

Mobilisation renouvelée de la main d'œuvre face aux vieilles formes de précarité : étude de cas de la syndicalisation des travailleurs agricoles migrants en Colombie-Britannique

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Résumé

Cet article examine les efforts déployés pour syndiquer les membres du Programme des travailleurs agricoles saisonniers (PTAS) de la Colombie-Britannique au Canada. Le PTAS a fait l'objet de nombreuses critiques par rapport aux droits des travailleurs, et particulièrement ses règlements permettant aux employeurs de nommer les employés qu'ils souhaitent rappeler et embaucher la saison suivante (le « système de rappel »). Par l'examen de trois cas juridiques clés, Greenway, Sidhu & Sons, et Floralia, on démontre le rôle positif que peuvent jouer la syndicalisation et la négociation collective pour améliorer les conditions de travail et la sécurité des travailleurs agricoles migrants au Canada. À la lumière de ces cas, l'auteur explore les stratégies de syndicalisation et de négociation collective employées par les syndicats pour contrer les conséquences problématiques associées au PTAS (particulièrement le système de rappel), ainsi que la façon dont ces stratégies améliorent la sécurité d'emploi des travailleurs, leurs droits, et leur possibilité de faire entendre leur voix. Collectivement, ces études de cas démontrent le potentiel du droit du travail à modifier les expériences et les conditions de travail des migrants, et à permettre aux travailleurs de négocier des emplois décents, d'obtenir des droits et d'améliorer leurs conditions de travail. Bien qu'axé sur le PTAS canadien, cet article à d'importants corollaires pour les travailleurs agricoles migrants de nombreux autres territoires et à l'échelle internationale.

Renewing Labour's Engagement with Old Forms of Precarity: A Case Study of Unionization of Migrant Agricultural Workers in British Columbia

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Abstract

This article examines the efforts to unionize Seasonal Agricultural Worker Program (SAWP) workers in British Columbia, Canada. Through an examination of three key legal cases, Greenway, Sidhu & Sons and Floralia, this article demonstrates the positive role that unionization and collective bargaining can have in improving working conditions and security for migrant agricultural workers in Canada. Specifically, through these cases, this article explores the strategies deployed by unions in organizing and collective bargaining processes to resist the problematic consequences associated with the SAWP's circularity and system for recalling workers, and how those strategies enhance workers' job security, rights and voice as workers. Together, these cases demonstrate the potential of labour law to shift conditions and experiences of work for migrants, and to enable workers to negotiate decent work, access rights and improve working conditions. Though focused on Canada's SAWP, this article bears important implications for migrant agricultural workers in many other jurisdictions, and internationally.

Introduction

This article examines three key legal cases that evidence the potential of unionization to improve working conditions and security for migrant agricultural workers in Canada. Agricultural work is a historically precarious and marginalized form of labour. In Canada, this work is largely taken up by migrants under the Seasonal Agricultural Workers Program (SAWP) which has operated since the 1960s (see Lenard and Straehle: Satzewich; Preibisch and Hennebry, 2012; Preibisch, 2016). The SAWP brings migrant workers from Mexico, Guatemala, and a number of Caribbean countries to labour in Canada's agricultural industry for up to 8 months per year. Critiques of the SAWP are widespread. The workplace rights violations

workers experience under the program are widely documented, as are health and safety issues (see Faraday; Preibisch, 2012; Cundal and Seaman; Nakache and Kinoshita; Basok, 2002; Hennebry; Hennebry and Preibisch, 2010; Hennebry et al; McLaughlin et al; Preibisch and Hennebry, 2011; Law Commission of Ontario; Hastie; Migrant Workers Centre; Preibisch, 2016; Reid-Musson; Silverman and Hari). As will be explained in Section I, the circular and seasonal nature of the program has been argued to create a heightened power imbalance between employer and workers, creating the potential for abusive and exploitative working and living conditions (see Basok, 2004; Fudge; Preibisch and Hennebry, 2012; Hastie). In short, it is a program that has been rife with widely documented problems for workers, including a lack of effective protections, abusive conditions of work, and violations of workplace rights ranging from wage theft to physical violence.

SAWP workers face further difficulty unionizing in many provinces, which compounds the issues noted above. This contributes to further marginalization in a context where unionization rates have broadly decreased, due in part to the globalization of trade and work (see Tapia and Ibsen; Blackett and Trebilcock). In British Columbia, a province that employs a large number of SAWP workers, agricultural workers are not excluded from unionization under the provincial *Labour Relations Code*, and the province has seen active organizing of SAWP workers over the past decade. The ability for SAWP workers in BC to formally organize has produced some positive results and incremental gains for these workers. This article examines the efforts to unionize SAWP workers in British Columbia.² It focuses on the strategies deployed by unions to resist the problematic consequences associated with SAWP's circularity and naming process, and how those strategies enhance workers' job security, rights and voice as workers. Specifically, this article draws on three key cases concerning unionization efforts for SAWP workers in the province: *Greenway, Sidhu & Sons*, and *Floralia*. Together, these cases demonstrate the potential of labour law to shift conditions and experiences of work for migrants, and to enable workers to negotiate decent work, access rights, and improve working conditions.

This article proceeds in five parts. In the first part, I outline the regulatory structure of the SAWP and highlight the problems attending the circular nature of the program, naming process,

and related regulatory features. This sets the stage for examining what and how unions are effectively resisting the problems of the program through organizing and bargaining strategies in BC. The next three parts will outline and discuss each of the identified cases: *Greenway, Sidhu & Sons*, and *Floralia*. Each of these cases contribute to the growth and development of strategies to resist the problematic constraints under SAWP through labour organizing and unionization. The final part of this article will draw together the discussion of the cases to comment more broadly on the potential, and limitations, of labour organizing and labour law to shift conditions and experiences of precarious work in under-represented and historically marginalized industries, especially for low-wage migrant workers. This part will also draw out from the cases to demonstrate how they illustrate the ways in which unions are engaging in innovative strategies to reclaim a place and purpose in the transnational workplace, marked by a consistent decline in formal unionization.

The Seasonal Agricultural Workers Program in Canada

Canada began introducing migrant workers to the economic landscape in the mid-1960s through the Seasonal Agricultural Workers Program (SAWP). While the mid-1960s saw an explicit turn away from racially discriminatory immigration policy in Canada generally, the simultaneous introduction of this program implicitly maintained a racialized dimension towards migrants (see Lenard and Straehle; Marsden; Sharma, 2012; Sharma, 2006; Satzewich). The SAWP program invited migrants from Caribbean countries, and later Mexico (Lenard and Straehle: 8), to labour in Canada's agricultural sectors for eight-month periods. The program was, as it still is, conducted through bilateral agreements between the Canadian government and sending country governments. In its first year of operation (1966), the SAWP program brought in 264 workers from Jamaica (Lenard and Staehle: 8). Today, over 20,000 migrants participate in the SAWP program on a yearly basis (Lenard and Straehle: 9).

Under the SAWP, as with Canada's general Temporary Foreign Workers Program [TFWP], work permits are designated on the basis of employment at a single location for a single employer (*Immigration and Refugee Protection Regulations*: 185(b); Nakache and Kinoshita: 17-18). This means that valid status and authorization

to work in Canada is dependent on a migrant worker remaining with the employer, in the job, and at the location, listed on their work permit. Under SAWP, employers also have broad discretion and power to terminate workers for “noncompliance, refusal to work, or any other sufficient reason”, and SAWP also includes an expedited repatriation regime, such that a worker who is terminated will typically be removed from Canada within 24-48 hours of termination (Faraday: 94; see also Fudge: 25).

The impact of the closed work permit, discretion to terminate, and expedited repatriation terms, create significant constraints on the rights and autonomy of SAWP workers. Both the work permit and status in Canada are contingent and temporary, and most importantly, linked together (Hennebry: 22). This means that a migrant worker is dependent on his or her employer not just for the job or wages, but also for status in Canada (Marsden: 217; see also Vosko, 2018: 885-886); the impact of status-dependence creates significant inequality of bargaining power, often assumed to be equal in employment and labour relations. The ever-present threat of deportation, and the ease with which it can occur under the expedited repatriation regime of SAWP, conditions migrant workers in a way that “effectively render migrant workers’ labour power as disposable” (Vosko, 2018: 885; see also Basok and Belanger). In other words, the closed work permit and expedited repatriation create a compliant and easily replaceable workforce and allocate a significant amount of power to the employer in the relationship.

In addition to the nature of the employment relationship, as shaped by the work permit and repatriation terms, the seasonal and circular nature of SAWP is widely documented as problematic for workers. Under SAWP, workers come to Canada for a maximum of 8 months each year; employers have the ability to individually name migrant workers whom they would like to return the following season. Because continued participation in the SAWP is shaped significantly by being “recalled” or “named” to return, workers have strong disincentives to voicing complaints, asserting their rights, or engaging in other activity that could be viewed negatively by an employer (Basok, 2004: 58; see also Basok and Belanger). Failure to be recalled by an employer can result in indefinite suspension from the program, or, at the least, damage the migrant’s record, jeopardizing any future placement under the program (Preibisch and Hennebry, 2012: 54). In addition, poor employer evaluations

can also jeopardize continued involvement in the program for migrant workers, thus acting “as powerful instruments of coercion of migrants’ behaviour” (Preibisch and Hennebry, 2012: 54; see also Basok and Belanger).

The seasonal nature and yearly re-negotiation of contracts under the SAWP program, coupled with the closed work permit and expedited repatriation, puts workers in an extremely precarious position. The impact of these regulatory features is to create heightened disincentives for migrant workers to voice a complaint or assert their legal rights in the face of abusive or unlawful treatment. Thus, the autonomy and rights of migrant workers are constrained by the SAWP regulations, and they may perceive significant risks to their long-term employment and income-earning opportunities for engaging in non-compliant behaviour. In other words, these conditions “mobilise workers’ insecurities to spur self-disciplining behaviour” (Vosko, 2016: 1374; see also Basok and Belanger) which, in turn, leads migrant workers to acquiesce to a range of employer demands, including abusive and unlawful demands.

The poor working conditions generally associated with agricultural work, coupled with the heightened power imbalance in the employment relationship of SAWP workers, make this population ripe for unionization. However, formal exclusion from labour relations law in many provinces, such as Ontario, coupled with historical neglect of racialized and marginalized work in labour law and union activities (see Smith), has left the agricultural industry largely unrepresented. In addition, the SAWP regulations thus further complicate the task and objectives of union intervention in this field. The closed work permit, coupled with the discretionary “naming” process creates perceived disincentives for workers to organize, as this may be seen as disruptive and undesirable behaviour, giving rise to the potential for deportation and non-renewal of work. The SAWP regulations further constrain efforts by unions to engage with workers given the requirement that workers live on the employer’s property, thus limiting access.

The next sections will examine three significant cases in BC that demonstrate the potential, but also risks and limitations, of union engagement with SAWP workers. As mentioned in the introduction, BC extends application of the *Labour Relations Code* (the legislation governing unionization and labour relations in the province), and, thus, the ability to formally unionize, to agricultural workers.³ The

series of cases discussed below establish the evolution of the legal right to unionize, its content, operation and consequences for SAWP workers as a distinct class of agricultural workers in the province. Despite continuing problems attending SAWP workers' experiences in BC, these cases also provide evidence about how unionization is working to resist the problematic conditions of SAWP, thereby creating greater security and voice for SAWP workers in BC.

Greenway: Creating Legal Space for Migrant Workers to Unionize

The decision of the BC Labour Relations Board in *Greenway* is the first decision to explicitly determine the application of the *Labour Relations Code* to workers under SAWP in BC.⁴ The employer challenged the union's certification of a bargaining unit containing both resident and SAWP workers on the basis of constitutional jurisdiction, claiming that the provincial *Labour Relations Code* did not apply to SAWP workers who were employed through a federally created and regulated migration program (*Greenway*: paras 1-2). The BC Labour Relations Board in *Greenway* was thus asked to determine whether provincial labour law applied to workers employed under SAWP, a federally regulated labour migration program.

On the question of applicability of provincial labour law, *Mayfair*, a case in Manitoba, had decided this question positively two years earlier. In *Mayfair*, the employer had argued that SAWP workers were excluded from provincial labour law because the matter fell properly within exclusive federal jurisdiction over “naturalization and aliens” (immigration) under s.91(25) of the *Constitution Act, 1982* (para 12). The Manitoba Labour Board decided against the employer and found that it had jurisdiction to adjudicate in this area. Distinguishing *Greenway* from *Mayfair* was the centrality of the employment agreements negotiated under SAWP as a reference point for determining the constitutional jurisdiction question.⁵

Like in *Mayfair*, the employer in *Greenway* advanced several arguments concerning constitutional jurisdiction, positing that the federal government held exclusive control over SAWP and that the employment agreements negotiated between the Canadian and foreign governments constituted the totality of negotiated employment rights and obligations, rather than minimum standards that could be subject to further bargaining or alteration. Therefore,

the employer argued, allowing collective bargaining through application of the provincial *Labour Relations Code* would frustrate the federal government's purpose in negotiating employment agreements under SAWP (*Greenway*: para 114), and “impair Parliament’s ability to regulate core aspects of the admission and regulation of foreign nationals in Canada, as well as its ability to enter into and enforce international agreements with foreign governments” (*Greenway*: para 26). In other words, the employer argued that applying provincial labour law to SAWP workers would render federal regulations governing the SAWP meaningless.

The Board’s analysis in *Greenway* turns significantly on its understanding of the nature and scope of the employment agreements in question, and on the employer’s argument that these agreements set “not merely minimum standards and protections for foreign workers while they are employed under the SAWP”, but the entirety of their employment terms, unalterable and not subject to further bargaining or negotiation (*Greenway*: para 114). The Board finds that this is not so. First, the governing Memorandum of Understanding between Canada and Mexico states that SAWP workers are to receive “treatment equal to that received by Canadian workers” (*Greenway*: para 116). As the Board notes, this includes “access to the same workplace protections, rights and responsibilities as are available to Canadian workers” under existing provincial employment and related legislation (*Greenway*: para 116; see also endnote² for a list of various provincial laws attending the workplace). Second, there is no explicit text in the agreements to give them the effect of constituting the totality of terms of employment. In fact, the text of the agreements itself supports the opposite position, that they are flexible rather than rigid. The Board points to, for example, provisions regarding wages that allow for variable rates of pay to support the finding that the agreements are flexible in nature (*Greenway*: paras 117-123). The Board concludes that the agreements in question set out *minimum*, not complete or unalterable, terms and conditions of employment (*Greenway*: para 124). Ultimately, the Board determined that the *Labour Relations Code* extended to SAWP workers, meaning they could organize and form a union under the *Code*.

The aftermath of *Greenway* is less positive. The unit at Greenway filed for decertification on the same day that the above decision was released (Russo, 2011: 137). Allegations were raised

by union representatives that the decertification had followed from an intimidation campaign (Russo, 2011: 137-138, citing Sandborn, 2011). Following these events, only 12 of the original 35 SAWP workers employed at Greenway were “named” to return the following season (Russo, 2011: 137). Union organizers commented that most of those named to return had not supported the union (Russo, 2011: 137, citing Sandborn, 2009). Rather than hiring new SAWP workers to supplement the workforce, the employer hired resident workers (Russo, 2011: 137, citing Sandborn 2009). Unfortunately, the consequential outcomes at Greenway may not be considered surprising, and reveal the limitations of labour law “on paper” as an effective tool to enhance worker power in practice, as will be discussed later in this article. However, despite the disappointing on-the-ground outcomes, the case is nonetheless a significant milestone in that it “concretised temporary migrant workers’ rights to collective bargaining in the province” (Vosko, 2014: 462). In other words, *Greenway* laid a crucial foundation for further developments by affirming the extension and application of provincial labour law to migrant agricultural workers under SAWP.

Sidhu & Sons: Migrant Workers as a Distinct Bargaining Unit

The legal space created by *Greenway* for SAWP workers to use labour law as a mechanism to improve their working conditions created a foundation for further unionization efforts and advocacy. This newly affirmed space also created new questions and tensions in parsing out the details of how best to extend and apply labour law for SAWP workers in the province. In *Sidhu & Sons*, in addition to highlighting many ancillary issues attending unionization of SAWP workers, the UFCW successfully argued for a determination of the bargaining unit exclusively for SAWP workers, even while working on a farm that also employed resident workers.

The union had first attempted to certify a bargaining unit containing all farm workers employed by Sidhu & Sons. Following this unsuccessful attempt, the union then shifted its focus to certifying a bargaining unit of the SAWP workers employed by Sidhu & Sons (*Sidhu & Sons*, 2008: para 11). This was challenged by the employer as an inappropriate bargaining unit. The union argued that the distinct terms and conditions governing the employment relationship of SAWP workers made a distinct bargaining unit appropriate in this context (*Sidhu & Sons*, 2008: para 7). In its initial decision,

the BC Labour Relations Board rejected the union's arguments and found that, while there were salient distinctions between SAWP and resident farm workers, they could not justify the designation of an exclusive bargaining unit and were "dramatically outweighed" by the shared duties and skills required for farm work (*Sidhu & Sons*, 2008: para 53). However, on application for reconsideration, the initial decision is reversed.

In the application for reconsideration, the Board determined that SAWP workers have sufficiently distinct interests to allow the bargaining unit. It noted that job content is not the only relevant factor in considering classification of employees, and that in this case, there were significant distinctions between SAWP and resident workers, considering "employment status, unique terms and conditions of employment, cultural, linguistic and social differences" (*Sidhu & Sons*, 2009: para 72). These created distinct interests relevant to determining "communities of interest" (*Sidhu & Sons*, 2009: para 73). Having granted the application, the decision on reconsideration certified the bargaining unit, albeit limiting negotiable issues only to those "consistent with [SAWP workers'] unique interests", including with respect to "accommodation, rates of pay, benefits, access to medical care, transportation, repatriation, recall and name request, health and safety, discipline and discharge" (*Sidhu & Sons*, 2010a: para 78).

The outcome in *Sidhu & Sons* meant that a bargaining unit of only SAWP workers could be unionized on the farm, and that these workers could bargain to achieve a collective agreement on matters specific to their status and participation as SAWP workers. Although the prohibition on bargaining general employment conditions might be seen as limiting, in fact, the decision in *Sidhu & Sons* created active legal space in which workers could improve the conditions of their participation in SAWP through the collective bargaining process. It thus highlights the positive role that unionization and collective bargaining can play for migrant agricultural workers.

The collective agreement made important gains in respect of recall ("naming") rights and seniority, concluding that employees were to be recalled in order of seniority, and laid off, if necessary, in reverse order. This provision of the collective agreement provided some insulation against the arbitrary discretion of employers to recall SAWP workers based on individual preference, as discussed in section I. It thus does some work to improve security and conditions

of work for SAWP workers employed under a collective agreement.

Despite the noted gains, the agreement provisions concerning seniority and recall are nonetheless constrained by two factors. First, the agreement acknowledged that it was not to conflict with the power and jurisdiction of sending state governments to recruit and select workers, as set out under the bilateral agreements (Vosko, 2014: 482). This is particularly problematic in light of the documented politicization of worker recruitment and retention, including the practice of “blacklisting” workers who are union supporters or otherwise “cause trouble” for employer participants (see *Certain Employees of Sidhu & Sons*: para 67; see also Vosko, 2016). In fact, Mexican government officials were found by the BC Labour Relations Board to have improperly interfered in the recall process which aided a decertification campaign (*Certain Employees of Sidhu & Sons*: para 79). While state immunity did not preclude the Board from finding Mexico had improperly interfered, it did preclude the Board from ordering any private law remedies against Mexico (see *United Mexican States*). Second, the agreement cannot circumvent the “the overarching dictum that growers must always hire available nationals first, dependent upon available jobs and job seekers” (Vosko, 2018: 900). As a result, the seniority and recall rights set out in the collective agreement are subject to real limitations, and there is little to stop an employer from replacing their entire SAWP workforce with resident workers or workers under the Stream for Low-Wage Occupations of the TFWP (see Vosko, 2018; Hanley et al: 258-259).

As with *Greenway*, the aftermath of the decisions concerning certification of the bargaining unit in *Sidhu & Sons* reveal the limitations of labour law and vulnerability for workers created by the seasonal nature and circularity of that program. As in *Greenway*, the number of SAWP workers employed on the farm dramatically decreased following the decisions. The number of SAWP workers employed by Sidhu & Sons fell from 73 to 30 in the short time between the application for certification (*Sidhu & Sons*, 2008: para 11) and a subsequent action concerning access to the premises by the union for the purposes of discussing bargaining matters and workplace issues with its members (*Sidhu & Sons*, 2010b: para 3). In addition, while a collective agreement was concluded with the union, it has been characterized as creating a “vulnerable unit” (Vosko, 2014: 481) due to the limits on seniority and recall rights

discussed in the previous paragraph and their impact on the inability of the collective agreement to provide meaningful protection against sending-state “blacklisting” practices (see *Certain Employees of Sidhu & Sons*: para 67; see also Vosko, 2018), and against the employer simply replacing SAWP workers with resident workers to defeat the union (Hanley et al: 258-259).

Floralia: A Test of the Legal Strength and Limits of Collective Agreement Terms Unique to Migrant Workers

Building from *Sidhu & Sons*, which demonstrated the potential for labour law and collective bargaining to have concrete impact for SAWP workers, the case of *Floralia* tests the enforceability of collective agreements for SAWP workers in practice. Like in *Greenway* and *Sidhu & Sons*, the SAWP workers at *Floralia* had a difficult time organizing and certifying a bargaining unit, with 14 workers being laid off and repatriated very shortly after the certification application was filed by the union (*Floralia*, 2008: para 14). An unfair labour practice complaint was filed due to the layoffs, but that complaint was dismissed. In any event, and despite the chilling effect this action could have had on the subsequent vote, the unit was certified and a collective agreement reached. Subsequently, the unit was decertified and a number of workers were therefore not recalled under the provisions of the collective agreement. The series of events at play in respect of the decertification and failure to recall, along with the reasons set out by the BC Labour Board in hearing complaints on those matters, evidence the potential of labour law and collective bargaining to materially increase the security and conditions of work for SAWP participants.

The decisions discussed in this section revolve around an application for decertification and subsequent enforcement of recall rights under the previously established collective agreement at *Floralia*, as noted above. In its initial complaint, the union alleged that the employer had interfered with the vote on a number of bases, including improperly counting resident workers (*Certain Employees of Floralila*, 2015: paras 19, 27), moving workers from another farm to alter employee numbers (*Certain Employees of Floralila*, 2015: para 42), and improperly influencing newly arrived SAWP workers (*Certain Employees of Floralila*, 2015: paras 56-65). In its initial decision, the Board denies the union’s complaint and request to revoke the decertification application (*Certain Employees*

of Floralia, 2015: para 88). However, on reconsideration, this is reversed (*Certain Employees of Floralia*, 2016: para 18).

During the short period in which the union at Floralia was decertified, between the initial decision and reconsideration as set out in the previous paragraph, the employer failed to recall a number of workers in (possible) violation of its collective agreement. The collective agreement in place at Floralia prior to decertification included Article 20.05, which requires the employer “to request by name SAWP workers who have recall rights” unless the worker elects otherwise (*Floralia*, 2017: para 15). In other words, this article operates to remove any discretion on the part of the employer in the recall or “naming” process, requiring that the employer recall existing SAWP workers unless the worker herself chooses otherwise (Russo, 2012: 178).

The facts concerning the failure to recall workers are replicated in detail in the Board’s decision. They are as follows. The initial decision ordering the unsealing of a ballot box for a decertification vote was rendered on December 30th, 2015, the vote was counted on January 6th, 2016 and the union’s certification was cancelled the following day. On January 12th, 2016, the employer submitted a Labour Market Impact Assessment (LMIA) for 8 of the most senior SAWP employees at the farm, with the exception of the 5th most senior employee who was a known union supporter (*Floralia*, 2017: para 31). The following day, on January 13th, 2016, assuming that the terms of the collective agreement were no longer in force, the employer submitted a second LMIA requesting 15 new SAWP workers, not previously employed at the farm (*Floralia*, 2017: para 32). On January 14th, 2016, the union filed for reconsideration of the initial decertification decision. Notice was mailed out to the parties, and the next day Floralia cancelled its LMIAAs (*Floralia*, 2017: para 34). During this period, senior SAWP employees at Floralia began being assigned to other farms due to the delay in Floralia recalling workers (*Floralia*, 2017: para 48). Floralia later submitted LMIAAs for seven of the most senior SAWP employees, but they had already accepted reassignments at that time (*Floralia*, 2017: para 50). As a result of the above events, only 9 SAWP workers were requested by Floralia in 2016, down from 24 the previous season, and only two of the nine had recall rights under the collective agreement (*Floralia*, 2017: para 52).

In its complaint, the Union alleged that the employer

had attempted to “decimate the bargaining unit” by delaying the submission of LMIs until after the SAWP workers identified as union supporters had accepted other positions (*Floralia*, 2017: para 21). The Employer disputed these allegations of “anti-union animus” and claimed that the delays were for “*bona fide* business reasons” (*Floralia*, 2017: para 22). The Board determined that, despite the numerous reasons the employer proposed for the cancellations of the LMIs and subsequent delays, “the only thing that changed for *Floralia* between January 12, 2016, and January 15, 2016, was the filing of the Union’s application for reconsideration of the 2015 Original Decision” (*Floralia*, 2017: para 105).

In finding for the union, the Board ordered that the employer return to the 2016 seniority list concerning recall rights and treat the employees’ terms as unbroken, despite most not being recalled in the 2017 season. This is significant because the Board was able to enforce the collective agreement despite the fact that the employer had attempted to use a legal loophole to effectively dismantle the unit. Further, The Board ordered S&G (another farm which evidence established shared workers with *Floralia*, as well as having familial ties in management) and *Floralia* be deemed common employers and that S&G’s employees be covered retroactively by *Floralia*’s collective agreement, including with respect to the seniority list. Finally, the Board ordered that a list of alternate workers be submitted with each LMI (to comply with the seniority list requirements) and copied to the union, and that the union further be copied on any correspondence with Service Canada (*Floralia*, 2017: para 117). The result of the last decision in *Floralia*, and the remedies ordered, evidences the ability of labour law to enhance security and conditions of work for SAWP workers.

Advancing Worker Voice and Interests, Reclaiming a Role for Labour (Law): Implications from *Greenway, Sidhu & Sons* and *Floralia* for Unions and Workers

As set out in the first section of this article, SAWP workers experience heightened precariousness and dependency in their employment relationship due to the nature of the Program’s regulations. In particular, the recall (“naming”) process serves as a strong disciplinary mechanism for workers to comply with employer demands and creates a strong disincentive towards behaviour that would be deemed undesirable (including union support) given the

negative consequences of not being recalled on a worker’s long-term employment and income-earning opportunities. This “naming” process for recall, along with the other problematic regulatory features of the SAWP as discussed in section I, are largely non-justiciable, meaning that there is no legal basis upon which a worker can challenge the regulations in court. Outside of a *Charter* challenge,⁶ which would be very difficult for various reasons, both procedural and substantive, and has yet to be successful, the regulations and their implementation are largely immune from legal challenge. As such, unionization and the ability to negotiate a collective agreement provide creative and distinct legal space from which to challenge and alter the regulatory framework.

Each of the cases examined in this article establish positive developments in improving SAWP workers’ power, voice and security through their focused interventions and strategies to extend meaningful collective bargaining rights to workers through unionization. These strategies, and the legal outcomes achieved in each of the cases, provide a mechanism through which to resist, challenge and improve the labour conditions of SAWP workers that, outside of unionization, are largely uncontestable at law, as described above.

First, *Greenway* opened the door to union engagement with SAWP workers by establishing that their participation in a federally administered program did not preclude their coverage under provincial collective bargaining legislation. The BCLR upheld the certification of a bargaining unit containing a majority of SAWP workers as well as some residents. This created a strong foundation for the further strategies and gains made in the *Sidhu & Sons* and *Floralia* cases.

Sidhu & Sons takes *Greenway*’s outcomes a step further by successfully arguing for bargaining unit determination on the basis of participation under SAWP, rather than having to unionize an entire farm workforce. The outcome of this determination also meant that collective bargaining could be attuned directly to the unique conditions and constraints attaching to SAWP workers. While it may be seen as a constraint or limitation that the collective bargaining and agreement was only limited to these issues, as opposed to also allowing for bargaining over job content and conditions, in fact, this created distinct and targeted legal space for unions to engage with, advocate on behalf of, and improve SAWP workers’ conditions of

participation under that program and in relation to their specific employment relationship. This is all the more significant when considered in light of the non-justiciable nature of the SAWP regulations and standard-form contracts, as noted earlier.

Sidhu & Sons evidences the creative potential of labour law to ameliorate the problematic features of SAWP by addressing workers' concerns through novel provisions in the collective agreement. Specifically, in that case, the workers had bargained for terms of recall based on seniority. This provision represented "an important step towards eliminating the de-facto blacklisting of workers through arbitrary recall provisions" (Russo, 2012: 178). Under the collective agreement in place in *Sidhu & Sons*, proving a violation of the provision would be difficult in practice, as the Mexican government is acknowledged as having "final say" over worker selection (Vosko, 2014: 481). This means that an employer could attribute a failure to recall based on seniority to the Mexican government, placing the apparent violation of the agreement out of reach of effective legal remedy.⁷ However, the achievement of bargaining for this provision is, itself, an incremental victory and innovative strategy deployed by the union to improve the conditions of participation under SAWP and increase the possibility of longer-term job security for workers.

Floralia both shows the progress made in respect of bargaining for recall provisions, and the strength that can come from union engagement in creating real liability for employers who engage in problematic practices under the SAWP. As discussed earlier, the arbitrary and discretionary nature of the recall system under SAWP creates a significant power imbalance between employer and workers, and can produce a context in which workers perceive few choices beyond submission to employer demands in order to maintain "good standing" and be named to return the following season. The practices that the employer engaged in in *Floralia* demonstrate how tenuous continued employment under the SAWP is, and the array of tactics an employer can use to discipline and effectively terminate workers. However, *Floralia* also illustrates the strength that can come from union engagement in resisting and even overcoming the problematic consequences associated with the recall regulations under SAWP. In particular, *Floralia* established that provisions governing SAWP participation, such as in relation to recall, can have real teeth under a collective agreement.

The accumulation of these three case studies: *Greenway*, *Sidhu & Sons*, and *Floralia*, demonstrate how unions and labour law can innovate to resist the problematic conditions associated with low-wage labour migration programs, and illustrate how these innovations can be implemented, moving from conceptual principles to concrete enforcement. These innovations importantly target conditions and regulations of SAWP work that are otherwise largely non-justiciable, meaning that there are few other legal avenues through which to change or improve these conditions on a systemic or institutional basis. The strength and protection of unionization and a collective agreement both creates this legal space and gives it meaning through the ability for enforcement. As such, this works to strengthen workers' voices and control over their labour in a context that is commonly characterized as highly vulnerable.

However, these cases also reveal the limitations of labour law's emancipatory potential for workers. First, as mentioned earlier, despite the success of certifying bargaining units containing only SAWP workers, this has come with the constraint that collective agreements for these units can only bargain with respect to SAWP workers' "unique interests". Again, although that in fact creates a positive legal space for improving workers' conditions and participation under SAWP, it does create a finite boundary beyond which bargaining in these contexts may not pass. In addition, by organizing around the workers' collective interests as workers and as participants under the SAWP, the union may have displaced the unity and strength of worker voice around immigration status, marginalizing the goal of security in immigration or residency status in favour of improved working conditions and prolonged participation in a temporary labour migration program. This critique has been levied in other contexts (see Eleveld and Van Hooren) and provides an important caution against categorizing SAWP participants and their interests in ways which may result in rendering invisible or unattainable some interests in favour of others.

Despite the achievement of collective agreements in *Sidhu & Sons* and *Floralia*, the retroactive and complaints-based nature of labour law proceedings further constrain the force and effectiveness of the agreement and its provisions in each of these cases. As discussed earlier in this article, despite a collective agreement being in place, employers in both cases reduced the number of SAWP workers, and in *Floralia*, engaged in legally questionable tactics in

this respect. These limitations are not unique to labour law as a subset of the larger legal system; however, it is important to acknowledge the enduring issues this presents for workers, and for labour law's emancipatory potential. Indeed, the use of formal unionization and litigation as a means to improve working conditions for migrant workers has been critiqued as expensive, protracted and limited in its overall effects (see Choudry and Thomas; Dias-Abey). As will be discussed below, alternative approaches for unions to engage in political and social activism and community building with migrant workers are suggested to create a more meaningful and broad-based response and a counter-point to the limited and incremental effects of legal avenues (see Choudry and Thomas; Tapia and Alberti).

Although the progress achieved for SAWP workers through unionization and bargaining in *Greenway, Sidhu & Sons* and *Floralia* is limited to the workers' "unique interests" as SAWP participants, within that sphere, the potential to use labour law and collective bargaining as a tool to achieve greater freedom, voice and dignity for participants under that Program is significant. In addition to the demonstrated ability to bargain for seniority and recall rights, so as to eliminate the problematic consequences of the discretionary "naming" system under SAWP, both negotiated collective agreements and broader labour law principles can further ameliorate the problematic aspects of the Program discussed earlier in this article. For example, the closed work permit system used under SAWP creates an opportunity for abuse by employers. The closed work permit system can also result in workers becoming unknowingly irregularized in their administrative status if, for example, they are moved to work at another location (Preibisch, 2016: 177). However, as happened in *Floralia*, where a union can establish that the multiple employers or locations are, in fact, a "common employer", this will bring workers within the ambit of labour law's protection, even where they have been moved between locations or farms.

Housing for SAWP workers is another commonly documented issue in existing literature (see Cundal and Seaman: 208; Hennebry and Preibisch: 30-31; Migrant Workers Centre: 10). Employers are required to provide accommodations for SAWP workers, often on the employer's property. The inadequacies of these accommodations are frequently documented. Collective agreements for SAWP workers, based on the wording and reasoning of the cases

discussed in this article, could provide a concrete basis for improving housing conditions through the negotiation and inclusion of terms relevant to this aspect of SAWP workers' employment and residence in Canada. Inclusion of terms in a collective agreement creates a stronger legal basis for enforcing those terms and conditions, as well as avenues for remedy where those terms are violated. As such, this may provide a stronger basis from which workers can assert their position, and the legal character of a negotiated instrument like a collective agreement may be treated more seriously by an employer in response.

Beyond the material consequences for SAWP workers in BC, the work of unions in certifying and collective bargaining for SAWP workers, as discussed through the cases examined in this article, evidences the broader potential and significance of union revitalization (see Tapia and Ibsen). The past 20 years have been characterized by continual decline of union density and coverage across the globe, due to factors including globalization, a shift from manufacturing to service work, and the erosion of the standard employment contract (see Tapia and Ibsen). Transnational labour law has recently emerged to provide a lens through which to cast into critical light neoliberal accounts of globalization and work, and to find new avenues through which to reclaim the emancipatory potential of labour law (see Blackett and Trebilcock; Blackett). The work of the unions and outcomes achieved in *Greenway, Sidhu & Sons*, and *Floralia* illustrate one kind of strategy that can lead both to union revitalization and the reclamation of labour law's emancipatory potential by strengthening voice and security for migrant agricultural workers, as described earlier.

The strategies deployed by the unions in the cases described in this article are, admittedly, conservative when placed within a broader spectrum of strategies and innovations unions are using to reclaim a role in contemporary workplaces and labour landscapes (see Tapia and Ibsen; Tapia and Alberti; Dias-Abey). Nonetheless, there are lessons that extend beyond the material outcomes achieved through collective bargaining for the SAWP workers in these cases. First, these cases and the work of the unions to reach out to and build community with the SAWP workers illustrate efforts to become more inclusive and expand to new constituencies (see Tapia and Isben; Tapia and Alberti; Hyman and Gumbrell-McCormick). Whether this occurs through, or results in, formal labour law action, as in the cases

discussed here, or more informal coalition and community building (see Tapia and Isben; Dias-Abey), the identification of constituencies that can be served by unions in some capacity is an important step in union revitalization and in reclaiming worker voice.

Unions in Canada, the UFCW in particular, have also engaged in broader activism concerning migrant workers' status and security in Canada. Specifically, the UFCW has been actively engaged in calling for an end to the temporary status allocated to such workers and has been vocal in advocating for permanent status for migrant workers (Basok and Lopez-Sala: 1280). In five Canadian provinces, the UFCW has also deployed a strategy of establishing community organizations which focus on education and support (called the Agricultural Workers Alliance or AWA) (Hanley et al). Also in Quebec, the IWC assist migrants in accessing benefits and connects them with advocacy groups, in addition to organizing media campaigns (see Choudry and Thomas). These activities illustrate another kind of strategy or innovation for union activity that can assist in union revitalization through participation in broader social movements and community organizing (see Tapia and Ibsen). This kind of strategy also supports worker voice, which can be particularly important for migrant workers who have a weak political voice due to the very nature of their temporary status in Canada.

Conclusion

This article examined efforts by unions to advance and adapt traditional labour law mechanisms to new contexts in order to improve the voice, security and dignity of migrant agricultural workers. Drawing on three key case studies from British Columbia: *Greenway*, *Sidhu & Sons*, and *Floralia*, this article has demonstrated the positive outcomes and advancements in labour law in extending and enforcing formal collective bargaining rights to migrant agricultural workers under the SAWP. It has further discussed how creative collective bargaining tactics have enabled unions to assist SAWP workers in improving terms and conditions of their participation under SAWP which would otherwise be non-justiciable. These cases thus illustrate how unions and workers can use legal mechanisms to resist the problematic aspects of low-wage labour migration programs. Although these mechanisms remain conservative, the processes lengthy and arduous, and the outcomes

incremental, they are nonetheless a useful tool in a wider toolbox of innovations and strategies that unions and other organization can deploy to strengthen the voice, freedom and security of migrant workers. The final part of this article discussed this broader spectrum of strategies and innovations that unions and community organizations are using to support migrant workers and legal, political and social actors in their countries of work.

Endnotes

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2. Although this article focuses on unionization and labour law, these are not the only legal tools migrant workers may use to access justice in the workplace. Many of the rights violations workers experience are protected through related employment standards legislation, occupational health and safety legislation, and human rights law.
3. Under Canada's *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5, s92, employment and labour relations are within the scope of powers allocated to individual provinces (except as concerns federal undertakings). This means that each province has its own legislation to govern employment standards, labour law (unionization), occupational health and safety, and human rights.
4. The decision of *Sidhu & Sons* (2008) a year earlier, had found a proposed bargaining unit of SAWP workers inappropriate. However, that case did not involve a challenge based on the application of the BC *Labour Relations Code*.
5. While the employment agreements governing SAWP workers were also important in *Mayfair*, in that case, they were used to support an argument that SAWP workers fell outside of the definition of “employee” under the provincial legislation. In *Greenway*, the arguments rested on the fact that, as an instrument negotiated between the federal and foreign governments, the SAWP employment agreements were jurisdictionally a matter of exclusive federal control. See *Mayfair*: paras 27-28, 36-38; *Greenway*: paras 99, 113-114.
6. Workers could attempt to bring a legal case to court on the basis of an infringement of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), c 11. The *Charter* guarantees, among other things, a right to life, liberty and security of the person (s.7) and to equality (s.15).

7. In *United Mexican States*, it was found that state immunity precluded the Board from exercising remedial jurisdiction over Mexico, but not from inquiring into their conduct and its effect on contractual relations between domestic parties. This is because Mexico's activity is characterized as "improper interference" under the *Code*, a finding of which is not technically a violation; it is simply an acknowledgment that "Mexico's conduct has legal consequences for Canadian employers and their employees (*United Mexican States*: para 133). The only action the Board can take in response is refuse to count the vote (*United Mexican States*: para 62). A refusal to count a decertification vote in the wake of a finding of improper interference "is a consequence that has legal effect on the employer, the employees, and the union. There is no legal consequence for any other person who is found to have improperly interfered" (*United Mexican States*: para 67). In theory, Mexico could continually bar the participation of union supporters in the program and have no exposure to any liability whatsoever. The Board acknowledges this when it says that "a finding, if made, would not purport to regulate, change, or interfere with Mexico's conduct" (*United Mexican States*: para 133).

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Insécurités émergentes : précarisation des relations de travail dans l'industrie automobile en Inde et en Afrique du Sud

Lorenza Monaco

Résumé

En comparant deux régimes de précarisation dans l'industrie automobile, soit le système de main-d'œuvre contractuelle en Inde et l'embauche de travailleurs par l'intermédiaire de pourvoyeurs de main d'œuvre en Afrique du Sud, le présent article étudie la possibilité que le précarariat puisse être considéré comme une nouvelle classe mondiale en devenir. Tout en tenant compte d'une dangereuse tendance mondiale à utiliser la main d'œuvre temporaire comme avantage concurrentiel, l'article rejette la tentative d'universaliser les catégories. Il invite plutôt le lecteur à observer l'intégration locale de la précarisation, et en particulier les trajectoires de développement industriel, les spécificités du marché du travail et les cadres institutionnels qui affectent l'expérience vécue de la précarité. Ultimement, homogénéiser les définitions, particulièrement celles qui excluent la réalité de la précarité dans les pays du Sud, mène non seulement à une compréhension théorique limitée des nombreuses nuances de la précarisation, mais peut tendre à une sur simplification des stratégies politiques mondiales, sans refléter la complexité des dynamiques locales de formation d'une classe et de luttes.