

The Regulatory and Policy Framework of the Caribbean Seasonal Agricultural Workers Program¹

by:

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April 2007

¹ This paper was prepared for The North-South Institute, with the support of the Labour Program, Human Resources and Social Development Canada. The views and opinions expressed in the paper do not necessarily represent those of The North-South Institute, Canada's Labour Program, or anyone consulted in its preparation.

List of Acronyms

AEPA	Agricultural Employees Protection Act
CPP	Canada Pension Plan
CSAWP	Caribbean Seasonal Agricultural Workers Program
EI Act	Employment Insurance Act
FARMS	Foreign Agricultural Resource Management Service
FERME	Fondation des Entreprises en Recrutement de Main d'oeuvre Agricole Etrangère
HRSDC	Human Resources and Social Development Canada
IRPA	Immigration and Refugee Protection Act
LRA	Labour Relations Act, 1995
MOU	Memorandum of Understanding
NSI	The North-South Institute
OECS	Organization of Eastern Caribbean States
OHSA	Occupational Health and Safety Act
SCC	Service Canada Centres
UFCW	United Food and Commercial Workers
WHMIS	Workplace Hazardous Materials Information Systems
WSIA	Workplace Safety and Insurance Act
WSIB	Workplace Safety and Insurance Board

I. Introduction

The Caribbean Seasonal Agricultural Worker Program (“CSAWP”) in Canada was inaugurated in 1966 as a pilot program between Canada and Jamaica to allow for 264 Jamaican agricultural workers to come temporarily to Canada to harvest tobacco in Southern Ontario. The program was implemented because of the inadequate supply of “reliable” agricultural labour from within the Canadian labour pool. Over the last 36 years, the CSAWP has expanded in all directions: there are more countries sending workers to Canada (Mexico, Jamaica, Trinidad & Tobago, Barbados, and the Organization of Eastern Caribbean States (“OECS”)); there are more agricultural commodity groups in which workers are placed; there are more provinces participating in the program; and the CSAWP is serving as a model for managed migration in other Canadian industries (i.e. hospitality, construction, and meat packing).

Table 1: Distribution of Caribbean & Mexican Seasonal Agricultural Workers in Provinces, 2005²		Table 2: Distribution of Caribbean & Mexican Seasonal Agricultural Workers by Source Country, 2005	
Ontario	16,448	Mexico	11,798
Quebec	2,667	Jamaica	5,916
British Columbia	551	Trinidad & Tobago	1,494
Alberta	451	OECS	640
Saskatchewan	33	Barbados	426
Manitoba	18		
Nova Scotia	17		
New Brunswick	--		
Newfoundland	--		
Unknown	82		
Total:	20,274	Total:	20,274

Source: Citizenship and Immigration Canada, *Facts & Figures 2005*

This paper is based on data collected between March 2002 and June 2003 which was presented in a final report for the North South Institute’s (“NSI”) study of “best practices” of the CSAWP.³ The findings are based on primary and secondary research. Interviews were conducted between March 2002 to June 2003 of various stakeholders including Human Resources Development Canada advisors and regional managers; government and consulate representatives from all participating sending countries; representatives from FARMS and FERMES; Canadian Immigration and Department of Foreign Affairs officials; and various representatives of the

² Due to privacy considerations, some cells in this table have been suppressed and replaced with the notation “-“. As a result, components may not sum to the total indicated. In general, CIC suppressed cells containing less than 5 cases except in circumstances where, in CIC’s judgment, it is not releasing personal information on an identifiable individual.

³ Verma, Veena. *The Mexican and Caribbean Seasonal Agricultural Workers Program: Regulatory and Policy Framework, Farm Industry Level Employment Practices, and the Future of the Program under Unionization* (Ottawa: North South Institute, December 2003). This paper updates some of the data in the original report, including statistics and changes in legislation where applicable.

United Food and Commercial Workers Canada (“UFCW”). Data on workers participating in the program was derived from secondary sources and worker surveys summarized and analyzed by the Mexican and Caribbean researchers in the NSI project. This paper does not include discussion of the new Temporary Foreign Worker Programs in Canada.

Agricultural workers are governed by provincial legislation as it relates to labour and employment laws. Therefore, there may be some variance in terms of the labour and employment practices of migrant workers depending on the province in which they work. Ontario was selected as the case study for the operation of the CSAWP because the majority of the migrant workers (85 - 90%) under CSAWP work in Ontario. However, federal legislation such as the *Employment Insurance Act*, the *Immigration and Refugee Protection Act*, and the *Canada Pension Plan*, apply to all agricultural migrant workers regardless of the province they are working in. In addition, the *Charter of Rights and Freedoms* has general application to all migrant agricultural workers.

Using a legal perspective, this paper will examine the current institutional framework of the CSAWP and the instruments governing the program, including the Memoranda of Understanding between the supply countries and Canada; operational guidelines; the employment agreement; and government policy statements. These instruments are placed within the general framework of Canadian immigration laws and the applicable provincial and federal employment laws. This paper will also review the administration of the program and the role of the various parties and stakeholders in the program. Throughout this paper, I will identify some strengths and weaknesses in the way the CSAWP is structured, particularly with respect to migrant workers’ rights, and review some dispute resolution models that may remedy these weaknesses. Finally, recommendations for labour-sending countries to address migrant workers’ needs will be summarized.

II. Policy and Institutional Framework of the Seasonal Agricultural Worker Program

Today, the Canadian government describes the CSAWP as a program of “managed migration” achieved through a partnership between the agricultural industry and government.⁴ This partnership allows for on-going dialogue between industry and government to ensure that growers have a sufficient number of “reliable” workers, but at the same time government monitors the broader public policy relating to the impact of these workers on Canada’s labour market.

A. Memorandum of Understanding (“MOU”) between Canada and the Caribbean States⁵

The Memorandum of Understanding and the annexed Operational Guidelines and Employment Agreements between the employer and the worker are the primary documents in facilitating the

⁴ Service Canada, Ontario Region. “Agriculture Programs and Services: Partnerships”, <http://www1.servicecanada.gc.ca/en/on/epb/agri/agri.shtml>, site accessed 31/03/2007.

⁵ This section is based on a review of the Memorandum of Understanding between the Government of Canada and the Government of Jamaica concerning the Commonwealth Caribbean Seasonal Agricultural Workers Program in force from January 1, 1995 to January 1, 2000 and continues in force thereafter unless terminated by either party giving three (3) months notice in writing to the other party. Such notice has not been provided since January 1, 2000 and, therefore, this MOU remains in force.

movement of Caribbean workers to Canada under the CSAWP. These instruments set out the recruitment, selection, and documentation procedures for CSAWP workers.

1. Legal Status of MOU

The CSAWP is established by a Memorandum of Understanding signed by both Canada and the Caribbean states. The federal Minister of Human Resources and Social Development Canada (“HRSDC”) is the Government of Canada’s representative and signatory for the MOU. Jamaica is represented by the Minister of Labour, Social Security and Sports. The content of the MOU between Canada and Jamaica is the same as the MOU between Canada and all of the other Caribbean states participating in the CSAWP. Therefore, references to it are applicable to Trinidad & Tobago, the OECS, and Barbados.

The legal status of the MOU is described explicitly as an “intergovernmental administrative arrangement”; it does not constitute an international treaty. The MOU states that any disputes which arise under the MOU respecting the interpretation or application of the MOU or its attachments (i.e. the Operational Guidelines or the Employment Agreement) will be resolved through consultation between both parties. However, the MOU is silent on what process would be undertaken if no resolution is achieved through consultations.

2. Policy Objectives Incorporated in the MOU

The preamble of the MOU states that the CSAWP symbolizes the “close bond of friendship, understanding and cooperation” which exists between the two countries. Furthermore, the preamble outlines the purpose of the MOU and the CSAWP as three-fold:

1. The CSAWP should continue to be of “mutual benefit to both parties”.
2. The CSAWP should facilitate the movement of seasonal agricultural workers into all areas of Canada.
3. The operation of the CSAWP is dependent on Canada’s determination of the need for seasonal agricultural workers to satisfy the requirements of the Canadian agricultural labour market.

The preamble incorporates the policy objectives and rationale of the CSAWP. In particular, it emphasizes the role of the state as: determining those aspects of the program which are to their “mutual benefit”; monitoring the movement of workers; and ensuring that migrant workers do not displace domestic labour. From Canada's perspective, the CSAWP is reported as a benefit because it meets the following objectives:

1. Meets qualifying fruit, vegetable and horticulture growers’ seasonal demand for “low-skilled” agricultural workers during the peak planting and harvesting season when there is a relative shortage of similarly-skilled Canadian workers;
2. Helps maintain Canada’s economic prosperity and global agricultural trade competitiveness through timely planting, harvesting, processing and marketing of fruits,

vegetables and horticulture crops, and expand job prospects for Canadian citizens dependent on agriculture and agriculture-related employment opportunities;

3. Enhances and maintains the Canadian economy's efficiency through better allocation of local labour resources;
4. Improves the economic welfare of migrant workers by providing them with temporary full-time employment in the labour-intensive commodity sectors of the fruit, vegetable and horticulture industry at relatively higher wages than they could obtain from similar or alternative activities in their home countries;
5. Facilitates the return of the workers to their home countries at the end of their temporary employment in Canada.

The need for government actors to develop an institutional and regulatory framework for the migration of agricultural workers into Canada is also recognized as necessary in order to prevent the exploitation of migrant workers that may result from illegal migration, the use of labour contractors, or private recruitment.

From the perspective of Mexico and the Caribbean states, the CSAWP supports economic development of the supply countries through remittances of foreign currency. In 2001, Jamaica estimated that it benefited from approximately \$7.6 million in remittances from CSAWP workers.⁶ The CSAWP also provides a scheme whereby high rates of local unemployment may be temporarily relieved. Workers benefit from Canadian wages which are used to improve farm workers' living conditions when they return home. As well, skills may be transferred to agricultural production at home. While both workers and the sending country identified benefits to the program, the characterization of those benefits may sometimes come into conflict. That is, the state's interest in remittances may override an individual worker's grievances relating to his or her non-wage working conditions.

The MOU outlines the guiding principles in the operation of the CSAWP as agreed to by Canada and the Caribbean states, which are summarized below with some commentary.

1. Workers under the CSAWP are to be employed only in the Canadian agricultural sector, and only during periods determined by Canada and when Canadian workers resident in Canada are unavailable. The Canadian government has made it clear in its policy formulation of the CSAWP that migrant agricultural workers are intended to supplement the current Canadian labour force and not displace it.⁷ Therefore, a key feature of the CSAWP is the "Canadians First" principle which requires growers to demonstrate that attempts were made to recruit and hire Canadian workers before approval will be given to a grower to hire a worker from Mexico or the Caribbean.⁸ This principle also serves industry's objective of maintaining a "reliable" workforce during critical months of the

⁶ This data was obtained from interviews conducted in 2002 and presented in Verma, *supra*, note 2.

⁷ Service Canada. *Statement of Policy and Terms and Conditions for the 2006 Commonwealth Caribbean and Mexican Seasonal Agricultural Workers Program* (hereafter "2006 CSAWP Statement of Policy").

⁸ Service Canada. *Caribbean & Mexican Seasonal Agricultural Workers Program – Overview*.

harvesting season. The effect of the principle is to restrict migrant labour mobility in Canada and designate this labour pool as temporary.

2. The guiding principles state that workers under the CSAWP are employed at a premium cost to Canadian employers. This means that employers must accept the fact that hiring foreign labour will cost them more, as opposed to hiring local or domestic labour. The “premium” paid by the employer includes those costs which an employer would not otherwise incur if hiring local labour, such as adequate accommodation and a portion of workers’ travel expenses. By design, the “premium” aspects of the program emphasize the “Canadians First” policy objective of the CSAWP by attempting to make it more attractive to hire Canadian rather than foreign workers.
3. The Caribbean MOU states that workers are to receive “fair and equitable treatment while in Canada under the auspices of the Program”. This language in practice is being interpreted by the parties as treating Caribbean workers the same as Canadian workers.

3. Annex I: The Operational Guidelines

The CSAWP is administered according to Operational Guidelines which are attached to the MOU as Annex I. The Operational Guidelines delineate how the CSAWP is to be administered and the role of the state and specified non-state actors, including designated duties and responsibilities. The Operational Guidelines are subject to annual review by both parties and amended as necessary to reflect changes required for the successful administration of the CSAWP and adherence to the principles contained in the MOU.

The Operational Guidelines provide for the recruitment of offshore workers which is closely regulated and monitored by the state parties. For example, the state parties agree that the employer and the Caribbean Government Agent in Canada are responsible for selecting and providing the most economical method of air transportation to and from Canada, and this information will be communicated to HRSDC. The Caribbean Guidelines provide that the employer or employer's agent will consult with the Caribbean Government Agent to ensure that the departure date from the Caribbean state is acceptable to the worker.

This formal and regulated method of recruitment is a “best practice” by ensuring that workers are tracked at every step in the process, and not subject to abuses or arbitrary treatment at the hands of employers or independent labour contractors. The delegated duties of each state party are attached as Appendix “A”.

4. Annex II: The Employment Agreement⁹

The Operational Guidelines require that both workers and employers participating in the CSAWP are required to sign an Employment Agreement attached to the MOU as Annex II. While the Operational Guidelines delineate the duties and obligations of the state parties in the administration of the CSAWP, the Employment Agreement delineates the duties and obligations of the worker and employer in the conditions of employment. It also details the role of the Government Agent from Mexico and the Caribbean as it relates to these conditions.

⁹ Commentary on the Employment Agreements for Mexico and the Caribbean are limited to the 2007 versions.

The Employment Agreement is supposed to be signed and reviewed by the worker before arriving in Canada. The Employment Agreement is subject to annual review by both state parties to the MOU. The Caribbean MOU states that amendments may be made only after consultation with “interested parties”. The Caribbean language may be interpreted to include non-governmental and workers' organizations, as well as employer groups. Currently, there is no consultation with employee groups or migrant worker representatives, except for the supply country's Government Agent.

The Employment Agreement does not stipulate how the Employment Agreement is to be enforced. Therefore, theoretically, it can be enforced in the same way as any other employment contract in the Canadian courts. There is no precedent or case law where either a worker or an employer has sought enforcement or damages for breach of contract under the Employment Agreement. This is not surprising since workers are only in Canada for a limited time and would have difficulty accessing legal representation. In addition, if the employer claims a breach of the Employment Agreement resulting in premature repatriation of the worker, enforcement becomes extremely difficult. The effect of the repatriation provisions will be discussed in further detail below.

B. Immigration Laws, Mobility Rights, and Prospects for Citizenship

The CSAWP is motivated by growers' and government's inability to attract Canadians to perform agricultural labour as well as the need for a “reliable” agricultural workforce. “Reliable” in this context means no threat of leaving the job during critical harvest periods despite low wages and difficult working conditions. This section will examine how Canadian immigration laws and CSAWP instruments are used to incorporate Caribbean and Mexican foreign labour as “reliable” labour for agricultural production in Canada.

1. Temporary Status of CSAWP Workers

General provisions of the *Immigration and Refugee Protection Act*¹⁰ (“IRPA”) and *Regulations*¹¹ relating to the issuance of temporary work permits apply to CSAWP workers. That is, an immigration officer authorizes the work permit if it is demonstrated that there is an offer of employment, and the offer is likely to result in “a neutral or positive economic effect on the labour market in Canada”.¹² HRSDC is required to provide a labour market opinion on the likely effect of approving a work permit for a temporary foreign worker by considering factors that are listed in the Regulations.¹³

The CSAWP operates on a seasonal basis during specific peak periods between January 1 to December 15.¹⁴

Temporary foreign workers, including CSAWP workers, require a valid work permit before commencing employment in Canada. Under the CSAWP, the employer submits a request for

¹⁰ 2001, c. 27.

¹¹ SOR/2002-227.

¹² s. 200(1)(c)(iii) and 203(1) of the *Regulations*.

¹³ s. 203(3) of the *Regulations*.

¹⁴ Service Canada. *2006 CSAWP Statement of Policy*, *supra*.

migrant agricultural workers at the local Service Canada Centre (“SCC”) with information including the number of workers required, the duration and location of employment, and pertinent tasks.

The length of authorized stay in Canada stipulated on the work permit corresponds with the anticipated length of employment. Authorized stay ends on the day on which any work permit issued to the temporary worker expires.¹⁵ If the worker's employment terminates before the expiry date on the work permit, the worker may still reside in Canada until the date of expiry, but he or she is unable to work for another employer unless approved by an HRSDC officer and the Government Agent.

The Employment Agreement delineates the conditions attached to the work permit approved under the *IRPA Regulations*. The Employment Agreement defines the scope and period of a worker's stay in Canada to be a period not less, than 240 hours in a term of six weeks or less nor longer than 8 months.¹⁶ The completion date of employment is filled in on the Employment Agreement to correspond with the expiry date on the individual's work permit.

The Caribbean Employment Agreement states that an unnamed worker shall not be discharged during the 14 day trial period except for “misconduct or refusal to work”.¹⁷ There are no guidelines describing what these reasons for discharge mean or how they should be interpreted.

For workers coming to Ontario, the average length of stay in 2005 was 18 weeks for Jamaican workers, 19.1 weeks for Barbadian workers, 21.9 weeks for East Caribbean workers, 17.4 for Trinidadian workers, and 20.7 weeks for Mexican workers.¹⁸ The average length of stay for all Caribbean workers in 2005 was 18.2 weeks, and 19.4 weeks for all participating SAWP countries.¹⁹ Upon completion of the term of employment as defined in the Employment Agreement and in the work permit, the worker must promptly return home.²⁰

2. Selection of Workers: “Named” vs. “Unnamed” Workers

A large number of Caribbean workers return to Canada year after year under the CSAWP. For example, 8% of the workers from St. Vincent and The Grenadines have over 20 years participation in the CSAWP and 53% have over 10 years participation; 37% of the workers from St. Lucia have over 10 years participation; 30% of the workers from Grenada have 8-14 years participation and 70% have 4 years or less participation.²¹

¹⁵ s. 183 of the *IRPA Regulations*.

¹⁶ Service Canada. *2006 CSAWP Statement of Policy*, *supra*; Caribbean Employment Agreement, I.1.

¹⁷ Caribbean Employment Agreement, I.3.

¹⁸ F.A.R.M.S., 2005 Harvest System – Ontario, 2005 Average Worker Length of Stay for Jamaica, Barbados, East Caribbean, Trinidad/Tobago, and Mexico.

¹⁹ F.A.R.M.S., 2005 Harvest System – Ontario, 2005 Average Worker Length of Stay for Caribbean Countries and All Countries.

²⁰ Caribbean Employment Agreement, IX.7.

²¹ Andrew Downes & Cyrilene Odle-Worrell, “Barbadian, Trinidadian and Eastern Caribbean Workers’ Participation in Canada’s Seasonal Agricultural Labour Market and Development Consequences in their Rural Home Communities” (Ottawa: North South Institute, 2003).

The Program provides a process whereby employers may request workers by name to return to work on their farms in subsequent seasons. These orders are processed as priority. Employers also have the choice of the supply country.

Named workers are considered a valuable supply of experienced workers. In 2002, there were 16,654 work placements approved under the CSAWP: 10,302 placements requested “named” workers (62%), and 6,352 were “unnamed” (38%). Caribbean workers are more likely to be “named” workers than Mexican workers. In 2002, 73% of Caribbean workers in Ontario were named whereas 52% of the Mexican workers were named. Seventy-four percent (74%) to seventy-eight percent (78%) of the Jamaican workers under the CSAWP were “named” workers for 2001-2002 making it the supply country with the highest percentage of “named” workers.

Table 3: CSAWP Named and Unnamed Workers in Ontario *

COUNTRY	<u>Named</u>		<u>Unnamed</u>		<u>Total</u>	
	2001	2002	2001	2002	2001	2002
Barbados	346	305	199	230	545	535
East Caribbean	302	317	146	110	448	427
Jamaica	4,372	4,481	1,551	1,265	5,923	5,746
Mexico	4,776	4,206	4,352	4,151	9,128	8,357
Trinidad/Tobago	1,117	993	671	596	1,788	1,589
TOTALS:	10,913	10,302	6,919	6,352	17,832	16,654

Source: FARMS. *Harvest System, Named & Unnamed Workers, 2000 & 2001.*

* This chart represents the number of work placements, not workers.

Generally, critics of guest worker programs have argued that many temporary workers do not return home after their contracts expire creating a pool of undocumented workers in the receiving country. However, the named worker process gives workers the reasonable expectation of returning the following year and provides some level of security for future employment thereby reducing incentives for illegal settlement.²² This system also fosters paternalistic relationships between workers and their employers. Loyalty of workers to their employers results in workers not wanting to abandon their employers and, therefore, lowers the incentive of non-return.²³

The process of naming workers may have the effect of placing them in a vulnerable position *vis-a-vis* their employer. That is, the imbalance in the power relationship between employer and employee is exacerbated when the employer has the ability to determine the worker’s future participation in the CSAWP through the “naming” process. A worker may be less inclined to raise grievances against their employer if he/she thinks that this may impact his/her job security in subsequent seasons.

3. Restrictions on Workers’ Mobility and the Transfer Process

²² Tanya Basok, “He Came, He Saw, He... Stayed. Guest Worker Programmes and the Issue of Non-Return” (2000) 38:2 *International Migration* 215-236.

²³ *Ibid.*

While in Canada, the migrant worker must live on the grower's property and in accommodation provided by the grower.²⁴ The worker cannot legally work for any other grower without approval of HRSDC and the supply country's Government Agent.²⁵ If an employer induces or aids a worker approved under the CSAWP to perform unauthorized work for another person or to perform non-agricultural work, the employer will be liable to a penalty up to \$50,000 or two years imprisonment, or both, under immigration laws.²⁶

HRSDC has published a 2007 Policy Statement Regarding Access to and the Termination of Assistance to an Employer under the Commonwealth Caribbean and Mexican Seasonal Agricultural Workers Program,²⁷ which elaborates the Canadian government's position as it relates to unauthorized employment.

With respect to the matter of unauthorized employment, this is the main area where, from time to time, abuses in the Program have been encountered with some employers. In this regard, foreign workers have, from time to time, been loaned or transferred to other employers without prior approval of the worker, Service Canada and the representative of the government of the country from which the worker came. This gives rise to a number of concerns.

The Policy Statement warns that such practices may constitute a breach of the worker's employment authorization and result in prosecution of the foreign worker, the employer who loans or transfers the worker, and the employer to whom the foreign worker is loaned or transferred. In addition, foreign workers may be put at risk in terms of ensuring: insurance coverage if he or she is injured or becomes ill while working for the other employer; proper deductions being made from wages and properly remitted to the government agent in accordance with the employment agreement; and meeting fair wages and working conditions. Finally, HRSDC is concerned that such practices may adversely affect the employment opportunities of Canadians.

The consequence of unauthorized employment as described above includes termination of assistance by the Canadian and foreign government in facilitating the inter-country movement of seasonal agricultural workers.

Employers may request and obtain "transfer workers", if available, with approval from SCC and the supply country prior to the movement of such worker. "Transfer workers" are workers who have completed, or are about to complete, their first term of employment with an employer approved under the CSAWP.²⁸ The initial period of employment, combined with the transfer period of employment, must not exceed the 8 month maximum. The Caribbean countries have a separate Employment Agreement for transfer contracts. A transferred worker has a trial period of 7 working days from the date of arrival on the new farm, after which the worker will be deemed

²⁴ Caribbean Employment Agreement, IX.2.

²⁵ Caribbean Employment Agreement, IX.6.

²⁶ Subsections 124(c) and 125 of the *IRPA*; Caribbean Employment Agreement, VIII.3.

²⁷ <http://www1.servicecanada.gc.ca/en/on/epb/agri/termination.shtml>

²⁸ Service Canada. 2006 CSAWP Statement of Policy, *supra*.

to be a “named” worker.²⁹ This is significant for the purposes of the repatriation provisions which are discussed below.

The transfer process benefits both workers and employers. Employers accepting transferred workers only have to pay the southbound airfares and the worker is available right away in Canada, and not subject to time delays resulting from the immigration process. Workers are provided an opportunity to work longer and earn more wages.

4. Repatriation

The repatriation provisions in the Employment Agreement allow the grower to repatriate a worker for “non-compliance, refusal to work, or any other sufficient reason”. There are no guidelines or definitions of what these terms mean. After consultation with the supply country’s Government Agent, the employer may terminate employment and repatriate a worker on these grounds based on the following distribution of costs³⁰:

1. if the worker was requested by name by the employer, the full cost of repatriation must be paid by the employer (i.e. southbound flight only);
2. if the worker was unnamed and selected by the supply country, and 50% or more of the term of the contract has been completed, the full cost of the returning worker will be the responsibility of the worker (i.e. southbound flight only);
3. if the worker was unnamed and selected by the supply country, and less than 50% of the term of the contract has been completed, the full cost of the northbound and southbound flights will be the responsibility of the worker.

The Caribbean Employment Agreement states that if there are domestic or personal reasons for premature repatriation, and:³¹

1. if the worker was “named”, the employer is obliged to pay the full costs of repatriation to Kingston, Jamaica (and not necessarily the travel costs to the country of residence if the worker lives outside of Kingston, Jamaica);
2. if the worker was “unnamed” and 50% or more of the term of contract has been completed, the Caribbean state will pay 25% of the cost of reasonable transportation to Kingston, Jamaica and subsistence expenses;
3. if the worker was “unnamed” and less than 50% of the term of contract has been completed, the worker is responsible for the full costs of repatriation.

If the worker is prematurely repatriated because of medical reasons, verified by a Canadian doctor, then the employer pays the “cost of reasonable transportation and subsistence”, except

²⁹ 2007 Transfer Contract for the Employment in Canada of Commonwealth Caribbean Seasonal Agricultural Workers, I.3.

³⁰ Caribbean Employment Agreement, X.1.

³¹ Caribbean Employment Agreement, X.2.

when the condition was present prior to the worker's departure in which case the Caribbean worker has to pay for his or her own costs of return.³²

The Employment Agreements stipulate that if it is determined by the consulate, after consultation with HRSDC, that the employer has breached the employment agreement, and if alternative agricultural employment cannot be arranged through HRSDC, the employer is responsible for the full costs of repatriation and payment to the worker for the total wages that would have been paid if the contract had been completed.³³

The vague language of the repatriation provisions that allow employers the right to repatriate workers without further compensation for “non-compliance, refusal to work, or any other sufficient reason”, allows the employer to arbitrarily remove workers from their property with no formal right of appeal. The implication of the premature repatriation provisions significantly undermine the migrant workers’ ability to enforce any rights they may have. The workers’ vulnerability is compounded by the fact that as non-citizens they have no rights of mobility while in Canada.³⁴ The worker may legally stay in Canada until the expiry of the work permit, regardless of the employer's decision to rescind the contract. However, if the employer triggers these provisions, the practical effect is that the worker is also immediately removed from the grower's property requiring costs for alternative accommodation to be incurred at the same time as employment income has ceased. Moreover, the worker is prohibited from working for another employer unless the consulate is able to find another farm for the worker. If a transfer placement is not available, there is some urgency to return the worker home in order to avoid any additional costs for room and board. In summary, if an employer decides to prematurely repatriate a worker, the only option for the worker is to either find employment on another farm through the worker's government agent and approved by HRSDC, or to go home. It is extremely difficult, as the grower knows, for the worker to attempt any claim for damages for breach of contract in these circumstances.

Recommendation: *Guidelines or a policy statement be drafted on the interpretation of “non-compliance, refusal to work, or any other sufficient reason”. In particular, note that a breach of contract will not be found where a worker refuses work that is unsafe.*

Recommendation: *The power of the employer to repatriate workers should be minimized. It is recommended that there should be a minimum two (2) week waiting period before a worker is required to be sent home in order to allow the worker the opportunity to raise a complaint about the validity of the repatriation decision. If the worker accepts the repatriation decision, the two (2) week period may be waived to allow for immediate return. If the worker files a complaint, then the complaint should be investigated by an independent body and the worker should be allowed to stay until the investigation is complete or a decision on the merits of repatriation have been determined. The transfer process may be used during this period in order to place workers with other farmers during this interim period.*

5. Access to Citizenship or Permanent Residency

³² Caribbean Employment Agreement, X.3.

³³ Caribbean Employment Agreement, VIII.4.

³⁴ Section 6 of the *Charter of Rights and Freedoms* only gives the right to mobility to Canadian citizens.

The CSAWP has been in existence now for 41 years and as demonstrated earlier a large number of workers arrive as “named” workers. Moreover, a number of workers have been returning to Canada on a seasonal basis for several years, working anywhere from 4-8 months of the year in Canada for up to 20 years. Despite the significant labour market and social attachment these workers have created in Canada, their years of labour in Canada are not recognized as it relates to mobility rights or citizenship rights in Canada.

The current immigration restrictions on migrant agricultural workers serve the employers’ and the supply country's interests, but not the workers’ interest. That is, employers receive a “reliable” labour supply and the supply country receives a “reliable” source of remittances. However, workers are denied opportunities for greater financial security which may be achieved through labour market mobility and obtaining permanent residency status in Canada.

Barriers to citizenship place migrant workers in a position of social and political disadvantage. Migrant workers cannot vote for Canadian politicians who may campaign for improvements in wages and working conditions, or otherwise influence Canadian authorities to address concerns relating to their employment. Thus, migrant workers are limited in their effective participation in the political process.

C. Administration and Operation of the CSWAP

The following discussion supplements the earlier review of duties and obligations of the various parties and stakeholder as outlined above. It provides insights into the practical operation of the CSAWP that are not mentioned in the Operational Guidelines attached to the MOUs.

1. Role of FARMS

FARMS acts as a “friendly voice” for growers. As an interviewed representative said: “It is run by employers and it is for the employers”. FARMS is a not-for-profit organization that is comprised of elected representatives from the grower community. It is funded through an administration fee per worker that all participating employers must pay if workers are to be placed on their farms.³⁵ These fees pay for the administration costs associated with the CSAWP, and result in savings for the Canadian government that had previously incurred these costs. In 2006, there were 1,474 growers participating in the program in Ontario and paying fees to FARMS.

The FARMS Board members are themselves growers who employ foreign workers. They also supply growers with information on the regulations that govern the program, including employment laws, health and safety laws, travel arrangements, and housing requirements. Its primary means of communicating these various rules and regulations is the *Employer Information Package* which is issued annually.

FARMS is accountable to HRSDC for the administration of the program. On HRSDC’s behalf, FARMS communicates the orders for workers that have been authorized by the Service Canada Centres to the governments of the supply countries. HRSDC is dependent on FARMS to provide it with reports and statistical data on the CSAWP. Statistics Canada does not track information as

³⁵ The fee for 2006 was \$35.00 plus G.S.T. per worker.

it relates to migrant agricultural workers. HRSDC relies on FARMS information to feed into policy recommendations relating to the CSAWP. FARMS is also the only body that maintains an up to date mailing list of all employers in the program and tracks the location of all migrant workers at all times. Therefore, HRSDC relies on FARMS to disseminate information to employers in the program.

FARMS may also assist Foreign Government Agents in dealings with complaints against individual employers. Generally, in this capacity, the relationship with the majority of the Government Agents was described as co-operative and positive. FARMS indicated that the Caribbean Liaison Offices provide a “complete” service and “operate as a business”.

FARMS has formal recognition to participate at annual review meetings, which provides it with the opportunity to raise the material interests of growers. HRSDC describes the relationship with FARMS as interactive and good, and sees a benefit to FARMS as a representative body that allows employers to negotiate directly with government offices on aspects of the CSAWP. Despite the Operating Guidelines defining FARMS role as purely administrative, it does act politically and advocates for the growers in policy negotiations. For example, HRSDC states that wages are not negotiable; however, there is significant lobbying by FARMS as well as heated disputes between FARMS and the foreign Government Agents on the issue of wages and costs of the program to the employer.

2. Role of Caribbean Liaison Officers

Generally, the role of the Caribbean Liaison Offices is program administration, policy inputs, and dispute resolution. They process approved requests for workers; provide worker orientation; inspect accommodations on the farms; investigate conflicts and disputes between workers and between workers and growers. Government Agents also provide general administrative services, such as processing tax returns and Workplace Safety Insurance Board claims. It was noted by all stakeholders that a good liaison or consular service is essential for the program to run smoothly.

It is also the federal government's position that the Government Agents should be interfacing with provincial officials on any specific employment related problem or request for information. However, interviews with the Government Agents indicated that this is not happening and there is inconsistency in terms of knowledge of the procedures for enforcing provincial legislation. For example, if the Government Agent believes there is a violation of the *Employment Standards Act*, he or she will call HRSDC for assistance.

Recommendation: *Capacity-building for Government Agents on procedural and substantive aspects of provincial employment laws. Provide Government Agents with provincial government contacts at various Ministries responsible for enforcement, and foster better communication between the Government Agents and provincial authorities.*

The Government Agents make the program work. In particular, they are needed to ensure that complaints, conflicts, and disputes are addressed quickly and effectively. The Caribbean Liaison Officers all reported that they make regular visits to work sites and make themselves readily accessible to workers every day of the week in case any incident should arise. It is observed that all of the Caribbean Liaison Officers are in Toronto with the exception of Jamaica which has an office in Leamington, Ontario.

Workers' advocacy groups, including church, community, and labour organizations, have voiced frustration with the consulates' failure to respond to workers' complaints when either the worker calls or the workers' group calls on their behalf. This has created a gap in services for workers which has been filled by workers' advocacy groups and trade unions, such as the United Food and Commercial Workers Canada ("UFCW"). The services they provide to migrant agricultural workers include legal referrals, assistance with Workplace Safety and Insurance claims, provision of plain language information on the application of the *Occupational Health and Safety Act*, and other employment related advice and support. The UFCW Migrant Agricultural Workers Support Centre in Leamington, Ontario was opened in 2002 and additional centres were opened in Simcoe, Bradford, and Virgil in Ontario, and St.-Remi in Quebec. These Centres are, in many cases, performing the job of the Government Agent; however, they are receiving no funding from the Canadian Government or other stakeholders in the CSAWP to provide this service.

Recommendation: *Create more satellite Liaison Offices closer to farm communities in order to be more accessible to workers.*

The Government Agents are identified as the workers' representatives by themselves and other official CSAWP stakeholders. However, this role is compromised in two ways: 1) the Government Agent is also identified as a mediator in disputes; and 2) state interests and the competitive structure of the CSAWP may conflict with individual worker interests.

The Government Agent plays the role of a negotiator or mediator in assessing and resolving conflict situations. Government Agents described themselves as "mediators", "neutral" or "in the middle". As one Government Agent said: "I am there for the farmer and for the worker." This is consistent with the language of the Operating Guidelines which state that the role of the Government Agent is to ensure that the program is running smoothly "for the mutual benefit of both the employers and the workers". The employers rely on this role to ensure that disputes do not escalate – "they [Government Agents] can put out brush fires". In some circumstances, the Government Agent may also act as an arbiter in making a decision about repatriation of a worker if an employer makes a complaint. This decision may be made despite any protest of a worker.

Thus, Government Agents play a "dual role" in the dispute resolution process. They represent the worker, but also need to act as a mediator and arbiter. The worker, therefore, does not have independent representation. In light of this, it is concluded that there is a conflict of interest in the Government Agent's role as the worker's representative because of the current CSAWP structure.

Recommendation: *Amend the Operational Guidelines to clarify that, while the government agent will endeavour to ensure the smooth functioning of the program, the role of the supply country's Government Agent is to represent the worker's best interest.*

The second potential for conflict of interest arises from the state interest that the Government Agents represent which is to maintain their respective country's participation in the program, and obtain as many placements as possible in order to maximize the return of remittances. This fact, tied with the employer's freedom to select workers from any of the countries at his or her discretion, creates a competitive structure among the consulates.

The Canadian Government supports the competitive structure of the CSAWP as being responsive to growers' needs, however, this competitive structure may undermine the Government Agents' ability to pursue worker grievances. HRSDC's response to the competitive structure of the program was as follows:

*Competition helps. Yes, it is there between the Caribbean countries and between the Caribbean countries and Mexico... A healthy level of competition is a good thing for the program. The countries are anxious to supply labour to us and be responsive to suggestions that we make. The employer community is well served by that.*³⁶

Employers state that their choice of supply country for workers is determined in large part to the level of service that a consular office will provide. The Government Agents understand that they are in competition for worker placements on farms and therefore, have to be responsive to employers, and they were all aware that if a dispute is not resolved, a grower may select workers from another country. This point is best illustrated by one Government Agent's response to a question about the prospects of appealing an employer's determination of misconduct. He said:

*The worker gets to have his say. I will try to resolve the situation. Usually the employer will give them another chance. But even if the worker is right, [he] may have to be sacrificed. I don't want to lose the whole farm. I tell the workers this before they come up. And I will try to transfer them. But you can't fight the farmer if the farmer really wants him off the farm. The farmers will threaten to go to another country. Sometimes, one worker must be sacrificed to save 20.*³⁷

Another Government Agent stated that his role in disputes is to, generally, make sure that the worker does the work – "I rarely lose farmers. They don't switch because of our service."

Another aspect to consider is whether workers are well served by this model. The competitive structure and the Government Agents' interests in retaining placements have the effect of leaving the worker with no independent representation. The worker's individual interests are subordinated to the Government Agent's role as a worker representative, mediator, and government agent for their respective country. One Government Agent admitted openly that he feels he is in a conflict of interest because of these multiple roles and believes that workers' interests needed to be represented through an independent workers' organization or a trade union.

The Government Agents do not have guidelines on servicing workers outside of the MOU, the Operational Guidelines, and the Employment Agreement. Interviews with all of the stakeholders and parties indicated that there is no consistency in servicing workers, and the worker and employer rely on the judgment of the individual Government Agent to address any issues which may arise. There is also inconsistency in the tracking of workers' complaints and how they are resolved. Some share this information with FARMS and HRSDC; others do not.

Recommendation: *Further guidelines should be developed to remove any potential conflict of interest of the Government Agents in their representation of workers. For example, it should*

³⁶ *Ibid.*

³⁷ *Ibid.*

be stated that the Government Agent acts only on behalf of the worker's interests and employers may seek their own independent representation.

Recommendation: *A central database of all worker complaints should be maintained in order to track patterns of industry level practices which may assist in developing future policy objectives and guidelines for the CSAWP. The database may also be used to track "good" and "bad" employment practices in assessing future employer participation in the CSAWP.*

Evaluation of the Government Agents was not canvassed with them. A standard evaluation of how they administer the program and service workers would assist in providing consistency in the delivery of their tasks and provide a mechanism of accountability. One possible model of evaluation may include the Government Agents completing a self-evaluation as well as HRSDC, FARMS and workers submitting evaluations on an anonymous basis to Ministry offices in the supply country responsible for the policy development of the CSAWP. Outcomes of the evaluation should be shared with HRSDC to ensure that the policy objectives of the CSAWP are being met.

Recommendation: *Develop a model of evaluation of Government Agents to ensure accountability and consistency in the servicing of CSAWP workers.*

3. Dispute Resolution Mechanisms

a. Informal and Consultative Mechanisms

At present, the dispute resolution mechanism in the administration of the program is informal and consultative. It works primarily through the Government Agents. If workers or employers have a conflict or dispute, they are instructed to call the Government Agent or the local Service Canada Centres. If the complaint is serious enough (as determined by the Government Agent), a visit may be made to the farm. The Caribbean offices reported that visits will be made to the farms in an attempt to resolve disputes but attempts to mediate the problem may also be done over the phone. It is the role of the Government Agent to exercise his or her discretion to address these situations. If Government Agents require assistance from either FARMS, or a Canadian federal or provincial government body (HRSDC, provincial Ministries of Labour, Health, etc.) they are supposed to contact the appropriate individual. In 2003, HRSDC saw its role in disputes as a neutral mediator or facilitator and admits that while it may intervene, it cannot solve the problem.

FARMS' position is that it does not represent "bad" employers, defined as employers who allow unsafe working conditions or do not follow the rules of the program. In some circumstances, FARMS will attempt to assist the employer, and if the employer does not respond to a matter satisfactorily, in FARMS' opinion, then the grower is "on his own". While FARMS may attempt to assist the Government Agent if there is a conflict with a grower, FARMS is incapable of sanctioning the grower in any way if the grower does not respond.

If all of these efforts fail, the consulate always has the ultimate authority to remove a worker from a farm for the grower's breach of contract, and transfer him/her to another farm. However, this assumes that another position can be found for the worker. The Government Agent's decision to remove a worker is made in consultation with HRSDC. HRSDC claims to remove

employers from the program in obvious egregious situations such as physical abuse or failure to pay wages. In greyer areas, HRSDC will not always agree with the Government Agent's decision, or agree that the employer's conduct warrants discipline.

If an employer does not agree with a Government Agent's decision to remove a worker, the employer has no recourse to challenge the decision, except through the courts which is a costly and lengthy endeavour.

If a dispute cannot be resolved through consultation, the grower may repatriate the worker. The Employment Agreement provides a wide, unfettered discretion to the employer to prematurely repatriate a worker for "non-compliance, refusal to work, or any other sufficient reason, to terminate the worker's employment". There is no independent adjudicator to interpret these words, except, arguably, the courts. But as discussed earlier, it is highly unlikely that an agricultural worker would be in a position to file any proceeding in the courts. This provision does not serve the "best interest" of the worker because the test is highly subjective.

For the most part, based on my interviews conducted in 2002, the Canadian Government reported that the dispute resolution process was working well and needed no adjustment. The government likes this model because it is flexible and cost-effective. It was assumed by one government official that there is a "gentleman's agreement" among the consulates that if one consulate will not provide workers to "bad" employers, then the rest will not provide the grower with a worker. However, in practice, this is not the case. It was admitted in the interviews that despite learning from another Government Agent that a worker had been involuntarily repatriated, when a request came in from the employer to replace the repatriated worker, the Government Agent agreed.

The competitive structure of the program creates pressures to be inattentive to individual worker's concerns, due to the potential loss of a grower to another country. The ability to simply switch to another country also increases the degree of employer power over workers and the Government Agents. The Government Agents noted that employers lack accountability if there is a dispute in the interpretation of the contract. It was suggested that there should be a mechanism to terminate employers' access to the program. Another Government Agent estimated that approximately 35 probationary workers per year may be repatriated at the discretion of the employer with no recourse:

This generally happens if they [the workers] are 'unsatisfactory'. They get a probation period of 2 weeks. It is up to the employer to decide. They judge the speed. Some might quit. Sometimes there are medical problems. They can appeal an employer's decision to the Liaison Officer, but ultimately it is the employer who determines if they will stay or not. It is very difficult because of the competitive nature of the program. Farmers may come down hard on the workers. But there is nothing that can be done to force the employer to keep the worker. And the employer can always go somewhere else for workers. They hold that over your head... The program promotes competition between countries. There must be some other way to sanction the employers.

The current mechanism makes workers particularly vulnerable. At present, their only contact to attempt to resolve a dispute is with the Government Agent. However, if the Government Agent

disagrees with the worker's position, then this leaves the worker with no independent representation and he or she is left to his or her own devices. Other disincentives also operate against a worker filing a complaint:

1. The Government Agent may not have the resources or staff to respond or investigate the complaint;
2. The worker fears the threat of repatriation;
3. The worker fears being “blacklisted” by employer and/or Government Agents from future participation in the program.

b. Employment Agreement as a Private Contract

One policy answer may be that the migrant worker and the employer are in a private employment contractual relationship; migrant workers are in the same position as any other Canadian employee and should not have any greater rights with respect to the contractual relationship.

However, the migrant worker's employment relationship and contract should be examined in the context of the policy objectives of the CSAWP. Unlike other employee-employer relationships, the migrant worker has no input into the contractual arrangement in which he or she is entering. Assuming that the Canadian Government realizes that the migrant worker has very little bargaining power to negotiate such contracts, a standard Employment Agreement has been created on their behalf in order to avoid exploitation of migrant workers. If this purpose is to be realized, then there must also be effective enforcement.

There are two relevant policy objectives in the CSAWP instruments and immigration laws relevant to dispute resolution models: 1) migrant workers are to be afforded equal treatment to Canadian workers, and 2) the hiring of migrant agricultural workers must not result in wages and working conditions unattractive to Canadian workers.

c. Access to Employment Tribunals and Courts

Canadian agricultural workers have access to employment related tribunals and courts to enforce their rights. Migrant agricultural workers may also theoretically access these mechanisms. However, migrant workers do not have the same labour mobility rights as Canadian workers and may be subject to premature repatriation before migrant workers are able to access or realize their rights under mechanisms otherwise available to Canadian workers. That is, if a Canadian worker is fired by an employer, he or she is free to find another job within Canada. On the other hand, if a migrant worker is fired, he or she is immediately returned home with minimal prospects of re-employment, and he or she may also be barred from future participation in the program.³⁸ The unique circumstances of migrant agricultural workers and their lack of mobility

³⁸ It is noted that several Government Agents stated that if he believed the employer was wrong in repatriating the worker, this would not be used against the worker in future participation in the program.

rights raise the question of whether these workers are provided equal treatment of Canadian workers when the *effect* of the repatriation provisions makes it difficult to enforce their rights.

d. Mediation and Arbitration Process for CSAWP Disputes

The current mechanism allows for the earlier-stated policy objectives to be undermined because the effect of the CSAWP's structure denies migrant workers equal access to dispute resolution mechanisms otherwise available to Canadian workers. This in turn leads to the potential of leaving poor working conditions unaddressed. If poor working conditions persist, agricultural workers will continue to be unattractive to Canadian low-skilled workers. Therefore, from a public policy perspective, migrant agricultural workers and employers should have an accessible, enforceable mechanism to ensure due process for complaints. While flexibility and cost-effective mechanisms are worthy considerations, structuring and checking discretion will also strengthen the instrumental framework as a credible mechanism by preventing the potential for arbitrary decision-making³⁹ and creating procedural fairness for workers. The call for a mechanism which guarantees due process is consistent with standards in international conventions applicable to migrant workers.⁴⁰ It is also consistent with the Supreme Court of Canada's remarks in the *Dunmore* case⁴¹, that from the workers' perspective, it may be in their best interest to have a more formalized dispute resolution process.

Recommendation: *A review of the dispute resolution mechanisms under the CSAWP be undertaken in order to ensure procedural fairness and enforcement of the various instruments.*

Recommendation: *In reviewing possible dispute resolution mechanisms, the following factors should be considered: proceedings must be quick and cost effective since migrant workers are restricted to Canada for a short period of time and farm production should not be jeopardized. To address these concerns, negotiation and mediation should be built into the mechanism as stages of dispute resolution before using a formal hearing process. For example, the parties may try to mediate the dispute with all representatives in a formal meeting; the next stage would be to use a trained neutral third party mediator to attempt to resolve the dispute; the next step would be binding arbitration with reasons for decision. If a worker is a member of a union, then the Employment Agreement should explicitly recognize the arbitration process under the applicable collective agreement as the dispute resolution mechanism, as required by law.*

Recommendation: *It is suggested that the dispute resolution process be enshrined in the Employment Agreements and include a roster of mutually agreeable arbitrators or mediators. An established list will ensure that the dispute is heard expeditiously.*

Recommendation: *The dispute resolution mechanism should be available to all affected parties and parties should have direct access to it. Therefore, while Government Agents should*

³⁹ Davis, "Discretionary Justice" (Louisiana State University Press, 1969)pp. 55-57, 65-67, 97-99, 102-103, 106-107 in Evans, J.M. et al. Administrative Law, 4th ed. (Toronto: Emond Montgomery Publications Ltd., 1995) at 1114-1119.

⁴⁰ *UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.*

⁴¹ *Dunmore v. Ontario (A.G.)* (2001), D.L.R. (4th) (S.C.C.) [hereafter "*Dunmore*"]. This case relates to the challenge of Ontario legislation that excludes agricultural workers from the protections afforded to workers to join a union. It will be discussed in further detail below under the description of the Ontario *Labour Relations Act, 1995.*

be able to file disputes with the body on behalf of a migrant worker, the worker should also be able to access the mechanism him or herself should the Government Agent disagree with the worker. The worker should have the right to represent himself independently or through an employee association.

Recommendation: *The dispute resolution mechanism should be paid for by the Canadian Government in recognition that resources will need to be committed in ensuring that policy objectives and contractual provisions intended to guarantee fair treatment of migrant workers are in fact enforceable. This will reinforce HRSDC's mandate to ensure that wages and working conditions are not depressed by the hiring of migrant workers.*

D. The Application of Canadian and Provincial Labour and Employment Laws to Migrant Agricultural Workers - An Ontario Case Study

The federal government has jurisdiction over general immigration matters in Canada and the development of temporary foreign worker programs. Therefore, the role of the federal government in these capacities is to develop the terms and conditions under which temporary foreign workers migrate to Canada to fill occupational positions. However, once in the province, CSAWP workers, like other agricultural workers in Ontario, are covered by provincial employment and labour laws. Some employment-related statutes fall under the federal jurisdiction regardless of occupation and apply to all employees in Canada. For example, the federal government has exclusive jurisdiction over unemployment insurance under the *Employment Insurance Act* and retirement or disability benefits under the *Canada Pension Plan*.

1. Provincial Jurisdiction

a. Occupational Health and Safety Act⁴²

Farming is one of the most dangerous occupations in Canada and in Ontario, involving exposure to a variety of hazards including unguarded machinery, working with large animals, falling hazards, extreme temperatures, and toxic chemicals and gases.⁴³ In August 12, 2002, a Jamaican worker under the CSAWP died while working when a 1,200 pound tobacco kiln fell on his chest and crushed him.

Agricultural workers were historically excluded from the *Occupational Health and Safety Act* ("OHSA"). On June 20, 2003, the UFCW, launched a constitutional challenge claiming that the exclusion from OHSA denied agricultural workers their rights to equality and life, liberty, and security of the person. The court application was never heard because the Ontario Government

⁴² R.S.O. 1990, c. O.1.

⁴³ W. Pickett, et al. "Surveillance of hospitalized farm injuries in Canada" (2001) 7 Injury Prevention 123-128 at 123.

announced that a regulation would be passed giving agricultural workers occupational health and safety protection. On June 30, 2006, farming operations were brought under OHSA with some limitations and exceptions.⁴⁴

The benefit of OHSA coverage to migrant workers is to reduce non-wage labour costs such as risk to their physical well-being and health. The benefit to employers is to reduce the incidents of workplace accidents which may have an adverse impact on payable Workplace Safety & Insurance premiums and work production slowing down as a result of the loss of injured workers unable to perform their duties.

OHSA establishes a mandatory, state-enforced system of minimum standards for occupational health and safety in Ontario. Workers covered by the OHSA have the right to a safe workplace. Agricultural workers now benefit from the following rights under OHSA:

1. The right to know about workplace dangers: This includes the right to be told about workplace hazards as well as to receive instruction and competent supervision to protect workers' safety.
2. The right to representation through health and safety committees: Workers at workplaces with more than five employees are entitled to have a health and safety representative who is selected by the workers. Workplaces with more than twenty employees are required to have a mandatory joint health and safety committee.
3. The right to refuse unsafe work; and
4. The right to be free from employer reprisals for trying to enforce rights under the Act: Anti-reprisal provisions protect a worker from being punished, including dismissal or threat of dismissal, should he or she enforce or attempt to enforce his or her rights. This protection is especially important in a worker's right to refuse unsafe work.

The Ontario Ministry of Labour Health and Safety Inspectors enforce the OHSA and regulations. They have two roles: to inspect the workplace for compliance with OHSA, and to investigate a critical injury, fatality, complaint or work refusal. During a health and safety inspection, the Inspector's activities on the farm may include but are not limited to:

- Meeting with a manager/supervisor and a worker.
- Advising the workplace parties of their responsibilities should they be unaware of them.
- Identifying and discussing non-compliance issues with the workplace parties.
- Asking questions of workers.
- Asking for demonstrations of certain pieces of equipment.
- Asking for the production of records (i.e. training records of workers, inspection and maintenance records of machines/equipment).

The Inspector will provide the workplace parties with a written "Premise Project" report at the conclusion of his/her visit. The employer is required to post this report in a conspicuous location at the workplace. Where an Inspector observes a contravention, an order may be issued in the

⁴⁴ Ontario Regulation 414/05.

written report. Where a grower fails to comply with an order, the Inspector may initiate a prosecution for non-compliance.

OHSA requires employers to notify certain people whenever a workplace injury, illness or fatality occurs. If a worker has been critically injured⁴⁵ or killed at the workplace, the employer must immediately notify an inspector at the nearest Ministry of Labour office, and the joint health and safety committee or health and safety representative. Within 48 hours, the employer must also notify, in writing, a Regional Director of the Ministry of Labour.

If an accident, explosion or fire occurs and a worker is disabled or requires medical attention, the employer must notify the joint health and safety committee or health and safety representative in writing within 4 days of the incident. If required by the inspector, this written notice must also be given to a Regional Director of the Ministry of Labour.

If an employer is told that a worker has an occupational illness⁴⁶ or that a claim for an occupational illness has been filed with the WSIB, the employer must notify the Regional Director of the Ministry of Labour, and the joint health and safety committee or the health and safety representative within 4 days. The notice must be in writing. This duty to notify applies not only with respect to current workers, but also with respect to former ones.

Despite amendments to give agricultural workers basic rights under OHSA, agricultural workers continue to be excluded from several regulations under OHSA which relate to specific hazards. For example, agricultural workers are excluded from regulations relating to *Workplace Hazardous Materials Information Systems (WHMIS)*.⁴⁷ WHMIS has three requirements: labelling of hazardous materials used in the workplace;⁴⁸ availability of material safety data sheets;⁴⁹ and safety training to all workers who may reasonably be exposed to hazardous material in the workplace.⁵⁰

In addition, the Ontario Government has avoided developing regulations under OHSA which would be specific to farming, although it has for every other industry under OHSA. Rather, the Ontario Government is allowing the industry to implement non-binding safety guidelines.

The Caribbean Employment Agreement provides that the employer agrees “to report to the Government Agent within 48 hours, all injuries sustained by the worker which require medical attention.”⁵¹ While the Employment Agreement does not provide any guarantee of safe work for migrant agricultural workers, it does provide that workers handling chemicals and/or pesticides

⁴⁵ “Critical injury” is an injury of serious nature that places life in jeopardy, produces unconsciousness, results in substantial loss of blood, involves the fracture of a leg or arm but not finger or toe, involves the amputation of a leg, arm, hand or foot but not a finger or toe, consists of burns to a major portion of the body, or causes the loss of sight in an eye.

⁴⁶ “Occupational illness” is defined as a condition that results from exposure in a workplace to a physical, chemical or biological agent to the extent that the normal physiological mechanisms are affected and the health of the worker is impaired. It includes an occupational disease for which a worker is entitled to benefits under the *Workplace Safety and Insurance Act, 1997*.

⁴⁷ Regulation 860, amended O. Reg. 36/93.

⁴⁸ Reg. 860, ss. 8-16.

⁴⁹ Reg. 860, ss. 17-18.

⁵⁰ Reg. 860, ss. 6-7.

⁵¹ Caribbean Employment Agreement, V.2.

are to be provided with protective clothing at no cost to the worker, receives appropriate formal and informal training and supervision where required by law.⁵² The Employment Agreement fails to recognize that workers now have the right to refuse to unsafe work. In fact, the agreement specifically states that employers can terminate workers for refusing to work without any qualification. As a matter of law, if there is an inconsistency between the Employment Agreement and OHSa, then OHSa would prevail. This should be made explicit in the Employment Agreement.

Recommendation: *Current language in the Employment Agreements that allow for workers' termination for refusal to work should be modified to ensure that termination or other reprisals will not result from workers refusing unsafe work.*

Recommendation: *Arrange training for Government Agents on OHSa by the Ontario Ministry of Labour.*

Recommendation: *Provide pre-departure orientation for CSAWP workers on OHSa as it affects them, including names of Ontario Ministry of Labour agents and telephone number for them to call if they have complaints.*

Recommendation: *Include OHSa briefings during the annual review meetings.*

Recommendation: *Health and safety committee matters should be reported to the Government Agents on a monthly basis in order to track these matters. In addition, critical injury or occupational illness reports should be forwarded to Government Agents.*

Currently, the Ontario Government collects and reports Ministry of Labour Enforcement Statistics under OHSa for various industries, such as construction and mining.⁵³ This includes reporting on field visits, inspections, investigations, consultations, orders issued, stop work orders, work refusals, complaints, and prosecutions. It is assumed that agriculture will be included in this reporting as data becomes available, however, the statistics will include all agricultural workers as opposed to segregating data specific to CSAWP workers.

Recommendation: *Collect annually and make publicly available data on CSAWP complaints under OHSa and responses by the Ontario Ministry of Labour.*

b. Workplace Safety and Insurance Act⁵⁴

The *Workplace Safety and Insurance Act* ("WSIA") promotes health and safety in workplaces and the reduction and prevention of workplace injuries and occupational diseases; facilitates the return to work and recovery of workers who sustain personal injury arising out of and in the course of employment or who suffer from an occupational disease; and provides compensation and other benefits to workers and to the survivors of deceased workers.⁵⁵

⁵² Caribbean Employment Agreement, VII.5.

⁵³ <http://www.labour.gov.on.ca/english/hs/stats/index.html>

⁵⁴ S.O. 1997, c. 16, Sch. A.

⁵⁵ s. 1.

The WSIA applies to farm employers and they are required to register with the Workplace Safety Insurance Board (WSIB) within 10 days of becoming such an employer.⁵⁶ In 2001, 24,013 farms in Ontario reported that they employed at least some hired labour.⁵⁷ However, in this same year, only 12,000 farms were registered.⁵⁸ Therefore, it appears that only half of farms employing hired labour are in compliance with registration obligations under the WSIA.⁵⁹

Migrant workers under the CSAWP are insured for workplace injuries under the WSIA.⁶⁰ Coverage begins as soon as the workers reach the agreed-upon point of departure in their country of origin and they remain covered until they return home. The workers are covered when they are: travelling from an airport in Ontario to the employer's premises; using a means of transportation authorized by the employer; and following a direct and uninterrupted route to or from the employer's premises. In addition, workers are covered during periods of leisure, meals, and while sleeping in employer-provided quarters.

Employers are obligated to immediately report to the WSIB and the supply country representative all work-related accidents and illnesses. The employer is also obligated to make arrangements for the worker to see a doctor if the worker states he or she is in need of medical attention.

If a worker is injured and unable to work because of an accident at work, he or she must file a claim for benefits before leaving Canada. If the worker does not file before leaving Canada, the Government Agent is responsible for ensuring that the Form 6 – the Worker's Report of Injury/Disease – is completed by the worker and returned to the WSIB. The WSIB must be notified when injured workers leave the country.

c. *Labour Relations Act, 1995*

In Ontario, labour relations between a trade union and employer are governed by the provincial *Labour Relations Act, 1995* (“the LRA”). The LRA is designed to facilitate collective bargaining between employers and trade unions that are the freely-designated representatives of the employees; to encourage co-operative participation of employers and trade unions in resolving workplace issues; and to promote the expeditious resolution of workplace disputes. The LRA states at s. 5: “Every person is free to join a trade union of the person’s choice and to participate in its lawful activities.”

However, the LRA states at s. 3(b) that it does not apply to agriculture. Therefore, migrant agricultural workers do not have the rights under the LRA to join a trade union and collectively bargain with the employer.

The exclusion of agricultural workers from the LRA was the subject of a constitutional challenge launched by UFCW. The UFCW claimed that the exclusion was a violation of agricultural

⁵⁶ ss. 67 and 75.

⁵⁷ Statistics Canada, Ontario Farm Data, 19961, 1996, and 2001 Census of Agriculture, <http://www.gov.on.ca/omafra/english/stats/census/summary.html>, site accessed on 10/17/2002.

⁵⁸ Affidavit of Eric Tucker sworn on 9 May 2003, in *Fraser et al. v. Ontario (A.G.)*, Court File No. 03-CV-250815CM3, Exhibit “S” - Ontario Workers’ Safety and Insurance Board 2001statistics.

⁵⁹ Affidavit of Eric Tucker sworn on 9 May 2003, *Ibid.* at para. 77.

⁶⁰ Workplace Safety & Insurance Board. *Operational Policy: Foreign Agricultural Workers*, Document Number 12-04-08.

workers' freedom of association under the *Charter of Rights and Freedoms*. The case eventually went to the Supreme Court of Canada, resulting in a significant decision on agricultural workers' right to unionize: ie. the *Dunmore* decision.⁶¹ However, equally significant is the Court's separation of the right to form a union from any corresponding right to bargain collectively.

The Ontario Government's response to *Dunmore* was to narrowly and technically implement the decision. The *Agricultural Employees Protection Act, 2002* ("AEPA"), which received Royal Assent on June 17, 2003, is the legislative response to *Dunmore*. It does not provide agricultural workers with the right to join a union. Rather, it only allows them to form or join an "employees' association"⁶², which is defined as "an association of employees formed for the purpose of acting in concert". This is in contrast with the definition of a "trade union" under the LRA which means "an organization of employees formed for purposes that include the regulation of relations between employees and employers".⁶³

The UFCW continues to challenge the exclusion of agricultural workers from the labour relations regime that applies to most other workers in Ontario. The UFCW has brought a constitutional challenge claiming that AEPA does not provide agricultural workers with collective bargaining rights, and therefore, violates agricultural workers' freedom of association and equality rights. This case was dismissed by the Ontario Superior Court of Justice in December 2005, and is currently before the Ontario Court of Appeal.

If the UFCW is successful in its court challenge, farms would most likely be unionized on a farm by farm basis, assuming that a sufficient number of union cards are voluntarily signed by workers. Based on the current model, where a union has been certified, there will likely be reconfiguration of the applicable instruments that apply to migrant workers' terms and conditions of employment. Based on the definition in the collective agreement, the union may be the only recognized bargaining agent on behalf of workers in a defined bargaining unit on an individual farm.

The establishment of unions as defined under the *Labour Relations Act* will inevitably result in the deduction of union dues from individual workers' pay cheques. The level of dues is determined by the union's constitution and by-laws of the trade union. The level of deduction is generally a percentage of a worker's wages (currently ranging from 1-2%). The union incurs substantial costs in providing the benefits of collective bargaining which provides the rationale for why unions should be able to demand that all who receive the benefits of collective bargaining pay for them.

If unions are permitted to bargain for the terms and conditions of migrant workers, the Employment Agreement will likely be replaced by the collective agreement based on current labour relations law. In this case, the role of the Government Agent will continue to be important in the operation of the CSAWP especially in the following areas:

- recruiting workers;
- managing the migration of workers from the supply country to Canada;
- providing orientation to workers and other CSAWP materials;

⁶¹ *Dunmore v. Ontario (A.G.)* (2001), D.L.R. (4th) (S.C.C.) [hereafter "*Dunmore*"].

⁶² s. 2(1)

⁶³ s. 1(1) of the *Labour Relations Act, 1995*

- processing income tax returns, CPP and worker's compensation claims;
- providing policy inputs into the direction of the program;
- negotiating with the Canadian government as it relates to the framework of the CSAWP;
- servicing workers on non-unionized farms, and assisting and advising unions on unionized farms on the unique features of the CSWAP; and
- liaising with the Canadian government, the union, and employers.

Currently, the CSAWP policy position is that government agents from the supply country are the workers' representatives. However, if unionization is realized in Ontario, this role could shift to the trade union in some circumstances (i.e. where a union is certified to be the workers' bargaining agent on any one farm). Assuming a union is successful in obtaining certification to represent workers on a farm, the employer will be obliged under labour relations law to recognize the union as the sole bargaining agent for the purposes of negotiating terms and conditions of employment.⁶⁴

As the worker's representative, the union will investigate complaints, file grievances on behalf of the worker, and, if necessary, pay for the litigation for arbitration of the dispute before an arbitrator. This will have the effect of reducing some the administrative costs for the supply countries in the operation of the CSAWP by shifting the costs to the union. The union will also be in a better position to access and understand labour and employment laws in Canada.

Currently, the 5 %-7% of the 25% mandatory savings deduction from Caribbean workers' pay cheques takes into account the administrative costs of the program, including the role Government Agents may play in representing workers. Arguably, this 5-7% amount may be reduced or eliminated if there is union representation because of a reduction of these administrative costs for the Liaison Offices in Canada. Because not all farms will unionize, Government Agents may be required to maintain a higher level of service for some workers compared to others. Therefore, the deduction may be adjusted accordingly in each individual case depending on whether the worker is unionized or not.

Recommendation: *Assuming unionization of a farm, the impact on lower administrative costs of the Government Agent in the representation of workers be assessed in determining a reduction or elimination of the 5-7% mandatory remittance in each individual worker's case.*

This model envisions unions and Government Agents working collaboratively to promote the common goal of job security, fair wages, and decent working conditions for migrant agricultural workers'.

2. Federal Jurisdiction

a. *Employment Insurance Act*⁶⁵

The fundamental goal of the unemployment insurance program in Canada is income support for people who are temporarily without work.⁶⁶ The program is financed by premiums paid by employees and employers in insured industries.

⁶⁴ see s. 47 of the LRA

⁶⁵ S.C. 1996, c. 23, as amended.

The *Employment Insurance Act* (“*EI Act*”) provides “regular” benefits, or unemployment insurance benefits, as well as “special” benefits which include sick benefits, maternity and parental leave benefits. Entitlement to benefits is based on contributions (i.e. premiums) from earned wages in insurable employment. The *EI Act* distinguishes between two types of employment: “insurable” and “excluded”.⁶⁷ The *EI Act* requires persons in insurable employment to pay premiums⁶⁸ and outlines the general obligation of employers to pay the employer premium and to withhold employee premiums from wages.⁶⁹ Agricultural work falls under the definition of insurable employment, therefore, premiums must be deducted from wages deriving from this work.

Primary qualification for benefits is based on the accumulation of hours worked based on regional unemployment rates in a 52 week period. For regular unemployment insurance benefits, the number of hours required may range from 420-700 hours. For sickness, maternity and parental leave benefits, 600 hours is required. Several CSAWP workers are able to accumulate the requisite hours to qualify for benefits. For example, in the case of Jamaican workers in 2001, they work on average 63.65 hours per week and work an average season length of 14.2 weeks. This is equivalent to 903.83 hours in one season.⁷⁰

However, despite working in insurable employment, paying premiums, and accumulating the requisite number of insurable hours, CSAWP workers are unable to collect regular EI benefits. In order to be eligible for regular unemployment benefits, claimants must be available for work in Canada.⁷¹ This requirement makes it virtually impossible for Caribbean workers under CSAWP to receive regular unemployment benefits.

The Memorandum of Understanding and the Employment Agreement, in addition to the *IRPA*, clearly requires workers to return to the Caribbean upon completion of their defined term of work on a Canadian farm(s). Therefore, despite any period of unemployment a worker may experience after completing his or her contract in Canada, the worker is ineligible to claim regular EI benefits under the *EI Act*.

In some circumstances, CSAWP workers may be eligible to receive sickness benefits. However, once a worker returns home, he or she is ineligible to receive these benefits because the *EI Act* requires the claimant to be physically in Canada, unless seeking medical treatment not readily available in Canada.

In contrast, it is not necessary for a claimant to be in Canada in order to receive maternity or parental leave benefits. However, to be eligible for these benefits, the child must be born while the claimant is working in Canada, though it is not necessary for the child to be born in Canada. The UFCW has successfully processed thousands of parental leave applications for Mexican workers in the last 5 years resulting in thousands of dollars being paid to workers.

⁶⁶ *Tetreault-Gadoury v. Canada (Employment and Immigration Commission)* [1991] 2 S.C.R. 23.

⁶⁷ s. 5 of the *EI Act*.

⁶⁸ s. 67 of the *EI Act*.

⁶⁹ s. 82(1) of the *EI Act*.

⁷⁰ R. Russell, *supra*.

⁷¹ s. 18(a) and s. 37(b) of the *EI Act*.

CSAWP workers have been contributing EI premiums for the last 40 years. In 2001, there were 17,382 CSAWP workers in Ontario who contributed a total of \$3.4 million to EI premiums.⁷² These contributions went into the Employment Insurance Account which has a surplus that has grown from \$666 million in March 1996 to \$40 billion in March 2002.⁷³ The Auditor-General of Canada has publicly criticized the Canadian Government for accumulating a surplus when the purpose of the EI program is to run on a break-even basis.⁷⁴ This surplus continues to grow and has been used by the Canadian Government to pay down the national debt.⁷⁵ In effect, Canada is profiting by receiving a straight transfer of payments from lowly paid migrant workers from developing countries.

b. *Canada Pension Plan*⁷⁶

Generally, migrant agricultural workers who have had *Canada Pension Plan* (“CPP”) amounts withheld and remitted by their employer to the Canada Customs and Revenue Agency will be entitled to benefit from the CPP if they become severely disabled during their working years or once they reach 60.⁷⁷ If a worker opts to receive retirement benefits before age 65, the benefit will be reduced; whereas delaying receipt may increase the benefit.

Employers in Canada are required pursuant to the Act and its Regulations⁷⁸ to withhold CPP contributions from the pay cheques of any workers who are:⁷⁹

- 18 or older, but younger than 70;
- are in pensionable employment during the year;
- have earned more than the basic exempted amount; and
- are not already receiving a CPP or Quebec Pension Plan retirement or disability pension.

FARMS reports that Canada collected \$6 million in CPP contributions from CSAWP workers in 2001.⁸⁰

Any worker who earns less than the basic exempted amount of \$3,500 on a yearly basis are exempted from CPP deductions and the corresponding benefits. Practically speaking, even those workers who make just above the exempted amount do not necessarily benefit significantly from CPP because the amount that they would earn during their contributory period (between 18 years and 65) is calculated by taking the total pensionable earnings and then dividing this by the number of months worked in the contributory period⁸¹, or by 120 months minus time excluded

⁷² FARMS. “The Quest for A Reliable Workforce in the Horticulture Industry” (Mississauga, 2003) at p. 6.

⁷³ Office of the Auditor General of Canada. *Report of the Auditor-General of Canada to the House of Commons, Chapter 11 - Other Audit Observations* (Ottawa, December 2002) at p. 40.

⁷⁴ *Ibid.* at p. 38.

⁷⁵ *Edited Hansards*, Number 018, 37th Parliament, 2nd Session, October 30, 2002.

⁷⁶ R.S.C. 1985, c. C-8. The author is indebted to Julie Kon Kam King for her research and draft of this section.

⁷⁷ ss. 44 and 45.

⁷⁸ C.R.C. 1978, c. 385.

⁷⁹ ss. 12, 6, 49, 19, 20, and 21 of the Act.

⁸⁰ FARMS. “The Quest for A Reliable Workforce in the Horticulture Industry” (Mississauga, 2003) at p. 6.

⁸¹ The contributory period commences January 1, 1966 or when the worker reaches the age of 18, whichever is greater, and ending when the worker reaches age 65 (before the end of 1986) or receives a retirement pension or reaches age 70 (after 1986): s. 49 of the Act.

for reason of disability, whichever is greater. The CPP then also drops out 15 percent of the worker's lowest earning years during his/her contributory period from the pensionable amount. If a worker's pensionable earnings are low, the amount that is eligible to be given back in benefits is seriously reduced by this calculation process.⁸²

Canada has international social security agreements with each of the participating countries in the CSAWP that provide for situations where a worker is splitting work or living periods between two places. If a worker does not live or work long enough in Canada to qualify for a CPP benefit, Canada will consider periods where workers may receive credit under the pension program in their home country as periods of contribution to the CPP.⁸³

To qualify specifically for disability benefits under the CPP, migrant agricultural workers must meet the same requirements as other workers in Canada (earnings above the exempt level of \$3,500 a year and withholding of payments and remittances with respect to CPP by the employer). Additionally, if the worker became disabled after December 31st, 1997, he/she must have contributed to CPP for a minimum of four of the last six years, and during that period must have earned at least 10 percent of the Year's Maximum Pensionable Earnings. In 2003, this amount was \$39,000. The worker must also be disabled as defined under the legislation⁸⁴ and be under the age of 65.⁸⁵

Under the international social security agreements between Canada and each country participating in the CSAWP, if a worker has not contributed to CPP for four of the six years but has contributed to the equivalent plan in an agreement country, then the worker may still qualify for disability benefits.

Government Agents in Canada are responsible for helping CSAWP workers in processing CPP claims. If the worker has already left the country he/she should be able to fill out a form or do this over the phone through the Canadian Consulate in his/her home country. As long as a worker meets the CPP eligibility conditions he/she can receive these benefits by cheque at an address outside of Canada.

E. Conclusions and Recommendations

Government controlled migration of temporary foreign labour such as the CSAWP minimizes the exploitation of migrant labour via labour contractors and other unregulated means. Managed migration also reduces the risk of illegal migration. The instrumental framework of the CSAWP including the MOU, Operational Guidelines, and Employment Agreement which delineates the roles, duties, and obligations of the various stakeholders provides benchmarks for program

⁸² ss. 42, 50 ad 52 of the Act.

⁸³ s. 107 of the Act; See for example, Agreement on Social Security between Canada and the United Mexican States. Similar agreements have been signed with Jamaica, Barbados, Trinidad & Tobago, and all participating OECS countries.

⁸⁴ s. 42(2)(a) of the Act defines disability as:

- a "severe" mental or physical disability that makes the individual "incapable regularly of pursuing any substantially gainful occupation"; and
- a "prolonged" mental or physical disability that is "likely to be long continued and of indefinite in duration or is likely to result in death".

⁸⁵ ss. 44, 56 of the Act and ss. 43 and 52 of the Regulations

evaluation in determining what is working in the interests of workers and employers and what is not working in the interests of workers and employers at all levels of the program.

The Government Agent plays a constructive role in providing information to workers, administering the program in certain aspects and providing policy inputs into the program. However, the “dual” role of Government Agents as the workers’ representatives creates potential for a conflict of interest and may undermine the independent representation of workers. The competitive structure of the program among the consulates to maximize the number of placements of workers on farms undermines enforcement of contracts for fear of having workers replaced by workers by other supply countries. In addition, the impact of the repatriation provisions and the lack of temporary workers’ mobility in Canada have an adverse impact on the enforcement of employment standards and the Employment Agreement. There is no system in place to address disputes that cannot be amicably resolved. Enforcement of workers’ rights is left to the discretion instead of objective criteria.

The integrity of the CSAWP can be strengthened by building dispute resolution mechanisms to check discretion and to provide accountability of stakeholders’ actions. These mechanisms will have the effect of improving living and working conditions of CSAWP workers while they are in Canada. A summary of the recommendations towards meeting this goal is provided at Appendix “B”.

Appendix “A”

Operational Guidelines and Delegated Duties of State Parties:

Canada

Canada's duties and responsibilities in the administration of the CSAWP include the following:

1. Establish directions in accordance with Canadian immigration laws to limit the admission to Canada of Mexican and Caribbean workers seeking entry for the purpose of the CSAWP to persons selected by the sending country who:
 - are at least 18 years of age;
 - are nationals of the sending countries;
 - satisfy immigration laws; and
 - are parties to an Employment Agreement attached to the MOU as Annex II.

Canada will not process workers under the CSAWP through private contractors or other private means.

2. Provide adequate notice to Mexico and the Caribbean states as to the number of workers required by Canadian employers in order to facilitate the documentation process and enable their arrival by the dates required by the employers. The Caribbean Operational Guidelines does not specify the number of days required for “adequate notice”; however, it states that named workers⁸⁶ should be processed as a priority.

⁸⁶ A large number of the workers return annually to Canada under the CSAWP. The CSAWP allows for growers to “name” a worker hired from the previous seasons. If a grower is approved to hire a migrant

3. Review applications, medical reports (in consultation with the Canadian Regional Medical Office), and other worker documentation material related to admissibility; as well as, issue letters of introduction authorizing the issuance of individual employment or visa authorizations, and to advise the Caribbean states when all documentation is complete. This review and issuance of work authorizations are performed by the Canadian consular offices in Mexico and the Caribbean.
4. Designate for the purpose of assisting in the administration of the CSAWP, the Foreign Agricultural Resource Management Service (FARMS), and, in Quebec, the Fondation des Entreprises en Recrutement de Main d'oeuvre Agricole Etrangère (FERME), to transmit employment orders accepted by a local Service Canada centre.

FARMS and FERME are the administrative arms of the CSAWP. They are grower organizations funded exclusively through a user fee, collected from participating employers at the time their applications are approved for processing.⁸⁷

Caribbean States

The Caribbean states have similarly specified their duties and responsibilities under the CSAWP in their respective Operational Guidelines, as follows:

1. Once notice has been received by the Caribbean state of the number of workers a Canadian employer requires, it shall complete the recruitment, selection and documentation of the workers and notify Canadian authorities of the number of workers, their names, and the dates of arrival in Canada. The Caribbean Guidelines state that this will be completed “within the specified time”.
2. Select only persons who are capable of performing agricultural and horticultural work and who meet Canadian health requirements. Medical examinations of workers are to be arranged before arrival in Canada pursuant to the medical processing guidelines mandated by Citizenship and Immigration Canada. The Caribbean states are expected to advise the worker to have available his/her own medical history.
3. Undertake to deliver applications, details of identity documents, and medical clearance to the Canadian consular offices. The Caribbean Guidelines state that this delivery will be “in adequate time before departure of any given worker's flight”.
4. Maintain a pool of labour of persons who are suitably qualified and ready to depart for Canada when requests are received from Canadian employers. The surplus pool of workers in the supply countries allows workers to be immediately available in cases of harvest-related emergencies or where replacement of workers is needed.
5. Appoint one or more agents in Canada for the purpose of ensuring the “smooth functioning of the Program for the mutual benefit of both the employers and the workers”, and to

agricultural worker but does not specify the name of the worker, then the “unnamed” worker is selected by the supply country from a pool of available workers.

⁸⁷ FARMS, *Employer Information Package*, 2006.

perform the duties required of that agent under the Employment Agreement. It is important to note here that the role of the government agent is not just to represent workers while they are in Canada, but also to ensure that the employer's interests are met. This circumscribes or neutralizes the Government Agent's representation of workers and it is peculiar that a foreign state has to ensure that Canadian employer's interests are met in the functioning of the program; this is normally the role of the Canadian government.

6. Ensure that Government Agents in Canada provide HRSDC with information such as arrivals and repatriations, transfer notices, records of persons absent without leave (AWOL), records and other program data as may be necessary and mutually agreeable. As well, ensure that the Canadian Immigration Medical Services is provided with the personal details of all workers having to be repatriated for medical reasons, including all medical documents relating the worker's pre-employment examination.

Appendix “B”

Summary of Recommendations

Strengthening Government Agents’ Capacity to Represent Workers

- Capacity-building for Government Agents on procedural and substantive aspects of provincial employment laws. Provide Government Agents with provincial government contacts at various Ministries responsible for enforcement, and foster better communication between the Government Agents and provincial authorities.
- Sending countries and/or the Canadian Government include in worker information booklets, names and contacts for provincial labour ministry officials where workers can file complaints, names and contacts for church groups, community organizations that assist CSAWP workers, and the Migrant Worker Centres. This booklet should be reviewed and updated annually. There should be a booklet prepared for each province since labour statutes in each province are different.
- Create more satellite Liaison Offices closer to farm communities in order to be more accessible to workers.
- Amend the Operational Guidelines to clarify that, while the Government Agent will endeavour to ensure the smooth functioning of the program, the role of the supply country's Government Agent is to represent the worker's best interest.
- Further guidelines should be developed to remove any potential conflict of interest of the Government Agents in their representation of workers. For example, it should be stated that the Government Agent acts only on behalf of the worker’s interests and employers may seek their own independent representation.
- Develop a model of evaluation of Government Agents to ensure accountability and consistency in the servicing of CSAWP workers.

Repatriation

- Develop guidelines or a policy statement be drafted on the interpretation of “non-compliance, refusal to work, or any other sufficient reason”. In particular, note that a breach of contract will not be found where a worker refuses work that is unsafe.
- The power of the employer to repatriate workers should be minimized. It is recommended that there should be a minimum two (2) week waiting period before a worker is required to be sent home in order to allow the worker the opportunity to raise a complaint about the validity of the repatriation decision. If the worker accepts the repatriation decision, the two (2) week period may be waived to allow for immediate return. If the worker files a complaint, then the complaint should be investigated by an independent body and the worker should be allowed to stay until the investigation is complete or a decision on the merits of repatriation have been determined. The transfer process may be used during this period in order to place workers with other farmers during this interim period.

Accountability and Dispute Resolution Mechanisms

- A review of the dispute resolution mechanisms under the CSAWP be undertaken in order to ensure procedural fairness and enforcement of the various instruments.
- In reviewing possible dispute resolution mechanisms, the following factors should be considered:
 - a.** proceedings must be quick and cost effective since migrant workers are restricted to Canada for a short period of time and farm production should not be jeopardized;
 - b.** to address these concerns, negotiation and mediation should be built into the mechanism as stages of dispute resolution before using a formal hearing process;
 - c.** if a worker is a member of a union, then the Employment Agreement should explicitly recognize the arbitration process under the applicable collective agreement as the dispute resolution mechanism, as required by law.
- The dispute resolution process may include stages of informal processes which escalate to formal and binding processes of arbitration should the dispute not be resolved. For example:
 - a.** the parties first try to mediate the dispute with all representatives in a formal meeting (informal process);
 - b.** the next step would be to use a trained neutral third party mediator to attempt to resolve the dispute;
 - c.** the next step would be appointment of an arbitrator by mutual agreement and binding arbitration with reasons for the decision (formal process).
- It is suggested that the dispute resolution process be enshrined in the Employment Agreements and include a roster of mutually agreeable arbitrators or mediators. An established list will ensure that the dispute is heard expeditiously.
- The dispute resolution mechanism should be available to all affected parties and parties should have direct access to it. Therefore, while Government Agents should be able to file disputes with the body on behalf of a migrant worker, the worker should also be able to access the mechanism him or herself should the Government Agent disagree with the worker. The worker should have the right to represent himself independently or through an employee association.
- The dispute resolution mechanism should be paid for by the Canadian Government in recognition that resources will need to be committed in ensuring that policy objectives and contractual provisions intended to guarantee fair treatment of migrant workers are in fact enforceable. This will reinforce HRSDC's mandate to ensure that wages and working conditions are not depressed by the hiring of migrant workers.

- A central database of all worker complaints should be maintained in order to track patterns of industry level practices which may assist in developing future policy objectives and guidelines for the CSAWP. The database may also be used to track “good” and “bad” employment practices in assessing future employer participation in the CSAWP.
- In the case where workers are represented by trade unions and have access the grievance arbitration process under a collective agreement, consider the impact on lower administrative costs of the Government Agent in the representation of workers in assessing a reduction or elimination of the 5-7% mandatory remittance for administrative fees in each individual worker’s case.

Worker Participation

- Create a formalized consultation process whereby workers can periodically provide feedback to Government Agents and sending countries on their working and living conditions. This information should be available for annual review meeting and reported to the Canadian government.
- Allow for workers to make representations (for example, a representative selected by workers) at annual review meetings about the operation of the CSAWP.

Enforcement of Occupational Health and Safety

- Current language in the Employment Agreements that allow for workers’ termination for refusal to work should be modified to ensure that termination or other reprisals will not result from workers refusing unsafe work.
- Arrange training for Government Agents on OHS by the Ontario Ministry of Labour.
- Provide pre-departure orientation for CSAWP workers on OHS as it affects them, including names of Ontario Ministry of Labour agents and telephone number for them to call if they have complaints.
- Include OHS briefings during the annual review meetings.
- Health and safety committee matters should be reported to the Government Agents on a monthly basis in order to track these matters. In addition, critical injury or occupational illness reports should be forwarded to Government Agents.
- Collect annually and make publicly available data on CSAWP complaints under OHS and responses by the Ontario Ministry of Labour.