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Collective Struggles: A Comparative Analysis of Unionizing Temporary Foreign Farm Workers in the United States and Canada

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Citation Details

Robert Russo, "Collective Struggles: A Comparative Analysis of Unionizing Temporary Foreign Farm Workers in the United States and Canada" (2018) 41:1 Hous J Int'l L 5.

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**COLLECTIVE STRUGGLES: A COMPARATIVE
ANALYSIS OF UNIONIZING TEMPORARY FOREIGN
FARM WORKERS IN THE UNITED STATES AND
CANADA**

Robert Russo

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I. INTRODUCTION

The use of temporary foreign migrant workers in the labor sector is part of a vibrant political and legal discussion in both the United States and Canada. Current reforms of temporary foreign worker programs in both countries call for an analysis of this workforce. This article focuses on documented temporary foreign workers performing agricultural labor in both countries. It is a comparative study of alleged violations of documented temporary foreign farm workers' rights relating to unionization in the United States and Canada.

This article does not focus on domestic migrant farm labor in the respective countries or undocumented foreign workers, although some areas of examined law touch on both groups. The main focus of the comparative analysis in this article is to provide insight into the broader situation of documented temporary foreign farm workers in the United States and Canada. These workers are part of the H-2A Visa Program in the United States and the Seasonal Agricultural Workers Program (SAWP) in Canada. In order to compare the situations, the article first provides an overview of Canadian and U.S. labor laws, including laws relating specifically to the hiring of H-2A and SAWP workers. It also provides a historical overview that is designed to provide a basis for a comparative qualitative analysis of Canadian labour and migration laws. Finally, there are case studies of unionization efforts in both countries involving H-2A and SAWP workers.

This article analyzes the responses to documented temporary labor migration and unionization in both countries in order to map out their differences and similarities. The analysis takes into account the respective countries' relevant social and labor history and legal systems. The comparison focuses specifically on analyzing the differences and similarities in collective organizing of H-2A and SAWP workers. It examines the responses generated by alleged violations of law relating to collective bargaining in the two countries. The "recent" history and responses in both countries are defined in comparative terms as being after the end of the Bracero Program in the United States in the 1950s, the beginning of the U.S. H-2A Visa Program, and the creation of Canada's SAWP in the 1960s.

The comparison illustrates that the legal situation of these foreign farm workers in both countries does not represent an exceptional situation. The historical and social context of farm labor and the use of an unfree population are not limited to a distinct North American farm history or racial attitudes towards using foreign farm labor.¹ The legal problems encountered in

1. See generally Jamie Morgan & Wendy Olsen, *The Absence of Decent Work: The Continued Development of Forced and Unfree Labour in India*, 6 GLOB. LABOUR J. 173, 183 (2015) (discussing the comparison of unfree labour practices in India to such practices in the United States and Mexico).

applying collective bargaining principles to H-2A and SAWP workers are related to the specific circumstances of the migration itself: its temporary nature, the vulnerability of its subjects, and its disproportionately unidirectional benefits to developed societies.

There are specific reasons for selecting Canada and the United States for a qualitative comparison and for the relatively narrow focus of this article. In both Canada and the United States, guest worker programs originated within their respective agricultural sectors.² Although there is disagreement about application of law to documented temporary foreign workers in both countries, current migration scholarship reveals a near consensus that both systems have generated legal responses that are inadequate to the alleged violations of collective bargaining rights.³ Compared to Canada, the United States under the Trump administration is witnessing a much broader debate over the presence and conditions of migrant workers, both documented and undocumented, within its territory. The workers' cause has been taken up by a variety of NGOs and public interest lawyers, and the United States has witnessed greater international recourse by workers' advocates.⁴

2. See S. POVERTY L. CTR., *CLOSE TO SLAVERY: GUESTWORKER PROGRAMS IN THE UNITED STATES* 4 (2013), <https://www.splcenter.org/sites/default/files/d6legacyfiles/downloads/publication/SPLC-Close-to-Slavery-2013.pdf> (describing how the H-2A Program was created when the Florida sugar cane industry obtained permission to hire Caribbean workers); W. Zachary Marshall, *Seasonal Agricultural Workers in Canada: Understanding the Socio-Political Issues* 2 (Aug. 2015) (MA research paper, Western University), https://ir.lib.uwo.ca/cgi/viewcontent.cgi?article=1003&context=sociology_ma_srp.

3. See Sarah H. Cleveland et al., *Inter-American Court of Human Rights Amicus Curiae Brief: The United States Violates International Law When Labor Law Remedies Are Restricted Based on Worker's Migrant Status*, 1 SEATTLE J. SOC. JUST. 795, 814 (2003) (discussing *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (making remedies unavailable to unauthorized workers and employers likely to violate workers' rights)).

4. See *Immigration and Refugee Law*, PUB. SERV. LEGAL CAREERS, https://www.psjd.org/Immigration_and_Refugee_Law (last visited Jan. 6, 2019) (discussing how legal intervention in various practice areas, including public interest and NGOs, is often required to ensure immigrant farm workers receive what they are entitled to under the law).

II. CANADIAN LABOUR LAW FRAMEWORK

Labour law in Canada falls under both federal and provincial jurisdiction, with both the federal Parliament in Ottawa and provincial legislatures able to enact labour legislation.⁵ The provinces have gained major jurisdiction due to various judicial rulings that have limited federal labour jurisdiction to a relatively small range of matters.⁶ Those labour matters under federal jurisdiction fall under the Canada Labour Code,⁷ while the provinces typically have labour legislation designated as Labour Relations or Industrial Relations Codes or Acts.⁸ The section of the Canadian Constitution Act (1867) dealing with “property and civil rights” gives provinces a civil right over employment contracts, which typically place restrictions between employers and employees. Federal jurisdiction over some employment matters arises out of S. 91 of the Constitution Act (1867), which gives the federal Parliament legislative authority over federal employees.

The Canada Labour Code is generally limited in its application to workers in “works or undertakings connecting a province with another province or country”⁹: international shipping, air transport, communications, banks, federal crown corporations, and defined operations “declared by Parliament to be for the general advantage of Canada or of two or more

5. See Constitution Act, 1867, c. 6, §§ 91–92 (UK).

6. See *British Columbia Elec. Ry. Co. v. Canadian Nat'l Ry. Co.*, [1932] 1 S.C.R. 161, 172 (Can.) (holding that the Board did not have jurisdiction); see *Canadian Union of Pub. Employees v. Labour Relations Board (N.S.) et al.*, [1983] 2 S.C.R. 311 (Can.) (narrowing the power the Board has to conduct labour legislation in provinces); see also *United Transp. Union v. Cent. W. Ry. Corp.*, [1990] 3 S.C.R. 1112, 1115 (Can.) (distinguishing that even though transportation of grain fell under federal jurisdiction, not all aspects of the industry were controlled by federal jurisdiction).

7. Canada Labour Code, R.S.C. 1985, c L–2.

8. See George W. Adams, *OVERVIEW OF LABOUR LAW IN CANADA* 3 (2nd ed. 1995) (explaining that labour relations are regulated by provinces, except if they are explicitly allocated to federal jurisdiction).

9. Greg J. Bamber & Philippe Pochet, *REGULATING EMPLOYMENT RELATIONS, WORK AND LABOUR LAWS: INTERNATIONAL COMPARISONS BETWEEN KEY COUNTRIES* 40 (2010) (listing examples of these works or undertakings include railways, bus operations, trucking, pipelines, ferries, tunnels, bridges, canals, and telephone and cable systems).

provinces.”¹⁰ Despite the federal jurisdiction over international matters, including the subjects of naturalization and aliens, most documented temporary foreign workers in Canada—including SAWP workers—are deemed by the federal government to fall under provincial jurisdiction.¹¹

As of February 2017, all Canadian provinces, with the exception of Ontario and Alberta, grant collective bargaining rights to farm workers through provincial labour legislation.¹² Alberta has the most extensive prohibition, banning all agricultural workers from engaging in any type of collective bargaining activity.¹³ Ontario was the scene of a protracted legal battle beginning in the 1990s. A left-leaning NDP government extended full collective bargaining rights to all legally employed farm workers in the province in 1994,¹⁴ only to have the legislation repealed by a right-leaning Progressive Conservative government the following year.¹⁵ The current legislation in Ontario entails a modified structure of farm worker associations but nevertheless excludes farm workers from taking advantage of collective bargaining provisions available to most other workers through provincial labour legislation.¹⁶ Finally, it should be noted that Canada has no federal legislation designed specifically relating to employment standards, collective bargaining, and documented foreign migrant workers in its territory. The

10. See *id.* (listing examples of operations deemed to be for the national advantage of Canada including flour, feed and seed cleaning mills, feed warehouses, grain elevators, and uranium mining and processing).

11. *Understand Your Rights as a Foreign Worker*, IMMIGR., REFUGEES & CITIZENSHIP CAN., <https://www.canada.ca/en/immigration-refugees-citizenship/services/work-canada/permit/temporary/after-apply-next-steps/understand-your-rights-foreign-workers.html> (last modified Apr. 12, 2018).

12. See Christopher Albertyn, *Labour Rights in Canada: Farm Workers and the Fraser Case*, 17 CAN. LABOUR & EMP'T L.J. 493, 497–98 (2012) (book review).

13. See Alberta Labour Relations Code, c L-1 (noting that an employee may only bargain through a bargaining agent).

14. Agricultural Labour Relations Act, S.O. 1994, c 6 (repealed 1995).

15. Labour Relations and Employment Statute Law Amendment Act, S.O. 1995, c 1, Sched. A; see Felice Martinello, *Mr. Harris, Mr. Rae and Union Activity in Ontario*, 26 ANALYSE DE POLITIQUES 17 (2000) (discussing how the Progressive Conservative government led by Mike Harris passed legislation on November 10, 1995, that was less favorable toward organized labour).

16. Agricultural Employees Protection Act, S.O. 2002, c 16; Labour Relations and Employment Statute Law Amendment Act, S.O. 1995, c 1, Sched. A.

Canadian government refers all questions regarding SAWP workers and employment standards to separate provincial departments.¹⁷

III. AMERICAN LABOR LAW FRAMEWORK

Labor law in the United States consists of numerous state and federal laws. Unlike Canada, American federal law has general jurisdiction over workers' rights to collective bargaining, but there are exceptions to this rule.¹⁸ The source of federal legislative primacy in the United States arises from the Supremacy Clause of the U.S. Constitution.¹⁹ The basis for federal jurisdiction specifically relating to labor law originates from the Commerce Clause of the U.S. Constitution.²⁰ This clause allows the U.S. Congress to enact legislation regulating commerce between American states.²¹ Federal labor law legislation is predicated on the theory that the federal regulation of labor-management relations is "necessary to diminish industrial strife that should disrupt interstate commerce."²² From the Supremacy and Commerce Clauses, U.S. courts have created a "doctrine of preemption" and the notion that certain federal legislation is intended to deprive U.S. states of jurisdiction in many labor law matters.²³

Current federal U.S. labor law is largely a product of New Deal labor reforms signed into law during the 1930s. Arguably the most important legislation to emerge from President

17. *Temporary Foreign Workers: Your Rights Are Protected*, EMP. & SOC. DEV. CAN., <https://www.canada.ca/en/employment-social-development/services/foreign-workers/protected-rights.html> (last modified May 17, 2018).

18. William B. Gould IV, *A PRIMER ON AMERICAN LABOR LAW* 28 (MIT Press 3d ed. 1993).

19. U.S. CONST. art. VI, cl. 2 ("The Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land . . . and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

20. U.S. CONST. art. I, § 8, cl. 3.

21. *Id.*

22. Gould IV, *supra* note 18, at 28.

23. *See id.* at 32 (explaining that U.S. courts have referred to this deprivation of state jurisdiction in certain matters as Congress intending to "occupy the field" and avoid conflicting interpretations of a law by state courts that may frustrate the objective of federal legislation).

Roosevelt's package of labor reforms was the National Labor Relations Act of 1935 (NLRA), popularly known as the Wagner Act.²⁴ The Wagner Act provided basic workers' rights in union organizing and collective bargaining, while prohibiting certain employer and union conduct that could make employment conditional on refraining from joining a union or mandatory union membership.²⁵

The NLRA does not apply to H-2A workers in the United States or to any agricultural workers. Some arguments similar to those seen in the Canadian context for excluding farm workers from unionization appear in U.S. labor history.²⁶ Apart from the NLRA, American labor laws have also generally excluded large groups of workers from coverage.²⁷ More specifically, the exclusion of agricultural workers from the NLRA had no "logical basis" other than the fact that they had "little political clout when the legislation was enacted."²⁸ Interestingly, both the 1933 National Industry Recovery Act²⁹ (declared unconstitutional by

24. See *Wagner Act*, ROOSEVELT INST. (June 20, 2012), <http://rooseveltinstitute.org/wagner-act/> (explaining that the Wagner Act, also known as the National Labor Relations Act, was passed in 1935 and is arguably the most important piece of legislation protecting workers' and unions' rights).

25. See *id.* (explaining that the Wagner Act included collective bargaining as a key principle and prohibited coercing employees against their rights, interfering with the formation of a labor organization, discriminating against employees to encourage or discourage forming a union, discriminating against employees who file charges or testify, and refusing to bargain collectively with the employees' representative).

26. See Brian Grijalva, *Pacific Northwest Civil Rights and Labor History: Communism in Washington State, Chapter 4 Organizing Unions: The 30's and 40's*, U. WASH., <http://depts.washington.edu/labhist/cpproject/grijalva.shtml> (last visited Jan. 23, 2019) (demonstrating that some of these arguments include the ever-present threat of communism expanding in the Northwest).

27. See Derek C. Bok, *Reflections on the Distinctive Character of American Labor Laws*, 84 HARV. L. REV. 1394, 1418 (1971) (explaining that the National Labor Relations Act and other labor relations laws are narrow in coverage, leaving much of the labor force without coverage); see, e.g., *Cal-Maine Labor Farms*, 307 N.L.R.B. 450, 452 (1992) (holding that employees were not exempt from coverage because Respondent failed to show that the employees did not regularly handle the eggs of outside producers after the certification date); *DeCoster Egg Farms*, 223 N.L.R.B. 884, 886 (1976) (holding that the processing plant employees and the straight truck and trailer drive employees did not fall within the agricultural exemption); *Camsco Produce Co.*, 297 N.L.R.B. 905, 912 (1990) (holding that the Glen Farm fresh pack department employees were agricultural workers exempt from the Act's coverage).

28. Gould IV, *supra* note 18, at 35.

29. National Industrial Recovery Act, Pub. L. 73-67, 48 Stat. 195.

the U.S. Supreme Court)³⁰ and the initial version of the Wagner Act in 1934 had no statutory exclusions of agricultural workers under their respective collective bargaining provisions.³¹ Legislative hearings on the Wagner Act, conducted in 1934 in the House of Representatives and the Senate, “hardly discussed” farm workers.³² When Senator Wagner reintroduced the legislation in 1935, the Senate report on the bill indicated that agricultural laborers had been excluded for “administrative reasons.”³³ An attempt in 1935 to include farm workers under the Wagner Act was defeated by congressional opponents, who expressed concerns over unionization’s effects on American family farms.³⁴

Although the NLRA does not cover any farm workers, several states have passed labor laws that offer protections to agricultural workers, including some collective bargaining provisions. New Jersey and Missouri have constitutional provisions that do not exclude farm workers from collective bargaining but currently have no implementing legislation; moreover, in any event, it is unclear if H-2A workers would be

30. *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

31. See Austin P. Morris, *Agricultural Workers and National Labor Legislation*, 54 CALIF. L. REV. 1939, 1947, 1951–52 (1966) (demonstrating that the NIRA certainly had no statutory exclusions under its collective bargaining provisions because the agricultural workers had no rights under NIRA whatsoever, and the Wagner Act originally applied to farm workers but was later changed to exclude them).

32. See Arthur N. Read, *Let the Flowers Bloom and Protect the Workers Too*, 6 U. PA. J. LAB. & EMP. L. 525, 559, 559 n.124 (2004) (explaining that some testimony apparently mentioned the need for farm worker protections under the Wagner Act and there was also some concern expressed over the ability of small family farm owners to continue functioning within the confines of the Wagner Act).

33. Morris, *supra* note 31, at 1953.

34. See 79 CONG. REC. 9668, 9721 (June 19, 1935) (recognizing that Congress’ debate included the term “agricultural laborer,” but opponents to agricultural laborer unionization prevailed and hence the term was not included in the bill).

protected.³⁵

California has inclusive laws specifically aimed at regulating agricultural workers' right to collective bargaining.³⁶ California has long protected and regulated the unionization of farm workers within the state through its Agriculture Labor Relations Act (ALRA):

It is hereby stated to be the policy of the State of California to encourage and protect the right of agricultural employees to full freedom of association, self-organization, and designation of representatives of their own choosing, to negotiate the terms and conditions of their employment, and to be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. For this purpose this part is adopted to provide for collective-bargaining rights for agricultural employees.³⁷

There currently appears to be some uncertainty as to whether H-2A workers would fall under the ALRA's jurisdiction although the ALRA's administrative body, the Agricultural Labor Relations Board, has heard complaints relating to the workplace conditions

35. See N.J. CONST. art. I, § 19 (providing to persons in private employment the right to organize and bargain collectively, but failing to include implementation instruction or define whether persons in "private employment" include H-2A workers); MO. CONST. art. I, § 29 (providing the right to organize and bargain collectively, but failing to include implementation instruction or define whether persons in "private employment" include H-2A workers); see generally Richard A. Goldberg & Robert F. Williams, *Farmworkers' Collective Organization and Bargaining Rights in New Jersey: Implementing Self-Executing State Constitutional Rights*, 18 RUTGERS L.J. 729, 731-32 (1987) (explaining that the provisions in the New Jersey and Missouri Constitutions must be interpreted as protecting the organizational and bargaining activities of farm worker unions).

36. See California Agricultural Labor Relations Act, CAL. LAB. CODE § 1140.2 (2012) (explaining that agricultural employees have the right to self-organize; to form, join, or assist labor organizations; to bargain collectively through representatives of their own choosing; and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection).

37. *Id.* §§ 1140.2, 1140.2.36.

of H-2A workers.³⁸

Wisconsin, Washington, Oregon, and Pennsylvania have had judicial rulings confirming some protected workplace rights for agricultural workers; however, yet again, no collective bargaining rights are offered to H-2A workers.³⁹ This modified protection regime seems to mirror Ontario's approach to SAWP workers with its AEPA that was confirmed by the Supreme Court of Canada in the *Ontario v. Fraser* case.⁴⁰ Significantly, twenty-two U.S. states—including most Southern states and many Plains and Western states that have a large proportion of seasonal migrant farm workers—have enacted “right-to-work” laws that limit the ability of unions to expand outreach programs to H-2A

38. See Cal. Agric. Lab. Rel. Bd., Public Hearing to Receive Comment on Worksite Access, Salinas Sports Complex (Sept. 14, 2015), https://www.alrb.ca.gov/wp-content/uploads/sites/196/2018/06/2015-09-14_Salinas_Public_Hearing.pdf (highlighting testimony to an Agricultural Labor Relations Board hearing in Salinas, California, which included complaints relating to workplace conditions for H-2A workers and evidencing the fact that there was some uncertainty in the hearing over whether those workers would fall under the jurisdiction of the ALRA's Agricultural Labor Relations Board).

39. See OR. REV. STAT. § 662.010 (explaining that employees not working for a definite term have a right to join a labor union, but failing to mention H-2A workers specifically); 43 PA. STAT. ANN. §§ 211, 211.3 (2018) (illustrating an example of a judicial ruling that upheld the right of laborers to organize); WIS. STAT. ANN. §§ 103.51–.62 (2018) (explaining that individual workers have full freedom of association, self-organization, and the designation of representatives of the worker's own choosing, but failing to mention H-2A workers specifically); see also *Bravo v. Dolsen Cos.*, 888 P.2d 147, 148 (Wash. 1995) (holding that the Washington State Labor Act and state public policy gives farm workers the right to strike and engage in other organized activities relating to working conditions, without employer retaliation) and *Garza v. Patnode*, No. 25255, 1971 WL 14853, at *5 (May 5, 1971) (holding that Washington state protections extend to farm workers, but failing to mention H-2A workers specifically); but see *Int'l Union of Operating Eng'rs v. San Point Country Club*, 519 P.2d 985, 988–89 (Wash. 1974) (holding that there was no employer duty to bargain in Washington state).

40. See *Ontario v. Fraser*, [2011] 2 S.C.R. 3, 6–7 (examining the extent to which collective bargaining rights are covered by Canada's constitutional guarantee of freedom of association). The Canadian Supreme Court rejected the argument that the government is constitutionally required to take an active role in promoting and fostering collective bargaining; instead, the right to freedom of association is limited to protecting the associational activity itself, not a particular process (e.g., a particular model of collective bargaining). *Id.*

workers.⁴¹

There are other significant federal labor laws that apply to farm workers in the United States but not necessarily to H-2A workers. The Migrant and Seasonal Worker Protection Act (MSPA) was adopted in 1983.⁴² The MSPA offers extensive workplace protections to American and permanent resident agricultural workers but specifically exempts H-2A workers from its protections, excluding them from its definitions of both “seasonal agricultural worker” and “migrant agricultural worker.”⁴³ The Fair Labor Standards Act (FLSA) is federal legislation in the United States.⁴⁴ Unlike the MSPA, some provisions of the FLSA do apply to H-2A workers, although there are exemptions with respect to farm workers related to minimum wage on smaller farms and overtime pay.⁴⁵ The H-2A Program itself requires compliance with FLSA minimum wages and federal workers’ deductions to ensure that migrant workers are not paid below the federal minimum wage.⁴⁶ States are free to set their own minimum wage laws, and in case of any conflict between state and federal wage laws, the higher rate would

41. Gould IV, *supra* note 18, at 48 (explaining that states may prohibit the negotiation of any such union security agreements, and twenty-one states have enacted “right-to-work” legislation accomplishing this objective); e.g., Dane M. Partridge, *Virginia’s New Ban on Public Employee Bargaining: A Case Study of Unions, Business, and Political Competition*, 10 EMP. RESP. & RTS. J. 127, 130–32 (1997) (showing that Virginia is one such example of a Southern state with right-to-work laws); see also Tim Carney, Opinion, *A Strong Argument in Favor of Right-to-Work (Featuring F.A. Hayek)*, WASH. EXAM’R (Feb. 23, 2011), <https://www.washingtonexaminer.com/a-strong-argument-in-favor-of-right-to-work-featuring-fa-hayek> (explaining that right-to-work laws allow workers in unionized shops to opt out of both union membership and dues).

42. 29 U.S.C. § 1801 (1983).

43. *Id.* §§ 1802(8)(B)–(10)(B)(iii) (stating that the MSPA’s definition of “migrant agricultural worker” or “seasonal agricultural worker” does not include “any temporary nonimmigrant alien who is authorized to work in agricultural employment in the United States under sections 101(a)(15)(H)(ii)3 and 214(c) of the Immigration and Nationality Act.”).

44. See *id.* § 1801 (defining “agricultural worker” as including the “harvesting of horticultural commodities”).

45. *eLaws – Employment Law Guide, Wages and Hours Worked: Minimum Wage and Overtime Pay*, U.S. DEPT OF LABOR, <http://webapps.dol.gov/elaws/elg/minwage.htm#who> (last updated Dec. 2016).

46. Laurel E. Fletcher et al., *Hidden Slaves: Forced Labor in the United States*, 23 BERKELEY J. INT’L L. 47, 63 (2005) (discussing how the federal minimum wage in the United States has been \$7.25/hour since July 24, 2009).

apply.⁴⁷ The FLSA operates independently from the H-2A Program.⁴⁸ American officials have admitted to some confusion in interpreting the law and difficulties in enforcing certain aspects of the FLSA, particularly with regard to H-2A workers—mainly attributing these obstacles to a lack of available resources and funding from the federal government.⁴⁹ Recent FLSA/H-2A violations include litigation in which eighty-eight H-2A workers from Thailand successfully sued their employer, Global Horizons, for \$153,000 in back pay and \$194,000 in civil money penalties in connection with significant violations of the H-2A Program.⁵⁰

IV. CANADA'S SEASONAL AGRICULTURAL WORKERS PROGRAM (SAWP)

The SAWP was established in 1966 as the first temporary foreign worker program in Canada.⁵¹ It initially brought workers from former British colonies in the Caribbean to work temporarily on Canadian farms.⁵² Jamaica became the first country to send migrant workers under the SAWP in 1966, starting with 264

47. See Labor Certification Process for the Temporary Employment of Aliens in Agriculture in the United States: 2018 Adverse Effect Wage Rates for Non-Range Occupations, 82 Fed. Reg. 60628 (Dec. 21, 2017) (describing how certain States with large migrant farm worker populations, notably California, Florida, Illinois, and Washington, have minimum wage laws higher than the federal rate; interestingly, the five states that have no minimum wage laws are all located in the Southern United States).

48. See U.S. DEPT OF LABOR, WAGE & HOUR DIV., FACT SHEET # 26: H-2A OF THE IMMIGRATION AND NATIONALITY ACT (Aug. 7, 2018), <https://www.dol.gov/whd/reg/s/compliance/whdfs26.pdf> (discussing how the H-2A Program provides for reimbursement of costs incurred for inbound transportation and subsistence not previously advanced or otherwise provided to a worker once the worker completes fifty percent of the work contract period; addressing the FLSA prohibition on migrant farm employees from incurring costs that are primarily for the benefit of the employer, if such costs take the employee's wages below the FLSA minimum wage; and stating that upon completion of the work contract, the employer must either provide or pay for the covered worker's return transportation and daily subsistence).

49. Temporary Employment of H-2A Aliens in the United States, 74 Fed. Reg. 25971 (May 29, 2009).

50. AgriCon Int'l Risk Mgmt. Inst., *Federal Laws that Impact Agricultural Employment and Seasonal Labor* (IRMI Agribusiness Conf., 2017), <https://www.irmi.com/docs/default-source/afis-handouts/federal-laws-that-impact-agricultural-employment-and-seasonal-labor.pdf?sfvrsn=6>.

51. Marshall, *supra* note 2.

52. See *id.* (stating how SAWP has expanded to include Commonwealth Caribbean countries).

men.⁵³ Trinidad and Tobago and Barbados followed in 1967, Mexico joined in 1974, and the Organization of Eastern Caribbean States⁵⁴ joined in 1976.⁵⁵ Only workers from these countries may participate in the SAWP. The Program grew to include over 26,000 workers in 2009.⁵⁶ The increased trade and labour cooperation under the North American Free Trade Agreement (NAFTA) led Mexico to supply the majority of SAWP workers coming to Canada, with BC employing a growing percentage of those workers.⁵⁷

The SAWP is administered by Human Resources and Skills Development Canada (HRSDC) and Service Canada (SC), although Citizenship and Immigration Canada (CIC) is also involved in aspects of the Program.⁵⁸ The Government describes the Program as matching “workers from Mexico and the Caribbean countries with Canadian farmers who need temporary support during planting and harvesting seasons, when qualified

53. *Id.*

54. See *Member States*, ORG. E. CARIBBEAN STATES, [/https://www.oecs.org/home/page/member-states](https://www.oecs.org/home/page/member-states) (last visited Jan. 23, 2019) (listing OECS full membership: Antigua and Barbuda; Commonwealth of Dominica; Grenada; Montserrat; St. Kitts-Nevis; Saint Lucia; St. Vincent; and the Grenadines).

55. *Seasonal Agricultural Worker Program*, GLOB. WORKERS JUST. ALL. <http://www.globalworkers.org/country-data-countries/canada/seasonal-agricultural-worker-program> (last visited Jan. 23, 2019).

56. See Philip L. Martin, *MIGRANT WORKERS IN COMMERCIAL AGRICULTURE* 16, fig.2, ILO (2016), https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/publication/wcms_538710.pdf (depicting a graph demonstrating the number of workers in 2009).

57. See Ofelia Becerril Quintana, *A New Era of Seasonal Mexican Migration to Canada*, FOCAL: FOCALPOINT, <https://www.focal.ca/publications/focalpoint/467-june-2011-ofelia-becerril-quintana-en> (last visited Jan. 23, 2019) (explaining that after joining the SAWP in 2004, BC saw the number of its SAWP workers increase from 1,484 in 2006 to more than 3,768 in 2008); see Peter H. Sawchuk, *Guest Worker Programs and Canada: Towards a Foundation for Understanding the Complex Pedagogies of Transnational Labour*, 20 J. WORKPLACE LEARNING 492 (2008) (discussing the effects of NAFTA on Mexican temporary labour migration to Canada); see also Lance A. Compa, *NAFTA's Labour Side Agreement and International Labour Solidarity*, 33 ANTIPODE 451 (2001) (discussing the effects of the North American Agreement on Labour Cooperation (the labour side-agreement to the NAFTA) on migration of Mexican farm workers).

58. See Irma Fabiola Cruz-Lopez, *Seasonal Agricultural Workers Program: Looking at Mexican Participation Through a Magnifying Glass* 45, 59, 70 (2013) (unpublished Ph.D. thesis, University of Ottawa), <http://www.migrantworkersrights.net/en/resources/the-seasonal-agricultural-workers-program-looking-a?display=print> (describing how SAWP is governed via SC, HRSDC, and CIC).

Canadians or permanent residents are not available.”⁵⁹ Only farms that produce “primary agriculture commodity sector products” may utilize SAWP workers.⁶⁰ As of July 2011, farms in most Canadian jurisdictions are eligible.⁶¹ The SAWP currently operates within the framework of the Temporary Foreign Worker Program (TFWP), which includes a range of occupations allowing for various lengths of employment in Canada and even for eventual residency for some occupations.⁶²

The process of hiring SAWP workers begins with an employer completing a Labour Market Opinion (LMO) Form.⁶³ The LMO form contains basic employer and employee information, including whether the employee request is for a direct arrival or transfer, the number of employees at the farm, and the types of agricultural commodities produced along with methods of

59. *Guest Worker Programs: Canada*, LIBRARY OF CONG., <https://www.loc.gov/law/help/guestworker/canada.php> (last updated July 30, 2015).

60. *See id.* (explaining that employers must meet three criteria to employ SAWP workers, including that the “production” of goods must be in “specific commodity sectors” and that SAWP workers “must work on the farm in primary agriculture”).

61. *See Labour Market Opinion (LMO) Statistics - Annual Statistics 2012*, EMP. & SOC. DEV. CAN., [http://s3.amazonaws.com/migrants_heroku_production/datas/1215/\(LMO\)_Statistics_HRSDC_original.pdf?1384392810](http://s3.amazonaws.com/migrants_heroku_production/datas/1215/(LMO)_Statistics_HRSDC_original.pdf?1384392810) (last modified Oct. 28, 2013) (noting the statistics of the provinces participating in SAWP as of July 2011, including: British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, New Brunswick, Nova Scotia, and Prince Edward Island; and showing that Newfoundland, Yukon, Northwest Territories, and Nunavut did not participate in the SAWP).

62. *See* Delphine Nakache, *The Canadian Temporary Foreign Worker Program: Regulations, Practices, and Protection Gaps* 16, 19, http://www.yorku.ca/raps1/events/pdf/D_Nakache.pdf (discussing other categories of workers including exotic dancers, certain non-agricultural “low-skilled” occupations (i.e., clerical, retail, health, manufacturing, etc.), and live-caregivers who have the possibility of being granted eventual residency in Canada after a period of time of employment; and noting how SAWP operates within the larger framework of the Temporary Foreign Worker Program: there are four “streams” under which foreign seasonal agricultural workers may now apply, including (1) the SAWP, “low-skilled” agricultural workers coming to Canada from non-SAWP countries, (2) “high-skilled” agricultural workers (including apiary technicians and farm managers), and (3) a “low-skilled” pilot project for foreign seasonal workers in certain mostly non-primary agricultural commodities).

63. *See Hire a Temporary Worker Through the Seasonal Agricultural Worker Program - Apply for a Labour Market Impact Assessment*, HUMAN RES. & SKILLS DEV. CAN., <https://www.canada.ca/en/employment-social-development/services/foreign-workers/agricultural/seasonal-agricultural/apply.html> (last modified Oct. 31, 2018) (explaining how to apply for a Labour Impact Assessment).

production.⁶⁴ The form allows the employer to request a specific worker or workers (the so-called naming of a worker) along with requesting any unnamed workers. The job offer information must indicate duties of the position, whether the position requires an English or French-speaking worker, and the requested arrival and anticipated departure date from Canada.⁶⁵

One of the basic purposes of the LMO form is to show that the employer has made efforts to “recruit and/or train willing and available Canadian citizens and permanent residents” for the position(s).⁶⁶ To that end, the government asks for a human resources plan, providing details of farm recruitment activities for Canadians in the relevant season including methods used to hire local workers or students.⁶⁷ The wages for the requested worker must be specified on the LMO form and are designed to illustrate that any wages offered by the employer are consistent with prevailing local wages in similar agricultural commodity work.⁶⁸

The other basic purpose of the LMO form is to ensure that the housing and working conditions offered meet minimal provincial employment standards.⁶⁹ Information on seasonal housing approval is requested, along with documented proof of seasonal housing inspection; if that is not available, the form requires information on the previous year’s inspection along with a current housing inspection as soon as possible.⁷⁰ Regarding working conditions, the LMO form requests information on whether the position is part of a union.⁷¹ If the worker is to be represented by a union, specific information must be provided on the relevant union local, including any consultations with the union along with the union’s position on hiring a temporary foreign worker through

64. Emp. & Soc. Dev. Can., Labour Market Opinion Application (LMO) Agricultural Stream-Labour Market Impact Assessment Application, ESDC EMP5519 (2018 12 001) E (displaying the Labour Market Impact Assessment Application Agricultural Stream).

65. *Id.* at 4 (requesting a description of the duties of the job offered and language requirements).

66. *Id.* at 7 (requesting employer to document recruitment efforts).

67. *Id.* (displaying a table for employer to list methods of recruitment).

68. *Id.* at 6 (requesting employer to document that wage range requested and the local wages meet the regional minimum requirements).

69. *Id.* at 10 (stating that it is the employer’s responsibility to comply with federal-provincial/territorial legislation and regulations in providing suitable accommodations).

70. *Id.* at 9 (describing when inspections should take place).

71. *Id.* at 6 (requesting information regarding association with unions).

the SAWP.⁷² Information is requested for any labour disputes in progress at the farm where the SAWP worker will be employed.⁷³

Along with the LMO form, the employer must submit a completed copy of the appropriate SAWP employment contract.⁷⁴ There are some differences among the employment contracts that revolve mostly around allowed employer deductions to recover worker transportation and housing costs. Each of the SAWP employment contracts contains some basic provisions covering:

- Scope and period of employment;
- Lodging, meals, and rest periods;
- Payments and deductions of wages;
- Insurance for occupational and non-occupational injury and disease;
- Maintenance of work records and statement of earnings;
- Travel and reception arrangements;
- Obligations of the employer and worker; and
- Premature repatriation.⁷⁵

To facilitate the administration of the Program, Canada has signed a number of bilateral and multilateral agreements with Mexico and the Commonwealth Caribbean.⁷⁶ These international agreements—or Memorandums of Understandings—contain basic provisions and protections for SAWP workers while in

72. *Id.* (requesting employer to document whether position is a part of a union); see MINISTER OF PUB. WORKS & GOV. SERVICES CAN., HOW TO HIRE A TEMPORARY FOREIGN WORKER (TFW): A GUIDEBOOK FOR EMPLOYERS 17 (2006), <http://www.cic.gc.ca/english/pdf/pub/tfw-guide.pdf> (explaining while HRSDC does not expect union concurrence, it does expect documentation proving that the employer informed the union that the position will be filled by a foreign worker).

73. *Labour Market Opinion Application (LMO) Agricultural Stream-Labour Market Impact Assessment Application*, *supra* note 64, at 3.

74. *Id.* at 10–11 (describing the employer responsibility of providing a copy of the employer contract).

75. See *Contract for the Employment in Canada of Seasonal Agricultural Workers from Mexico – 2019*, EMP'T & SOC. DEV. CAN., <https://www.canada.ca/en/employment-social-development/services/foreign-workers/agricultural/seasonal-agricultural/apply/mexico.html> (last modified Dec. 18, 2018) (listing the provisions of the employment contract).

76. See Jenna L. Henneby, *Globalization and the Mexican-Canadian Agricultural Worker Program: Power, Racialization & Transnationalism in Temporary Migration* (2006) (unpublished Ph.D. thesis, University of Western Ontario) (explaining that SAWP is governed by a bilateral agreement with Mexico and Canada and was modeled after the bilateral agreement with the Caribbean).

Canada.⁷⁷ The Canada-Mexico SAWP operates according to a “bilateral Memorandum of Understanding (MOU) originally signed in 1974, which outlines the operational guidelines and responsibilities” of each party in the Program.⁷⁸ The agreement makes it the responsibility of Mexico and Caribbean Commonwealth countries to “assist” in the “recruitment, selection, and documentation of bona-fide agricultural workers,” “maintaining a pool of workers who are ready to depart to Canada when requests are received from Canadian employers, and appointing agents at their embassies/consulates in Canada.”⁷⁹ Officials from source countries are also tasked with assisting Canadian government officials in the “administration of the program, and to serve as a contact point” for SAWP workers regarding any work-related complaints.⁸⁰

Despite the importance of the agricultural sector to the Canadian economy, it is difficult for SAWP workers to apply for permanent residence (or landed immigrant) status. Unlike other temporary foreign occupations that are considered high-skilled, SAWP workers have no dedicated stream of permanent immigration. Canada’s immigration system selects economic immigrants based on job offers from Canadian employers and considers qualities such as education, Canadian work experience, and official language abilities.⁸¹ These considerations make it extremely difficult for any SAWP workers to apply for landed immigrant status. Statistics issued from the period 2005–2009 show that only two percent of SAWP workers in Canada successfully transitioned to permanent residency, most of them applying through the Family Class program (after having left

77. See Karla Valenzuela, *Protection of Nationals Abroad: The Mexican State and Seasonal Agricultural Workers in Canada*, 4 MEX. L. REV. 309, 312–13 (2011) (stating that the Memorandum of Understanding contains guidelines and responsibilities for employers and employees).

78. *Id.*

79. *Id.* at 313.

80. *Id.*

81. See *Points-Based Immigration Systems: Canada*, LIBRARY OF CONG., <https://www.loc.gov/law/help/points-based-immigration/canada.php> (last updated June 9, 2015) (listing changes made to the points system considerations to include language, education, and Canadian work experience).

Canada).⁸²

SAWP workers may only remain in Canada for a minimum of six weeks to a maximum of eight months per year between January 1 and December 15, and they may return in subsequent years subject to the same entry and exit restrictions.⁸³ The recruitment process on the Canadian side specifies certain minimal requirements, including experience in farming and being over the age of eighteen.⁸⁴

However, workers in the SAWP are selected by Mexico and participating Caribbean countries, which generally require participants to have dependents in order to take part in the Program.⁸⁵ This recruiting preference also results in a workforce that is more willing to work more hours. It is a strong incentive for SAWP workers to maintain their employment and remittances sent home and to recognize the precariousness of their position in Canada.

A. *The United States H-2A Visa Program*

From 1942–1964, the United States acquired a large amount of Mexican farm labour through the Bracero Program.⁸⁶ Although Mexican farm laborers had long been working on American farms, the Bracero Program is generally acknowledged as the first

82. *Transition from Temporary Foreign Workers to Permanent Residents*, STAT. CAN.: BLOG, <https://www.statcan.gc.ca/eng/blog/cs/transition-to-permanent> (last modified Sept. 28, 2017).

83. *Guest Worker Programs: Canada*, *supra* note 59 (stating that “employers can hire TFWs from participating countries for a maximum duration of 8 months, between January 1 and December 15, provided they are able to offer the workers a minimum of 240 hours of work within a period of 6 weeks,” and that a “worker must go back to his home country before he can apply for another work permit”).

84. *Hire a Temporary Worker Through the Seasonal Agricultural Worker Program – Apply for a Labour Market Impact Assessment*, *supra* note 63.

85. See Kerry L. Preibisch, *Local Produce, Foreign Labour*, 72 RURAL SOC. 418, 435 (2007) (stating that “SAWP workers enter the country as single applicants, although they must prove they have dependents in order to qualify for the program”).

86. See Vernon M. Briggs Jr., *Background: Guestworker Programs: Lessons from the Past and Warnings for the Future*, CTR. IMMIGR. STUD. (Mar. 2004), <http://www.cis.org/sites/cis.org/files/articles/2004/back304.pdf> (stating that the Bracero Program’s “biggest year was in 1959 when 439,000 braceros were employed”).

“major” American temporary foreign farm worker program.⁸⁷ It was meant to address the perceived problem of a surge of undocumented Mexican migrant workers entering the United States in the 1930s and early 1940s and worked in conjunction with the mass round-ups of undocumented Mexican migrant workers in the early 1950s.⁸⁸ Many scholars have emphasized the needs of the American agricultural sector as the prime motivation behind the Bracero Program, with lax enforcement of minimum wages and employment and housing conditions responsible for the relative expansion of the Program in the 1950s.⁸⁹ The Bracero Program was officially ended in 1964.⁹⁰

The American Department of Homeland Security summarized the Bracero Program as a “success” in “expanding the farm labor supply” but attributes its demise to “depressed wages” for farm workers in the Southwestern United States.⁹¹ In reality, there were many more problems with the Bracero Program, including substandard housing conditions, dangerous employment conditions, and continuous lawsuits related to

87. See U.S. DEPT OF HOMELAND SEC., FACT SHEET: H-2A TEMPORARY AGRICULTURAL WORKER PROGRAM, HOMELAND SEC. DIG. LIBRARY 483694, <https://www.hsdl.org/?view&did=483694> (last modified Feb. 6, 2008) (describing the Bracero Program as the first major temporary worker program); see generally Peter N. Kirstein, *ANGLO OVER BRACERO: A HISTORY OF THE MEXICAN WORKER IN THE UNITED STATES FROM ROOSEVELT TO NIXON* (1977) (explaining that the Program was named for the Spanish term *bracero* derived from the term *brazo* or “arm” and that *Bracero* translates into “one who works with his arms”).

88. See generally Kelly Lytle Hernandez, *The Crimes and Consequences of Illegal Immigration: A Cross-Border Examination of Operation Wetback, 1943 to 1954*, *W. HIST. Q.*, 421, 423, 424, 429 (2006) (describing the creation of the Bracero Program and the importation and subsequent deportation of Mexican temporary laborers).

89. See generally KITTY CALAVITA, *INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S. 42* (John Brigham & Christine B. Harrington eds., 1992) (describing how the lax enforcement of the Program linked directly to the demands of growers); see also *Braceros: History, Compensation*, *RURAL MIGRATION NEWS* (Apr. 2006), <https://migration.ucdavis.edu/rmn/more.php?id=1112> (describing how the U.S. Department of Labor intentionally lowered the regulation standards for Bracero housing, wages, and food to make it easier for growers to hire and accommodate legal Mexican farm workers).

90. *Uneasy Neighbors: A Brief History of Mexican-U.S. Migration*, *HARV. MAG.* (May–June 2007), <https://harvardmagazine.com/2007/05/uneasy-neighbors-a-brief-html>.

91. FACT SHEET: H-2A TEMPORARY AGRICULTURAL WORKER PROGRAM, *supra* note 87.

deductions of worker wages that were never repaid.⁹² In 2008, former Bracero workers reached a settlement agreement with the Mexican government over unpaid wages and a fund was set up to pay class members a cash settlement.⁹³

The problems with the Bracero Program and the continuing entry of undocumented Mexican workers spurred the growth of the agricultural union movement.⁹⁴ In particular, the ending of the Bracero Program has been noted as the beginning of the modern problems surrounding undocumented Mexican labor migration to the United States. “The problem of Mexican illegal immigration is born at the moment that the Bracero Program ends. [Mexicans] keep coming, because the demand [for labor] is still there.”⁹⁵ The increasing number of undocumented Mexican migrant farm laborers in the United States led unions to focus their attention on advancing collective bargaining rights for American citizens employed in the agricultural industry.⁹⁶

In 1964, the H-2 Visa Program replaced the Bracero Program, allowing American employers to hire foreign workers “for both agricultural and non-agricultural jobs in locations with a

92. See Kristi L. Morgan, *Evaluating Guest Worker Programs in the U.S.: A Comparison of the Bracero Program and President Bush’s Proposed Immigration Reform Plan*, 15 BERKELEY LA RAZA L.J. 125, 131 (2004) (describing how the problems with the Bracero Program resulted in terrible working and living conditions); see also Otey M. Scruggs, *Texas and the Bracero Program, 1942-1947*, 32 PAC. HIST. REV. 251, 261 (1963) (describing how the Braceros had to accept painfully low wages and miserable living conditions); see also CLOSE TO SLAVERY: GUESTWORKER PROGRAMS IN THE UNITED STATES, *supra* note 2 (describing how efforts to recover the Braceros’ unpaid wages have resulted in several lawsuits totaling hundreds of millions of dollars).

93. See N.D. Cal., *If You Worked in the Bracero Program Between 1942 and 1946, or If You Are the Surviving Spouse or Child of Such a Bracero, and You Are Living in the United States, You Could Get an Award from a Class Action Settlement*, <https://www.ufw.org/pdf/EnglishClassNotice.pdf> (last visited Aug. 9, 2018) (explaining that as a result of the settlement, the Braceros Relief Fund was established, which offered class members a one-time payment of 38,000 pesos).

94. Elaine Y. Chang, Senior Research Seminar Paper, *Social Workers and the Bracero Program: Working Within Migration Discourse and Conflicting Policy*, U. CAL. BERKELEY C. NAT. RES. (2010), https://nature.berkeley.edu/classes/es196/projects/2010final/ChangE_2010.pdf.

95. *Uneasy Neighbors: A Brief History of Mexican-U.S. Migration*, *supra* note 90 (quoting Jorge Domínguez).

96. See generally Chang, *supra* note 94 (describing how the Bracero movement facilitated the discussion that would later lead to American workers seeking bargaining rights in the civil rights movement).

shortage of domestic workers.”⁹⁷ Although some legal gains were made by guest workers through the H-2 Program, many of the problems faced by Bracero workers continued and the Program itself became the subject of wider immigration reforms enacted during the 1980s.⁹⁸ In 1986, the Immigration Reform and Control Act (IRCA)⁹⁹ was enacted, distinguishing between H-2 workers into foreign temporary/seasonal agricultural workers (the H-2A visa) and foreign temporary non-agricultural workers (the H-2B visa).¹⁰⁰ A so-called amnesty provision in the IRCA allowed certain undocumented workers to legalize their status in the U.S., provided that they could prove they worked for ninety days on an American farm from May 1, 1985 to April 30, 1986.¹⁰¹ Nearly three million undocumented Mexican farm workers in the U.S. obtained permanent residency status under the amnesty program.¹⁰² The Department of Homeland Security’s statement on the H-2A Visa Program echoes the general Canadian government statements on the SAWP:

Employers in the United States have often faced a shortage of available domestic workers who are able, willing and qualified to fill seasonal agricultural jobs. The H-2A program was instituted to meet this need for seasonal and temporary labor, without adding permanent residents to the population.¹⁰³

97. FACT SHEET: H-2A TEMPORARY AGRICULTURAL WORKER PROGRAM, *supra* note 87.

98. See Ragini Tripathi, *The H-2B Visa: Is This How We Treat a Guest?*, 11 ST. MARY’S L. REV. 519, 527–28 (2009) (describing how Bracero protesters laid the foundation for future generations and started a movement that eventually forced Congress to enact wider immigration reforms).

99. Immigration Reform and Control Act of 1986, Pub. L. No. 99–603, 100 Stat. 3359 (1986) (codified at 8 U.S.C. § 1101).

100. FACT SHEET: H-2A TEMPORARY AGRICULTURAL WORKER PROGRAM, *supra* note 87.

101. See *id.* (explaining that the IRCA also provided for additional “replenishment agricultural workers to enter the United States as temporary residents between 1990 and 1993 if there was a shortage of farm workers during that time”).

102. Leah Haus, *Openings in the Wall: Transnational Migrants, Labor Unions, and U.S. Immigration Policy*, 49 INT’L ORG. 285, 288 (1995).

103. FACT SHEET: H-2A TEMPORARY AGRICULTURAL WORKER PROGRAM, *supra* note 87.

The Immigration and Nationality Act¹⁰⁴ authorizes the establishment of the H-2A visa and outlines entrance procedures. Three federal agencies manage the H-2A Program:

- The Department of Labor (DOL) issues the H-2A labor certifications and oversees compliance with labor laws.
- U.S. Citizenship and Immigration Services (USCIS) adjudicates the H-2A petitions.
- The Department of State (DOS) issues the visas to the workers at consulates overseas.¹⁰⁵

The Department of Homeland Security oversees any security issues related to the admittance of foreign migrant workers.¹⁰⁶ Nationals of a broad range of countries may apply for an H-2A visa.¹⁰⁷ There is no current limit on the number of foreign agricultural workers admitted under the H-2A Visa Program.¹⁰⁸ Similar to the Canadian SAWP protocol, there is a process whereby employers must (1) verify that no U.S. citizens or permanent residents are available to perform the required work,

104. See Immigration and Nationality Act, Pub. L. 82-414, 66 Stat. 163 (1952) (codified at 8 U.S.C. ch. 12), § 1101(a)(15)(H)(ii)(a) (demonstrating that this section authorizes the H-2A Visa Program).

105. FACT SHEET: H-2A TEMPORARY AGRICULTURAL WORKER PROGRAM, *supra* note 87.

106. Randall Monger, *Nonimmigrant Admissions to the United States: 2012*, U.S. DEPT OF HOMELAND SEC., OFF. OF IMMIGR. STAT. (Aug. 2013), https://www.dhs.gov/sites/default/files/publications/ois_ni_fr_2012.pdf.

107. H-2A Temporary Agricultural Workers, U.S. CITIZENSHIP & IMMIGR. SERV.'S, <https://web.archive.org/web/20110121101553/http://www.uscis.gov/portal/site/uscis/template.PRINT/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextchannel=889f0b89284a3210VgnVCM100000b92ca60aRCRD&vgnextoid=889f0b89284a3210VgnVCM100000b92ca60aRCRD> (last updated Jan. 14, 2011) (explaining that "effective January 18, 2011, nationals from the following countries are eligible to participate in the H-2A and H-2B Programs: Argentina, Australia, Barbados, Belize, Brazil, Bulgaria, Canada, Chile, Costa Rica, Croatia, Dominican Republic, Ecuador, El Salvador, Estonia, Ethiopia, Fiji, Guatemala, Honduras, Hungary, Ireland, Israel, Jamaica, Japan, Kiribati, Latvia, Lithuania, Macedonia, Mexico, Moldova, Nauru, The Netherlands, Nicaragua, New Zealand, Norway, Papua New Guinea, Peru, Philippines, Poland, Romania, Samoa, Serbia, Slovakia, Slovenia, Solomon Islands, South Africa, South Korea, Tonga, Turkey, Tuvalu, Ukraine, United Kingdom, Uruguay, and Vanuatu. Of these countries, the following were designated for the first time this year: Barbados, Estonia, Fiji, Hungary, Kiribati, Latvia, Macedonia, Nauru, Papua New Guinea, Samoa, Slovenia, Solomon Islands, Tonga, Tuvalu, and Vanuatu").

108. FACT SHEET: H-2A TEMPORARY AGRICULTURAL WORKER PROGRAM, *supra* note 87.

and (2) certify that the proposed wages and employment conditions satisfy the applicable state employment standards and do not result in depressed wages for American agricultural workers performing similar labor.¹⁰⁹ Entrance under the H-2A visa is generally authorized for less than one year, but the visa may be extended for “qualifying employment” in increments of less than one year, up to a maximum stay of three years.¹¹⁰ A foreign seasonal worker who has been in the United States on an H-2A visa for three years is required to leave the United States and remain outside U.S. territory for a consecutive three-month period before seeking readmission under an H-2A visa.¹¹¹

H-2A workers can, under certain conditions, apply for permanent residency in the United States through the family-based immigration stream of the Immigration and Nationality Act.¹¹² This requires an H-2A worker to have close relatives who are U.S. citizens or U.S. permanent residents.¹¹³ These relatives would file an immigration petition for an H-2A worker to attain permanent residency immigration status and a Green Card.¹¹⁴ It is also theoretically possible for an H-2A worker to attain a Green Card by having an employer sponsor him or her—but in practice, this would be quite difficult.¹¹⁵

Several aspects of the H-2A Program have been criticized. The Program has been condemned as “deeply flawed” and giving

109. *Id.*; *H-2A Temporary Agricultural Workers*, *supra* note 107; Kerry L. Preibisch, *Local Produce, Foreign Labor: Labor Mobility Programs and Global Trade Competitiveness in Canada*, 72 *RURAL SOC.* 418, 431 (2007).

110. *H-2A Temporary Agricultural Workers*, *supra* note 107.

111. *Id.*; see 8 C.F.R. § 214.2(h)(5)(viii)(C) (2011) (explaining that an individual having H-2A status for three years must remain outside the country for three uninterrupted months before being granted H-2A status again).

112. Immigration and Nationality Act, *supra* note 104; see *Family-Based Immigrant Visas*, TRAVEL.STATE.GOV, <https://travel.state.gov/content/travel/en/us-visas/immigrate/family-immigration/family-based-immigrant-visas.html> (last visited Aug. 10, 2018) (explaining that some visas are available based on the presence of a family member in the United States).

113. 8 U.S.C. § 1151 (explaining that close relatives are defined by the INA to include parents, children, and spouses).

114. *Family-Based Immigrant Visas*, *supra* note 112.

115. See Alana Semuels, *For U.S. Farmers and Mexican Workers, It's Tough Being Legal*, L.A. TIMES (Mar. 30, 2013), <http://www.latimes.com/nation/la-na-guest-worker-20130331-dto-htmlstory.html#> (explaining that employers say that the H-2A Program is broken and complicated and the process is a headache of applications and paperwork).

“too much control to employers” when compared to Canada’s SAWP with respect to worker selection and placement.¹¹⁶ Under the Program, which has been noted to amount to “slavery” and “government bondage,” workers pay high fees for visas, job placement, and poor quality housing and food.¹¹⁷ The Program allegedly stimulates the development of the recruitment and contracting industry through unregulated private recruiters who frequently mislead workers about job opportunities and benefits and charge exorbitant job placement fees.¹¹⁸ Workers do not receive adequate medical care for injuries and illness, and they are threatened out of consulting with legal service providers or talking to activists who try to inform the workers of their rights.¹¹⁹

Similar to the SAWP, the H-2A Program has grown exponentially. The number of workers in the United States on an H-2A visa increased from 6,445 in 1992, to approximately 64,404 in 2008, and to over 134,000 in 2016.¹²⁰ Unlike the SAWP, the U.S. Department of Homeland Security does not have any specific obligation to ensure that H-2A workers return to their home

116. Bjorn Jensen, *Labor Mobility and the Global Economy: Should the World Trade Organization Set Migration Policy?* 21, AM. FRIENDS SERV. COMM. (July 10, 2006).

117. CLOSE TO SLAVERY: GUESTWORKER PROGRAMS IN THE UNITED STATES, *supra* note 2.

118. *See id.* at 11 (describing how recruiters lied to workers about pay and amounts of work and in some cases charged workers \$10,000 in fees).

119. *See id.* at 29 (describing how employers took the passports of workers, denied them medical care, and threatened complainers with deportation).

120. *See* ANDORRA BRUNO, IMMIGRATION: POLICY CONSIDERATIONS RELATED TO GUEST WORKER PROGRAMS, CONG. RESEARCH SERV., RL32044 (2006), available at trac.syr.edu/immigration/library/P333.pdf (noting the 1992 increase in H-2A visas issued from 6,445 to 30,201); *Multi-Year Graphs*, TRAVEL.STATE.GOV, https://web.archive.org/web/20100602191646/http://travel.state.gov/visa/statistics/graphs/graphs_4399.html (last visited Aug. 16, 2018) (showing the level of H-2A visas issued had risen to 64,404 in 2008); Philip Martin, *The H-2A Farm Guestworker Program Is Expanding Rapidly: Here Are the Numbers You Need to Know*, ECON. POL’Y INST.: WORKING ECON. BLOG (Apr. 13, 2017), <https://www.epi.org/blog/h-2a-farm-guestworker-program-expanding-rapidly/> (explaining that the number of H-2A visas issued in 2016 was over 134,000).

countries.¹²¹ The removal of overstaying H-2A workers would be similar to any other process for removing aliens who overstay their visas in the United States. However, American legislation prohibits any H-2A worker who overstays his or her visa from returning to the United States on another H-2A visa for a minimum five-year period.¹²² The Immigration and Nationality Act states that an alien illegally in the United States for a period of more than six months is prohibited from returning to the country for a three-year period.¹²³ Reliable statistics on overstay rates for those workers issued H-2A visas are difficult to obtain, and the American government is currently studying a number of options to implement a comprehensive computerized visa exit tracking system.¹²⁴ One 2004 study of Mexican workers receiving H-2A visas at the U.S. Consulate in Monterrey, Mexico, found that approximately forty percent of the workers issued H-2A visas at that location subsequently overstayed their time in the United

121. *Compare* Changes to Requirements Affecting H-2A Nonimmigrants, 73 Fed. Reg. 30, 8230 (proposed Feb. 13, 2008) (to be codified at 8 C.R.F. pts. 214, 215, 274a) (describing a possible change in U.S. policy in consideration of the current lack of exit monitoring for nonimmigrants that involves adding a monitored exit through a designated port of entry), *with* Tanya Basok, *Canada's Temporary Migration Program: A Model Despite Flaws*, MIGRATION INFO. SOURCE (Nov. 2007), <https://www.migrationpolicy.org/article/canadas-temporary-migration-program-model-despite-flaws> (describing how Canadian policy requires nonimmigrant workers to check in at a recruitment agency in their home country upon completion of their work in Canada).

122. FED'N AM. IMMIGR. REFORM, *Backgrounder: H-2A Agricultural Guest Worker Program*, available at <https://web.archive.org/web/20160327050737/http://www.fairus.org/DocServer/h2a.pdf> (last visited Aug. 16, 2018); *see also* *H2 Visas*, U.S. CONSULATE GEN. U.S., MONTERREY, MEX. (Mar. 6, 2016), https://web.archive.org/web/20160316194605/http://monterrey.usconsulate.gov:80/work_visa.html (explaining how H-2A workers must return their entry visa forms (I-94 forms) at the border when returning to Mexico once their work time has ended as proof that they have not overstayed their work period in the United States).

123. *See* Immigration and Nationality Act, *supra* note 104, § 212(a)(9)(B) (noting that aliens who overstay for over a year are prohibited from entering the United States for a ten-year period).

124. *See* Daniel Costa & Jennifer Rosenbaum, *Temporary Foreign Workers by the Numbers: New Estimates by Visa Classification*, ECON. POL'Y INST. (Mar. 7, 2017), <https://www.epi.org/publication/temporary-foreign-workers-by-the-numbers-new-estimates-by-visa-classification/> (explaining that the U.S. government is the main source of information on nonimmigrants and the data collected is generally of poor quality and recorded inconsistently across federal agencies); *see generally* *Homeland Security To Have Immigrant Exit Tracking System Ready Within 'Weeks'*, CBS DC (Mar. 6, 2012), <https://washington.cbslocal.com/2012/03/06/homeland-security-to-have-immigrant-exit-tracking-system-ready-within-weeks/> (describing how the U.S. is considering adding a biometric system to track immigrants when they leave).

States.¹²⁵

There have been no Canadian government studies on overstay rates relating to SAWP workers. The structure of the SAWP—requiring workers to have dependent family members in their home countries—appears to have limited illegal overstays or attempts by SAWP workers to gain permanent residency through marriage.¹²⁶ The World Bank has conducted studies showing the overstay rates to be relatively small at 1.5%.¹²⁷ This “negligible” figure, at current SAWP recruitment rates, would represent about 400 to 500 SAWP workers overstaying their visa in Canada.¹²⁸

B. Canadian Unionization Campaigns and SAWP Workers: Manitoba and Quebec

The United Food and Commercial Workers (UFCW) took on the task of unionizing Canada’s SAWP workers. The UFCW’s general position was that no worker in Canada—regardless of his or her nationality or status—should be denied basic collective

125. See generally *H-2A, H-2B*, RURAL MIGRATION NEWS (Apr. 2006), <https://migration.ucdavis.edu/rmn/more.php?id=1111> (explaining how the Mexican Consulate in Monterrey began to require a sample of Mexican workers receiving H-2A visas at that location to report for interviews within a month of the expiration of their visas; from that sample, an approximate number of Mexican workers overstaying H-2A visas was extrapolated).

126. See Janet McLaughlin & Jenna Hennebry, *Pathways to Precarity: Structural Vulnerabilities and Lived Consequences in the Everyday Lives of Migrant Farmworkers in Canada* 7, INT’L MIGRATION RES. CTR.: WILFRID LAURIER UNIV., http://www.yorku.ca/raps1/events/pdf/McLaughlin_Hennebry.pdf (last visited Sept. 5, 2018) (explaining that the screening process for SAWP workers has, in part, resulted in the vast majority of SAWP workers returning home following their contracts); see also Kerry L. Preibisch, *Local Produce, Foreign Labor: Labor Mobility Programs and Global Trade Competitiveness in Canada*, 72 RURAL SOC. 418, 435 (2007) (showing how SAWP’s requirement for workers to have dependents is intended to deter SAWP participants from seeking residency through marriage or from staying in Canada illegally).

127. Basok, *supra* note 121.

128. See *id.* (explaining that SAWP overstays are negligible at a rate of 1.5%); see also Rosa Marchitelli, *Migrant Worker Program Called ‘Worse than Slavery’ After Injured Participants Sent Home Without Treatment*, CBC NEWS (May 16, 2016), <https://www.cbc.ca/news/canada/jamaican-farm-worker-sent-home-in-a-casket-1.3577643> (noting that 30,000 farm workers come to Canada annually through the Seasonal Agricultural Workers Program, and when multiplied by the SAWP overstay rate, it reflects approximately 450 people who overstay as part of SAWP).

bargaining rights.¹²⁹ The UFCW's national campaign to unionize agricultural workers took form in two provinces that had long participated in the SAWP: Manitoba and Quebec. Later efforts would be concentrated in British Columbia while some provinces, such as Alberta, saw no unionizing activity at all due to the continuing existence of restrictive provincial laws regarding agricultural workers and unionization. The following sections examine and analyse unionization efforts of SAWP workers in these provinces.

Manitoba was an early site for union organizing efforts on farms. From 1999 to 2011 the province had an NDP majority government heavily supported by trade unions.¹³⁰ Premier Gary Doer's labour reforms early in his first term made it easier for unions to obtain certification, generating some measure of opposition from Manitoba's business community.¹³¹ Doer may have been able to blunt opposition to unionization by the agricultural industry in Manitoba because his agricultural policies were seen in a favorable light by many farmers.¹³² Manitoba was also active in addressing problems with the Temporary Foreign Worker Program. In 2007, the province announced consultations aimed at regulating the unscrupulous behaviour of temporary foreign worker recruiters and abuses associated with recruiting foreign workers.¹³³

The first unionization efforts involving SAWP workers in

129. Manoj Dias-Abey, *Justice on Our Fields: Can "Alt-Labor" Organizations Improve Migrant Farm Workers' Conditions?*, 53 HARV. C.R.-C.L. L. REV. 167, 185 (2018).

130. *NDP Delegates Prepare for Fall Election*, UNITED FOOD & COM. WORKERS: LOCAL 832 (Apr. 12, 2011), <http://www.ufcw832.com/node/745>; Nelson Wiseman, Draft Paper, *The NDP: Manitoba's Natural Governing Party?* 11–12, UNIV. TORONTO (Sept. 2008), http://umanitoba.ca/faculties/arts/departments/political_studies/media/wiseman_paper.pdf.

131. David Kuxhaus, *Premier Tries to Placate Business Riled by Contentious Labour Law Changes*, WINNIPEG FREE PRESS, Aug. 2, 2000, at A1 (noting that Doer's government raised the minimum wage by almost fifty percent in nine years, generating more business opposition).

132. See Valerie Lawton, *Farmers Get \$170 Million More in Aid*, TORONTO STAR, Nov. 5, 1999, at A5; Brian Laghi & David Roberts, *One-Time Cash Payout to Help Prairie Farmers with Spring Crop*, GLOBE & MAIL, Feb. 25, 2000, at A4; Mia Rabson & Leah Jenzen, *Border Reopens to Live Cattle*, WINNIPEG FREE PRESS, Dec. 30, 2004, at A1.

133. News Release, Gov. Man., *Province Announces Consultations to Better Regulate Immigration Recruiters and Modelling Agencies* (Nov. 21, 2007), <https://news.gov.mb.ca/news/index.html?item=2662>.

Canada occurred in 2006 at Mayfair Farms in Portage La Prairie, Manitoba. UFCW Canada Local 832 applied to represent the bargaining unit in September 2006 but legal challenges by the employer delayed the certification vote until June 2008, when ninety-three percent of those who voted were in favor of a collective agreement.¹³⁴ The campaign was marred by claims from some of the Mexican SAWP workers alleging that they had been misled by the UFCW into signing union cards.¹³⁵ These forty-three Mexican workers were represented by legal counsel who alleged that the UFCW tricked the workers into signing union cards by promising legal representation to three of their coworkers in a criminal matter.¹³⁶ The UFCW denied this stating that the workers may have been coerced into making the claims.¹³⁷

In its negotiations with Mayfair Farms the UFCW was also constricted by the farm's "fiscal realities" and the reality that the process could not "put farmers out of business."¹³⁸ Wages were just one issue for the union in the collective agreement negotiations. For SAWP workers, the issues of seniority, as well as a grievance procedure that protects temporary foreign workers who complain of workplace conditions from being arbitrarily repatriated, were of major importance, particularly given the powers of the employer in the SAWP.¹³⁹ The farm signed a three-year contract with UFCW Local 832 that was groundbreaking, as it was the first successful attempt to create a bargaining unit

134. *Ratification of UFCW Canada First-Contract at Manitoba Farm Historic Breakthrough for Migrant Workers*, UNITED FOOD & COM. WORKERS CAN. (June 23, 2008), http://www.ufcw.ca/index.php?option=com_content&view=article&id=587&catid=5&Itemid=99&lang=en.

135. *Mexican Migrant Workers Say They Were Misled into Signing Union Cards*, CBC NEWS (Jan. 31, 2007), <http://www.cbc.ca/news/canada/montreal/story/2007/01/31/migrant-workers.html>.

136. *Id.* (stating that the forty-three workers who signed statements "accused the UFCW of telling them the union would provide them with a lawyer for three of their coworkers, who were arrested in connection with a sexual assault and the assault of a police officer while the workers were off duty").

137. *Id.*

138. *Agricultural Workers in B.C. Join UFCW*, UNITED FOOD & COM. WORKERS: LOCAL 832 (Aug. 8, 2008), <http://www.ufcw832.com/node/558>.

139. *Id.*

including SAWP workers.¹⁴⁰

However, in August 2009, the workers at Mayfair farms voted to decertify their union.¹⁴¹ Prior to the vote, the Mexican consul had visited migrant Mexican farm workers at the farm and allegedly warned them in a closed-door meeting that they could be prevented from ever coming to Canada again if they did not vote to decertify their union.¹⁴² Workers were allegedly threatened with exclusion from the SAWP based on their support of unionization and “at least one strong union supporter [was] denied return to Mayfair Farms” in 2009.¹⁴³ Although the UFCW’s unionization campaign in Manitoba continues, recent union efforts seem to be directed towards building alliances with local migrant worker advocacy groups.¹⁴⁴

In Quebec, the situation is complicated by the province’s unique control over immigration. Under the Canada-Quebec Accord, the federal and Quebec governments share jurisdiction with regards to immigration.¹⁴⁵ Section 1 of the Accord sets out its broad objectives.¹⁴⁶ This includes the selection of persons intending to reside and/or work permanently or temporarily in Quebec.¹⁴⁷ In addition to federal entry requirements, the consent of Quebec’s government must be obtained prior to the entry of any SAWP worker.¹⁴⁸ A Quebec “Acceptance Certificate” valid for one

140. Historic Ratification for Migrant Farm Workers, UNITED FOOD & COM. WORKERS: LOCAL 832 (June 20, 2008), <http://www.ufcw832.com/node/542>.

141. Ed White, *Unionized Farm Workers Choose to Decertify*, W. PRODUCER (Aug. 13, 2009), <https://www.producer.com/2009/08/unionized-farm-workers-choose-to-decertify>.

142. Jennifer deGroot, *How Clean Are Your Carrots?*, WINNIPEG FREE PRESS, Aug. 14, 2009, at A3.

143. *Id.*

144. See *Local 832 Builds Bonds with Migrant Workers*, UNITED FOOD & COM. WORKERS CAN. (Apr. 26, 2011), http://www.ufcw.ca/index.php?option=com_content&view=article&id=2334:local-832-builds-bonds-with-migrant-workers&Itemid=6&lang=en.

145. Canada–Québec Accord Relating to Immigration and Temporary Admission of Aliens (Feb. 5, 1991), <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/agreements/federal-provincial-territorial/quebec/canada-quebec-accord-relating-immigration-temporary-admission-aliens.html>; Margaret Young, *Immigration: The Canada-Quebec Accord*, BP-252E (Mar. 1991), <http://publications.gc.ca/collections/Collection-R/LoPBdP/BP/bp252-e.htm>.

146. Young, *supra* note 145.

147. *Id.*

148. Canada–Québec Accord, *supra* note 145.

season must be issued to MICC prior to arrival of any SAWP workers in the province.¹⁴⁹ Under Jean Charest's Liberal government, which came into power 2003, the province had been ambivalent towards the UFCW's initial attempts at unionizing SAWP workers at Quebec farms.¹⁵⁰ The neo-liberal, more agri-business-friendly attitude of the Quebec Liberal Party under Charest mirrored to some extent the approach previously taken by the Harris government in Ontario. In particular, the Charest government's ambitious "Réingénierie de l'État" (Reengineering of the State) involved curtailing the power of Quebec's labour unions through reducing the number of bargaining units in the public health sector and abolishing the unions formed by domestic care workers as first steps towards more drastic changes in industrial relations.¹⁵¹

As in Ontario, the UFCW and agricultural employers in Quebec became engaged in a legal battle that included union complaints to the Quebec Labour Relations Board (QLRB). A complaint to the QLRB culminated in a recent decision that dramatically altered the situation for SAWP workers in the province; the decision effectively nullified a law that prevented the unionization of mainly migrant farm workers and granted a certification application for a unit of six Mexican migrant workers.¹⁵² In *Travailleurs et travailleuses unis de l'alimentation et du commerce, Section locale 501 v. Johanne L'Écuyer & Pierre Locas*,¹⁵³ the Quebec Labour Relations Board struck down Section 21, Paragraph 5, of the Québec Labour Code, which stated, "Persons employed in the operation of a farm shall not be deemed to be employee . . . unless at least three of such persons are ordinarily and continuously so employed." This section of the code effectively prevented migrant farm workers from unionizing by requiring a minimum of three workers in the proposed unit to be

149. *Id.*

150. Michel Coutu & Julie Bourgault, *Freedom of Association in Québec Since BC Health Services: The New Quiet Revolution?*, 16 CAN. LABOUR & EMP'T L.J. 135 (2011).

151. *See id.* at 138 (noting that "well over half a million workers are directly affected by these challenges").

152. *Travailleurs et travailleuses unis de l'alimentation et du commerce, Section locale 501 v. Johanne L'Écuyer & Pierre Locas*, 2010 QCCRT 0191 (Can.) [hereinafter *Travailleurs*].

153. *Id.* paras. 2–3.

“continuously” employed at the farm.¹⁵⁴

The Quebec government intervened in part to stress the differences among the migrant workers’ status in Quebec.¹⁵⁵ Quebec argued that Mexican farm workers in the province under the SAWP faced a different set of circumstances with respect to employment conditions when compared to Guatemalan farm workers in the province under the low-skilled stream of the TFW Program.¹⁵⁶ While information on both groups was included as part of the *Travailleurs* complaint, and the Quebec government essentially argued that the QLRB should ignore information presented on behalf of TFWP workers when applying the Charter to SAWP workers.¹⁵⁷ The QLRB rejected this argument, noting that many sources of information can “permettent de tisser la toile de fond sur laquelle s’inscrivent les questions constitutionnelles débattues par les parties” [“help to weave the background fabric on which to view the constitutional questions discussed by the parties”].¹⁵⁸ Finally, Quebec argued that if the labour code provision was found unconstitutional, the appropriate remedy would be for the Quebec legislature to design new labour code provisions for migrant farm workers—however, these new provisions did not necessarily have to incorporate a certain model of union certification.¹⁵⁹

The QLRB held that the Quebec Labour Code provision violated the Charter by effectively preventing union representation for the largely temporary foreign migrant farm workers in the province, stating that Section 2(d) of the Charter guarantees the right to engage in collective bargaining, not just a theoretical right to join an association.¹⁶⁰ The QLRB specifically noted the circumstances of SAWP workers on Quebec farms, whose vulnerability and discriminatory treatment were prohibited under the Charter.

Le statut de travailleurs agricoles migrants constituerait

154. *Id.* para. 33.

155. *Id.* paras. 38, 46.

156. *Id.* para. 39.

157. *Id.* paras. 46–56.

158. *Id.* para. 59.

159. *Id.* paras. 402–03.

160. *Id.* para. 341.

un autre motif de discrimination prohibée par la Charte canadienne. Cette exclusion du régime général d'accréditation prévu au Code constituerait un désavantage et une distinction ayant pour effet de dévaloriser et marginaliser davantage des travailleurs particulièrement vulnérables. Cette vulnérabilité découle de leur condition de travailleur agricole migrant n'ayant aucun statut légal en tant que citoyen ou résident permanent du Canada.

[The status of migrant farm workers constitutes another ground of discrimination prohibited by the Charter. This exclusion from the system of certification under the Code would be a disadvantage and a distinction that has the effect of devaluing and marginalizing workers who are more particularly vulnerable. This vulnerability stems from their status as migrant farm worker with no legal status as citizen or permanent resident of Canada.]¹⁶¹

The *Travailleurs* decision also contains large sections devoted to analysing the SAWP work contract, wages of Mexican and Caribbean workers in the province, and such workers' mobility and employment restrictions.¹⁶² The QLRB noted that the Code provision affected a significant number of workers, approximately 6,000 SAWP and other temporary foreign agricultural workers from non-SAWP participating countries in Quebec each year.¹⁶³ In striking down Section 21, Paragraph 5, of the Quebec Labour Code, the QLRB determined that it must apply the labour code as if the impugned provisions did not exist.¹⁶⁴

The QLRB granted a certification application for a unit of six Mexican migrant workers.¹⁶⁵ It refused the province's requests to delay implementation of the decision or allow time for drafting of new legislation on the following basis: (1) there had already been a twenty-month delay in certification, and (2) the Board could not presume that the province's intentions in applying for judicial review or in amending the Labour Code would include extending

161. *Id.* para. 24.

162. *Id.* paras. 135–78.

163. *Id.* para. 107; *Union Victory for Quebec Farm Workers*, NAT'L UNION PUB. & GEN. EMP.'S (Apr. 22, 2010), <https://nupge.ca/content/union-victory-quebec-farm-workers>.

164. *Travailleurs*, *supra* note 152, paras. 408–10.

165. *Id.* para. 405.

some type of coverage to seasonal migrant workers.¹⁶⁶ The QLRB was also critical of the farm industry's arguments that it was economically, uniquely fragile, noting that there was insufficient evidence to prove that the agricultural industry in Quebec was on the brink of economic failure. More specifically, the QLRB stated that there is no plausible link between the stated objective of protecting family farms and the denial of unionization to seasonal workers, pointing out that recognizing the right of farm workers to engage in collective bargaining is a prerequisite to industrial democracy.¹⁶⁷

The QLRB's consideration of SAWP workers in Quebec resulted in a positive outcome for the UFCW and for SAWP workers seeking to unionize.¹⁶⁸ This outcome was reached by adopting an approach that considered the historical context of SAWP workers in Canada, the nature of farm work, and the goals of workplace equality in a democracy. Significantly, it acknowledged the marginal position of the complainants and rejected arguments that rights can be abrogated to protect certain economic interests. The QLRB's ruling potentially opened the door for eventual legal recognition of labour unions in Quebec comprised of a majority of SAWP workers or temporary foreign workers for designated employers. More recently, an agricultural unit at *Produit VegKiss* farms outside of Montreal, composed largely of Mexican SAWP workers and Guatemalans in the lower-skilled stream of the TFWP, was certified in Quebec in December 2011.¹⁶⁹

However, the QLRB did not guarantee SAWP workers the right to participate in the Wagner model of collective bargaining. It left open the possibility that an alternative model of collective bargaining could be enacted for Quebec farms, similar to the

166. *Id.* paras. 411–412.

167. *Id.* para. 302.

168. *UFCW Canada Union Victory for Quebec Farm Workers*, UNITED FOOD & COM. WORKERS CAN. (Apr. 26, 2010), http://www.ufcw.ca/index.php?option=com_content&view=article&id=1803.

169. *Seventh Agriculture Unit Certified in Quebec*, UNITED FOOD & COM. WORKERS CAN., http://www.ufcw.ca/index.php?option=com_content&%20view=article%20&id=2600%3Aseventh-agriculture-unit-certified-in-quebec&catid=6%3Adirections-news-letter&Itemid=6&lang=en (last visited Jan. 24, 2018).

AEPA in Ontario.¹⁷⁰ The legal process was also quite long, and as of April 2012, it was still ridden with legal uncertainty. The *Travailleurs* decision came nearly two years after workers at the Mirabel-area farm voted for certification. Perhaps most importantly, the QLRB's decision was issued one year before the Supreme Court of Canada's *Fraser* decision. A good deal of the QLRB's reasoning was based on Judge Winkler's Ontario Court of Appeal ruling in *Fraser*—much of which was later overturned by the Supreme Court.¹⁷¹

Alberta remains the province with the most comprehensive exclusions with respect to agricultural workers and collective bargaining. There has been very little UFCW activity in Alberta, despite the fact that the province is host to a small number of SAWP workers. In 2010, the total number of Mexican SAWP workers in Alberta was approximately 850, representing a 3% decline from the previous year and accounting for approximately 5% of the total number of Mexican SAWP workers in Canada.¹⁷²

The composition of SAWP workers in Alberta is almost exclusively Mexican and includes a majority of "name hires" (i.e., workers specifically requested by name), with slightly more than ten percent of cases refused as name hires.¹⁷³ The 15 complaints involving SAWP workers in Alberta in 2010 included 1 worker "sent home due to performance issues, 3 due to poor health, and 3 due to personal issues."¹⁷⁴ The average SAWP worker's experience in Alberta is characterized by seasonal returns to Canada for a period of 6 years, with 118 Alberta farms using SAWP workers in 2010.¹⁷⁵

The province has made it easier for skilled temporary workers, entering the province through the federal Temporary Foreign Worker Program, to apply for permanent residency. In 2011, the Alberta government announced that skilled temporary

170. *Travailleurs*, *supra* note 152, paras. 342–343, 401, 411.

171. *See generally id.* (frequently referencing the Canadian Supreme Court case *Ontario v. Fraser*, the opinion of which was delivered by Judge Winkler).

172. ALTA. BEEKEEPERS COMM'N, *Record of Service Canada Meeting to Discuss SAWP with Alberta Employers* (Oct. 27, 2010).

173. *Id.*

174. *Id.*

175. *Id.*

foreign workers that are certified in Alberta's thirty-one optional trades can apply directly to the province—as opposed to going through their employers—for permanent residency.¹⁷⁶ This residency option is not applicable to SAWP workers or workers entering the TFW Program through the low-skilled stream.¹⁷⁷

SAWP workers are reliant on their federal employment contract protections since Alberta farm workers remain excluded from many legislative protections in the workplace.¹⁷⁸ A voluntary workers' compensation scheme for farm owners forces injured farm workers to resort to litigation, a route that SAWP workers are unlikely to pursue due to unfamiliarity with Canada's legal systems and for fear of being blacklisted.¹⁷⁹

Provisions in the Alberta Employment Code regarding minimum wages, wages relating to overtime and statutory holidays, and hours of work do not apply to temporary foreign agricultural workers; even some provisions restricting the employment of children do not apply to the workers.¹⁸⁰ The exemptions are similar to those in other provinces (Ontario, Saskatchewan, and Prince Edward Island), targeting farm workers “whose work is directly related to the primary production of eggs, milk, grain, seeds, fruit, vegetables, honey, livestock, game-production animals, poultry, bees[,] or cultured fish.”¹⁸¹ Workers on Alberta farms and ranches are also exempted from collective bargaining provisions in the Alberta Labour Relations Code if they are involved in these activities “or any other primary agricultural operation specified in the regulations under the

176. News Release, Gov't Alta., Temporary Foreign Workers Certified in Alberta Trades Can Apply for Permanent Residence (Mar. 14, 2011), <https://www.alberta.ca/release.cfm?xID=30062B4E87190-D7CB-48ED-F675A738194FDDE4>; see also Gov't Alta., List of Compulsory and Optional Certification Trades (Oct. 20, 2018), https://trade.secrets.alberta.ca/SOURCES/PDFS/designated_trades_certification.pdf; *Alberta Foreign Workers Can Apply to Government for Permanent Residency*, EDMONTON J. (Mar. 14, 2011).

177. News Release, Gov't Alta., *supra* note 176.

178. Bob Barnetson, *The Regulatory Exclusion of Agricultural Workers in Alberta*, 14 JUST LAB.: CAN. J. WORK & SOC. 50, 50 (2009).

179. *Id.* at 53–54.

180. Alberta Employment Standards Code, R.S.A. 2000, c E-9, pt. 1, § 2(3)(4).

181. Barnetson, *supra* note 178, at 53.

Employment Standards Code.”¹⁸² Alberta’s legislative exclusion is broader than Quebec’s exclusion before the latter was struck down in 2010.¹⁸³ Following *Fraser*, it is unclear if a constitutional challenge to Alberta’s legislation would produce the same outcome as in Quebec. What is clear is that SAWP workers remain completely excluded from collective bargaining in Alberta for the foreseeable future.

C. Union Organizing and H-2A Workers

While unionization efforts by H-2A workers bear many similarities to those efforts employed by their Canadian counterparts, they also reflect important differences. The United Farm Workers often used full-time organizers to spread information regarding collective bargaining, mirroring efforts by other American unions in the industrial sector.¹⁸⁴ Since the NLRA formed the basis of legal regulation for collective bargaining in the private sector, American labor unions increasingly criticized the exclusion of agricultural labor from the NLRA while targeting farm workers for unionization.¹⁸⁵ Individual farm labor contracts tended to undermine the protection of exclusive representation as well as the legal enforcement of employers’ obligation to bargain with farm workers.¹⁸⁶

The Bracero Program, centered on unrepresented foreign workers entering into individual contracts, represented another challenge, as unions also saw it as an obstacle to their efforts to improve working conditions and wages for local farm workers.¹⁸⁷

182. Alberta Labour Relations Code, *supra* note 13, c L-1, § 4(2)(e)(i)(ii) (an amendment made by SA 2017, c 9, enacted on June, 7, 2017, came into force retroactively on May 4, 2017).

183. Barnetson, *supra* note 178, at 53.

184. See generally William B. Gould, *Taft-Hartley Revisited: The Contrariety of the Collective Bargaining Agreement and the Plight of the Unorganized*, 13 LAB. L.J. 348 (1962) (providing an overview of the difficulties and potential pitfalls of utilizing paid union organizers in collective bargaining campaigns).

185. *Agricultural Labor Relations – The Other Farm Problem*, 14 STAN. L. REV. 120, 142–49 (1961).

186. See *J. I. Case Co. v. N.L.R.B.*, 321 U.S. 332, 332 (1944) (holding that individual employment contracts outside of a collective bargaining scheme could serve as an obstacle to organization and permit an employer to “divide and conquer”).

187. SUSAN FERRIS & RICARDO SANDOVAL, *THE FIGHT IN THE FIELDS: CESAR CHAVEZ AND THE FARMWORKERS MOVEMENT* 56–60 (Diana Hembree ed., 1997).

Many of the justifications for using Braceros on American farms mirrored the racist stereotypes of Mexican and Caribbean workers seen in Canada, outlined above in article 2.¹⁸⁸ The key differences in the American responses to this situation stem from several factors. Discrimination in America is deeply rooted in the legacy of slavery and has been addressed openly in American society. This has prompted a much more robust federal legal response through instruments such as the Civil Rights Act of 1964.¹⁸⁹ Public-interest labor law is a highly-developed field of litigation in the U.S., with the most litigated area in this field being employment discrimination.¹⁹⁰ The Civil Rights Act also established the Equal Employment Opportunity Commission, which prohibits discrimination in employment based on race, color, sex, national origin, or religion.¹⁹¹ Furthermore, the post-1945 period witnessed the general engagement of American unions with agricultural workers on a scale not seen in Canada at least until the 1990s or into the new millennium. Much of this was due to charismatic and influential labor leadership in the agricultural sector, at the forefront of which was Cesar Chavez.

Chavez was a giant in the American farm labor union movement and a full examination of the man and his work would far exceed the ambit of this article.¹⁹² For purposes of this paper, though, Chavez's significance lies in his background coming from a family of Mexican migrant farm workers; his signature accomplishment was his founding, with Dolores Huerta, of the National Farm Workers Association, which later became United Farm Workers Union.¹⁹³ Born to Mexican migrants in Yuma,

188. *Id.* at 109.

189. Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241, enacted July 2, 1964 (outlawing racial discrimination throughout the United States, including major forms of discrimination in the workplace).

190. Gould IV, *supra* note 18, at 187.

191. Civil Rights Act of 1964, *supra* note 189, § 703(b).

192. See Ferris & Sandoval, *supra* note 187 (providing a fuller appreciation of Chavez's effect on the American Labor movement).

193. See *Cesar Chavez*, HISTORY.COM, <https://www.history.com/topics/mexico/>

Arizona, Chavez's influence began in 1950 in San Jose, California, with own personal involvement as a Mexican-American farm worker enduring often brutal and low-wage employment.¹⁹⁴ His subsequent efforts involved decades of community organizing and interacting with the political and legal systems.¹⁹⁵ His actions involved forming alliances with other immigrant groups besides Mexicans working on American farms and, in particular, the Filipino farm worker community.¹⁹⁶ Chavez's work, and the American farm labor movement, hit a critical point in early 1966, culminating in a historic march of California grape pickers for higher wages; workers marched almost 400 kilometers from the small farming town of Delano to the state capitol in Sacramento.¹⁹⁷ The striking farm workers earned the support of several influential U.S. politicians, including then Senator Robert F. Kennedy.¹⁹⁸ Organizing movements sprang up across the Southwestern and Midwestern United States.¹⁹⁹

It was through many efforts similar to these that by the 1960s, a critical mass of workers led by effective labor leadership had brought the issue to the forefront of politics in several large U.S. states. During this period a considerable number of

cesar-chavez (last updated Aug. 21, 2018) (explaining that the United Farm Workers Association was renamed United Farmworkers Union, or UFW, after joining with AFL-CIO); Inga Kim, *The Rise of the UFW*, UNITED FARM WORKERS (Apr. 3, 2017), <https://ufw.org/the-rise-of-the-ufw/> (explaining that Cesar Chavez was the son of extremely poor farm workers and later founded the National Farm Workers Association with the help of cofounder Dolores Huerta).

194. See *Cesar Chavez*, HISTORY.COM, *supra* note 193 (explaining that Cesar Chavez was born in Yuma, Arizona, to immigrant parents); see also Cesar Chavez, *Huelga: Tales of the Delano Revolution The Organizer's Tale*, RAMPARTS MAG., July 1966 (explaining that Cesar Chavez's experience began in 1950, sixteen years before 1966).

195. *Id.*

196. *When Mexicans and Filipinos Joined Together*, UNITED FARM WORKERS, <https://ufw.org/research/history/mexicans-filipinos-joined-together/> (last visited Sept. 16, 2018).

197. See generally KATHLEEN KRULL & YUYI MORALES, *HARVESTING HOPE: THE STORY OF CESAR CHAVEZ* (2003) (explaining that the march from Delano to the state capitol in Sacramento was more than three hundred miles).

198. *RFK and Cesar Chavez*, PBS: AM. EXPERIENCE, http://www.pbs.org/wgbh/amex/rfk/peopleevents/p_chavez.html (last visited Sept. 16, 2018).

199. See generally Wendy Jepson, *Spaces of Labor Activism, Mexican-American Women and the Farm Worker Movement in South Texas Since 1966*, 37 ANTIPODE 679 (2005); Mark Erenburg, *Obreros Unidos in Wisconsin*, 91 MONTHLY LAB. REV. 17 (1968); *About FLOC*, FARM LABOR ORG. COMM., <http://www.floc.com/wordpress/about-floc/> (last visited Jan. 12, 2019).

American unions had joined forces to urge the U.S. government to dissolve the Bracero Program and, moreover, attempt to divide the “alliance between ranchers” and “government bureaucrats” that ran the Bracero Program.²⁰⁰ Bracero was essentially a system of temporary contract labor that viewed Mexican farm workers as unable to contribute to American society outside of the harvest season.²⁰¹ Chavez echoed the general arguments of U.S. organized labor and was deeply opposed to the Bracero Program, not only because of the Program’s racist, economically exploitative elements and often degrading treatment of migrants, but also on the grounds that the Program hurt domestic American farm workers by keeping farm labor wages low and hindering the formation of unionized farm labor through the availability of cheap, non-resident migrant farm labor.²⁰² This position was in line with the general historical position of most American unions prior to the twentieth century, a position that largely excluded new migrants from organizing activities.²⁰³

In 1972, Chavez went on a hunger strike in an attempt to stop Arizona from passing a bill that would ban farm workers from striking during the harvest season—a move that would effectively gut the power of their union.²⁰⁴ Although his hunger strike was unsuccessful in stopping the anti-union legislation, it brought the plight of non-unionized farm workers to the widespread attention of Americans.²⁰⁵ By the 1980s, with free trade negotiations and international labor issues becoming more prominent political issues, American unions had shifted their position to supporting migration of foreign workers to the United States “when such measures [helped to] facilitate organization of foreign-born

200. Ferris & Sandoval, *supra* note 187, at 54, 65, 70.

201. See Marjorie S. Zatz, *Using and Abusing Mexican Farm Workers: The Bracero Program and the INS*, 27 L. & SOC’Y & SOC. REV. 851 (1993).

202. Ferris & Sandoval, *supra* note 187; see also KITTY CALAVITA, *INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S.* (1992).

203. GWENDOLYN MINK, *OLD LABOR AND NEW IMMIGRANTS IN AMERICAN POLITICAL DEVELOPMENT: UNION, PARTY, AND STATE, 1875–1920* 165–66 (1986).

204. *History of Si Se Puede!*, UNITED FARM WORKERS, <https://ufw.org/research/history/history-si-se-puede/> (last visited Sept. 16, 2018).

205. *Id.*

workers.”²⁰⁶ The efforts to unionize farm workers also led unions to adopt a more “inclusive approach” to organizing H-2A workers in the 1990s.²⁰⁷

D. Collective Bargaining and H-2A Workers: R.J. Reynolds Case Study

The UFW created its “Guest Worker Program” in 2006 in response to H-2A workers’ inability to obtain union representation in the United States.²⁰⁸ The UFW’s traditional approach had been to advocate for eliminating the H-2A Program due to its “highly exploitative nature.”²⁰⁹ The UFW’s criticisms of the H-2A Program and unionization of H-2A workers mirrors that of the UFCW in Canada. The UFW alleges that H-2A workers in the United States have faced blacklisting and intimidation whenever discussions of union representation have arisen.²¹⁰ Like the UFCW in Canada, the UFW has worked with foreign governments on migrant farm worker issues; one example includes signing an agreement with the government of the Mexican state of Michoacán to “ensure the integrity of H-2A recruitment” for Mexican H-2A workers in the U.S.²¹¹

The UFW campaign resulted in a collective bargaining agreement including H-2A workers being signed with Growers Labor Services (GLS), a federally licensed farm worker contractor.²¹² The agreement provided for “seniority rights for workers; a binding issues resolution process; wages above the federally required minimum; and minor medical coverage for non-work related injuries or illnesses and discharges only in the case

206. Leah L. Haus, *Openings in the Wall: Transnational Migrants, Labor Unions, and U.S. Immigration Policy*, 49 INT’L ORG. 285, 293 (1995); see generally GARY WOLFE MARKS, *UNIONS IN POLITICS: BRITAIN, GERMANY, AND THE UNITED STATES IN THE NINETEENTH AND EARLY TWENTIETH CENTURIES* (1989) (providing a comparison of organizing techniques for skilled and unskilled workers in the United States).

207. Haus, *supra* note 206 (“Unions may seek to organize these [foreign] workers to advance the interests of American workers. Absent organization, foreign-born workers may undercut unionized American workers.”).

208. *UFW Guest Worker Program*, UNITED FARM WORKERS (July 29, 2008), <https://ufw.org/UFW-Guest-Worker-Program/>.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

of just cause.”²¹³ The GLS collective agreement also includes “all rules and regulations related to the H-2A program” in order to facilitate direct enforcement of H-2A provisions “without depending on State or Federal agencies.”²¹⁴ This provision addresses the problems American state and federal officials face with enforcement of both H-2A regulations and labor legislation.²¹⁵ The UFW has thus moved away from advocating abolishment of the H-2A temporary farm worker Program to a model of reform and collective organization for temporary foreign farm workers. It has also increased its advocacy work for H-2A workers in communicating with state and federal agencies.²¹⁶

However, the first collective bargaining agreement in the United States to include H-2A workers was signed prior to the GLS agreement and involved the Farm Labor Organizing Committee (FLOC), a farm workers’ advocacy group founded in the mid-1960s and inspired by many of the goals that motivated Chavez and the UFW.²¹⁷ The FLOC is primarily active in the Midwest and North Carolina.²¹⁸ It was in North Carolina in the late 1990s that the FLOC became engaged with H-2A workers complaining of poor wages and working conditions at a pickle company called Mt. Olive.²¹⁹ The FLOC “organized a 5-year boycott and won a collective bargaining agreement with both Mt. Olive and the North Carolina growers association in 2004.”²²⁰ The FLOC described the win as “historic” not only “because it was the first ever collective bargaining agreement for agriculture workers in the South, and the first in the history of the H2A program,” but

213. *Id.*

214. *Id.*

215. *See id.* (ensuring that workers’ rights are protected through a union contract in order to develop a just program that is both fair to workers and meets the needs of U.S. farmers).

216. *Id.*

217. *See* Jen Soriano, *FLOC: Winning Collective Bargaining for Farm Workers*, GRASSROOTS GLOB. JUST. ALL. (July 14, 2011), <http://ggjalliance.org/node/796> (stating that FLOC was founded in the mid-1960s by Baldemar Velásquez, a tomato farm worker in Northwest Ohio, “who started out by convincing a small group of migrant farmworkers to come together for their collective good”).

218. *See id.* (stating that FLOC has thousands of members in the Midwest and North Carolina).

219. *Id.*

220. *Id.*

also because it opened the door for FLOC organizers to target other North Carolina growing operations for H-2A worker unionization.²²¹ The tobacco industry was selected, primarily because of the continuing significance of tobacco in the North Carolina economy even in the face of declining tobacco farming.²²²

The FLOC focused its collective bargaining efforts on R.J. Reynolds American, the largest tobacco company in the United States, as well as the largest non-unionized tobacco company in the U.S. and a major user of H-2A workers.²²³ In September 2007, the FLOC launched a letter-writing campaign, followed by attendance at shareholders meetings, thereby pressuring lenders in an attempt to force the company to negotiate a contract including H-2A workers and domestic farms workers at Reynolds' tobacco farms in North Carolina.²²⁴

R.J. Reynolds responded to the allegations with an open letter addressed to “[t]hose interested in farm labor issues.”²²⁵ The letter complained of inappropriate efforts to “pressure” Reynolds into negotiations for a collective bargaining agreement for H-2A workers:

What may not be clear to many who have contacted R.J. Reynolds, urging the company to negotiate with the union, is that FLOC has had a collective bargaining agreement with the N.C. Growers Association (NCGA) for the last four years. All guest H2A workers who are interested in union representation have been and continue to be free to sign up for membership with FLOC. Neither RAI nor R.J. Reynolds is the appropriate party to negotiate any collective bargaining agreement

221. *Id.*

222. See TOM CAPEHART, TRENDS IN U.S. TOBACCO FARMING, ERS, TBS-257-02 (Nov. 2004), www.ers.usda.gov/webdocs/publications/39463/48597_tbs25702.pdf?v=42087 (noting that twenty-nine percent of farms that grew tobacco were in North Carolina, but by 2002, that number had fallen to fourteen percent).

223. See Soriano, *supra* note 217 (recognizing that the FLOC also targeted R.J. Reynolds because of its “long history of using racism and red-baiting to destroy union efforts”).

224. *Id.*

225. Press Release, Bd. of Dir.'s & Leadership Team of Reynolds Am. Inc., An Open Letter to Those Interested in Farm Labor Issues (Jan. 16, 2019) (later revised and titled: An Open Letter From the Board of Directors and Leadership Team of Reynolds American Inc.).

with FLOC. As the sponsoring organization for the H2A workers, the NCGA is the appropriate body to negotiate such an agreement – and they have done so.²²⁶

The Company claimed that employed H-2A workers were not “employees” of R.J. Reynolds and therefore any collective bargaining arrangement would have to be made with the sponsoring agency, the North Carolina Growers Association:

Many of the farmers R.J. Reynolds contracts with employ workers to assist them in growing and harvesting the tobacco. Workers are employed by those farmers; they are not employees of either R.J. Reynolds or RAI; so neither company is an appropriate or necessary party to a collective bargaining agreement for farm workers. If farm workers want to be represented by a union, the workers and their employer should negotiate with the union – not RAI or R.J. Reynolds. The North Carolina Growers Association has a collective bargaining agreement with FLOC, and the farms with whom R.J. Reynolds contracts are free to join the association and participate in the collective bargaining agreement if they so choose. Many do, and thus, some of the workers on farms with whom R.J. Reynolds contracts are already FLOC members.²²⁷

Finally, Reynolds noted that the “real issue” appeared to be getting new sources of revenue for the union, and in particular accused FLOC of singling out Reynolds using deceptive tactics and inaccurate information:

FLOC’s actions against our companies to this point lead us to believe that this is an issue of revenue for the union. According to the N.C. Growers Association, FLOC membership among H-2A workers has dropped from 4,000 to 640. FLOC’s membership is plummeting; workers may be cancelling their membership because they are not receiving benefits they believe were promised by the union. RAI and its operating companies will not be party to efforts to pressure workers into rejoining the union they have voluntarily left. FLOC has been accused of using deceptive tactics to recruit

226. *Id.*

227. *Id.*

membership. The Consulate of Mexico has contacted the N.C. Growers Association regarding concerns they have that FLOC is not delivering on its promises to members. Approximately 800 workers have filed complaints about FLOC with the Consulate. . . . It should be noted that R.J. Reynolds is not the largest purchaser of tobacco in North Carolina or any other state where tobacco is grown. Yet R.J. Reynolds is the only tobacco company being targeted for protests and boycotts by FLOC. . . . The issues surrounding migrant workers are national, longstanding and involve the production of a number of crops – but for unspecified reasons FLOC has singled out tobacco, farms in North Carolina and R.J. Reynolds in this matter. Reynolds American and R.J. Reynolds support efforts to ensure that workers in all industries have a safe work environment. Guest H-2A workers in North Carolina who are interested in joining FLOC can do so, and they would then be party to the collective bargaining agreement already in place with the N.C. Growers Association. Absolutely nothing prevents them from doing so today.²²⁸

FLOC offered a point-by-point rebuttal to Reynolds letter repeating that it only asked for a meeting with company officials, not negotiations.²²⁹ The letter conceded that Reynolds does not employ the workers but repeats that Reynolds “maintains ultimate responsibility” as the contractor with growers who hire the farm workers.²³⁰ It objected to Reynolds’ claim that the North Carolina Grower’s Association is responsible for any collective bargaining negotiations with the UFW, claiming that according to a “best guess . . . merely 20% of their growers are members of the NCGA.”²³¹ FLOC denied organizing a boycott against Reynolds, stating that it was targeting the tobacco industry in general—not just Reynolds—as other tobacco companies would be approached and Reynolds was merely the first because of its

228. *Id.*

229. See Press Release, Farm Lab. Org. Comm., FLOC Response to Reynolds’ “Open Letter to Those Interested in Farm Labor Issues” (2009) (addressing Reynolds’ open letter by presenting responses alongside individual points made by Reynolds).

230. See *id.* (arguing although Reynolds is not the employer, Reynolds controls the work conditions of the tobacco farmers).

231. *Id.*

dominant position in the industry.²³² Finally, FLOC noted that Reynolds' "Corporate Social Responsibility" program included many interviews and focus groups on workers' and employers' issues, involving all stakeholders in the industry and the H-2A Program—except for the farm workers themselves.²³³ The dispute between FLOC and Reynolds resulted in FLOC working with Oxfam America and the United Church to present an assessment of human rights conditions in tobacco fields to a Reynolds' shareholders meeting on May 6, 2008.²³⁴ FLOC shareholders of Reynolds attended the 2009 shareholders' meeting in an attempt to press their concerns involving a number of issues including H-2A worker conditions.²³⁵

Despite the successes noted above, unionizing H-2A workers in the United States remains difficult. In the last decade, there has also been an exponential increase in the number of H-2A applications filed by employers. While certified H-2A jobs are usually greater than actual H-2A visas issued, they nevertheless indicate the continued growth of the Program. In the first year of the Obama Administration, fiscal year 2009, employers filed 8,150 labor certification applications requesting 103,955 H-2A workers for temporary agricultural work.²³⁶ The Department of Labor certified 94% of the applications submitted for a total of 86,014 workers.²³⁷ In 2017, during the first year of the Trump Administration, employers filed 10,115 applications for a total of 200,049 certified positions.²³⁸ Despite the increase in H-2A applications, the proportion of unionized H-2A workers has remained relatively steady. Even accounting for FLOC's

232. See *id.* (noting that Reynolds has a stature globally, given that British American Tobacco owns 42.5% of Reynolds).

233. *Id.*

234. *FLOC Goes to the 2008 Reynolds Tobacco Shareholders Meeting*, FARM LAB. ORG. COMM. (2010).

235. See *Reynolds Represses Shareholders, Refuses to Hear Farm Workers*, FARM LAB. ORG. COMM. (2010).

236. *Rule for H-2A Temporary Agricultural Worker Program Announced*, U.S. GREEN CARD LOTTERY NEWS (Mar. 5, 2010), <http://www.usadiversitylottery.com/news/immigration/green-card-dv2012-immigration-news-mar052010.php>.

237. *Id.*

238. EMP'T & TRAINING ADMIN., U.S. DEP'T OF LABOR, OFFICE OF FOREIGN LABOR CERTIFICATION: H-2A TEMPORARY AGRICULTURAL LABOR CERTIFICATION PROGRAM — SELECTED STATISTICS, FY 2017 (displaying data as of Sept. 30, 2017).

organizing efforts in North Carolina, the amount of H-2A workers unionized throughout the Midwest and South by FLOC remains at 10,000 farm workers.²³⁹

Most employers involved in the H-2A Program continue to oppose the UFW organizing efforts. Legal counsel for H-2A employers have recently warned agricultural employers that

The UFW is continuing its efforts to force H-2A workers to join a union. . . . Unions want to be the gatekeepers of the H-2A program in their desperation to grow their membership. The UFW's involvement with the recruitment of H-2A workers from Mexico will impact employers.²⁴⁰

The UFW was also criticized for its agreement with the State of Michoacán:

In April 2008 the UFW signed an agreement with the state of Michoacán, Mexico to bring H-2A workers into the US who would automatically join the UFW. According to the UFW, their involvement with the H-2A program will reduce corruption in the recruitment workers and protect their rights in the US. It will also conveniently provide the UFW with more members who will have no choice in union membership.²⁴¹

The advent of the FLOC in the 1960s in some ways mirrors the efforts of the UFCW in Canada in the 2000s. Both organizations attempted to address issues unique to migrant farm workers, including legal issues resulting from alleged abuses in the H-2A Program and SAWP. However, there are some key differences between the two. FLOC was created as a bottom-up or grassroots organization by a farm worker raised in a Mexican migrant worker family.²⁴² The key strength of such an organization is its ability to channel direct and practical concerns

239. David Flores, *FLOC Launches Ambitious Plans in Tobacco Fields*, LAB. NOTES (July 1, 2014), <http://labornotes.org/2014/07/floc-launches-ambitious-plans-tobacco-fields>.

240. MC Saqui & AP Raimondo, *The UFW's Continuing Efforts to Recruit H-2A Workers* ("It is critical that employers carefully examine the labor contractors they intend to work with and to consult with qualified immigration and labor counsel as they put together their H-2A programs.").

241. *Id.*

242. René Perez Rosenbaum, *Farm Labor Organizing Committee (FLOC): Grassroots Organizing for the Empowerment of the Migrant Farm Worker Community*, 13 CULTURE, AGRIC., FOOD & ENV'T 21, 21 (1993).

on the ground into political power.²⁴³ The FLOC was and has remained keyed in to regional concerns in the Midwest and mid-Atlantic regions as exemplified by its persistent efforts against R.J. Reynolds in North Carolina.²⁴⁴ Although it became affiliated with The American Federation of Labor and Congress of Industrial Organizations (AFL–CIO), a national labor union, in 1992, it did so partly to “build relations” with international farm workers groups; this effort is demonstrated by its opening of an office in Monterrey, Mexico, to provide information and assist H-2A workers in coming to the United States.²⁴⁵ In comparison with the FLOC, which has been in operation for over forty years, the UFCW’s organizing efforts on Canadian farms began in earnest in the 1990s.²⁴⁶ Although there were some earlier attempts at organizing, efforts directed towards SAWP workers began in earnest only after the *Dunmore* decision in 2002.²⁴⁷ The most analogous grassroots organization in Canada directed towards migrant farm workers would be the AWA. But the AWA is a farm workers’ advocacy group, not an actual union, and does not generally engage in legal challenges.²⁴⁸

V. COMPARATIVE CONCLUSION

The disparity between the number of total workers in the

243. See LEE STAPLES, *ROOTS TO POWER: A MANUAL FOR GRASSROOTS ORGANIZING* 3 (1984) (reasoning that participating in the political process by voting as a group is a source of power for grassroots organizations).

244. See *FLOC Goes to the 2008 Reynolds Tobacco Shareholders Meeting*, *supra* note 234 (describing over 100 supporters rallied to meet with FLOC).

245. See *The Early Years of FLOC*, FARM LAB. ORG. COMM. (2010) (noting that the AFL-CIO is a national American trade union center and the largest federation of unions in the United States).

246. See *History of Agricultural Workers in Canada*, UNITED FOOD & COM. WORKERS CAN., http://www.ufcw.ca/index.php?option=com_content&view=article&id=2012:history-of-agricultural-workers-in-canada&catid=58&Itemid=5&lang=en (last visited Jan. 25, 2018) (illustrating the timeline of UFCW’s efforts with respect to agricultural workers).

247. *Id.*

248. See UNITED FOOD & COM. WORKERS CAN., *The Status of Migrant Farm Workers in Canada 2010-2011* 12 (2011), http://www.ufcw.ca/templates/ufcwcanada/images/awa/publications/UFCW-Status_of_MF_Workers_2010-2011_EN.pdf (describing the services as assisting workers with a number of issues such as repatriation intervention, worker’s compensation claims, parental leave benefits, CPP, QPP, employment insurance, and health insurance claims).

United States relative to Canada is clearly important in any comparison between the countries. In the area of documented and temporary foreign agricultural workers, the numbers narrow somewhat as there are more than twice the number of H-2A visa workers entering the U.S. in recent years compared to foreign workers coming to Canada through the SAWP.²⁴⁹ However, equally as important as the countries' differences in size is the history of the countries' respective labor movements. It is a critical consideration in this analysis.

Organizing migrant farm labor takes time, and time is a key element in any comparative analysis between the United States and Canada related to migrant farm labor and collective bargaining. The comparatively recent legal engagement with unionizing agricultural workers in Canada is clearly responsible for much of the delay in efforts to unionize these workers. The delays in resolving the issue through Canada's Supreme Court are another problem. Canada's labour laws and legal labour structure, along with the advent of the Charter in 1982 and subsequent court challenges to violations of workers' Charter rights, also played critical roles in the relatively later development of a migrant farm labor consciousness in Canada.

The relative delay in Canadian legal activity is only one part of the problem in unionizing SAWP workers. This article provided a background of collective organizing efforts directed at farm labor in the United States, and information from the U.S. H-2A Program relating specifically to documented temporary agricultural workers. A comparison to Canada's own context and the SAWP demonstrates the historical use in both countries of "unfree" populations to engage in farm labor and the difficulties and resistance encountered in unionizing documented temporary foreign agricultural workers.

America's labor law structure and its greater federal involvement has led to the enactment of federal laws specifically directed at protecting migrant workers' rights. The differing levels of union activity between Canada and the U.S., coupled

249. See Juliana Vengoechea Barrios, *Labor Trafficking in the Americas in Context: A Look into the Guest Worker Program*, 8 MEX. Y.B. INT'L L. 639, 645-46 (2013) (stating that roughly 30,000 workers enter the U.S. through the H-2A Program and 18,000 workers enter Canada through the SAWP).

with the fact that some states have allowed for farm labor collective bargaining, has led to a greater level of unionization activity in many U.S. states.

The comparison also illustrates differences among jurisdictions within both countries. The largest U.S. state, California—which has the largest migrant worker population and is arguably the most relevant for Mexican H-2A workers—has long offered extensive legislative protections and seen large-scale civil rights and political protest related to migrant workers.²⁵⁰ The largest Canadian province, Ontario—which has the largest percentage of SAWP workers—continues to argue for limited organizing rights for farm workers.²⁵¹ This state of affairs exists while both Canada's Supreme Court and the federal government largely ignore or understate the difficulties SAWP workers face in Canada. Some other jurisdictions in the U.S. and Canada, such as Alberta and many U.S. Southern states, are notable in their similarity of banning agricultural unionization efforts. The American legislative protections that address violations are balanced out by employers' greater control in the H-2A Program over recruitment and less government regulation relating to the Program itself.

Politically, there are some key differences as well. Federal policies relating to H-2A workers under recent Democrat administrations in the United States have relied less on the support of Southern states in national elections, and therefore may have fewer political reasons to fear pro-union reforms of the H-2A Program. Recent federal Conservative governments in Canada have garnered strong political support from the two provinces most resistant to farm worker unionization: Alberta and Ontario. However, the current federal Liberal government has been more open to reforming some of the abuses associated

250. See Daniel Costa, *California Leads the Way: A Look at California Laws that Help Protect Labor Standards for Unauthorized Immigrant Workers* 1, 7, ECON. POL'Y INST. (Mar. 22, 2018) (analyzing laws passed in California for the protection of migrant workers).

251. See *Canada: SAWP*, RURAL MIGRATION NEWS (Apr. 2008), <https://migration.ucdavis.edu/rmn/more.php?id=1304> (stating that “workers employed in the Ontario agricultural sector continue to be excluded from union organizing laws,” and noting that “Ontario also excludes farm workers from joining trade unions for the purpose of collective bargaining”).

with the SAWP, although it has also been criticized for taking little actual steps to improve the SAWP.²⁵²

Both the U.S. and Canada share a racist past in aiming to procure “suitable” temporary farm labor from the developing world. Although the United States never explicitly rationalized the H-2A Program as a form of aid to developing states, the Program is defended by the American government as being in line with the international labor goals of fair wages and equal treatment of migrant workers.²⁵³ But many U.S. states use the term “development” in conjunction with the H-2A Program only to refer to the development of their own employment sectors.²⁵⁴ At least one can complement the honest use of the term. The use of temporary populations with limited freedom to alleviate farm labor shortages may allow a destination country to focus on its own workforce development in other sectors. However, this dispels the notion that the H-2A Program is in place to promote economic development in Mexico. Similarly, the SAWP, viewed as a “labor development” program or a form of development aid, cannot redress the inequalities and labor disruptions caused by economic globalization.

Some U.S. labor activists have argued that extending NLRA coverage to include agricultural workers in the U.S. would be the best avenue for addressing collective bargaining issues.²⁵⁵ For a variety of reasons, however, expanding the NLRA to include

252. See Edward Dunsworth, *Predicting the Future of Temporary Foreign Worker Programs. . . In the 1960s and 70s*, ACTIVEHISTORY.CA (Oct. 4, 2017), <http://activehistory.ca/2017/10/the-future-of-temporary-foreign-worker-programs> (stating “while Trudeau and the Liberals continue to issue platitudes around improving TFWPs and providing pathways to permanent residency, very little has actually changed”).

253. See News Release, United Farm Workers, Federal Court Rejects Agribusiness Attack on Obama Administration Rules on Agricultural Guestworkers (Apr. 10, 2010), <https://ufw.org/FederalCourt-Rejects-Agribusiness-Attack-on-Obama-Administration-Rules-on-Agricultural-Guestworkers/> (stating that in January 2009, the Obama administration issued regulations restoring wage, housing, transportation, and other workplace regulations removed from the Program by the previous Bush administration); *International Labor Standards on Migrant Workers*, ILO, [https://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/migrant-workers/lang—en/index.htm](https://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/migrant-workers/lang-en/index.htm) (last visited Jan. 23, 2018).

254. *H2A Process for Temporary Seasonal Agricultural Workers*, IOWA WORKFORCE DEV. (Oct. 8, 2014), <https://web.archive.org/web/20141008223633/http://www.iowaworkforce.org:80/centers/alc/h2a.htm>.

255. Read, *supra* note 32, at 530.

agricultural workers is not a practical option. First, the “overwhelming political power” of the agricultural lobby makes it difficult to imagine a successful Congressional vote in favor of the proposition, at least for the foreseeable future.²⁵⁶ Second, any federal intrusion into this area has the potential to “undercut” farm worker unionization gains made by American unions through relatively progressive state labor legislation such as the ALRA.²⁵⁷ Many American labor lawyers familiar with the NLRA complain that it offers inadequate protections to those workers that it does cover.²⁵⁸

Perhaps most significantly, the extension of increased legal protections has failed to prevent widespread abuses within the H-2A Program. In contrast to the Canadian SAWP experience, the situation in the United States demonstrates that governmental deregulation of the operation of a temporary foreign worker program, even in the context of increased formal legal workplace protections, results in more employer control. Less governmental oversight results in increased obstacles for unionization and increased potential for abuses of foreign workers’ rights.²⁵⁹ This occurs even when the law is extended to provide nominal protections for these workers. As this article has illustrated, the practical benefits of American and Canadian law for H-2A and SAWP workers are impeded by a variety of factors: the lack of federal and/or provincial/state resources and influential corporate and farming interests being two of the primary issues.

256. *Id.* at 529.

257. *Id.*

258. See Austin P. Morris, *Agricultural Labor and National Labor Legislation*, 54 CAL. L. REV. 1939, 1952, 1956 (1966).

259. See U.S. GOV’T ACCOUNTABILITY OFF., GAO-15-154, H-2A AND H-2B VISA PROGRAMS: INCREASED PROTECTIONS NEEDED FOR FOREIGN WORKERS (Mar. 2015), <https://www.gao.gov/assets/690/684985.pdf>