

***'Domestic Transnationalism': Legal Advocacy for Mexican Migrant Workers' Rights in Canada<sup>i</sup>***

NOT FOR CITATION

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**Summary:**

This paper focuses on Mexican migrant agricultural workers who come to Canada as part of the Seasonal Agricultural Workers Program (SAWP). We examine legal strategies that civil society advocates have undertaken to promote migrant worker rights at the national and sub national scales. The result, we suggest, is a form of "domestic transnationalism": a phenomenon whereby domestic actors make use of domestic legal provisions in the host state to represent the interests of a transnational labour force.

Within the academic literature there is a focus on the potential of universal citizenship rights and international human rights to address the situation of non-citizen temporary workers. In many ways, however, Canadian civil society actors trying to secure better rights for migrant workers have found these instruments ineffective. Instead they have turned to legal strategies within the domestic arena. This paper examines one of these strategies - right to organize unions and bargain collectively in the Ontario agricultural sector. This struggle took place in the period 1995 - 2011. While ultimately unsuccessful it offers the an important instance of trying to extend labour rights to agricultural workers, at least one quarter of whom are migrant temporary workers (Preibisch 2011).

***Precarious Status***

The starting point of our paper is the recognition that many people living outside their countries of birth are constructed as non-citizen or ambiguous citizens. These individuals occupy "lesser, conditional or ambiguous states meaning 'they may be ineligible for the rights of political participation, social services and sometimes international recognitions of their status'" (Brysk and Shafir 2004:6).

In Canada, temporary migrant workers in the SAWP program are legally resident and entitled to work but their

condition is characterized as one of "precarious status". This status, according to Goldring et. al., is evident when any one of the following conditions associated with permanent (residence and citizenship) in Canada is missing: "work authorization; right to remain permanently in the country; not depending on a third party for ones right to remain to be in Canada (such as sponsoring spouse or employer); social citizenship rights available to permanent residents (e.g. public education and public health coverage)" (Goldring et. al. 2009:240-241).

The Canadian SAWP program is a small-scale temporary farmworker program that dates back to the 1960s when Canada entered an agreement with Jamaica. Mexico entered the program in 1974 and today Mexican workers comprise the majority of SAWP workers - some 11,798 out of 21,000 workers in 2008. Most of them are men, most work in Ontario and many are involved in horticulture, fruits and vegetables (UFCW 2008-09:8). The SAWP functions as a bilateral agreement between sending states and Canada. Under the terms of the agreement the Mexican government is responsible for recruiting workers and overseeing working conditions. Workers come to Canada for between four to eight months, and often work 10-12 hours days, six days a week (Muller 2005: 44). Work permits assign migrants to one employer. Formally, workers are covered by some social rights but their ability to access entitlements is often compromised. Employers also exert a significant degree of control (Gabriel and Macdonald 2011).

In sum, under the structure of the SAWP temporary workers are in a "precarious status" because they are not permanent residents. They lack many of the rights and entitlements we associate with citizenship. They depend on a third party - that is the employer - for the right to be in Canada and they are not eligible for permanent resident status.

The immobility of migrant workers, their controlled living conditions, lack of language skills and education as well as their vulnerability to employer sanctions has meant that migrant workers themselves are seldom able to play a leading role in activism to promote their own rights within Canada. Civil society groups have engaged in a number of actions to support and promote migrant farm workers' rights including through direct action and worker advocacy. Chief among these advocates is the United Food and Commercial Workers Canada union (UFCW). As the largest private sector

union in Canada, UFCW has significant resources to draw on in support of its work with migrants, in contrast with smaller community organizations with limited resources.

### ***Multi-scalar Politics***

Efforts to promote the rights of those with "precarious status" can take place across a number of scales: the transnational, national and sub national. Supporters of these workers are able to draw on both a discourse of international human rights and nationally located citizenship rights. Specifically, migrant rights activists in the cases discussed here refer to section 2(d) of the Canadian Charter of Rights and Freedoms, which guarantees freedom of association, arguing that migrant workers (and agricultural workers in general) have been denied this right in some Canadian provinces. Section 2(d) is often referred to in an effort to argue that agricultural workers have the right to be members of labour unions. Additionally, the other section of the Charter frequently referred to in legal arguments is Section 15, which provides that every individual is equal before the law, and prohibits "discrimination on the basis of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability" (Charter, 1982; see Suen 2000). It is assumed that all residents in Canada are entitled to Charter rights not explicitly restricted to citizens, but in practice non-citizens do not enjoy many of the same rights as citizens (Basok and Carasco, 2010: 352).

It is also important to note that although Canada is signatory to numerous international agreements related to the rights of migrant workers, these treaties do not become binding on Canadian courts until incorporated into domestic law, and many of the most important international human rights instruments such as the ICCPR and the ICESCR have yet to be so incorporated (Basok and Carasco, 2010: 351).

Tanya Basok and Emily Carasco claim that Canadian migrant rights activists have made arguments based on the "international human rights framework" in various judicial fora to include migrant workers under certain labour and social rights (Basok and Carasco, 2010: 345). However, we argue that while it is true that Canadian courts and legal activists can and do refer to international provisions, they do so in the context of Canadian domestic judicial institutions, and that these claims are supportive of, but

only secondary to, arguments based on domestic Canadian legal provisions, especially the Charter. It is also important to note that Canada, like many other migrant-receiving states, has refused to ratify the U.N. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

At the national scale, UFCW engages in extensive advocacy around farm workers' rights (including those of both migrants and domestic workers). The UFCW has also undertaken some transnational advocacy work; it has lobbied governments of some of the sender states, including Mexico, Thailand, Guatemala, Jamaica, and the eastern Caribbean countries to make them aware of the human rights violations occurring to their compatriots working in Canada. Overall, transnational advocacy work represents only a small element of the UFCW's broader work in defense of migrant rights, and appeals to international legal norms are limited in efficacy.

### ***Legal Strategies***

Perhaps the most effective tool employed by the union in support are the several legal battles it has engaged in in defense of migrant workers' rights. Stan Raper of the UFCW says that the union adopted this form of struggle because they felt they had to "force governments to govern...We could be waiting for twenty, thirty years before a government realizes they've signed international conventions" (Preibisch 2007a: 119). "We're saying, 'time's up. Legal challenges are going to force you to do some of this stuff'" (Preibisch 2007a: 124).

The UFCW has engaged in legal challenges around such issues as employment insurance and occupational health and safety. However, not surprisingly, given the fact that it is a union, its main legal efforts have focused on gaining for migrant workers the right to organize and to engage in collective bargaining. In Ontario, all agricultural workers - whether temporary workers or nationals - are prohibited from collective bargaining.

In 1994, the Ontario government led by the social democratic New Democratic Party (NDP) administration introduced the *Agricultural Labour Relations Act* (ALRA), which briefly gave agricultural workers the right to unionize and bargain collectively. However, the NDP

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government was subsequently defeated and the new Conservative administration repealed the ALRA and introduced *Labour Relations Act, 1995 (LRA)*. The new act once again denied the right to unionize and to engage in collective bargaining.

The UFCW challenged ALRA's repeal and the exclusion of farm workers from the right to collective bargaining in *Dunmore*, arguing that these actions violated s. 2(d) - freedom of association - of the Canadian Charter of Rights and Freedoms. The Charter is part of the Canadian *Constitution Act* (1982). Under the charter all government legislation, regulation and procedure must conform to its provisions. In December 20, 2001, the Supreme Court of Canada (SCC) ruled in favour of *Dunmore* and UFCW Canada, supporting their argument that the complete exclusion of agricultural workers from labour rights violated s. 2(d) of the Charter. The SCC gave the Ontario government (now led by the Liberal party) 18 months to comply with the ruling and address agricultural workers' exclusion from the Ontario *LRA*. In response the Ontario government developed new legislation - *Agricultural Employees Protection Act (AEPA)*. The new legislation still excluded agricultural workers from Section 3(b.1) of the *LRA* covering the right to collective bargaining. Instead it granted agricultural workers the right to form or join an "employees' association". In 2005 the UFCW appealed. The Ontario Superior Court of Justice heard the case brought by three agricultural workers, and Fraser, who at the time was the Director of UFCW-Canada. In January 2006, the Ontario Court ruled against the UFCW, holding that the *AEPA* is constitutional.

The UFCW appealed this decision to the Ontario Court of Appeal. In 2008 the court ruled in favor of the UFCW by declaring that the *AEPA*'s denial to farm workers of the right to collectively bargain is a violation of freedom of association rights guaranteed under the *Charter*. The court gave the Liberal government until November 17, 2009 to provide farm workers with sufficient legislative protections to enable them to bargain collectively as other workers in the province (see Faraday 2008). In February 2009, the Government of Ontario filed an appeal with the Supreme Court of Canada on the 2008 Ontario Court of appeal ruling. The UFCW countered this appeal. The case was heard at the SCC in December 2009. On April 29, 2011 the court found the legislation is constitutional. It stated: the "Ontario legislature is not required to provide a

particular form of collective bargaining rights to agricultural workers, in order to secure the effective exercise of their associational rights.” (SCC 2011: 6).

Reviewing the documents associated with this trial, it is clear that the legal reasoning associated with the case centers primarily on domestic law. The UFCW’s factum refers occasionally to principles of international law and international norms, but only in the context of how they support and overlap with domestic law. For example, in the section which provides an overview of the Respondents’ position, international legal principles are never mentioned. The sole legal precedents and provisions to which the respondents’ refer are Section 2(d) and section 15 of the Charter, the SCC 2001 ruling in *Dunmore v. Ontario* and the SCC 2007 case of *B.C. Health Services* in which the Court ruled that “the right to bargain collectively is also protected as an exercise of freedom of association under s. 2(d) of the Charter. The factum of the Appellants, the Attorney General of Ontario, does refer briefly to the presence of SAWP workers in the labour force, but argues that their rights are adequately protected under domestic legislation.

The Appellants also refer briefly to ILO conventions, but argue that these do not require inclusion of the duty to bargain collectively, “in recognition of the fact that domestic regimes vary widely even in their broad features”. Apart from this brief discussion, all other legal references are to Canadian legislation and court cases.

### ***Concluding Observations***

In this paper, we have explored the legal strategies adopted by advocates of the rights of migrant agricultural workers in Ontario. This case highlights the complexities of the situation of migrant workers, and the weaknesses of international human rights norms and fora for promoting migrant workers’ rights. The precarious nature of these workers’ citizenship rights means they are vulnerable to exploitation and abuse. In this context, workers and their advocates rely heavily on federal and provincial legal provisions, particularly appeals to the Canadian *Charter of Rights and Freedoms*, to push for equality and mobility rights. This, we argue, constitutes a form of domestic transnationalism, in which domestic actors make use of

domestic legal provisions in the host state to represent the interests of a transnational labour force.

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