The Changing Workplaces Review: Employment Standards Consultation

SUBMISSION
TO THE
MINISTRY OF LABOUR

BY FUERZA PUWERSA

Fuerza.puwersa@gmail.com

18 September 2015

1. Introduction

Fuerza Puwersa (which means "strength" in Spanish and Tagalog), is a migrant worker advocacy group in Guelph Ontario. We are pleased to offer this submission in response to the Ontario Ministry of Labour's (MOL) "Changing Workplace Review." This submission was prepared by Mina Ramos, Joshua Gilbert, Lalo Nideaquinidealla, Samantha Blostein, Kovarthanan Konesavarathan, and Terri Aversa.

When Mina Ramos from our group presented to your committee in Guelph on 25 June 2015, she told you that the migrant workers from Leamington who were to accompany her were not able to leave work that day. Why they were not able to come is the crux of the actions needed from this review.

Migrant workers toil for long hours for six and sometimes even seven days a week. Taking the day off to participate in this review would likely have resulted in those workers immediately getting fired from their jobs and repatriated to their home country with no chance to appeal or protest. Entire families would be left without the income that they rely on. This is not conjecture; the International Agreement Contract for migrant workers states, "the employer, after consulting with the [worker's] government agent [liaison], shall be entitled for non-compliance, refusal to work, or any other sufficient reason to terminate the worker's employment……and so cause the worker's repatriation."

It gets worse. Depending on the timing of the termination, workers may not yet have earned enough to pay back what are often exorbitant recruitment fees that they are often forced to pay to get here and that they may still owe.

There's more. Others being repatriated (ie Guatemalans) not only lose income, but lose access to the benefit coverage program that they are eligible to pay into in Guatemala to provide coverage to their families back home while they are here working.

These would have been the costs to these workers if any of these workers took the day off on June 25, 2015 to accompany Mina to present to you.

However, as we did on June 25, and in this submission, Fuerza Puwersa shares what we hear from our work with migrant workers—and what Mina heard from them in her preparations to speak to you.

Our submission includes migrant workers (called temporary foreign workers by the system) in the Live-In Caregiver Program (LCP), the Seasonal Agricultural Workers Program (SAWP), and the Temporary Foreign Workers Program (TFWP) (all occupations).

The Migrant Worker Programs:

The Live-In Caregiver Program (LCP)—In this program, workers (mostly women) come to Canada to do domestic work in people's homes. The program requires that workers complete two years of work in Canada and a one-year Canada-based care-work training prior to being eligible for residency, as well as stricter education and language requirements. When caregivers apply for permanent residency, they must wait up to 18 months to obtain an open work permit. The federal government's two 'pathways' for permanent residence for caregivers are capped at 5,550 permanent residency applications each year. This means that even if caregivers meet the stringent requirements for residency, they will be deported if the quota has been filled (no one is illegal 2015).

Seasonal Agricultural Workers Program (SAWP)—The SAWP program is run in Ontario by the private user-fee agency Foreign Agricultural Resource Management Services (FARMS). Caribbean countries with agreements with Canada recruit, select, and maintain a pool of workers ready to meet Canada's needs. Sending countries incur the costs of administering the program and conduct the medical assessments necessary to clear workers who are fit to work in Canada. The sending country provides a consulate liaison—often also a migrant worker—to oversee the program in Canada. Workers can work a maximum of eight months, are tied to one employer, and can be named to return the following year. SAWP workers are entitled to OHIP upon arrival in Canada (although many are not aware or receive health cards). There is no access to apply for permanent status in Ontario. Unlike many other provinces, there is no right for these workers to unionize to collectively bargain in Ontario.

Temporary Foreign Workers Program (TFWP)—Under this program, migrant workers of any country can be brought in for any industry (including agriculture) by employers with the help (that often includes large fees) of recruiters from any country in the world once an employer has an approved Labour Market Impact Assessment (LMIA) from Employment and Social Development Canada (ESDC). The TFWP caps migrant workers at four years after which they must return to their home country for four years. This program has no role for the sending country and the workers are not entitled to OHIP for the first three months. There is no access to apply for permanent status for these workers. While these workers are permitted to unionize and engage in collective bargaining in many provinces except Ontario, the new four year rule will nullify their union status as they are sent back home and a new group of workers brought in.

We concur with the recommendations made by the Workers Action Centre and the Migrant Workers Alliance for Change (MWAC). Like us, these organizations are embedded in the migrant worker community. They work with migrant workers every day and are closely aware of employment standards changes needed to protect these workers.

We will comment on some of the questions you posed in the following pages, but we want to emphasize the three main things that the workers we spoke to talked about:

- Do away with ESA exemptions (your question #5)
- Action to prevent reprisals (Employment standards in this review, but occupational health and safety is also needed)
- Access to collective bargaining (your question #3)

Q 1: *How has work changed?*

Migrant workers are forced to come abroad away from their families to earn wages to survive. Employers and governments are taking advantage of these workers' dire circumstances by structurally restricting them from becoming permanent residents in exchange for their important contributions to our country.

Migrant workers in all three programs (LCP, SAWP, and TFWP) have temporary work contracts governed by federal rules. Yet, protections such as employment standards, occupational health and safety, workers compensation, and health coverage are left to provincial authorities. These workers' rights get lost in this provincial federal divide. Their rights—even if promised—are not realized in practice.

Fuerza Puwersa was in Divisional Court on 25 March 2014, when Denville Clark and Kenroy Williams lost their appeal for OHIP coverage (that they had won in two earlier appeals) after their workplace injuries took them past their contract end-date of December 2012. While under the care of WSIB, the workers needed OHIP coverage to provide them other health care services while they continued to seek treatment and recovery in Canada. Ontario's concern? One judge asked, "Why should Ontario pay for a federal program?" and declared, "Allowing the migrant workers to have OHIP will open the flood-gates for other migrant workers to collect OHIP if they remain in Ontario past their contract dates" (Ontario court proceeding 25 March 2014). Lost in this discussion is that these workers should have been able to rely on provincial rights after being injured while they were here working under a federal program. Ultimately the court overturned the previous decisions that provided OHIP coverage to workers who remain in Canada after their injuries. The result? Canada signs them up, Ontario cuts them off.

This review, then, must take steps in its Employment Standards action plan to address the federal/provincial divide that robs these workers of rights that they supposedly have on paper.

Migrant workers' employment relationships are precarious, rendering them vulnerable to termination and repatriation—all without the right to appeal. Most of these workers are blocked from becoming full citizens which keeps them in perpetual limbo—with their families in one country and them in another, and with no opportunity to settle roots in the country of their choosing. This is inhumane in a society where individuals are supposedly free and have the right to dignity and respect.

And the addition of the agricultural stream of the TFWP that became permanent in 2011 renders workers even more vulnerable because they are now capped at working in Canada for four years even though their work continues. Employers now have less incentive to operate safe and healthy workplaces or comply with health and safety and employment laws because they will get a new group of healthy workers every four years.

Q 2: *What type of workplace changes do we need to both improve economic security for workers, especially vulnerable workers, and to succeed and prosper in the 21st century?*

We need Ontario to provide all the rights and entitlements to any workers who come to work in this province under the federal migrant worker programs. This includes employment standards, occupational health and safety, human rights, workers compensation, health care, and pension benefits. It includes fair wages.

Stopping repatriation:

Knowing that the federal programs have repatriation built in, we agree with the Workers' Action Centre that Ontario has to take steps to neutralize the danger of repatriation in terms of the rights provided by the province. Protecting employment standards means preventing repatriation before those rights can be met. This means:

- Having reprisal protections for employment standards (and occupational health and safety) that prohibit repatriation until an expedited hearing is held on the matter.
- The hearing must occur in the migrant worker's language
- The migrant worker must be afforded the opportunity to be accompanied by a representative of their choosing
- Barriers to attend must be removed (ie transportation costs, other applicable expenses)
- This means having enforcement activity that investigates, works with worker advocates, and addresses situations where repatriation has occurred, or prohibit repatriation during dispute processes
- The system must accept and act on third party complaints
- It means prohibiting employers from taking reprisals, and includes fines and prosecutions for employers who take reprisals against workers who assert their rights to employment standards.

Collective Bargaining Rights

Q 3: *As workplaces change, new types of employment relationships emerge, and if the long term decline in union representation continues, are new models of worker representation, including potentially other forms of union representation, needed beyond what is currently provided in the LRA?*

The consultation paper framework notes that unionization has dropped from 27% in 1986 to 19% in 2009 but what it doesn't mention is that agricultural workers are denied the right to unionize in Ontario. This needs to be rectified immediately. Worker voice and unionization are linked. SAWP and workers in the Live-in Caregiver Program need the right to collective bargaining.

Workers in the TFWP need the right to collective bargaining also, but there is a second problem that needs to be addressed. We are not fooled. We know that the four year rule threatens established unionization and collective bargaining relationships. It means that collective bargaining and unionization will exist in a workplace for four years—until the workers are rotated. That is not true protection at all.

One worker we talked to said that a 'good' employer is one who drives the truck into the field to collect the workers at six in the evening to let them know the day is done. The worker said "nobody wants to ask the hours you work—nobody is asking and you don't want to be the one to ask." This quotation speaks to the importance of clear Employment Standards and **the need for employment terms to be in writing** for migrant workers.

Collective agreements can provide the terms of work—such as hours—in writing. Indeed, collective agreements for UFCW Canada Local 832 (retail TFWs) in Manitoba and UFCW Canada Local 1118 (food-processing TFWs) in Alberta show that unionization in agriculture may be able to temper some of the employer latitude in the SAWP and TFWP. The TFW agreements in UFCW Local 832 and 1118 secure employer commitments to nominate workers for permanent citizenship under Provincial Nominee Programs. Permanency relieves some of the vulnerability at the root of reluctance to speak up about workplace safety (Lewchuk, Clarke and de Wolff 2011).

Yet unionization has been a struggle for migrant agricultural workers in Ontario. UFCW (2011) reports eleven certification applications across Canada for migrant workers before provincial labour boards since 2006. None were successful in Ontario because no right to unionize exists for migrant workers, despite over a decade of work by UFCW.

In 2000, workers at Rol-Land Farms voted (132-45) to unionize because their workplace was dark, mouldy, and infested with cockroaches. Three migrant workers, assisted by UFCW, launched a legal challenge in 2001 to *Ontario's Agricultural Employee Protection Act* that gave farm workers the right to form associations but not unions. Employers are not compelled to bargain with associations. The legal challenge was won in 2008 when the Ontario Court of Appeal declared that banning unionization violated the *Charter of Rights and Freedoms.*

That decision was reinforced in 2007 by a Supreme Court decision that linked collective bargaining rights to Freedom of Association protections in a BC health care case. Further clarity seemed promising on 18 November 2010 when the International Labour Organization (ILO) declared Canada and Ontario guilty of withholding human and labour rights from farm workers in Ontario by failing to allow collective bargaining through

unionization. The ILO report maintained that "the absence of machinery for the promotion of collective bargaining constituted an impediment to one of the principle objectives that guaranteed Freedom of Association under the *Charter"* (ILO 2010, paragraph 358). Yet, five months after that, and despite the previous rulings—in April 2011—the Supreme Court of Canada sided with the Ontario government's appeal of the 2008 decision that had originally supported unionization. In her decision, Justice McLachlin (with Justice Abella dissenting) decided that "meaningful negotiations" that workers are entitled to under the *Charter* do not necessarily require unionization. It is time for Ontario to join other provinces that do consider unionization as key to meaningful negotiations.

Q 4: *Are these the key objectives or are there others? How do we balance these objectives or others where they may conflict? What are the goals and values regarding work that should guide reform of employment and labour laws? What should the goals of this review be?*

Fuerza Puwersa believes that there is nothing to balance until migrant workers are meaningfully provided the same rights as others who work in Ontario. And we mean on paper as well as in their lived experiences. Workers' perceptions are important here too. Ontario needs to do work—not only to provide the meaningful rights and entitlements, but also to protect how those rights are perceived by migrant workers by proactively enforcing those rights.

Indeed, international labour and human rights expert Jeffrey Hilgert (2012) notes that basing arguments against strengthening social protections on fears like job or economic losses represents a reincarnation of old market-based justifications used to trample human rights. According to Hilgert (2012), human rights supersede other rights. As such, human rights should not be balanced against "business or private concerns" (Hilgert 2012, 515). Therefore, basic health and dignity for all must outrank the search for profits.

Eliminate Exemptions—ESA

Q 5: *In light of the changes in workplaces, how do you feel about the employment standards that are currently in the ESA? Can you recommend any changes to better protect workers? Do the particular concerns of part-time, casual and temporary workers need to be addressed, and if so, how?*

- We need all exemptions removed for the work migrant workers do in the SAWP, TFWP, and LCP. No exemptions for holiday pay, overtime to be paid, no lowering of standards, meal breaks and coffee breaks to be provided, and sick time earned (at least one hour for each 35 hours worked to a maximum of 52 hours unless more is agreed).

- ESA exemptions for agricultural workers (including Farm Employees, Harvesters, Flower Growers, and those engaged in processing, packing or distribution of fresh fruit or vegetables) should be removed.
- Full access to termination and severance pay, recognizing all service with an employer
- Considered to be on temporary lay-off between contracts with the same employer of a gap up to 35 weeks.
- There needs to be specific language prohibiting lowering any standards—with enforcement and employer penalties for doing so. The rationale for this is because the jobs, remuneration, and conditions of work are almost never the same as promised.

ESA Coverage

Q 8: ***In the context of the changing nature of employment, what do you think about who is and is not covered by the ESA? What specific changes would you like to see? Are there changes to definitions of employees and employers or to existing exclusions and exemptions that should be considered? Are there new exemptions that should be considered?***

All migrant workers need to be covered by the ESA—SAWP, TFWP, and LCP. Why should they have less? German philosopher Kant's view is that people should be treated as "ends not means" (Hilgert 2012, 508).
Faraday (2012) describes a human rights approach that is embodied in Canada's *Charter of Rights and Freedoms* and provincial human rights legislation.

Consider also the International Labour Organization (ILO) which has a mandate to "protect the interests of workers when employed in countries other than their own." In 1998, the ILO passed the *Declaration of Fundamental Principle of Rights at Work* where decent work must contain "conditions of freedom, equity, security, and human dignity."

The ILO also adopted two conventions and two recommendations specifically to protect migrant workers. All these international and national laws and conventions provide a human rights framework that should ensure fair treatment of migrant workers across the globe.

Elements of protection should include:
- protection during all stages of migration;
- governments' role to ensure information is provided and to prevent misinformation;
- governments role to regulate migrant worker processes and eliminate costs to migrant workers;
- governments' role to supervise contracts;
- governments' role to ensure that local and provincial laws protect migrant workers;

- migrant workers' rights to hearings before being expelled; access to education, social, and health services;
- and government's role to ensure unity of migrant workers' families (Faraday 2012).

Q 9: ***Are there specific employment relationships (e.g., those arising from franchising or subcontracting or agencies) that may require special attention in the ESA?***

Migrant workers who work as live-in caregivers and in the SAWP and TFWP work in precarious work arrangements require special protections from reprisals in the ESA and in the Occupational Health and Safety Act. Why? Because for these workers, a reprisal often comes in the form of immediate deportation, which leaves both the initial concern and the resulting reprisal unaddressed. By being deported, the worker has no mechanism for redress.

ESA Compliance

Q 10: ***Do the current enforcement provisions of the Act work well? In your experience, what problems, if any, exist with the current system, and what changes, if any, should be made? In your experience, what changes could help increase compliance with the ESA?***

Unfortunately, it is the experience of migrant workers and their advocates that the only enforcement in terms of migrant worker programs is directed AT the workers through raids completed under the authority of the Canada Border Services Agency (CBSA), rather than enforcement directed at employers for violations of the ESA or OHSA. Canada Border Services Agency officers have broad powers to detain migrants if they believe – based on mere suspicion – that the person is a flight risk, a danger to public safety, inadmissible on security grounds, or is not adequately identified. For example, on 14 August 2014, over 50 people were arrested and 21 detained through "vehicle safety sweeps" in Downsview supported by Ontario Provincial Police and Ontario Ministry of Transportation.

If some of the resources spent on arresting and detaining migrants and migrant workers were used instead to ensure that employers complied with legislation such as the ESA and the OHSA, it would be a step forward to protect the rights of migrant workers who are at the mercy of their employers' decisions.

Other

Q 16: ***Are there any other issues related to this topic that you feel need to be addressed? Are there additional changes, falling within the mandate of this review, that should be considered?***

Access to pensions at stake

While the new Ontario pension plan is not part of this review, it is important to consider the limitations attached to other rights that migrant workers may have in order to appreciate the strength of the changes needed in the ESA to protect these workers.

For example, the Ontario Retirement Pension Plan Act, passed in April mandated that employers will be required to contribute 1.9 percent each on an employee's earnings up to $ 90,000. It didn't take long for the agricultural industry to start doing presentations to the government to exempt farm employers. Ken Forth, chair of the agricultural industry's Labour Issues Coordinating Committee presented in Guelph within three months of the legislation. Forth argues that, since migrant workers are not spending their pensions in Ontario (because they live abroad) that they should not participate in the plan. Forth opined that higher employer costs "threatens viability and competitiveness" and may cause farmers to move out of Ontario. It remains to be seen whether the agricultural industry will be exempted from this important provincial legislation. Exempting the agricultural industry (if it occurs) will deprive migrant workers of pensions that will be provided to other workers in Ontario.

In conclusion, the point is that migrant workers are not afforded the same rights as other workers, either because of legislated denial, or denied in practice in their lived experiences. Thus it is important for legislation such as the ESA to provide maximum coverage and benefits for these workers in all the areas we have mentioned. They need maximum protections under the ESA—with no exemptions, they need enforcement of their ESA rights and protections against reprisals, and they need the right to collectively bargain and to unionize in Ontario (with special attention to how this works in the TFWP with the four-year rule).

Thank you for reading this submission. We look forward to hearing from you.

Members of Fuerza Puwersa
Mina Ramos
Joshua Gilbert
Lalo Nideaquinidealla
Samantha Blostein
Kovarthanan Konesavarathan
Terri Aversa.

Fuerza.puwersa@gmail.com

References

Faraday, Fay. 2012. *Made in Canada: How the Law Constructs Migrant Workers' Insecurity.* Metcalf Foundation. http://metcalffoundation.com/wp-content/uploads/2012/09/Made-in-Canada-Full-Report.pdf

ILO (International Labour Organization). 2010. "Complaint Against the Government of Canada Presented by the United Food and Commercial Workers and Supported by the Canadian Labour Congress and the UNI Global Union." Case No. 2704. 18 November. http://www.ufcw.ca/templates/ufcwcanada/images/issues/Report_ILO_CaseNo274_UFCW%20Canada%20_November%202010.pdf

Hilgert, Jeffrey. 2012. "Building a Human Rights Framework for Workers' Compensation in the United States: Opening the Debate on First Principles." *American Journal of Industrial Medicine* 55: 506-18.

Lewchuk, Wayne, Marlea Clarke, and Alice de Wolff. 2011. *Working Without Commitments* McGill-Queen's Univ. Press. Canada.

No one is illegal. 2015. Legislating Discrimination in Canadian Immigration. Report. Vancouver. http://www.neverhome.ca/credits/