Demanding dignity: how Ontario can undertake reforms to end the vulnerabilities of migrant workers

Submission of Justice For Migrant Workers

18 September 2015

Justice for Migrant Workers

www.justicia4migrantworkers.org

c/o Workers Action Centre

720 Spadina Avenue, Suite 223

Toronto, ON M5S 2T9
I. Introduction

This submission addresses the review of employment standards protections in the province of Ontario. Justice For Migrant Workers ("J4MW") is a volunteer-run collective which works alongside migrant workers in their efforts to secure control within their workplaces and wider social lives. We write to convey urgent priorities drawn from recent workshops J4MW members conducted with migrant workers, and from our extensive experience working in support of workers for over a decade in Ontario and other parts of Canada.

J4MW regularly organizes with migrant workers employed in greenhouses, fields, orchards, packing houses, poultry operations, fish processing plants, vegetable processing plants, construction sites and welding sites. Justice for Migrant Workers engages with and builds relationships with migrant workers through a series of activities that include popular education, workplace organizing, community organizing, individual support, and legislative reform. We annually conduct 30 to 50 workshops across Ontario on the following topics: immigration, employment standards, workers compensation, occupational health and safety, EI and healthcare. Between 600 to 1,000 migrant workers participate in these sessions every year. We also undertake street outreach activities that reach approximately 3000 migrant workers per season to share information about their rights at work and in their communities.

We organize with workers to expose workplace injustices through both legal and non-legal strategies. J4MW has supported efforts of migrant workers in dozens of workplaces across Ontario so that workers can address the following issues: unpaid wages, workplace harassment, occupational health and safety, racism and sexism, illegal deductions, housing, recruitment fees and wage theft. We attempt to counter divisive workplace strategies to strengthen multi-racial organizing amongst different racialized communities. In addition, every year we partner with community legal clinics across Ontario to support dozens of individual workers that bring forth workplace complaints. We have helped bring forward several landmark challenges at different tribunals to raise issues related to the vulnerability of migrant workers employed in Ontario, such as the recent Presteve case at the Human Rights Tribunal of Ontario.

The research conducted by J4MW leads us to conclude that there is a noticeably unequal and fundamentally unjust power imbalance in agricultural workplaces. Owners of agricultural operations, already privileged in structural terms vis-à-vis migrant workers, receive considerable advantage through the application of the ESA as it exists today. We offer our submission not only as a way of alerting the provincial government to the role of the ESA in enforcing gross inequality, but as an opportunity for the voices of migrant workers to be heard in the review process. We do not speak for workers. We implore the Committee to solicit perspectives from migrant workers, and to take seriously the structural vulnerability of these workers, as outlined below.

Our submission sets out the structure of Canada’s temporary labour migration programs, noting its construction of “structural vulnerability” for migrant workers. We then turn to specific issues surrounding employment standards raised by migrant workers. The submission concludes with a set of recommendations.
1. Canada’s Approach to Temporary Labour Migration

A migrant worker is defined as "a foreign national engaged in paid work activity who is authorized, with the appropriate documentation, to enter and to remain in Canada for a limited period." Recruitment of migrant workers to Canada occurs under the Temporary Foreign Workers Program ("TFWP"). This submission will focus on two distinct labour regimes under the TFW that recruit so-called low-skilled migrant workers: the Seasonal Agricultural Workers Program (SAWP) and the NOC C & D or "Low Wage" Stream of the TFW. The SAWP, in place since 1966, has brought workers from Jamaica, and later Trinidad & Tobago, Barbados and the eastern Caribbean states, and from Mexico, to work in Canadian fields. The Live-In Caregiver Program ("LCP") recruits mostly women to serve as in-house care labour for Canadian families. In the early 2000s, the federal government created the program formerly known as the Pilot Project for Hiring Foreign Workers in Occupations that Require Lower Levels of Formal Training (now referred to as the Agricultural Stream and the Stream for Lower-skilled Occupations). Through these Streams, workers arrive from such places as Thailand and Guatemala to work in virtually all sectors of the economy and all regions of the country. Our submissions focus on the issues faced by agriculture and food workers toiling within the auspices of the SAWP and the NOC C & D.

Since the 1970s, there has been increased resort to temporary labour migration in Canada and at the turn of the century the newest program faced significant expansion. Consistently, Ontario employers have employed the largest proportion of migrant workers. In 2011, employers in the province hired 35.6 percent of all 190,842 migrant workers who were new-entry and re-entry in Canada. In 2012, of the 25,000 migrant workers employed in agriculture in Canada, 66 percent received employment in Ontario. The sizable migrant population in Ontario suggests that the province possesses a unique responsibility to uphold their rights and protections. That responsibility is deepened by the vulnerability experienced by migrant workers through the TFWP and the especially acute vulnerability of SAWP workers in isolated rural areas of the province.

Our extensive involvement in migrant justice work leads us to the troubling belief that, while in Canada (and predominantly in southern Ontario), migrant workers are confined to a racist existence owing to social, historical and legal developments. Although it is evident that this racism develops out of the colonial histories of European imperial powers, which held that the peoples and places of what we now term 'the global South' were inferior, and as such predates Canada's excursions into temporary labour migration, it is also clear that provincial laws and wider policy do little to redress racist mistreatment of foreign-born working peoples. That is to say, we are of the position that the current provincial employment standards framework represents a continuation of the structural vulnerability of migrant workers from the global South.

---

2 This submission does not address high-skilled temporary labour migration to Canada.
2. Migrant Workers’ Employment Standards Concerns

In recent workshops conducted by J4MW, migrant workers have voiced a number of concerns with respect to the ESA.

We organize these concerns into three categories related to: A.) wage theft; B.) collective bargaining; and, C.) proactive enforcement.

   A. Wage theft.

   Rights on paper: exemptions from the Employment Standards Act

Currently, most migrant agricultural workers are exempt from basic employment protections regarding the minimum wage, hours of work, daily rest periods, time off between shifts, (bi)weekly rest periods, eating periods, overtime pay, public holiday pay and vacation with pay. This is a clear instance in which the Employment Standards Act, as well as other provincial legislation perpetuates the systemic oppression of racialized peoples form the Global South that is Canada’s historic immigration legacy.

The classification of different agricultural workers’ occupations under the ESA creates a complicated patchwork coverage of rights for agricultural workers depending on their occupation. In addition to undertaking the traditional ‘field’ duties of agricultural work, workers are also consistently doing other job tasks including mechanical repair, gardening, greenhouse repair and construction, and carpentry. Migrant workers on a Harvester work permit typically engage in such additional jobs as pesticide applicator, picker, planter, seeder, packer, cleaner, forklift operator, and line supervisor. As well, they also find themselves engaged in non-agricultural work related to computing. While they may complete all of these various tasks, the owner of the business operations determines how much and for what each worker receives compensation.

“How does it make sense that my husband and I both work in the program, both work in greenhouses and he doesn’t get overtime pay and I do cause I am packing” - Thelma Green, migrant farmworker from Jamaica who presented to the Special Advisors in Windsor, Ontario.

The agricultural compensation structure is designed as though employment operations are small or modest, family farms. The branding of these operations in this way ignores the highly capitalized nature of these operations and their insertion into transnational circuits of global capital. There is a well-founded belief amongst many migrant workers that, as one such worker put it, ‘everyone is getting wealthy off the backs, off their labour’.

It is our position that the ESA unequal coverage of different farming occupations further entrenches the unfairness of the existing pay structure.

   Rights in practice: Piece Rate Short Changes Workers

The prevailing compensation structure facilitates wage theft. The use of piece rate to pay migrant agricultural workers in Ontario is found to be highly problematic and must be addressed in reforms to the ESA. Piece refers to the wage regime where workers are remunerated dependant on productivity rather than hourly wages. A base rate is set for every unit produced, for example: a
pound of cucumbers, a full box of mushrooms, a tomato plant that got certain leaves cut off, a bed of soil that was prepared for planting. Site supervisors then have a system for keeping track of each worker’s production: they might give them a chip for every box they deliver. Workers are then paid based on the amount of units they produced.

"We also feel abused with regards to our work and wages. Often times we are paid by the hour and many times our pay does not match with the amount of hours we did. The "peace rate" system is a system that many farmworkers think might be unfair for them. This system forces the workers to do more work in less time, this causes the workers to do a poorer quality work and often times gets less pay even though working harder. Also for the workers being paid an hourly rate, they might do a lot of overtime or work on holidays, however they are not paid for overtime or for working on holidays. We need to feel equal, the same equal rights and benefits should be offered to us as they do for native Canadian workers". - Sam Sharpe, migrant farmworker from Jamaica who presented to the Special Advisors in Mississauga, Ontario.

Workers are typically guaranteed by their employers or by their contracts (in the case of NOC C & D workers) to make at least the minimum wage when they are working for ‘piece rate’, whichever is higher. Workers complain that they often do not make the minimum wage when their piece rate and hourly wages are averaged out over the pay period. Often the tallying system is inaccurate and confusing-. Employers unilaterally and arbitrarily determine the value of the work and set the rate. As well, the provision of piece rate is necessarily one-sided, allowing employers to set and enforce the rate, which lacks transparency from the standpoint of workers. It also breeds divisions between fellow workers, intensifying competition, promoting individualism in workplace practices, and fostering sharp social divisions between workers. These factors leave workers highly reliant on the employer and thus susceptible to theft of wages.

At one large mushroom operation that employed close to 100 temporary foreign workers, workers reported they were paid by weight but their production was never weighed. Rather, it was based on the volume and assumed weight of the boxes they filled. They report seeing their supervisors then weigh the boxes and take off the excess mushrooms and fill other boxes with them, from which they were not paid. This group of workers was making well under the minimum wage (varying between $4 and $10) after the number of authorized and unauthorized deductions made from their pay cheques, so the amount of pounds they were not being paid for was significant in relation to their wages. None of them was willing to file an ESA claim, since they knew they would lose their job and be deported immediately.

Piece rate has a destructive and debilitating impact on workers’ bodies. In this respect, piece rate undermines migrant worker occupational health and safety promoting injuries and exacerbating the breaking down of their bodies and overall health, as evidenced in studies from research conducted jurisdictions throughout North America. That empirical data illustrates the deleterious effects of piece rate on worker health. In addition to the need for this to be addressed in provincial

6 British Columbia Employment Standards Coalition Campaign to Abolish the Hand Harvester Piece Rate System. http://www.nwdlc.ca/NWDLCNEWS%26EVENTS/NEWS%20ARCHIVE%202012/abolishhandharv.html

occupational health and safety protections, the ESA must abolish the application of piece rate as it applies to migrant agricultural workers to preserve occupational safety and integrity. Any benefits of piece rate accruing to employers, and to a few workers, is undermined by its wide negative effects on most migrant workers.

**The forty hour week and overtime pay**

The forty-four-hour pre-overtime rule is unacceptable. It both goes against labour standards set across other provincial jurisdictions, it also circumvents work-week rules set elsewhere including the U.S. Fair Labour Standards Act and international standards.

Migrant farm workers work for anywhere from 15 to 40 hours of overtime each week on average. As minimum wage earners, many workers welcome the chance to work extra hours to supplement their income. However, they rarely get the opportunity to choose whether or not they want to work above 48 hours and they do receive overtime pay for those hours. Farm workers are typically losing out on thousands of dollars of income annually, that would make up a sizable percentage of their total yearly income (see Appendix 1- Leamington Greenhouse overtime calculation). In a recent workshop held with farm and greenhouse workers in Leamington, Ontario, overtime pay was ranked one of the highest priorities for change within the ESA (See Appendix 2- June 7 workers rights workshop and priorities).

“For a person who is picking it and planting it, that can be the hardest part of the job. It’s not fair that people packing have different rights than other agriculture workers. Why in agriculture are you robbed of your equal rights. It is the most important jobs – without it we would not have our fruits and vegetables to eat.” – Thelma Green, migrant farmworker from Jamaica who presented to the Special Advisors in Windsor, Ontario.

**B. Collective Bargaining**

Meaningful enforcement requires the removal of any and all constraints imposed on migrant workers’ capacities to act collective. The permission to engage in collective action, including collective bargaining and exercising the right to withdraw their services or strike, amounts to the most effective form of “self-enforcement” for migrant workers. These measures would promote democracy in the workplace.

Agricultural workers are one of the most vulnerable segments of workers across North America. A traditional Wagnerian model of industrial relations falls short in protecting the rights of agricultural workers in jurisdictions where agricultural workers can bargain collectively. We believe that agricultural workers across the industry should be able to bargain both collectively and sectorally so they can level the playing field between farm and employers. We endorse the recommendations set out in the still working on the edge report on Sectoral Bargaining (page 51 and 70).

**C. Proactive Enforcement: more democratic workplaces**

Wider remedying of the inequalities and injustices perpetrated against migrant workers requires meaningful approaches to ESA enforcement. The existing structural vulnerability of migrant workers in their work environments does not enable them to come forward with complaints. Workers live under constant fear of retribution or reprisals, being targeted by
employers for speaking out or exercising their workplace rights. In addition to the threat and actual use of deportation, migrant workers are subjected to a range of workplace reprisals, including a reduction in shifts, being sent back to ‘bunk houses’, given less on-the-job opportunities, and outright dismissal.

“It is a great opportunity for us to work in Canada, however for the most part we at times work in fear. We are afraid because we do not have equal rights and if we do, we are not aware of them; we are afraid that if and when our rights are abused, if we complain we will be deported. Knowing this, a lot of abuse goes unreported. We would love for the government to remove this fear from us and provide some form of security where we can freely report or complain if we are being abused, without losing our jobs or deported.” - Sam Sharpe, migrant farm worker from Jamaica who presented to the Special Advisors in Mississauga, Ontario.

As well, migrant workers have conveyed the troubling information that disciplinary systems within workplaces, whether through warning letters or other forms of performance evaluation, are being used as retribution against workers attempting to exercise their workplace rights. Some employers, in an attempt to justify these problematic practices, are forcing workers to sign documents admitting fault.

As things stand, there are low inspection rates in the agriculture sector. Cuts in enforcement officers, and a privatized complaints-driven process, undercut prevailing enforcement provisions.

One way of leveling the playing field is through proactive enforcement, which ensures anonymity. Proactive enforcements through “blitzes” should be coupled with legislative reforms to support workplace improvements. An additional approach would be to end the practice of prior employer notification beforehand, which undermines the efficacy of proactive enforcement. The province must adopt a “snap” inspection model for employment standards enforcement, replicating the one that exists in occupational health and safety.

“Because I work in packing we are entitled to our two 15-minute breaks. We don’t always get our breaks or sometimes we would only rest 10 minutes. If the Ministry is already checking our workplaces for safety, why can’t they check to see if our boss give us our breaks and proper pay. It’s bad to reply on worker complaints cause there is a fear they will be sent home” - Thelma Green, migrant farmworker from Jamaica who presented to the Special Advisors in Windsor, Ontario.

Concrete measures: expedited claims, anti-reprisals and third party complaints

ESA reforms also should allow expedited processing of claims for migrant workers who stay in the country for only a temporary period. It should also explicitly prohibit employers from sending workers back to their home country, especially in cases where reprisals are being alleged against workers.

As mentioned, migrant workers are faced with the ongoing threat of reprisals due to their precarious migration status.
Third-party complaints approaches are needed so that groups like J4MW could support the advancement of workplace rights. However, as noted above, because organizations like ours are volunteer-run and have access to modest funds at best, the costs of third-party complaints should not be borne by workers and advocacy groups.

**Recruitment fees**

The government of Ontario recently extended protections to ban recruitment fees for all temporary foreign workers. These protections were enacted only after migrant workers and their allies undertook through marches, MPP delegations and media exposes to expose the exorbitant fees that migrant workers pay to work in minimum wage employment in Ontario. Recent protections ban recruitment fees in Ontario however the lack of enforcement and a robust legislative framework has meant that the steps taken against recruitment fees fail to provide much needed protections.

Recruiters extent tremendous control over migrant workers in Ontario. The exploitation migrants face go beyond the issues of fees.

*Safia a migrant worker from Indonesia, has worked in Canada for two years as a packer in Southwestern Ontario. She paid a Canadian based recruiter who has links to Indonesia, $7,000 to work in Canada. The recruiter coerces Safia and her coworkers to pay recruitment fees, fees for housing and fees for work permits. The employer is fully aware that the migrant workers are forced to pay the fees but turns a blind eye to the actions. The recruiter told the workers that they If the worker refused to pay they would lose work, housing and be deported from Canada. At the same time, Safia’s family was threatened. Recruiters will not be held accountable because there is absence of regulations.*

While some recruiters may be held accountable for their actions (recently a recruiter was arrested for the extortion of fees from migrant workers) this does not address the systemic nature of the power imbalance between workers and recruiters. Protections need to be taken to address the control that recruiters have over workers.

In addition to recent steps undertaken by the province, Ontario should implement a System similar to Manitoba that includes the registration and licensing of recruiters and employers and holding both recruiters and employers jointly responsible for violations migrants face in the recruitment process. J4Mw fully endorses the Recommendations made in the Still Working on the Edge report regarding recruitment of migrants (page 70).
A note on health:

The current workers rights coverage in Ontario has important negative impacts on the health of thousands of migrant workers. Workers are consistently and regularly working long work hours, not being able to take bathroom breaks for hours on end, not being able to refuse excessive work. A single migrant worker is doing the work of two people. Long and excessive work hours adversely effects worker well-being and diminishes their capabilities. Juan Ariza presented to the Special Advisors Panel in London, Ontario and spoke about the preventable death of 10 of his co-workers due to a driving accident. Juan’s co-worker was driving after working excessive hours, being forced to perform the job of a chicken catcher and a driver at the same time, and the lack of, Ministry proactive oversight of workplaces where migrant workers work.

"In my first day I saw when my coworker was working like me taking chickens, picking up chickens. After 8 hours, he was driving too. He was doing two jobs in the same day. I don’t know. At the time I didn’t know how it would be possible to do that in Canada. We have to do something because two weeks ago I was watching the news and I saw another car accident. And nothing changes. 10 people died, 10 people pass away and nothing changes. Why? Why the people suffering too much? ... I don’t know how many more accidents have to or how many people have to die.”

– Juan Ariza, migrant chicken catcher from Peru who presented to the Special Advisors in London, Ontario

Concluding Remarks

The members of J4MW welcome this ESA and ORLA review. We offer our submission on good faith noting the desire of the provincial government and residents of the province to offer protections for all workers. The need is especially acute for migrant workers, who come here to Canada to overcome the longstanding injustices of structural vulnerability, not to deepen them; who wish to use their human resources to improve their socioeconomic plight, not to be cheated out of their earnings and health; who arrive with visions of Canadian benevolence but leave with broken promises. J4MW writes our submission in support of Migrant workers who are only requesting fulfillment of what the ESA and the ORLA promises: dignity in work and wider social life for all workers in Ontario.

Recommendations

We echo the recommendations made in the Still Working on the Edge report by the Workers Action Centre and the recommendations presented by the Migrant Workers Alliance for Change, of which we are a member.

Particularly important for our members are:

Wage theft

1. No exemptions to the ESA and no special rules for agricultural workers.

2. Amend the ESA to prohibit piece rate wage regime in agriculture

3. Access to termination and severance pay for seasonal agricultural workers program.
Collective bargaining

1. The immediate repealing of the Agricultural Employees Protection Act and include coverage of agricultural workers under the Ontario Labour Relations Act

2. Establish the legislative framework to enable sectoral bargaining in Ontario.

Proactive enforcement.

1. Implement a model of enforcement that compels employers to comply with the ESA
   a. Proactive ESA snap inspections of workplaces that employ temporary foreign workers
   b. A system of fines for employers found in violation of workers rights
   c. The publicizing of the names of employers found in violation of workers rights

2. J4MW endorses the anti-reprisal protections for migrant workers that are listed in Working on the Edge. These include:
   a. Amend the ESA to include a process for expediting complaints of reprisal and, in the case of migrant workers, ensure that such complaints are heard before repatriation. Where there is a finding of reprisal provisions would be made for transfer to another employer or where appropriate reinstatement.
   b. The ESA should explicitly prohibit an employer from forcing repatriation on an employee who has filed an ESA complaint.
   c. Change the Canada-Ontario Immigration Agreement (COIA) to create an open work permit program for migrant workers who have filed complaints against recruiters, under the Employment Protection for Foreign National Act and ESA.
Appendix 1. Leamington Greenhouse overtime calculation.

In a workshop delivered by J4MW in August 2015, a group of workers from one large greenhouse collectively calculated how many hours of overtime they work, and how much that would mean in increasing earnings if they were covered by overtime protections. Workers calculate that for that week they worked 18 hours of overtime and would be paid $99 extra if they were paid overtime pay. If they had calculated vacation pay on those earnings, the amount would be $102.96 for that worker for that week, the equivalent of 5,353.92 in a year for one worker.

Then they calculate that there are 142 workers at that greenhouse, who would collectively be owed $14,058 for that week. With vacation pay, the workers would actually be owed $14620.32 for a week.
Appendix 2. June 7 workshop on Employment Standards and statements.
Below are statements (photographs and translations) that 14 of the workshop attendees wrote and wanted to include in the groups submissions to the Changing Workplaces Review in an anonymous way. All 14 workers are either SAWP or TFWs currently living and working in Leamington, Ontario.

1. “Que no haiga pago por destajo que sea por hora.”
   End piece rate pay, we want hourly pay.
2. “Que el supervisor no sea racista o que no tenga preferencia a su gente de su mismo país que sea igual con toda la gente de cualquier país.”
   We want the supervisor to stop being racist, and stop preferential treatment of workers of their own country, we should all be treated the same regardless of the country we are from.
3. “Sugeriría que nos pagarán overtime porque trabajamos más de lo estipulado por la ley.”
   I would suggest that we got paid overtime because we work more than is protected by the law.
4. “Que haya” inspecciones en las farmas porque si hay mucha presión hacia el trabajador de los ”supervisores”.
   We want inspections of farms because there is too much pressure being put on workers by their supervisors.
5. “We want permanent residence”
6. "Inspecciones a las farms'
   We want farm inspections
7. “No más a la esclavitud en el trabajo”
   Stop slavery at work
8. “Inspección”
   Inspections
   “Pagar por hora”
   Hourly rates
   “No deducciones al salario”
   No deductions from our wages
9. “Que se cumpla el contrato”
   Contract compliance
   Overtime
   “Inspecciones”
   Inspections
   “Castigos por desempeño”
   Reprisals for productivity
10. “Mi prioridad como trabajador agrícola sería que paguen el overtime ya que en ocasiones se trabaja más de lo que podemos dar.”
    My priority as a farmworker would be to get overtime pay because we sometimes work more than our capacity.
11. Pagar días festivos
    Pay holiday pay
12. No a la reducción del salario mínimo a los trabajadores agrícolas
    No to the decreasing of minimum wage for for markers
13. Es bueno que revisen inspección en cuanto al trato del trabajador
    It’s good when there is inspection to look into the treatment of workers and overtime
14. “Sería bueno que se pagara el overtime y días feriados.”
    It would be good to receive overtime pay and holiday pay.
Mi prioridad como trabajador agricola
Seria que paguen el overtime ya que en ocasiones se trabaja mas de lo que podemos dar

Pagar dias festivos

Sugeriria
Que nos paguen overtime. Porque trabajamos mas de lo estipulado por la ley.

Que el supervisor no sea racista o que no tenga preferencia a su gente de su mismo pais que sea igual con toda la gente de cualquier pais

Que no haya pago por destajo que sea por hora

Que haya inspecciones en las farmas, porque si hay mucha presion hacia el trabajador, de los supervisores

Que se cumpla el contrato overtime

Inspecciones

Custigios x desempeno

Llega a la reduccion del salario minimo a los trabajadores agricolas.