Submission for the Changing Workplaces Review

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Submission written by: Jenna L. Hennebry, PhD, Director, International Migration Research Centre, Associate Professor, Balsillie School of International Affairs, Wilfrid Laurier University; Janet McLaughlin, PhD, Assistant Professor, Health Studies, Research Associate, International Migration Research Centre (IMRC), Wilfrid Laurier University; Kerry Preibisch, PhD, Associate Professor, Sociology, University of Guelph

Addressing Agricultural Migrant Worker Protection

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400 University Ave., 12th Floor
Toronto, ON M7A 1T7

Contact Details:

Jenna L. Hennebry, PhD
Director, International Migration Research Centre (imrc.ca)
Associate Professor, Dept. of Communication Studies and Balsillie School of International Affairs, Wilfrid Laurier University
Balsillie School of International Affairs
67 Erb Street West, Waterloo Ontario, Canada, N2L 6C2
Phone: +1-226-772-3139 | Fax: +1-226-772-3004
Email: jhennebry@wlu.ca | Website: imrc.ca
Online Profile: http://www.balsillieschool.ca/people/jenna-l-hennebry | Skype: jenna.hennebry

Janet McLaughlin, PhD
Assistant Professor, Health Studies
Research Associate, International Migration Research Centre (IMRC)
Wilfrid Laurier University
73 George Street
Brantford, Ontario, Canada N3T 2Y3
Office: RCE 242
Tel: 519-756-8228 ext.5568
email: jmclaughlin@wlu.ca
web site:
http://wlu.ca/faculty-profiles/hss/janet-mclaughlin.html
Migrant Worker Health Project: www.migrantworkerhealth.ca

Kerry Preibisch, PhD
Associate Professor, Department of Sociology and Anthropology
University of Guelph
643 Mackinnon Building, Guelph, Ontario, Canada
Tel: 519 824 4120 x52505
Email: kpreibis@uoguelph.ca
Website: http://www.uoguelph.ca/csahs/web/research/faculty-profiles/kerry-preibisch-associate-professor

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Introduction

The following submission is offered by Drs. Jenna Hennebry, Janet McLaughlin, and Kerry Preibisch. We are professors who have each conducted over a decade of individual and collaborative empirical research with temporary foreign workers in Ontario, primarily in agriculture. This submission draws on evidence gathered from our surveys with over 1,000 migrant farmworkers, interviews with migrant workers, government officials, employers, health care providers, WSIB officials, among others, as well as official statistics from government organizations. This research has been funded by organizations such as the Social Sciences and Humanities Research Council (SSHRC), the Canadian Institute of Health Research (CIHR), the Workplace Safety and Insurance Board (WSIB), the Ontario Ministry of Agriculture and Food (OMAFRA), the Public Health Agency of Canada, the United Nations Entity for Gender Equality and the Empowerment of Women (UN Women), and the World Bank, and has been published extensively in international and national peer reviewed journals.[i] This submission aims to highlight some of the most urgent problems and provide recommendations and further resources for the Special Advisors' consideration.

There is a rising number of Temporary Foreign Workers (TFWs) in low wage jobs in Ontario, comprising a growing proportion of the workforce in some sectors. One such sector is agriculture, in which 36% of Ontario harvesters were TFWs in 2012 (up from 19% in 2000).[ii] Particular attention must be directed toward this sector, in part because of TFWs' over-representation in this industry, but also because they face very specific vulnerabilities and risks that stem from the confluence of their occupation in agriculture, and their temporary migration status. Indeed, research has consistently shown that migrant agricultural workers are particularly vulnerable to abuse, exploitation, and health risks and face great difficulty to exercise their rights.

This submission focuses on four key issues and related recommendations regarding the Employment Standards Act (ESA) and the Labour Relations Act (LRA). For each issue we have provided some basic background, sources, and some specific recommendations.

Exclusions and partial inclusions of farmworkers in the LRA and ESA

Farmworkers are excluded from several components of the Employment Standards Act, including minimum wage, hours of work, rest periods, statutory holidays and overtime.[iii] In the absence of coverage under this legislation, the Seasonal Agricultural Workers Program (SAWP) agreements[iv] contain some basic guidelines regarding hours of work (note: these agreements only apply to workers in the SAWP; TFWs entering through other streams may have less regulated conditions). The agreements state, however, that employers may request that workers postpone their day of rest and extend their workday when the urgency of work requires it.

In practice, this happens all the time. Results from a survey of nearly 600 MFWs in Ontario[v] suggested that:

- the average number of hours worked by migrant workers per week ranged from 64 in the low season to 74 during busier periods[vi]
- 51% of MWs reported having worked without breaks
- 20% of MWs reported that working without breaks happened "often" or "all the time"

These long hours of demanding physical labour, often in intense heat and with few rest periods, increase workers' susceptibility to work-related illness and injury, which our research has also demonstrated to be a significant problem. Further, exhaustion, when coupled with unsafe and under-regulated transportation (in particular unlicensed drivers; modified or crowded vehicles), can lead to tragic traffic accidents resulting in fatalities (as we saw with the tragic death of 11 workers in Hampstead in 2012)[vii]. Such incidents can have long-term health and financial repercussions for migrants and their families.

All agricultural workers are *excluded* from the Labour Relations Act. Instead, they are covered under the Agricultural Employees' Protection Act (AEPA). Yet without the right to bargain collectively, the AEPA is toothless and does not provide agricultural workers with the protections they need to effectively advocate for their rights.[viii] Indeed, meaningful worker representation, including the use of unions, is a key component to ensuring the effectiveness of workers' voices to be heard and their ability to access OHS and related protections.[ix]

Most provinces in Canada – all but Ontario and Alberta – now allow agricultural workers to collectively bargain. The ILO, a UN body, has condemned the AEPA for failing to ensure the collective bargaining rights of agricultural workers under the principles of freedom of association. Why should Ontario agriculture, which employs the highest number of TFWs in the country, be an exception to these basic labour rights?

Justifications for these exclusions have been based on the assumption that agriculture is a small family endeavour, which should not be subject to industrial labour laws.[x] However, the agricultural exceptionalist argument is losing traction as food and farm industries become increasingly capital and labour intensive, with larger numbers of paid employees and often featuring year-round climate controlled conditions of greenhouses and nurseries.

In debates over labour legislation in the Ontario Assembly, MPPs who voted in favour of the AEPA argued that migrant workers are well treated by most employers, and that the employee-employer relationship should not be "tampered with or jeopardized," as would be implied if workers had recourse under the LRA. In fact one MPP stated that "*I say 99% of*

those individuals who rely on offshore labour treat their employees well."[xi] Such rationales, which were based on anecdotal consultations with employers rather than systematic research with workers, served to justify their exclusion from this labour right to which almost all other Ontario workers are entitled. Furthermore, if it is indeed the case that 99% of workers are treated well, employers should have little to lose from providing them with basic labour rights and protections.

Many employers nonetheless argue that allowing workers to join unions could jeopardize the financial profitability or viability of their operations. However, it would not be in the workers' or the unions' interests to put employers out of operation and make workforces—and unions representing them—redundant. In the case of the twelve farms organized by the United Food and Commercial Workers (UFCW) in British Columbia and Quebec, where unionizing is legal, affected jobs have remained either steady or have risen, suggesting that these unionization efforts have not negatively impacted operational success, jobs or competitiveness. Rather than focusing on increased wages, these contracts have emphasized providing workers with increased job stability and improved grievance procedures (e.g. seniority/recall rights, negotiated rent, a formal grievance procedure, and the provision of Spanish-speaking union representatives who help mediate conflicts). These are all areas that improve conditions for workers without causing major financial burdens for employers.[xii]

These conclusions are echoed by Supreme Court justice Rosalie Abella, who noted that, along with Ontario:

> "…all provinces except Alberta give agricultural workers the same collective bargaining rights as other employees…. There is no evidence that this has harmed the economic viability of farming in those provinces, or that the nature of farming in Ontario uniquely justifies a severely restrictive rights approach."[xiii]

RECOMMENDATION: *All categories of workers in agriculture should be fully included in both the ESA and the LRA. They should have the right to bargain collectively and to form and join unions and the freedom to exercise these rights.*

Seasonal Agricultural Worker Program repatriation and naming practices

Whatever rights are afforded to agricultural workers are often difficult for migrant workers to exercise in practice due to their fear of repatriation, and both current and future job loss. If a migrant worker is fired, there is no appeals process (independent or otherwise); they are simply repatriated. Effectively, loss of employment equates to the loss of the right to remain in Canada. In particular, the repatriation clause in their employment agreements remains a distinct challenge facing migrant workers. Indeed, many migrant workers feel

pressured to work even when they are sick or injured because they do not want to disappoint their employer and risk losing their jobs. In our survey, 55% of migrant workers in Ontario indicated that they work while sick or injured due to fear of loss of employment.[xiv]

Further the naming system in the SAWP impacts workers' employment in subsequent years.[xv] This fundamental power imbalance is a major deterrent to workers feeling safe in issuing complaints or work refusals, even if failing to do so means compromising their health or safety. It is for this reason that proactive, and not only reactive, measures are especially important for the protection of migrant workers.

RECOMMENDATION: *We recommend the provincial government should take a lead in helping to promote the rights of migrant workers and their ability to exercise them. We echo the Law Commission of Ontario's recommendations [xvi] that could enhance these workers' empowerment, such as: accessible education to both employers and workers about rights; reprisal complaints hearings prior to deportations; an independent decision-making process for migrant workers prior to repatriation; and greater supports for migrant workers in making claims.*

Cumulative work periods, seniority and severance pay

Most of the agricultural jobs in which migrant farmworkers are employed, while framed as temporary, are actually permanent or long-term, with many of the same workers returning to the same farm for years or even decades in a row. Employers often name the employees they wish to have return based on the previous year's performance, and do so year after year. Despite their long-term dependence on TFWs, employers do not need to provide any compensation or comprehensive explanation if they choose not to invite back a migrant worker the following year. As such, despite their many years of service, these workers on consecutive temporary contracts are given no seniority provisions and are not entitled to severance pay.

RECOMMENDATION: *TFWs should be entitled to severance pay based on their accumulated work periods, even if they are not consecutive.*

Regulation and enforcement contracts, bylaws and legislation

Migrant workers arrive with terms of their employment articulated through verbal promises and/or in the terms outlined in their contract. Yet, many are pressured into working longer hours, doing tasks outside their job descriptions, undertaking piece work arrangements or are subcontracted/loaned to other employers. Where housing is provided by employers (as is a requirement of the SAWP), workers have noted unexplained or high

deductions from their pay, insufficient amenities and washroom facilities, unsafe or unhealthy conditions (such as crowding), and lack of security and privacy. [xvii]

RECOMMENDATION: *We recommend more proactive enforcement to ensure employers' compliance, rather than putting the onus on workers to bring forth complaints. The Ministry of Labour (MOL) should use the ESA to strengthen the evaluation and accountability measures aimed at employers, such as requiring on-site workplace and housing inspections, and levying fines or other employer sanctions for non-compliance.*

Conclusion

Ultimately the problem is one of differentiation. What exists is a system of agricultural employment whereby different groups of workers are afforded different protections and rights – both on paper and in practice.

First the legislation enables differentiation between agriculture and other sectors. Second, it enables differentiation between the types of work in agriculture (for example, the categorizations of harvesters versus farm employees or 'near farmers'). This can result in significant variability in wage rates, use of piece work, overtime pay, and housing, as employers are incentivized to maneuver within these categories to maximize their profits at the expense of workers. Third, the differentiation between migrant and non-migrant workers in agriculture amounts to differential access to rights *in practice* for a highly vulnerable population. Though this is not entirely due to these legislative frameworks, this issue needs to be addressed by them.

If Ontario's agricultural industry requires support to remain competitive in the global economy, this should not come at the expense of basic worker rights and protections. The Ontario government should consider other means to support agriculture, such as ways to further promote and protect the sale of local agricultural products, without sacrificing the basic rights of agricultural workers. The agricultural workforce is comprised of a growing number of vulnerable migrant workers. Rather than fewer protections, these workers need more.

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Appendices

Appendix I – List of relevant research

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Appendix II – List of other related research

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[i] See the Reference List and Appendix I for samples of this research. See Appendix II for other studies on similar themes.
[ii] Facts and Figures, Citizenship and Immigration Canada, 2013.
[iii] See: http://www.labour.gov.on.ca/english/es/pubs/factsheets/fs_agri.php.
[iv] SAWP Agreement 2013: http://www.esdc.gc.ca/eng/jobs/foreign_workers/agriculture/seasonal/sawpmc2015-bc.pdf.
[v] Hennebry et al., 2012; Hennebry, 2012; Hennebry et al., 2015.
[vi] Binford 2002; Hennebry et al. 2012; Otero and Preibisch 2009; Russell 2003.
[vii] http://news.nationalpost.com/news/canada/hampstead-crash-eleven-killed-in-horrific-southwestern-ontario-accident.
[viii] See Faraday et al., 2012.
[ix] See Vosko *et al.* 2011.
[x] See Hennebry & Preibisch, 2012; Tucker, 2006.
[xi] As quoted in Raphael, 2013. For more information, see the edited volume Fay Faraday, Judy Fudge and Eric Tucker (2012) Constitutional Labour Rights in Canada: Farmworkers and the Fraser Case. Toronto: Irwin Law; and Raphael, Philippe, "The Social Organization Of Labour Rights In Ontario: Governing Migrant Agricultural Workers Through The Agricultural Employees Protection Act" (2013). Toronto: Ryerson University, *Theses and dissertations.* Paper 1970.
[xii] This section was adapted from a forthcoming book chapter: McLaughlin, Janet, Strengthening the Backbone: Local Food, Foreign Labour and Social Justice. *Nourishing Communities.* Irena Knezevic, Charles Levkoe, Phil Mount, Erin Nelson, Alison Blay-Palmer (eds)., University of Toronto Press.
[xiii] As quoted in: Makin, Kirk. Farm workers have no right to unionize, top court rules. *Globe and Mail,* April 29, 2011. Retrieved from: http://www.theglobeandmail.com/news/national/farm-workers-have-no-right-to-unionize-top-court-rules/article578141/.
[xiv] Hennebry et al, 2012.
[xv] See McLaughlin, 2009.
[xvi] http://www.lco-cdo.org/en/vulnerable-workers-final-report-sectionVII.
[xvii] See Hennebry et al, 2012; Hennebry et al., 2015; McLaughlin, 2009; Preibisch & Hennebry, 2011.