that it can take between 3 months and an entire harvest cycle to acquire the skills necessary to efficiently do the job in the greenhouses and packaging.
UFCW Canada has also negotiated recall protections based on seniority. Typically migrant farm workers arriving in Canada through the low-skilled stream of the TFWP are on 1-year contracts. These recall rights, insist that employers re-hire past workers were work is available.

Another issue that migrant agriculture workers face when they arrive is the availability of work. While there are guaranteed minimum hours associated with the SAWP program, there is no equivalent guarantee for workers that arrive through the TFWP. Under UFCW Canada collective agreements, such guarantees are in place, as well as supplementary wage provisions for overtime work.

Understanding and addressing the realities of agriculture work, our collective agreements maintain some measure of labour flexibility while protecting workers.

These collective bargaining protections should be available to all workers who seek them, including migrant agriculture workers currently excluded by Bill 8.

Recommendation:

• Bill 8 should be repealed; all agriculture workers should be fully included in Quebec’s Labour Code without exception.

Fairness and the Need to Change Ontario Legislation

Ontario’s agriculture workers still do not have access to an effective collective bargaining statute. The Agricultural Employee Protections Act\(^{24}\) (AEPA) eliminates all bargaining leverage, without a binding arbitration provision to compensate. As a result, the employment relationship remains vastly unequal.

UFCW Canada continues to advocate for a fair labour relations regime for Ontario’s agriculture workers. In 2010, we launched a complaint with the International Labour Organization (ILO) alleging that the AEPA contravened the Freedom of Association and Protection of the Right to Organize Convention (No. 87).

In B.C. Health Services, the Supreme Court of Canada held that the state of international law is a persuasive source for the interpretation of the Canadian Charter of Rights and Freedoms, including the interpretation of section 2(d)—freedom of association.\(^{25}\)

In 2011, the Supreme Court of Canada upheld the constitutionality of the AEPA. At the time the Court was worried that declaring the statute of no force or effect would create a constitutional guarantee for a particular labour relations regime and a particular form of collective bargaining.\(^{25}\)

\(^{24}\) Agricultural Employee Protection Act, SO 2002 c 16.

\(^{25}\) Health Services and support – Facilitates Sector Bargaining Assn. v British Columbia 2007 SCC 27 at para 70.

\(^{26}\) Ontario (Attorney General) v Fraser 2011 SCC 20.
We disagreed then and we disagree now. So in 2012, we welcomed the ILO’s ruling that the AEPA did not meet Canada’s international commitments.

“We disagree then and we disagree now. So in 2012, we welcomed the ILO’s ruling that the AEPA did not meet Canada’s international commitments.

“Canada’s adherence to international documents recognizing a right to collective bargaining supports recognition of the right in s. 2(d) of the Charter (freedom of association). The Charter should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified.”

The ILO’s ruling is consistent with our long-standing position that the AEPA continues to infringe agricultural worker’s section 2(d) Charter guarantee—freedom of association.

The AEPA does not provide meaningful collective bargaining. Instead the Act weakens effective collective bargaining—without compensating with a binding arbitration provision. Instead, the Act contains only a duty on the employer to hear worker representations in good faith, but with no compulsion to act.

To the extent that the employer reads and listens to representation, the employer has complied with the AEPA obligations. As mentioned, the ILO ruled that this violated Canada’s international commitment to freedom of association. The statute does not provide agricultural workers access to the more comprehensive mechanism for collective bargaining.

To date, no group of agriculture workers in Ontario has succeeded in achieving a collective agreement under the AEPA regime.

The ineffectiveness of the AEPA is evidenced in the inability of unions to strike collective agreements for the benefit of agriculture workers.

Unsurprisingly, the employer’s duty to read or listen to collective representations under the AEPA has provided absolutely no leverage to workers. As a matter of justice and fairness, the discriminatory exclusion of agriculture workers from their full labour rights and protections must be addressed through legislative change.

Recommendation:

• Repeal the Agricultural Employees Protection Act. The Labour Relations Act should be amended to include agricultural workers, or the Agricultural Labour Relations Act should be revived.
Conclusion

Migrant agriculture workers are some of Canada’s most vulnerable and exploited workers. Vulnerability matters because the more vulnerable a worker is, the less effective reactionary workplace laws are. In other words, laws that respond to complaints do little to protect vulnerable workers because they are unlikely to complain even if they know their rights.

The extreme vulnerability of migrant agriculture workers is the result of deficiencies and discrimination ingrained in current immigration and workplace law. Currently, immigration law creates a captive migrant work force through the use of closed work permits, and workplace law excludes agriculture workers form important workplace rights, protections, and entitlements.

Many of workplace exclusions rest on outmoded notions of the farm. The myth of the family farm sustains agriculture worker legislative exclusion from many provincial minimum employment standards, motivates the exclusion from an effective labour relations regime, and drives the exclusion from provincial health and safety legislation.

Contemporary agriculture production has evolved predominantly into a corporate, large-scale industrial enterprise, yet the evolution of workers’ rights has been frozen and excluded. These exclusions simply drive down labour costs and regulatory compliance costs, to the benefit of the industry and to the detriment of the workers.

A fairer balance must be struck. It is a matter of justice and human rights in the face of a current system that perpetuates global exploitation and abuse.
RECOMMENDATIONS:

1. Provide a transparent, impartial process of appeal available to all workers before any decision to repatriate is made, including appointment of a representative from UFCW Canada to fully participate in this appeal process on behalf of the workers.

2. Immediately make public the statistics used by ESDC to determine the yearly wage rates to be paid to migrant farm workers.

3. Enforce the provisions of the SAWP and the TFWP to ensure that workers in these programs are paid at least as much as the provincial seasonal average wage rate.

4. Create national standards for the provinces to accredit, monitor and discipline if necessary both domestic and offshore recruiters of foreign workers. Provinces that fail to meet these standards would be denied access to workers under the SAWP and TFWP.

5. Inspect all workers’ housing prior to and following their occupancy. Frequent and random inspections should also be mandated and occur regularly throughout the season. Employers who are found to be in non-compliance with standards for adequate housing should be terminated from the SAWP. Immediately ban the practice of housing workers above or adjacent to greenhouses in recognition of the obvious dangers associated with living in buildings housing chemicals, fertilizers, boilers, industrial fans and/or heaters. These conditions should also apply to housing rented to TFWs by employers.

6. Make it mandatory that all written materials, instructions and signage—particularly regarding workplace health and safety issues and chemical/pesticides use and application—be provided in English, French, Spanish, Thai, Punjabi and other native languages as necessary. In addition, an orientation on employment standards, and health and safety legislation should be conducted for migrant and temporary workers in their native language before they start their employment. A complete, language-friendly information package on the above should also be provided to each worker.
7. Immediately terminate from the SAWP and TFWP any employer found to be holding the personal documents, particularly passports and health cards, of migrant workers. Amend the program to ensure that this is a direct contravention of the program whether the withholding of the documents is done by the employer or through consular or liaison officers.

8. If an employer is removed from SAWP for violating the agreement, including unfair labour practices such as blacklisting a worker, the employer should be banned from participating in any other federal or provincial foreign temporary worker program.

9. Ensure that workers are given a free medical exam before they return to their home country, to confirm they are healthy and free from workplace illness or injury. If this is not the case, ensure that worker compensation claims are duly filed.

10. Provide financial support to the Agricultural Workers Alliance and the UFCW Canada for effective, on-the-ground representation for seasonal agricultural workers.

11. Ensure that employers remit a credible Labour Market Opinion based on much more substantial evidence than currently required, allowing the hiring of workers under SAWP and TFWP.

12. Canada must not wait any longer to sign the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which has been adopted by the United Nations General Assembly.

13. The closed work permit should be replaced with a sectoral work permit that allows migrant labourers to change employers within the agricultural sector in a given region.

14. Migrant agriculture workers should be given a pathway to permanent residence in every province under the provincial nominee programs.
15. SAWP workers should gain full access to the employment insurance program that they have paid into since 1966, and the barriers for access to special benefits, created in 2012, should be removed.

16. Greater resources should be allocated to provincial health and safety departments to increase the breadth and frequency of inspections of farm equipment, transportation, and housing.

17. We call upon the federal government to reorganize SAWP so that recalled SAWP workers receive their visa directly from Citizenship and Immigration Canada to prevent foreign government interference with domestic rights.

18. Bill 8 should be repealed in Quebec; all agriculture workers should be fully included in Quebec’s Labour Code without exception.

19. Repeal Ontario’s Agricultural Employees Protection Act. The Labour Relations Act should be amended to include agriculture workers, or the Agricultural Labour Relations Act should be revived.
Notes
UFCW Canada and the Agriculture Workers Alliance (AWA)

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