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Illness, Injury and Medical Deportations at the Frontier: The Canadian Legal Regime for Health Care Protections for Agricultural Migrant Workers

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I. Introduction

In May of 2016, newspapers reported on the story of Sheldon MacKenzie, a Jamaican man who was in Canada on a temporary work permit.[1] He was employed as an agricultural worker on a farm in Manitoba. He had been brought to Canada to work for several years in a row, and his family had benefitted significantly from his labour. In particular, it allowed him to pay tuition to send his daughters to their local school. Mr. MacKenzie was injured on the job and fell into a coma. He died three months later in a Canadian hospital. What makes this tragic story unusual is that Mr. MacKenzie was not deported back to Jamaica. Upon being injured and no longer able to work, his work-related rights to receive health care and to remain in Canada both effectively

[1] Rosa Marchitelli, "Migrant Worker Program Called 'Worse Than Slavery' After Injured Participants Sent Home Without Treatment", *CBC* (16 May 2016), online: <www.cbc.ca/news/canada/jamaican-farm-worker-sent-home-in-a-casket-1.3577643>.

came to an end. His family, however, intervened. They filed an application for Mr. MacKenzie to be allowed to remain in Canada, on humanitarian and compassionate grounds, while receiving medical treatment. They obtained a stay of his deportation while that application was being determined. Although his death from his workplace injuries occurred before the application was heard, he continued to receive care up until his death, and did not suffer from the disruption and uncertainty that being deported back to Jamaica would have entailed.

This paper explores how health interests and rights play out in the temporary agricultural worker regime. In particular, it illustrates how a system that–as discussed below–is formally positioned as granting such workers the same rights as nationals, may not in practice provide equivalent or meaningful protections. The assessment is not just about the social exclusion challenges that often undermine the ability or possibility of migrant workers to activate their legal rights (which is the usual critique of why post-national citizenship writing is overly optimistic),[2] but about how the legal and regulatory system itself misses the mark.

Mr. MacKenzie's story gestures to some of the tensions that undergird the migrant worker regime. To be explicit, the regime operates in the broader context of poverty, environmental degradation, and other locally experienced hardships. This contributes to a constant supply of migrants from the south who are willing to experience extended separations from their families and social isolation in exchange for employment in the north, filling jobs that Canadians ostensibly refuse to take. Their reward is real: economic gains for their families that would otherwise be outside of their grasp.

Canada's economy benefits significantly from such workers and has done so since the 1940s, when we first introduced programs to fill low-skill labour gaps in a variety of areas on a temporary basis. The number of temporary migrant workers who support our economy has ebbed

[2] Tanya Basok, "Post-National Citizenship, Social Exclusion and Migrants Rights: Mexican Seasonal Workers in Canada" (2004) 8:1 Citizenship Studies 47 at 50.

and flowed, but overall, it has increased over the years.[3] These programs have considerable support from employers, who petition for expanding them and reducing fees.[4]

As currently defined,[5] the Temporary Foreign Worker Program authorizes several streams of workers.[6] Some of these streams are directed at filling seasonal or short-term labour needs; these job offerings are premised on the worker *not* becoming a permanent part of our labour market.[7] A few programs contemplate the worker having the opportunity to potentially obtain permanent resident status in Canada after having worked here for a certain period of time. These streams have different requirements and restrictions. In all cases, such workers have, in principle, health protections while working in Canada that are equivalent to those of Canadian citizens and permanent residents (hereinafter referred to as "nationals").

These protections arise where workers are included in the same regimes that protect nationals or where employers are required to subscribe to private insurers who offer an equivalent basket of services and protections. On its face, temporary migrant workers residing in Canada appear to have become "post-national citizens" in terms of their health interests, as they formally benefit "from the legal extension of rights previously reserved for the national population."[8]

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[3] From 1996 to 2015, the number of individuals in Canada with work permits under the Temporary Foreign Worker program increased from 14,663 to 69,138, with a high of 112,563 in 2009. See Government of Canada, Immigration, Refugees and Citizenship Canada, "Facts & Figures 2015: Immigration Overview - Temporary Residents - Annual IRCC Updates", online: <open.canada.ca/data/en/dataset/052642bb-3fd9-4828-b608-c81dff7e539c?_ga=1.45405795.639513810.1482239377>. However, there are currently around 250,000 to 300,000 people in Canada with temporary status, who are authorized to work. Temporary work permits may be issued to foreign students, spouses of temporary workers or students, those present in Canada through numerous international agreements, etc. See Government of Canada, *2016 Annual Report to Parliament on Immigration*, online: <http://www.cic.gc.ca/english/resources/publications/annual-report-2016/index.asp>

[4] House of Commons, Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities, *Temporary Foreign Worker Program: Report of the Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities* (September 2016) (Chair: Bryan May) [Standing Committee of 2016].

[5] Categories have changed over the years. Currently, only temporary positions where the employee is being hired to fill a specific labour gap and where the employer must obtain a labour market impact assessment are referred to as part of the Temporary Foreign Worker Program.

[6] Standing Committee of 2016 *supra* note 4 at 3.

[7] The legitimacy of this premise – that the labour needs are only temporary and thus the right to be in Canada should also be temporary – has long been questioned. See Sedef Arat-Koc, "Good Enough to Work but Not Good Enough to Stay" in E Comac, ed, *Locating Law: Race/Class/Gender* (Halifax: Fernwood Press, 1999) 125.

[8] Basok, *supra* note 2 at 50.

This paper focuses specifically on the temporary agricultural worker regime. Currently, most agricultural workers come to Canada through one of two programs. One is the Seasonal Agricultural Workers Program (SAWP),[9] which commenced in 1966. It operates under bi-lateral Memorandums of Understanding between Canada and other governments–in particular, with the governments of several Caribbean countries and Mexico. Prospective Canadian employers identify the source country whose workers they would like to employ, and the request is screened by Canada's federal government to ensure the employers meet the terms of the program. Aspiring workers apply to their home governments, who then select and assign the workers. As part of this process–and importantly for the purposes of this analysis–workers must pass health screenings.[10] The work terms range from six weeks to a maximum of eight months. The employment contract is a standardized one, approved by both governments. Although the home government determines which workers can participate, employers can request that named workers be selected to return for subsequent work terms. Nominated returns are the norm: in 2010, nearly 80 percent of Mexican SAWP workers in Canada were so nominated.[11]

The second route is the Agricultural Stream of Canada's Temporary Foreign Worker Program (the "Agricultural Stream"). This program, which was initiated in 2011, contemplates private contracts of employment and work permits of up to two years' duration. Although the contract is not completely standardized–as discussed below–certain terms are mandatory. As will become apparent, Agricultural Stream workers are, in many instances, situated differently than SAWP workers.

On its face, Canada's approach to temporary migrant workers is robust and just, with all parties holding a winning hand. It formally complies with several of the core health and safety

[9] SAWP is authorized under nation-to-nation agreements between Canada and Mexico, and between Canada and 11 Caribbean countries. Each agreement outlines the responsibilities of the respective governments. Canada and the respective other country also approve standardized contracts, which identify employer and employee obligations. See Government of Canada, Employment and Social Development Canada, "Hire a Temporary Worker Through the Seasonal Agricultural Worker Program" (25 January 2016), online: <www.canada.ca/en/employment-social-development/services/foreign-workers/agricultural/seasonal-agricultural.html>.
[10] See e.g. Government of Barbados Ministry of Labour, "Canadian Seasonal Agricultural Workers Programme", online: <labour.gov.bb/neb_overseas_employ_prog_agricultural?printable=yes>.
[11] Jenna Hennebry, "Permanently Temporary?: Agricultural Migrant Workers and Their Integration in Canada" (2012) Institute for Research on Public Policy, Study No 26 at 5 [Hennebry, "Permanently Temporary?"].

obligations identified in key international human rights instruments concerning migrant workers, despite Canada not being a signatory to said conventions.[12] For example, the Convention on the Protection of the Rights of All Migrant Workers, a major post-national citizenship instrument,[13] requires that migrant workers have the same health and safety rights as nationals,[14] which Canada seems to grant.[15] This would appear to indicate that the precarious status that temporary migrant workers otherwise occupy does not spill over into their health care experiences.[16]

However, as Mr. MacKenzie's story suggests, and this paper illustrates, this expectation is not consistently borne out. There are several reasons for this. Structurally, temporary migrant workers occupy a different position than nationals due to how their employment status intersects with their migration status. Their situation may be understood as one of "market citizenship," where rights are hinged not on an understanding of human rights, but are instead linked to their participation in the market economy.[17] As migrant workers lack meaningful market mobility, they are rendered especially vulnerable market citizens, constituting what leading labour law scholar Judy Fudge has termed "unfree labour."[18] A tangible outcome of this is that they may be unable to experience comparable care and protection merely by being included within regimes designed to serve nationals.

The agriculture-specific streams were selected as the focus of this paper over other programs that are intended to permit employers to fill general short-term labour gaps, such as

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[12] For a discussion of these instruments, and their limitations, see Judy Fudge, "Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers" (2012) 34:1 Comp Lab L & Pol'y J 95 at 122–128.
[13] See discussion in Basok, *supra* note 2 at 47–48.
[14] *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, 18 December 1990, UNTS 2220 arts 25(1)(a), 43(1)(e), 70 (entered into force 1 July 2003). It is not clear whether Canada complies with Article 28. Canada is not, however, a signatory to this Convention.
[15] Fudge, *supra* note 12 at 128.
[16] There is a sizable literature on the precarious status of temporary migrant workers which highlights how such workers do not enjoy the basic rights and entitlements of permanent residents, such as mobility rights, family reunification, and a direct path to permanency should they so desire. See e.g. Salimah Valiani, "The Shifting Landscape of Contemporary Canadian Immigration Policy" in Luin Goldring & Patricia Landott, eds, *Producing and Negotiating Non-Citizenship: Precarious Legal Status in Canada* (Toronto: University of Toronto Press, 2013) 55 at 57. For a discussion of the evolution of this concept, see Fudge, *supra* note 12 at 98–103.
[17] Natalie Deckard & Alison Heslin, "After Postnational Citizenship: Constructing the Boundaries of Inclusion in Neoliberal Contexts" (2016) 10:4 Sociology Compass 294 at 294–95.
[18] Fudge, *supra* note 12 at 95

food counter attendants. This decision rested on two factors. First, the route by which most agricultural workers enter, work, and live in Canada is more highly regulated by the state than other temporary worker regimes.[19] Canada has already earmarked most of these workers for special legal attention. Second, agricultural workers are employed in a high-risk industry. The risks associated with agriculture include long hours and reduced rest days, the use of heavy machinery, repetitive manual labour, and the potential for exposure to pesticides and other chemicals. These risks translate into high rates of work-related illness, poisoning, fatalities, injury, and disability, including high rates of traumatic brain injury.[20] Workers' compensation data indicates agricultural workers have a heightened serious injury rate and longer recovery time.[21] As the nature of the work itself renders all agricultural workers vulnerable to health harms, a failure for migrant agricultural workers to access and realize the promised health care rights and protections can be expected to have particularly detrimental and potentially long term effects.

I turn now to describing the health protection regime and the experiences of workers who have a workplace injury or health need. I then assess the role of law in structuring elements of inaccessibility.

II. Agricultural Migrant Workers and Health Rights in Canada

All Canadian nationals benefit from federal and provincial or territorial regimes that recognize they have certain health and workplace safety rights. There is no single history of said rights, but in general, it is safe to associate their emergence with the development of the welfare

[19] See *ibid* at 111–112 (Fudge compares the level of state involvement with SAWP workers versus other temporary migrant workers).
[20] Janet McLaughlin, Jenna Hennebry & Ted Haines, "Paper Versus Practice: Occupational Health and Safety Protections and Realities for Temporary Foreign Agricultural Workers in Ontario" (2014) 16:2 Perspectives interdisciplinaires sur le travail et la santé at 2, online: <pistes.revues.org/3844>.
[21] Kerry Preibisch & Gerardo Otero, "Does Citizenship Status Matter in Canadian Agriculture? Workplace Health and Safety for Migrant and Immigrant Laborers" (2014) 79:2 Rural Sociology 174 at 179 [Preibisch & Otero, "Does Citizenship Matter"]. For a discussion of how these factors are exacerbated in the case of foreign agricultural workers, see Jenna Hennebry et al, *Health Across Borders: Health Status, Risks and Care Among Transnational Migrant Farm Workers in Ontario* (Toronto: CERIS Ontario Metropolis Project, 2008) at 9 [Hennebry et al, *Health Across Borders*].

state.[22] As noted above, the Canadian system is structured such that temporary foreign workers, including SAWP workers and Agricultural Stream workers, are to have their health interests protected and supported in a manner that is consistent with that afforded to nationals. The general nature of how these commitments are structured in terms of workers' compensation regimes, health and safety standards, and health insurance, is described below.

All Canadian provinces and territories, for example, have a workers' compensation regime which employers may pay into. It compensates workers who experience an occupation-related illness or injury in lieu of retaining a common law right to sue for injury.[23] The compensation extends to lost future earnings, as well as supporting needs resulting from the injury or illness and re-training. Importantly, these regimes operate on a no-fault basis, so there is no obligation to show negligence on the part of the employer to access compensation. Since employer premiums increase when benefits are paid out to their workers,[24] employers are motivated to ensure that they have a safe workplace (and also may have an interest in contesting claims).

Governments have shown considerable commitment to ensuring that temporary agricultural workers benefit from these regimes. The inclusion of SAWP workers in provincial workers' compensation regimes is explicitly expressed either in legislation, or through instruments such as policy directives.[25] In some instances, these instruments are very sensitive to the SAWP context and the limited control that workers are likely to have over aspects of their lives, which may, in other contexts, be outside of the employment relationship. For example, the policy that is in force in Ontario states that SAWP workers are covered "as soon as they reach the agreed-upon point of departure in their homeland, and remains in place until they return to their country" and extends coverage to "periods of leisure, meals and while sleeping in employer-provided quarters."[26]

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[22] Deckard & Heslin, *supra* note 17 at 295–96.
[23] See e.g British Columbia's *Workers Compensation Act*, RSBC 1996, c 492, s 1; Ontario's *Workplace Safety and Insurance Act 1997*, SO 1997, c 16. For a discussion of the goals of workers compensation regimes and the trade-offs for workers, see *Reference Re Workers' Compensation Act* 1983 (Nfld.), [1989] 1 SCR 922, aff'g 67 Nfld & PEIR 16, 44 DLR (4th) 501.
[24] Anette Sikka, Katherine Lippel & Jill Hanley, "Access to Healthcare and Workers' Compensation for Precarious Migrants in Quebec, Ontario and New Brunswick" (2011) 5:2 McGill JL & Health at para 76.
[25] Government of Canada, Immigration, Refugees and Citizenship Canada, "Temporary Foreign Workers: Your Rights are Protected" (22 August 2017), online: <www.cic.gc.ca/english/resources/publications/tfw-rights.asp>.
[26] Ontario, Workers Safety and Insurance Board, *Policy 12-04-08: Foreign Agricultural Workers* (Toronto: Workers Safety and Insurance Board, 2009).

Thus, on its face, the regime is highly responsive. SAWP workers should expect fulsome protection under workers' compensation regimes for occupation-related illness or injury.

Similarly, for Agricultural Steam workers, the employer is required to either arrange and pay for provincial workplace safety insurance coverage, or to provide such coverage through private insurance. If the employer choses this second route, the coverage must be consistent with "arrangements made for Canadian and permanent residents."[27] Thus, the explicit state goal is equivalency with the protections afforded to nationals.

All Canadian provinces also have workplace standards and safety legislation, which on their face extend the same protections and rights to all, making no distinctions based on whether or not the worker is a national.[28] For example, British Columbia's legislation turns on the fact of there being an employer/employee relationship and expressly "applies to all employees" unless they are categorically excluded under regulations. [29] British Columbia's regulations, like those of other provinces, do not exclude temporary foreign workers from the scope of the legislation. They do, like other jurisdictions, exclude farm workers from certain provisions, including those that restrict hours of employment and require the observance of statutory holidays,[30] and import a different approach to minimum wage where work is hand-harvesting various types of produce.[31] This creates a workplace that is characterized by otherwise unacceptably long workdays and few breaks. It is important to note that these exclusions apply to *all* farm workers in Canada, not just those workers hired through SAWP or the Agricultural Stream.[32] When it comes to hours, the standardized SAWP agreements expressly include terms obliging employers to treat SAWP workers as well as they do nationals, including, for example, requiring employers, when making requests for work days that exceed eight hours, to do so "in accordance with the customs of the district and the spirit of the program, giving the same rights to Mexican workers

[27] See Employment and Social Development Canada, "Agricultural Stream: Employment Contract" form EMP5510 (2016-12-005)E, clause 8 ["Employment Contract"].
[28] Sarah Marsden, "'Silence Means Yes Here in Canada': Precarious Migrants, Work and the Law" (2014) 18:1 CLELJ 1 at para 17.
[29] *Employment Standards Act*, RSBC 1996, c 113, s 1(1).
[30] *Employment Standards Regulation*, BC Reg 396/95, s 34.1.
[31] *Ibid*, s 40.1.
[32] See *ibid* s 1(1), which defines "farm worker" in terms of employment responsibilities, not migration status.

as given to Canadian workers."[33] In so far as Canada protects its national agricultural work force, the regulatory regime also protects the temporary migrant labour force.

The Canadian regime is also shaped to ensure that SAWP and Agricultural Stream workers have health care insurance coverage. The form that this coverage takes varies between provinces. In Ontario and Quebec, SAWP workers are automatically enrolled in provincial medicare regimes upon arrival.[34] Manitoba appears to have recently adopted this approach as well.[35] In other provinces, medicare coverage turns on meeting a residency requirement. In British Columbia, if the work permit is for six months or more, then the worker is deemed to have met the residency requirement upon arrival.[36] However, if the permit is for a lesser period of time, then the employer must obtain private health insurance for the worker. The insurance must cover non-occupational accidents, sickness, hospitalization, and death benefits.[37] The employer can deduct money from the worker's wages to cover the cost of the insurance.[38] In other provinces, eligibility for medicare arises only after the worker has physically resided in the province for a certain period of time, usually three months, and the intervening gap must be filled by private insurance under the terms described above. The SAWP agreements enable the home country to control aspects of this arrangement. For example, for all SAWP workers from Mexico, the employer is required to acquire said insurance from a specific identified provider, with the insurance arrangement being brokered through the Mexican consulate.[39] So, on the face of it, all

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[33] Government of Canada, Employment and Social Development Canada, "Agreement for the Employment in Canada of Seasonal Agricultural Workers from Mexico – 2017" s I(3), online: <https://www.canada.ca/content/dam/canada/employment-social-development/migration/documents/assets/portfolio/docs/en/foreign_workers/hire/seasonal_agricultural/documents/sawpmc2017.pdf> ["Agreement for Employment"].

[34] *Health Insurance Act* RRO 1990, Reg 552, s 1.3(2)(4); *Health Insurance Act*, CQLR c A-29, r1, s 3(3).

[35] The author could not locate regulatory authorization for this practice, but rather relies on a brief that was submitted to Parliament by a migrant worker NGO in 2016. See Migrant Worker Solidarity Network Manitoba, "A Brief on the Temporary Foreign Worker Program" submitted to the House of Commons Standing Committee on Human Resources, Skill and Social Development and the Status of Persons with Disabilities (HUMA) 20 May 2016 at 2, online: <www.parl.gc.ca/Content/HOC/Committee/421/HUMA/Brief/BR8374833/br-external/MigrantWorkerSolidarityNetwork-e.pdf>.

[36] *Medicare Protection Act*, RSBC 1996, c 286, s1; *Medical and Health Care Services Regulation*, BC Reg 426/97, s 2(b).

[37] See e.g. "Agreement for Employment" *supra* note 33 ss V(3), V(6)(a).

[38] See e.g. *ibid.*

[39] See e.g. Consulate General of Mexico in Vancouver, *2015 Season Guidelines: Seasonal Agricultural Workers Program*, at 11, online: <consulmex.sre.gob.mx/vancouver/images/stories/sawp2015.compressed.pdf>. This guideline requires medical coverage with Great West Life Insurance Company (GWLI) for non-work related

SAWP workers are covered for health care needs, either through provincial or private regimes, although in some cases the SAWP worker bears the cost of being protected.

The Agricultural Stream workers, whose work permits may be up to two years long, typically have a waiting period of several months for provincial medicare coverage as they are not exempted from any provincial or territorial waiting periods. During this time, the employer is required to provide private health care coverage.[40] Unlike SWAP, the federal regime prohibits the employer from deducting the cost of insurance from the worker's wages. The relevant clause in the employer/employee contract, which Canada requires be used, is:

> 7.1 The employer agrees to arrange and pay for the temporary foreign worker's private health insurance at no cost to the temporary foreign worker. The coverage will begin from the time the TFW arrives in Canada until the temporary foreign worker is covered by the appropriate provincial/territorial health insurance plan. The private insurance provided to the temporary foreign worker will be equivalent to the insurance plan.[41]

With regard to the three pillars: workers' compensation, workplace health and safety standards, and health insurance, we see a practice of identical or equivalent rights. The goal is to ensure that the temporary migrant agricultural workforce is not relegated to a second or lower tier of health care protections and care, but rather is placed on par with nationals.

III. The Reality: Data About Access and Access Experience

The provincial and federal governments have created an overarching structure to protect temporary migrant agricultural workers, providing exactly or substantively the same protections that are granted to Canadian nationals. The question, then, is whether or how these protections

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accidents and medical assistance. According to the Guidelines, Mexico sends GWLI an arrival manifest and GWLI then bills the employer. This appears to be how the parties comply with Part V of the agreement.

[40] In Ontario, for example, there is a three-month residency requirement. Then, as long as the work permit is for at least six months, the worker will qualify for medicare. See *Health Insurance Act supra* note 34 ss 1.4(6), 1.5(1), 5(1). See also Janet McLaughlin et al, "The Migrant Farmworker Health Journey: Identifying Issues and Considering Change Across Borders" (2014) 6 IMRC Policy Points at 6, online: <imrc.ca/wp-content/uploads/2013/10/IMRC-Policy-Points-VI.pdf>.

[41] See "Employment Contract" *supra* note 27, clause 7.1.

play out in the lives of individuals. It does not appear that provinces or the federal government collect data concerning how their health needs or injuries are satisfactorily addressed or left untreated. With the exception of one large Ontario-based study in 2010 of 585 SWAP workers[42] and two medium-sized studies (one involving 242 Mexican SWAP workers who were working in the Leamington area of Ontario,[43] and the other surveying 100 Mexican SAWP workers in British Columba),[44] much of the data comes from smaller-scale studies. The data is usually based on interviews with workers, health care providers, service organizations, and sometimes employers.

These studies consistently find that temporary migrant workers employed in agricultural activity experience high rates of workplace injury and illness: one study of Mexican and Jamaican SAWP workers, for example, found a self-reported rate of illness or injury of around 25 percent.[45] However, they do not experience the promised level of health care, either because of structural disincentives which motivate workers to not seek care, or – as discussed further below - due to access barriers.

The consensus across the studies is that temporary agricultural workers often do not report and thus do not receive assistance for work-related injuries or work-related general illnesses;[46] similarly, they also do not report unsafe working conditions.[47] For example, one study documents 30–50 percent of surveyed SAWP workers reporting that their co-workers continued to work, without seeking care or compensation, despite illness or injury.[48] In the largest study to date, 69 percent of surveyed workers attributed current health problems to their work, but less than one quarter sought medical assistance in Canada.[49]This practice needs to be understood

[42] Jenna Hennebry, "Not Just a Few Bad Apples: Vulnerability, Health and Temporary Migration in Canada" (2010) Canadian Issues 74 [Hennebry, "Not Just a Few Bad Apples"].
[43] Basok, *supra* note 2 at 52.
[44] Preibisch & Otero, *supra* note 21 at 176.
[45] Hennebry, "Permanently Temporary?", *supra* note 11 at 17.
[46] See e.g. Sylvie Gravel et al, "Ethics and the Compensation of Immigrant Workers for Work-Related Injuries and Illnesses" (2010) 12:5 J Immigrant Minority Health 707 at 709.
[47] Brem, *supra* note 48 at 4.
[48] Maxwell Brem, *Migrant Workers in Canada: A Review of the Canadian Seasonal Agricultural Workers Program* (Ottawa: North-South Institute, 2006) at 10.
[49] Hennebry, "Not Just a Few Bad Apples", *supra* note 42 at 75.

alongside the experiences of workers who do seek, or try to seek, assistance. As is discussed below, a significant number of studies document the structural difficulties workers experience when they attempt to get the promised assistance for their health or safety needs.[50]

The scholarship on these points of disconnection–investigating why workers do not seek care and report safety issues, and the barriers to care when they do seek it–points to access barriers that relate to the nature of the job itself. That is, they may affect, to some degree, all agricultural workers, and reflect a general industry problem. Remoteness and long hours of work are one such factor. In times of high production, both Mexican SAWP workers and permanent resident agricultural workers in British Columbia report a 76-hour workweek of 12-hour days on weekdays and 8-hour days on weekends. Low production periods involve 55-hour workweeks, with 9-hour days on weekdays and 5-hour days on weekends.[51] This means that accessing health care is dependent on agricultural workers having reliable transportation and choosing to lose wages so as to attend a clinic instead of filling a work shift, unless the clinic has irregular or late opening hours.[52]

These access issues are compounded for migrant workers, who, given their social isolation,[53] are less likely than nationals to be networked with local drivers. Recent changes to the SAWP program appear to try to address this issue. A new employer obligation, appearing in 2016 and also present in the 2017 contracts, obliges the employer to be responsible for transporting workers to a hospital or clinic if a worker needs medical attention.[54] This measure may help

[50] See e.g. Michael Pysklywec et al, "Doctors Within borders: Meeting the Health Care Needs of Migrant Farm Workers in Canada" (2011) 183:9 CMAJ 1039 at 1041.
[51] Preibisch & Otero, *supra* note 21 at 186. Such hours of work are authorized under the MOU. See e.g. "Agreement for Employment" *supra* note 33, clause I(3), II(12). For a discussion of this norm across the general industry, see Jenna Hennebry, Janet McLaughlin & Kerry Preibisch, "Out of the Loop: (In)access to Health Care for Migrant Workers" (2016) 17:2 Intl J Migration and Integration 528 at 529.
[52] Kerry Priebisch & Jenna Hennebry, "Temporary Migration, Chronic Effects: The Health of International Migrant Workers in Canada" (2011) 183:9 CMAJ 1033 at 1034.
[53] Malcolm Sargeant & Eric Tucker, "Layers of Vulnerability in Occupational Safety and Health for Migrant Workers: Case Studies from Canada and the UK" (2009) 7:2 Pol'y & Practice in Health & Safety 51 at 54–55.
[54] The agreements from 2014 are silent on medical transportation. However, the 2016 and 2017 agreements impose this obligation. (The author was not able to locate a copy of the 2015 agreements.) See "Agreement for the Employment in Canada of Commonwealth Caribbean Seasonal Agricultural Workers – 2017" at Part VI, online: www.canada.ca/content/dam/canada/employment-social-development/migration/documents/assets/portfolio/docs/en/foreign_workers/hire/seasonal_agricultural/documents/sawpcc2017.pdf> and compare with "Agreement for the Employment in Canada of Commonwealth Caribbean

address some of the consequences of agricultural migrant workers being socially excluded from the communities in which they work and reside,[55] but others remain.

Language, for example, is a barrier. One study found that 46 percent of Ontario SAWP workers who sought care had language difficulties when communicating their concerns to health care professionals.[56] This makes access contingent on the worker being able to locate and bring along a translator who they trust and who is reliable. The situation is further problematized when employers wrongfully retain workers' health care cards. In Hennebry's 2010 Ontario survey of 576 SAWP workers, more than 20 percent had not been given the care card, which their employer had received on their behalf.[57] When employers retain employees' care cards, it means workers must, in effect, disclose to their employer that they are seeking medical care. As discussed below, this creates a disincentive to seek care as employees strive to ensure that their employer will nominate them to return to work the following season, and to avoid being repatriated for medical reasons.

Other scholars have identified that fact that migrant workers are not likely to have the same knowledge base as nationals, and that this lack of knowledge both creates risks and renders remedies based on rights inaccessible.[58] For example, without instruction, migrant workers are unlikely to know how medicare works, let alone how to navigate the complexities of workers' compensation regimes. Indeed, 74 percent of surveyed SAWP workers in British Columbia reported having a "poor" or "very poor" understanding of their health care insurance,[59] and 93 percent of SAWP workers in Ontario reported they did not know how to file a claim for workers' compensation.[60] There is also a documented deficit in migrant workers' knowledge of provincial

Seasonal Agricultural Workers — 2014", online: <s3.amazonaws.com/migrants_heroku_production/datas/1231/Agreement_for_the_Employment_in_Canada_of_Commonwealth_Caribbean_Seasonal_Agricultural_Workers_-_2013___HRSDC_original.pdf?1384442358>.

[55] Basok identifies social exclusion as being a pivotal factor for understanding why migrant worker's legal rights are often inaccessible to them. See Basok, *supra* note 2 at 51.

[56] Hennebry "Not Just a Few Bad Apples", *supra* note 42 at 75.

[57] *Ibid.*

[58] Basok, *supra* note 2 at 48.

[59] Gerardo Otero & Kerry Preibisch, *Farmworker Health and Safety: Challenges for British Columbia* (Vancouver: WorksafeBC, 2010) at 70, online: <www.sfu.ca/~otero/docs/Otero-and-Preibisch-Final-Nov-2010.pdf> [Otero & Preibisch, *Farmworker Health and Safety*].

[60] Hennebry, "Not Just a Few Bad Apples", *supra* note 42 at 76.

safety standards, such as the requirement of employers to provide protective clothing to those working with pesticides, or to have adequate safety training for operating equipment.[61] In Hennebry's Ontario survey, 62 percent of Mexican workers and 35 percent of Jamaican workers reported they had not received health and safety training.[62] When safety training is properly provided, language barriers may make the training less effective.[63] Preibisch and Otero's British Columbia survey had similar findings.[64] These last deficits point primarily to enforcement issues, a problem that the Canadian government has been seeking to remedy for some time.[65]

A third commonly identified reason for temporary migrant workers to continue working when ill or injured and to not seek assistance or workers' compensation is the differing economic opportunities of migrant workers in their home country versus Canada. Most SAWP workers from Mexico, for example, are poor and landless agricultural day-workers.[66] This motivates workers to accept unsafe working conditions, and to continue to work when ill or injured, in an attempt to maximize their earnings during their short, and perhaps only, opportunity to earn Canadian wages.[67] That is, the economic precarity that led them to seek work under the temporary worker regime in the first place carries forward, influencing the precarity they experience while in Canada. In turn, this is further compounded by the regulatory regime in Canada.

IV. The Role of Law in Structuring Inaccessibility

The regulatory regime generates and compounds vulnerability among these workers in several ways, including the reliance on private health care rather than medicare in several provinces, the fact that workers' compensation regimes are designed to serve nationals rather than migrant workers, the very real fear of medical repatriation should a worker attempt to claim

[61] See Hennebry et al, *Health Across Borders*, *supra* note 21 at 9.
[62] Hennebry, "Not Just a Few Bad Apples", *supra* note 42 at 75.
[63] Priebisch & Hennebry, "Temporary Migration, Chronic Effects", *supra* note 52 at 1035.
[64] Preibisch & Otero, *supra* note 21 at 188, 190–191.
[65] Standing Committee of 2016, *supra* note 4 at 9.
[66] Sargeant & Tucker, *supra* note 53 at 59.
[67] Priebisch & Hennebry, "Temporary Migration, Chronic Effects", *supra* note 52 at 1035. Preibisch and Otero note that similar patterns emerge for new immigrant workers engaged in seasonal agricultural employment; see Preibisch & Otero, "Does Citizenship Status Matter", *supra* note 21 at 185.

their health protections, and other disincentives that discourage migrant agricultural workers from seeking or accessing their rights to health care and protection.

A. Private health care is not medicare

As discussed above, the federal government incorporates terms into these programs to enable agricultural workers to access health care. Health care is, with a few exceptions, delivered by the provinces. The *Canada Health Act* recognizes that provinces have jurisdiction to define, within limits, who is a provincial resident and thus entitled to access provincially insured medicare.[68] Ontario, Quebec, and Manitoba have chosen to grant medicare coverage to all SAWP workers upon arrival. No province has made such an allowance for Agricultural Stream workers. The federal government has endorsed imposing obligations on employers who want to participate in this program to turn to private plans that are mandated to provide equivalent coverage. But the federal government cannot reach very far into mandating how such plans operate or make them actually perform on par with medicare. The most blatant example of the difference between private plans versus medicare is that some private plans require the beneficiary to pay for the care in advance, and then seek reimbursement. This directly impedes access.[69]

Not only is the process of receiving care under private plans different, but private plans are also treated differently by health facilities. Not surprisingly, given their temporary status, the most common point of access to health care services for SAWP workers is through walk-in clinics. However, some walk-in clinics do not accept private health care plans—once again requiring the insured worker to pay for the service in advance and then seek repayment.[70] As a result, otherwise accessible health care facilities are rendered inaccessible. The cost of a consultation coupled with the need to have cash on hand thereby becomes an immediate barrier

[68] *Canada Health Act*, RSC 1985, c C-6, s 2 defines a resident of a province as "a person lawfully entitled to be or to remain in Canada who makes his home and is ordinarily present in the province, but does not include a tourist, a transient or a visitor to the province." The *Act* does not define what constitutes residence except limiting the waiting period to qualify for residency to three months.
[69] Priebisch & Hennebry, "Temporary Migration, Chronic Effects", *supra* note 52 at 1034.
[70] *Ibid* at 1036; Preibisch & Otero, "Does Citizenship Status Matter", *supra* note 21 at 191. See also Otero & Preibisch, *Farmworker Health and Safety*, *supra* note 59.

to realizing the promised rights for workers. This situation clearly demonstrates how a right on paper to private health care that is equivalent to medicare remains out of reach in practice. Where provinces have regulated that SAWP workers will automatically be enrolled in medicare, these barriers, at least, fall away; however, they remain for all Agricultural Stream workers.

This differential treatment between private health care and medicare, with its identified adverse impacts on access, exists because of provincial decisions to shift the cost of health care insurance to employers, or, in the case of some provinces, to the SAWP workers themselves, and then to have those payments go to private companies. Clearly if Quebec, Ontario, and Manitoba have found that it is in their interest to extend medicare immediately to SAWP workers, such an arrangement could be reached in other provinces. It is not economical, and it makes no common sense, for provincial regimes to force employers or workers to pay for insurance for health care services that those workers may then be unable to access. The health insecurity that agricultural workers experience, due to access barriers associated with private health care plans, are entirely foreseeable and a product of the regulatory regime.

B. *Workers' compensation regimes are designed to serve nationals*

Workers' compensation regimes are, in general, supported by employers and employees alike,[71] although they do have shortcomings.[72] In their review and assessment of these regimes in Canada, the Newfoundland Court of Appeal identified a myriad of benefits associated with them, such as: the employer's solvency is irrelevant to employee recovery, benefits are immediately payable, and the program "responds positively to the needs of an injured worker."[73]

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[71] This sentiment is reflected in the following comment: "Representatives of management and labour intervening in this matter all agreed that the concept of workers' compensation in a good thing. For what it is worth, they endorse the so-called historic trade-off." *Reference Re Workers' Compensation Act 1983*, [1987] 67 Nfld & PEIR 16, 44 DLR (4th) 501, at p. 510, aff'd by [1989] 2 SCR 335.

[72] See e.g. Michael Fournier et al, "Barriers in Access to Compensation of Immigrant Workers who Have Suffered Work Injuries" (2005) Canadian Issues 94.

[73] *Reference re Workers' Compensation Act*, *supra* note 71. While identifying no disadvantages for employers, the court saw only one for employees, which was that some employees could in some circumstances potentially receive a larger settlement under a common law action.

One would expect these advantages to translate into workers' compensation regimes serving all covered workers well, regardless of migration status. But they do not. As noted above, surveys of temporary agricultural workers indicate that they continue to work when injured, and often fail to seek compensation. The data on compensation claims in British Columbia is consistent with such practices. The average number of workers' compensation claims for SAWP workers is 40 percent lower than the provincial industry average. [74] Either nationals are extremely unlucky on the job, or else there is considerable underreporting of work-related illness or injury by SAWP workers, perhaps coupled with the inability to effectively pursue claims.[75] The regulatory regime fosters these twinned outcomes because it was not designed to recognize how SAWP workers are differently situated than nationals.

Ethnographic researchers have documented how these circumstances play out in the lives of some temporary migrant workers. McLaughlin and Hennebry, for example, describe how one worker, "Steve," suffered a workplace injury due to being asked to ride on the back of a farm vehicle. Steve's physician ordered physiotherapy and an MRI. While he received workers' compensation for several days of missed work, when Steve returned to work he found himself unable to perform modified work duties. His employer informed Steve that he would be returned to his home country because he was not performing his contracted-for duties. The MRI and physiotherapy were still pending, and scheduled for shortly after Steve's flight was to depart. Steve did not board his flight, knowing that he would not be able to access an MRI or treatment in Jamaica. Not surprisingly, upon evading his planned departure, Steve's work permit, and thus health care coverage, came to an end. The MRI became financially inaccessible and was never performed. When Steve returned to Jamaica and brought a workers compensation claim, it was rejected, in part because Steve did not have an MRI to substantiate his claimed injuries.[76]

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[74] Hennebry, "Permanently Temporary?", *supra* note 11 at 18, citing Bogyo 2009 from Worksafe BC. In particular, the industry average is 3.6 per 100, and the average for SAWP workers is 2.2 per 100.

[75] This phenomenon was also observed in an empirical study contrasting the experience of recent immigrant versus non-immigrant workers who brought musculoskeletal compensation claims and who had legal assistance. The study found that immigrant workers were far more likely to have difficulty making themselves understood, and to have sought assistance after the deadline for filing had passed. See Gravel et al, *supra* note 46.

[76] Janet McLaughlin & Jenna Hennebry, "Pathways to Precarity: Structural Culnerabilities and Lived Consequences for Migrant Farmworkers in Canada" in Luin Goldring & Patricia Landolt, eds, *Producing and Negotiating non-Citizenship: Precarious Legal Status in Canada* (Toronto: University of Toronto Press, 2013) 175 at 188.

In their survey of reported decisions concerning temporary workers (including agricultural workers) who sought workers' compensation in Quebec, Sikka, Leppel, and Hanley described how the regime's requirements created unique difficulties for foreign workers due to how their migration status intersects with their employment status. These difficulties included having claims denied due to not accessing physicians in a timely manner (an expectation that for reasons discussed above may be quite onerous for agricultural migrant workers to meet), having returned to their countries of origin and thus being unavailable for medical evaluation by a Quebec physician, being unable to participate in rehabilitation programs (due to not being in Canada), or being unable to attend and testify at appeals of their claims (due to not being in Canada).[77] Reported decisions from Ontario concerning SAWP workers show similar patterns. For example, one injured worker did not apply to renew his work permit, knowing he would not be referred to the program, and so his claim was undermined by the determination that he was not sufficiently pursuing work.[78] In a case involving a Jamaican worker, there was no award for lost future earnings because, had the worker remained in Canada, the Ontario labour market was such that despite having amputated fingers, the worker would have been able to find other minimum wage jobs. The worker appealed on the ground that he would not be able to obtain employment at that wage level in Jamaica. The board denied the appeal, concluding it could not assess economic loss in the context of the Jamaican labour market, only the Ontario market. The Board wrote:

> [T]he Act was intended to provide compensation to workers injured in Ontario with compensation determined according to employment standards and conditions that exist in Ontario. The fact that a worker must leave Ontario soon after an accident, regardless of the reason for leaving, may have the incidental effect of increasing the magnitude of the economic loss experienced by the worker. In my view, such increased loss was not intended to be compensated by the Act.[79]

Assuming the above decisions are reasonable interpretations of the statutes in question, it is clear that the workers' compensation adjudicative system is often incompatible with the reality

[77] Sikka, Lippel & Hanley, *supra* note 24 at para 104.
[78] *Ibid* at para 97.
[79] Ontario Workplace Safety and Insurance Appeals Tribunal (2003), Decision No 334/03 at para 57 (2003 ONWSIAT 2383).

and legal regime that governs migrant agricultural workers. Its mere importation does not result in its benefits being transferred to said workers.

Marsden relates stories of SAWP workers who were pressured not to pursue workers' compensation claims. One worker alleged that his attempt to seek guidance from the workers' compensation board resulted in punitive actions being taken against him: "I talked to WCB and that bothered my boss. He wanted to fire me…then I was reported to abandon my job and that was sent…to the Consulate of Mexico…My boss gave his version and it's his word versus my word."[80] Being identified as having abandoned one's job would result in the work permit being repealed, and the worker being required to leave Canada. Similarly situated national workers certainly experience vulnerability, and may end up in a "their word versus my word" situation, but they will not face analogous consequences and indeed can remain in Canada and claim wrongful dismissal. This dynamic fosters a troubling power dynamic "that favours employers and makes workers less willing to seek redress for violations of their statutory rights under provincial law."[81] The SAWP program offers the employee no formal mechanism to challenge an employer's claim about them. Even if it did, the reliance upon being nominated for return work means that an employee who brings a claim is likely also bringing the possibility of future employment in Canada to an end.[82]

The needs of nationals can, in principle, be supported by a workers' compensation regime that may take several years to reach final decisions, include programs of rehabilitation that contemplate a potentially long-term scale for recovery, assume full access to the labour market, and expect mitigation of losses. Migrant workers, on the other hand, lose the right to remain in Canada once the employment contract ends. As migrant workers must leave Canada, they are obviously excluded from key aspects of compensation such as rehabilitation[83] and re-training,[84] which are a vital part of the workers' compensation regime. These regime-generated factors, along with more mundane practical issues such as being unable to navigate forms or effectively

[80] Marsden, *supra* note 28 at para 65.
[81] *Ibid* at para 66.
[82] See discussion in McLaughlin & Hennebry, *supra* note 76 at 182.
[83] McLaughlin et al, *supra* note 40 at 6.
[84] Hennebry, "Permanently Temporary?", *supra* note 11 at 19.

communicate with physicians about the cause of the incident,[85] results in workers' compensation regimes not serving them as they do nationals, despite having, in principle, equal access to them. This lack of access has consequences that directly affects their ability to remain in Canada: upon becoming ill or injured, and thus potentially in need of workplace compensation, they also become eligible for medical repatriation.

C. *The fear of medical repatriation is reasonable*

The most commonly cited reason offered by SAWP agricultural migrant workers for not seeking medical care was the fear of being repatriated and thus losing employment. Pursuant to the employment agreement, after consulting with the home country's government's agent, employers "shall be entitled for non-compliance, refusal to work, or any other sufficient reason stated in this agreement, to prematurely cease the worker's employment."[86] The agreement further expressly contemplates workers needing to return to their home country for medical reasons that are not related to pre-existing physical or medical conditions.[87] The requirement to involve the consular office does not mitigate worker vulnerability. The local consular officials can be expected to have conflicting interests. The SWAP work results in considerable remissions to home states. Consular officers are motivated to ensure employers feel well-served by their citizens, to try to maximize the number of workers from their home country working in Canada, and to avoid employers switching source countries.[88] As such, they may be inclined to use their discretion to keep employers happy.

Canada does not collect information on medical repatriations.[89] However, it was recorded that between 2001 and 2011, at least 787 migrant agricultural workers were explicitly repatriated for medical reasons.[90] This data was collected by a private sector organization that "facilitate[s]

[85] Basok, *supra* note 2 at 57.
[86] "Agreement for the Employment", *supra* note 33 s X(2).
[87] *Ibid*, s X.
[88] Sargeant & Tucker, *supra* note 53 at 57.
[89] Aaron Orkin et al, "Medical Repatriation of Migrant Farmworkers in Ontario: A Descriptive Analysis" (2014) 2:3 Canadian Medical Association Journal E192 at E197.
[90] *Ibid* at E194.

and coordinate[s] the processing of requests for foreign seasonal agricultural workers."[91] It was entered into evidence as part of a human rights tribunal hearing regarding the death of a SAWP worker, Ned Peart. A group of researchers obtained a redacted version of the dataset through an access to information request, analyzed it, and published their findings.[92] Less than 2 percent of these repatriations were recorded as having been at the request of the worker. In almost all cases, the employer exercised their right to report that the worker could no longer do the job they were hired for, and must have asserted that no accommodations were possible. This brought the work permit to an end and the worker was required to leave Canada.

Of those who were repatriated, 41.3 percent were for medical or surgical reasons, including back and limb problems,[93] and 25.5 percent were for external injuries: the most common injuries were upper body related and including muscle strain, and broken or severed fingers, hands, wrists, and shoulders, although poisoning was also cited.[94] As the authors of the study concluded, while the dataset does not state whether the injuries or illnesses were directly related to work, "most reported injuries are likely directly related to agricultural work."[95]

The overall rates of known medical repatriation are relatively low figures. They range from 2.22 workers per 1,000 in 2011 to 7.81 workers per 1,000 in 2003. However, the knowledge that one *could* be repatriated for allegedly health-based reasons serves to discipline and render workers vulnerable.[96] In her Ontario survey, Hennebry found that 45 percent of SAWP workers reported their co-workers continued working while sick due to fear of what their employers would do.[97] This self-reported situation was more broadly confirmed in the *Peart* decision, where a human rights tribunal found:

[91] Foreign Agricultural Resource Management Services (FARMS), "Home", online: <farmsontario.ca>.
[92] Orkin et al, *supra* note 89 at E193.
[93] Orkin et al, *supra* note 89 at E194.
[94] *Ibid* at E195.
[95] *Ibid* at E197.
[96] *Peart v Ontario (Community Safety and Correctional Services)*, 2014 HRTO 611 (CanLII) at para 134.
[97] Hennebry, "Not Just a Few Bad Apples", *supra* note 42 at 75.

> While actual rates of repatriation may be relatively low, it is the broad discretion afforded to employers to repatriate SAWP workers and the fear of triggering such action which serves as a powerful barrier to SAWP workers in making complaints about their employers.[98]

Studies bear out this conclusion: workers consistently cite the fear of being sent home as being why they fail to report or act to have their illness or injury treated.[99] Migrant workers are, for the same reason, less likely to request safety equipment, report potential hazards and accidents, and are more likely to accept unsafe work or work when ill or injured "because of a fear of loss of employment."[100]

D. The nomination process is also at the heart of the problem

Most of the workers coming to Canada through SAWP are returning workers. Although entry into the program from the home country is mediated by the home government, employers can nominate—or name—workers who they would like to return in subsequent seasons. Workers are highly motivated to be so nominated: the average amount of money that is remitted by Mexican workers for a five-month period of work is $5,000 to $6,000, a sum that is 2.2 times higher than what a person would receive working minimum wage in Mexico for a year. While the figure appears modest, it can be expected to make "the difference between a decent life and one of desperation."[101]

In 2010, 78 percent of Mexican SAWP workers were nominated return workers.[102] The nomination process results in the majority of workers returning to participate in the program for four to six years, with a fifth of workers continuing to participate for more than ten years.[103] As

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[98] *Peart v Ontario*, *supra* note 96 at para 134.
[99] Brem, *supra* note 48 at 10. In particular, 30 to 50 percent of surveyed workers self-reported that fear of being sent home or losing waged hours of work motivated them to continue working through illness or injury, rather than report it.
[100] Priebisch & Hennebry, "Temporary Migration, Chronic Effects", *supra* note 52 at 1035.
[101] *Peart v Ontario*, *supra* note 96 at para 74.
[102] Hennebry, "Permanently Temporary?", *supra* note 11 at 14.
[103] *Ibid* at 13, citing data collected by the Mexican government agency Secretaria del Trabajo y Prevision Social (STPS).

such, the SAWP program operates as a "circular" migratory worker program.[104] As noted in copious reports, including a significant study by the North-South Institute, this creates a clear incentive for workers to set themselves up to be nominated for future years, and so they may not report workplace related safety issues.[105] Once again, the threat of not being nominated for return does not need to be uttered to have coercive effect. The mere fact that this discretion rests in the hands of the employer—to choose not to nominate a worker the following year—is self-disciplining. Hence Preibish and Otero's findings where 69 percent of the 100 surveyed Mexican SAWP workers in British Columbia said they worked when ill or injured due to concerns about jeopardizing future employment.[106]

The threat that hangs over the head of the Agricultural Stream workers is that their work permits, like those of SAWP workers, can be unilaterally brought to an end by the employer if the employee is claimed to be no longer able to work.

In her in-depth study of migrant workers, Sarah Marsden interviewed employees working in agencies that served migrant workers. They reported that SAWP workers who had medical conditions were reported to the program, and were unlikely to be offered permits in subsequent years.[107] Other studies have found that those workers who were not nominated by specific employers for return were unlikely to be selected by their home governments, unless the employer evaluation, which the employee does not see, is very positive.[108] While this information is anecdotal, it points to the highly discretionary nature of the work permit process, where the worker must either be selected by the home government or else nominated by the employer. SAWP workers thus live with the overarching threat of being replaced arbitrarily, and without recourse.[109]

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[104] *Ibid* at 13. Workers coming in under the Agricultural Stream, on the other hand, can work in Canada for no more than four years before being precluded from obtaining a temporary work permit for another four years.
[105] Brem, *supra* note 48 at 4; Hennebry, "Permanently Temporary?", *supra* note 11 at 14.
[106] Preibisch & Otero, "Does Citizenship Status Matter", *supra* note 21 at 185.
[107] Marsden, *supra* note 28 at para 27.
[108] Fudge, *supra* note 12 at 113; Preibisch & Otero, "Does Citizenship Status Matter", *supra* note 21 at 183.
[109] McLaughlin & Hennebry, *supra* note 76 at 183.

The Canadian government is well aware of these problems in accessing promised rights. During hearings before a House of Commons Standing Committee on temporary foreign workers in 2016, briefs were submitted to support claims regarding the experiences of SAWP workers who become ill or experience a workplace injury. In particular, that workers are denied medical care. This is because their eligibility to access health insurance turns on their continuing to have a valid work permit, but upon becoming ill or injured their work permit is cancelled and they are deported.[110] Despite concluding that practices such as the power of SAWP employers to return injured workers to their country of origin "are having a negative impact on temporary foreign workers," the committee did not make any recommendations to address such impacts.[111] Their silence on this point is troubling. The committee did, however, respond to concerns about labour standards violations and safety enforcement gaps where migrant workers are too fearful of losing their jobs to report the issue. They recommended increasing the frequency of site visits to ensure that labour laws are being enforced, and to guarantee "that any workplace injuries that require immediate attention be granted emergency care where deemed necessary in Canada."[112] This recommendation is sound, but very limited in its scope.

V. Conclusion

In her assessment of agricultural workers, Fudge concluded that with SAWP employment agreements "the basic legal premise is that permanent resident and migrant workers should be treated equally under the law."[113] This approach explains why the International Labour Organization (ILO) identifies Canada "as exemplifying best practices under a rights-based approach for implementing the international standards pertaining to the protection of migrant workers at the national level."[114] However, these best practices, as identified through protocols and on paper, are inconsistently operationalized at a lived level. This is because when labour laws intersect with migration law, there is "a differentiated supply of labour that produces

[110] "Standing Committee of 2016", *supra* note 4 at 19.
[111] *Ibid* at 32.
[112] *Ibid* at 34.
[113] Fudge, *supra* note 12 at 113.
[114] *Ibid* at 122–128.

precarious workers and precarious employment norms."[115] Workers' vulnerability is institutionalized through the very structure of the legal regime.[116]

Commenting on this structure, some scholars identify Canada as having built a regime "to provide the ideal workforce in the form of a limitless and constant source of fit, healthy migrant labour, which can be easily removed, returned and replaced the moment any problem or concern arises."[117] Employers are certainly very supportive of the SAWP program. They describe SAWP workers as essential for the success of their businesses; they are hard working, cost effective, and willing to do work that Canadians do not want to do. Employers also see the program as being incredibly beneficial to SAWP workers because of the relative earning potential that the workers experience.[118] However, the economic precarity that drives workers to see the program as a "win" has deeply troubling operational consequences.

A 2014 human rights tribunal summarized the extensive evidence it received on the SAWP program as follows:

> The structure of the SAWP is such as to create one of the primary conditions of vulnerability for this group. I accept the evidence before me that, because of the "closed" employment relationship and risk and fear of repatriation, SAWP workers are reluctant to make complaints about their employers, including health and safety complaints, are more willing to continue working while sick or injured, and are less able to resist work demands placed upon them, including both the nature of the work being performed and the incredibly long hours of work required.[119]

[115] *Ibid* at 96.
[116] See e.g. Audrey Macklin, "Freeing Migration From the State: Michael Trebilcock on Migration Policy" (2010) 60:2 UTLJ 315 at 332.
[117] McLaughlin & Hennebry, *supra* note 76 at 175.
[118] Miya Narushima & Ana Lourdes Sanchez, "Employers' Paradoxical Views About Temporary Foreign Migrant Workers' Health: A Qualitative Study in Rural Farms in Southern Ontario" (2014) 13:65 Intl J Equity in Health 1 at 5–6.
[119] *Peart v Ontario*, *supra* note 96 at para 273 (the case concerned whether inquiries should be mandatory when SAWP workers die on the job, as it is in several other areas of industry).

On the surface, the Canadian practice would seem to align with a post-national citizenship model, where residency, not citizenship, is central to whether an individual bears rights.[120] At the same time, it is clear that while the migrant agricultural worker programs are understood and valued, changes to the programs are driven by the employers. Deckard and Heslin summarize the situation as follows:

> Whereas postnational citizenship would expect the basis of rights and acceptance to lie in the migrant labourer as a human being, endowed with certain unalienable rights, conversations regarding immigrant laborers revolve primarily around their capacity to contribute to the health and success of the local economy without detracting from local employment.[121]

There are many aspects of the provincial and federal regime that could be scrutinized and modified to enable to the system to achieve what I believe is its goal: to provide temporary agricultural workers with equivalent health protections. Such aspects include:

- Consider how the principles of workers' compensation can be made relevant to seasonal foreign workers and if provinces should be urged to modify their approaches in light of such workers' unique situation.
- Consider the viability and value of mandatory health exams when workers leave Canada, and follow-up care based on those exams.
- Consider the viability of on-site health exams.
- Reconsider the role of nominations within the regulatory regime.
- Identify whether there are any barriers to all provinces following the lead of Quebec, Manitoba, and Ontario regarding extending medicare to all SAWP workers. If there are, identify how to address these barriers.
- Determine the viability of all provinces extending medicare to Agricultural Stream workers.

[120] See e.g. S Sassen, *Losing Control? Sovereignty in an Age of Globalization* (New York: Columbia University Press, 1996) at 89; J Cohen, "Changing Paradigms of Citizenship and the Exclusiveness of the Demos" (1999) 14:3 Intl Sociology 245.

[121] Deckard & Heslin, *supra* note 17 at 300.

- Revisit the terms for medical deportation. In particular, do not allow medical deportation without an assessment of whether the medical condition is work-related (and then, only allow if appropriate care is meaningfully available in the source country).
- Begin the systematic collection of health care utilization data and medical deportation data, so that we better understand whether and how the regime is actually working.

In sum, Canada's efforts to protect temporary migrant workers are commendable and obviously work in some instances. The federal government has built programs that are premised on care and compensation. That protection, however, is precarious in that health needs or injuries can become either direct or indirect grounds for medical deportation, even if the illness or injury is work-related. The health and safety regulatory regimes are, in many instances, of limited value for actually protecting the health and well-being of migrant workers. While these regimes create expectations of care and protection, the entwinement between systemic structural legal factors, such as employer discretion, and non-legal factors, such as economic desperation, mean these expectations may never be realized.

Provincial laws and policies are constructed around a labour force that is presumed to be mobile.[122] Where this premise is flawed and provincial legislation fails to account for the lack of labour mobility and the absence of a continuing right to remain and seek work in Canada, it cannot provide equivalent protections to migrant workers. When the lack of provincial protections is combined with a federal regime that imbues the employer with the power to determine if a worker is likely to be able to return to Canada to work in future seasons, the regulatory regime fosters an employment relationship of gross vulnerability.[123] The potential for both intentional and unintentional exploitation is built into the system.

Further, there is no designated oversight from any one level of government; divided jurisdiction between the federal and provincial governments can make it very easy for each level of government to take a back seat.[124] It is notable that many provincial governments have acted

[122] Marsden, *supra* note 28 at para 18.
[123] See generally Fudge, *supra* note 12 at 102.
[124] *Ibid* at 114.

to provide extra protections, such as making medicare immediately available. However, the provincial variations in their experiences, despite coming under the same overarching MOU, is troubling. If Canada's commitments are to be substantively fulfilled, we must identify strategies that consider the situation and unique protection needs of migrant farm workers.[125]

[125] See e.g. Sargeant & Tucker, *supra* note 53 at 54.