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Kathryn Neilson*
Innis Christie**

The Agricultural
Labourer in Canada:
A Legal Point of View

1. Introduction

The public has recently been made aware of special difficulties affecting farm labour. In August, 1973 the Report of a Federal Department of Agriculture team entitled "The Seasonal Farm Labour Situation in Southwestern Ontario"¹ emphasized the deplorable living and working conditions, on some farms at least, of the seasonal labourers hired to harvest field crops in southwestern Ontario. Heavy media coverage erupted almost immediately, and there was renewed coverage in the autumn of 1974.² Much less sensationally, through the spring and summer of 1974, the media gave coverage to special efforts by the government at both the Federal and Provincial levels to combat an increasingly serious shortage of farm labour. Special arrangements for the importation of Caribbean and Mexican labour, the organization of experimental labour pools, advertising programs and arrangements to facilitate the mobility of farm labour within the country have been reported in the press.³ The law relating to the employment of farm labour does not go to the root of these serious social problems, but the statutes, the regulatory institutions and the few reported court and tribunal cases provide the legal backdrop against which they must be seen. The law governing employment is only one societal factor, but it is one at least in which changes can be made.

In one sense the plight of the seasonal farm labourer is not a significant social problem in Canada, because even in peak

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1. Canada Department of Manpower and Immigration Report, *The Seasonal Farm Labour Situation in Southwestern Ontario*, August 11, 1973.

2. For example: *Toronto Globe and Mail*, Aug. 16, 1973; *Time*, Sept. 3, 1973; "As it Happens", C.B.C. Radio, Sept. 18, 1974; *Halifax Mail Star*, Sept. 18, 1974; *Edmonton Journal*, Sept. 20, 1974; *Toronto Globe and Mail*, Oct. 9, 1974, reporting on the release by the Ontario Federation of Labour of a report entitled "Harvest of Concern" by Robert Ward.

3. *Halifax Chronicle-Herald*, Mar. 14 and Aug. 30, 1974; *Toronto Globe and Mail*, Aug. 30, 1974; see also (1974), 74 *The Labour Gazette* 543.

employment periods there are very few such workers in Canada. In 1971 agricultural labourers in the Canadian labour force included about 38,500 regularly paid workers and the number rose to close to 140,000 during the harvest.⁴ Of the 100,000 seasonal labourers, approximately 50,000 of whom would have been employed in Ontario, it can probably be assumed that at least half were students, those temporarily unemployed in other parts of the labour force and moonlighters. Thus, at most, there are sixty or seventy thousand persons who are really dependent on employment as seasonal farm labourers for all or a significant part of their income.

For a lawyer, however, saying that the number of seasonal farm labourers is not large is not the same as saying that it does not matter that the law allows victimization of whatever farm labour population the country does have. Moreover, Canadian farms are, in fact, infected, even if only minimally, with that blight on the U.S. farm labour scene; the exploitation of migrant farm labour. The squalor in which the some half million migrant farm labourers live as they move about the United States, following the crops on their own or as members of contract labour gangs has received considerable attention in the whole range of the American press, from scandal sheets to substantial legal journals.⁵

In addition to the seasonal farm labourers there are up to 40,000 year-round hired hands on farms in Canada. Again, the limited number does not render their individual deprivations so insignificant that their special legal position is not worth considering. The average agricultural wage is often only half of the industrial average at best. In 1971 the average minimum wage in Canadian jurisdictions was \$1.61. For agricultural workers in the same year the figure was \$1.38. Regular hours of work or vacations are unheard of, and it is not uncommon for an employee to work up to sixteen hours a day during a peak period, and they to sit idle for long periods of time, at his own expense.⁶

The increasing shortage of farm labour is beyond question a significant problem, the solution to which is involving increasing government participation. The Caribbean Seasonal Workers

4. D.B.S. Census Statistics.

5. For example: *Midnight*, Oct. 14, 1974; Kantor, *Florida's Forgotten People: The Migrant Farm Workers* (1970-71), 23 U. of Fla. L. Rev. 756; Hollman and Seltzer, *Migrant Farm Labour in Upstate New York* (1968), 4 Columbia J. Law and Soc. Problems 1.

6. Annual Reports, Canada Department of Manpower and Immigration, 1969-72.

Programme, administered through the Department of Manpower and Immigration, is an example. By means of an agreement between Canada and several Caribbean countries, Caribbean workers are brought to Canada at the request of farmers who need them and are willing to meet the terms of employment set out in the Agreement. These terms include a minimum wage, a guaranteed number of work weeks, partial payment of transportation costs, and decent, inspected accommodations. Caribbean liaison officers ensure that prospective employers comply with all conditions before their labour requests are filled. The result is an inexhaustible Caribbean labour supply for those employers in return for their extra expense in meeting the required conditions.⁷ The Federal Department of Manpower and Immigration, in a somewhat similar way, makes special arrangements for the entry into Canada of skilled tobacco workers, although until the summer of 1973 there would not appear to have been the same concern under that program for the employment and living conditions of the workers that is manifested in the Caribbean Seasonal Workers Programme.⁸

Within Canada, government involvement in the recruitment and movement of agricultural labour and the promotion of improvements in working and living conditions is administered under the Federal-Provincial Manpower Agreements.⁹ Under these Agreements the province is required to establish a Provincial Agricultural Manpower Committee, usually chaired by the senior officer of the Provincial Department of Agriculture, and including provincial officials, representatives of farm organizations and representatives of the Federal Department of Manpower and Immigration. The Federal government is required to establish a Canada Agricultural Manpower Committee somewhat similarly constituted which includes the Chairmen of the Provincial Agricultural Manpower

7. Canada Department of Manpower and Immigration Report, *supra*, note 1, at 14 ff. and Canada Department of Manpower and Immigration, *Manpower Manual*, paras. 43.22-43.27.

8. Canada Department of Manpower and Immigration, *Manpower Manual*, paras. 43.28-43.30. The Alien Labour Act, R.S.C. 1970, c. A-12, s. 2 makes it unlawful for anyone to prepay transportation for, or assist or encourage foreigners to enter Canada to perform labour. The Act is limited in its application to countries with reciprocal legislation (s. 13), but nevertheless has serious implications in areas such as southwestern Ontario where agricultural employers seek to reduce labour costs by illegally importing aliens. See Canada Department of Manpower & Immigration, Report, *supra*, note 1.

9. Canada Department of Manpower and Immigration, *Manpower Manual*, paras. 43.06-43.21.

Committees. The provincial committees are supposed to establish guidelines for wages and working and living conditions to be met by employers of any workers who are moved under the Agreements. Each Committee assesses the manpower demands within its province and advises the Department of Manpower and Immigration. The actual selection and referral of workers is carried out by Canada Manpower Centres which, according to the Department's "Manpower Manual", will not refer or move any workers unless the specifications listed on the employers' orders for workers are within the guidelines established by the provincial Committee. In the words of the Manual: "By including the Agreement provisions for the establishment of guidelines, a positive effort has been made to raise labour standards governing wages and conditions of work within the farming industry. This, in turn, helps provide a more adequate and stable labour supply for the industry."¹⁰ The Federal Department of Manpower and Immigration, in fact, underwrites half the cost of transportation for persons moving from elsewhere in Ontario to the southwestern region to harvest the crops for persons coming from other provinces to do seasonal farm work in southern Ontario. Most of these come from Quebec and a small group from the Maritimes.¹¹

The controversial Report on "Seasonal Farm Labour Situation in Southwestern Ontario" of August, 1973,¹² and a much more bland and measured "Report on Migrant Farm Labour Investigation — Southwestern Ontario"¹³ in October of that same year both seem to indicate that the inspection and approval procedures which are part of the Caribbean Seasonal Workers Programme and the Federal Provincial Manpower Agreements usually operate to ensure at least minimally effective conditions for workers moving under their auspices. Even the second Report, however, does not mask the fact that for some migrant workers, including a few from Quebec, conditions are deplorable. To quote from the October Report:

10. *Id.* at para. 43.12. New Brunswick has a Seasonal Employment Act, S.N.B. 1959, c. 12, under which a committee is established to study and coordinate employment patterns and to act in an advisory capacity to the Province's Minister of Labour.

11. Canada Department of Manpower and Immigration, *Manpower Manual*, para. 43.11; Canada Department of Manpower and Immigration Report, *supra*, note 1, at 13.

12. *Supra*, note 1.

13. Office of the Minister, Canada Department of Manpower and Immigration, Release, Oct. 5, 1973.

It is evident that the problems exist where uncontrolled movement is allowed to grow — the Mexican movement being an obvious example. . . . the Mexican movement consists almost exclusively of Mennonite families of German extraction. For the most part, they are employed by Canadian Mennonite employers on vegetable farms in the Leaming, Chatham and South Norfolk County areas. These families usually have a Canadian connection, as noted in the earlier Farm Labour Report. Often, one or more adult members of the family are Canadian citizens by birth. In fact, as this unofficial farm labour movement between Mexico and Canada has already existed for over a decade, a number of the minor children are Canadian citizens by virtue of their birth in Canada during the period of the families' annual trek. These families have a high birthrate, up to a dozen children being not uncommon.¹⁴

However desirable the regulated importation of farm labour may be when contrasted with "free lance" migrant labour like "the Mexican movement", it is apparent that farmers' organizations and the Canadian Federal and Provincial governments do not see in it a long-term solution to the problem of farm labour shortages. In an effort to make farm employment more attractive to native Canadians the Federal Department of Manpower and Immigration is experimenting with labour pools, Federally funded and Provincially administered. The hope is that by setting up central clearing houses demands for labour can be met quickly and workers can be assured of longer periods of continuous employment under regulated terms and conditions.¹⁵

In the context of these problems and embryo solutions a reassessment of the legal position of farm labourers is called for. It must be appreciated just how deprived they are of the legal protection afforded to virtually every other class of worker in Canada except domestic servants.

While the majority of Canadian employees enjoy the benefits of legislation defining minimum wages, hours of work, and vacation pay, their agricultural counterparts have been effectively excluded from the operation of such laws in most provinces. Only two provinces afford the farm worker compulsory coverage under workmen's compensation legislation¹⁶ and few jurisdictions have

14. *Id.* at 5.

15. Office of the Minister, Canada Department of Manpower and Immigration, Release, Sept. 27, 1973.

16. *Infra*, notes 89-90 and accompanying text.

enacted safety legislation which extends to farming operations.¹⁷ Five Canadian provinces have either totally barred unions of agricultural labourers from the protection of labour relations legislation,¹⁸ or have subjected such organizations to special provisions.¹⁹

The first questions must be "Just who is an agricultural employee?", and "Why is he excluded from the scope of various pieces of protective legislation?". Specific types of legislation will then be examined to ascertain the precise position of farm labourers under the laws across Canada. The arguments that have been made publicly to justify the special position of farm labour will be considered both in connection with particular legislative deprivations which they purport to justify, and then, generally. Finally, such limited conclusions as can be drawn from the study of the law alone will be advanced. An all-pervading question is whether farmer organizations, which have been the traditional exponents of excluding farm workers from legislative protection, will be forced by the labour shortage to take a different stance.

II. Who Is An Agricultural Labourer?: The Problem of Definition

Faced with statutes expressly excluding farm workers from coverage, Canadian courts and labour tribunals are called upon to decide what categories of workers are caught by the term "agricultural employee" or other similar phrases. A narrow interpretation of the exclusion could give such borderline cases as packers or irrigation workers the benefit of employment standards legislation and may, therefore, be of great significance to them. Nevertheless, Canadian courts, labour boards and workmen's compensation boards have not developed a definitive or even consistent approach to this issue, perhaps due to the small number of cases. A survey of the provincial labour relations boards indicated that only those of Alberta, Manitoba, and Ontario have been called upon to decide cases involving definitions of agriculture. Provincial workmen's compensation boards uniformly reported that they had decided no cases relevant to agriculture, although there is one court case in the area from New Brunswick.²⁰

17. *Infra*, notes 106-108 and accompanying text.

18. *Infra*, notes 42-44 and accompanying text.

19. *Infra*, notes 45 and 46 and accompanying text.

20. *Oulette v. F. W. Pirie Co.* (1957), 8 D.L.R. (2d) 608 (N.B.S.C., App. Div.).

The absence of case law is somewhat surprising in view of the scope for dispute in the varying statutory definitions. Farm workers are variously referred to as "farm labourers", "persons employed primarily in farming, ranching, or market-gardening", or in "farming and horticulture", and in some jurisdictions the "farm labourer" or "agriculture" exclusions carry special restrictions. For example, under the Alberta Labour Act, 1973 and the Employment Standards Part of the Prince Edward Island Labour Act employees of a commercial enterprise are covered even if they are farm labourers.²¹ In Quebec, under workmen's compensation legislation, farming does not include what the Quebec Commission terms "para-agricultural enterprises" such as animal farms, grain elevators and handling of grain and other crops, and manufacturing of dairy products.²² The Saskatchewan Labour Standards Act, 1969, expressly exempts farming, ranching and market-gardening from coverage, but specifies that those terms do not include egg hatcheries, greenhouses, and nurseries.²³ In Nova Scotia the agricultural exemption under the Labour Standards Code is expressed as "persons engaged in work on a farm whose employment is directly related to the primary production of eggs, milk, grain, seeds, fruit, vegetables, maple products, honey, tobacco, pigs, cattle, sheep, poultry, or animal furs, . . ." ²⁴ but a farm does not include an agricultural establishment at which the production of crops is carried on predominantly under cover.²⁵ The Industrial Safety Act of Ontario does not apply to the "raising and care of fowl or livestock, the cultivation of plants, trees, flowers, fruits and vegetables and farming operations".²⁶

The Ontario Labour Relations Board has decided several cases on the issue of who is "a person employed in agriculture" under s. 2(b) of the Labour Relations Act²⁷ and therefore ineligible for certification. The first of these, *The Ontario Tree Fruits Co-op* case,²⁸ dealt with employees in a co-operative packing plant, owned

21. S.A. 1973, c. 33, s. 2(2)(d) and (4); S.P.E.I. 1971, c. 35, s. 49(2).

22. Letter, Quebec Workmen's Compensation Board, Nov. 12, 1973.

23. S.S. 1969, c. 24, s. 4(2)(c).

24. Regulations made under the Labour Standards Code, R. & R., S.N.S. 1973, p. 320, Reg. 2(3).

25. *Id.* at Reg. 1(1)(c).

26. S.O. 1971 (1st session), c. 43, s. 2(e)

27. R.S.O. 1970, c. 232.

28. *United Packinghouse, Food and Allied Workers, AFL-CIO-CLC v. Ontario Tree Fruits Co-op Ltd.* (1962), 62 C.L.L.C., para. 16,235 (O.L.R.B.).

and operated by neighbouring farmers, in which produce was stored, graded and packed prior to sale. The farmers argued that these employees were performing functions representing the final phases of the agricultural production cycle. The jobs could have been performed by each of them on his own farm and therefore the employees were agricultural workers. The Board did not agree. By examining the dictionary definitions it came to the conclusion that the essential element of agricultural operations is the connection to the cultivation of the soil and production. The employees in question were part of a commercial enterprise run as a separate legal entity from the farms and were entirely removed from primary farm production. As a result they were held not to be agricultural employees and eligible for certification.

In the *Tree Fruits* case the Ontario Board did not decide how the employees would be classified had the same activities been carried out on the farm which produced the goods. An earlier Alberta Labour Board case indicates that such employees might be classified as agricultural, at least in that province: "If a farmer chooses to make an additional profit. . . by the manufacture and sale of dairy products from materials produced on his farm, or even from the products of the soil, purchased and converted into finished products on his farm, none of these activities makes him any less a farmer, not his land any less a farm. . . ." ²⁹ Nor, it was concluded, does it make his employees any less farm workers.

The Ontario Board followed its *Tree Fruits* decision the next year in *International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers, Local 419 and Federal Farms Ltd.*, ³⁰ an application for certification made by employees of a packing plant owned by a farmer who used it to process both his own produce and that bought from others. The reported proportions were 20% his produce and 80% that of others. The respondent argued that his packing operation was indivisible from the primary business of agriculture; the produce remained in its natural state, and the only distinction from a farmer preparing his own produce lay in the scale of the preparations. However, the Board found the growing and packing functions readily divisible, and the large proportion of produce taken from other farms was interpreted as indicative of an

29. *Hill v. Lethbridge Municipal District No. 25* (1955), 14 W.W.R. (N.S.) 577, at 593 (Alta. S.C.).

30. (1963), 63 C.L.L.C., para. 16,292 (O.L.R.B.).

operation on an industrial scale. As a result the employees were not classified as agricultural and were free to organize.

However, in Alberta the packing situation has been dealt with differently. In a 1967 ruling, the Alberta Board determined that employees who packaged and distributed vegetables grown by their employer and by other farmers were agricultural employees and, as such, did not come under the jurisdiction of the Board.³¹ On the basis that the right to free collective bargaining should not be unduly restricted the Ontario position is obviously preferable.

In the case of egg hatcheries, however, the Ontario Labour Board has taken the opposite stance to that taken in the case of packing operations. In the *Spruceleigh Farms* case,³² the O.L.R.B. ruled that all segments of chicken-raising operations, including not only breeding and raising duties, but also trucking and hatchery activities, were to be classified as agricultural work. The duties were not divisible into production and marketing facets, as was the case in *Ontario Tree Fruits*. Rather, all activities were held to be integral to the "production" of chickens.³³

Perhaps such inconsistencies result from failure of the deciding bodies to focus on the basic issues with which they are dealing. One systematic test suggested for determining whether any secondary production operation, such as packing, is to be treated as an agricultural operation takes four variables into account: whether the employer grows the produce; whether the crop is materially changed by the process; whether the employees involved do field work as well; and the size of the operations.³⁴

Another approach is to insist on the separation of activities even where an employee does both farm and non-farm work, but it is questionable whether this is possible or desirable. As the New Brunswick court pointed out in *Oulette v.F. W. Pirie Company*,³⁵ the confusion where an employee's status might change from hour to hour would make such an approach simply unworkable.

An important point is that the outcome of any of these exercises in classification depends on whether emphasis is placed on the

31. *Jake's Northern Pride Wholesale Ltd.*, Alta. Board of Industrial Relations, Dec. 8, 1967 (unpublished).

32. (1972), 73 C.L.L.C., para. 16,072 (O.L.R.B.).

33. *Id.*, at 16,236.

34. Rummel, Charles, *A Current Development in Farm Labor Law*. (1967-68) 19 *Hastings L.J.* 371.

35. *Supra*, note 20.

nature of the employee's activities or the nature of the employer's operations. Reliance on the nature of employee activities is exemplified by the decisions of the Ontario Labour Relations Board in the *Tree Fruits* and *Federal Farms* cases.³⁶ In spite of the fact that the employers involved were farmers the employees were classified as non-agricultural because they were not concerned with the actual cultivation of soil. In the *Spruceleigh* case,³⁷ on the other hand, drivers and hatchery workers were not involved in cultivation but were classified as agricultural because the Board emphasized the overall nature of the employer's operation. The emphasis chosen may thus be highly significant from the point of view of employees who seek the protection of social legislation, and from the point of view of the employer who is anxious to avoid the consequent costs. Deciding bodies should at least be aware of the distinction.

Inconsistency in the definition of agricultural employees may also arise from the increasing difficulty in drawing the line between commercial undertakings and farming operations, as the corporate farm becomes an increasingly common phenomenon. In Alberta this potential difficulty is evident on the face of the legislation. Section 2 of the Alberta Labour Act provides, in part: "2(2) This Act does not apply to. . . (d) employees employed as farm labourers and their employers while acting in the capacity of their employer;. . . (4) For the purposes of subsection (2), 'farm labourers' does not include employees employed in an undertaking which, in the opinion of the Board, is a commercial undertaking."³⁸ In the *Eastern Irrigation District* case before the Alberta Industrial Relations Board employees of the Eastern Irrigation District Board sought and were granted certification. The employer brought *certiorari* proceedings in the Alberta Supreme Court on the ground that the Labour Board had erred in finding the operations to be a commercial undertaking. The Court found for the employer, stating that the Irrigation Board was more akin to a municipality than a commercial undertaking, in that it was a non-profit organization whose primary purpose was the supply of water to surrounding farms. It also found that the Labour Board had erred in including office workers and tradesmen employed by the Irrigation Board in the agricultural category. Only the workers

36. *Supra*, note 28 and 30.

37. *Supra*, note 32.

38. Part II of the Prince Edward Island Labour Act, S.P.E.I. 1971, c. 35, pertaining to Employment Standards, contains a very similar provision.

responsible for cleaning and maintaining the ditches could be classified as farm labourers, since their primary function is related to farming. The others, however, “. . . perform a work that is only by reason of the employer related to farming, and is essentially a separate trade or calling”. The Labour Board appealed this decision, and the Appeal Court quashed it on the grounds that the definition of a commercial undertaking was a matter for the Board alone to decide and was not subject to judicial review.³⁹

The definitions of farm and farming have been flexible over the course of time. In *Hill v. Lethbridge Municipal District No. 25*, Egbert, J. stated:

. . . as in the case of many words, the word ‘farmer’ is a good exemplification of the fact that over the course of years the meaning of words may alter. . . . With the application of modern and recent scientific methods and systems to agriculture, it is hardly to be expected that such words as ‘farm’, ‘farmer’, ‘farming’, and ‘agriculture’ would bear exactly the same meanings as they bore half a century ago. . . these terms have, over the years, acquired a different and wider meaning than they had in the past. . . so that farming. . . now includes many ancillary and incidental activities that our ancestors never dreamed of.⁴⁰

Mr. Hill was classified as a farmer for assessment purposes, although he acted as a livestock dealer as well.

The New Brunswick court in *Oulette v. F. W. Pirie Co.*⁴¹ also recognized the changing nature of the term “farm labourer”, with technical innovations and changes in the nature of farm tasks. A farm foreman attempted to argue that he did not fall under the “farm labourer” exemption in the New Brunswick Workmen’s Compensation Act, because the term included only those farm employees involved in manual work. He claimed he was a foreman whose duties stretched beyond such tasks. The New Brunswick Supreme Court was quick to point out that the term “farm labourer” was created at a time when all farm work was manual and that the meaning contended for by the plaintiff would deprive it of real and practical effect in light of the extent to which mechanization had since touched farm tasks.

39. *Eastern Irrigation District, Brooks, Alberta v. B.I.R. Alberta et al.* (1970), 73 W.W.R. 466 (Alta. S.C., App. Div.).

40. *Supra*, note 29 at 588, 593.

41. *Supra*, note 20.

The *Hill* and *Oulette* cases might have some significance if, in fact, they indicated a willingness on the part of the courts to define “farming” and “agriculture” in light of contemporary conditions, but in neither does the result display the sensitivity which agricultural labourers seeking protection under employment standards legislation must hope for. A purposeful approach to the interpretation of the relevant terms could lead the court and boards to bring the employees of corporate “factory” farms under legislative protection. In fact, of course, in the trial court decision in *Eastern Irrigation*, in the *Hill* case and in the *Oulette* case the employer, not his employees, benefited from the broad approach which the court chose to take.

The only result of these few decisions of Canadian courts and labour tribunals on the scope of the exclusion of agriculture from employment legislation has been conflicting approaches on the issue of who is an agricultural employee. Although wider objectives must be sought by legislative reform, adjudicative bodies must recognize their power to extend the benefits of existing legislation to quasi-agricultural groups. A consistent policy should be formulated in decisions on the determination of who is a farm labourer.

III. Legislation: The Specifics of Vulnerability

1. Collective Bargaining Legislation

In five of the thirteen legislative jurisdictions in Canada agricultural labourers are either excluded completely from the coverage of labour relations legislation or there are special provisions with which they must comply to be eligible for certification. The statutes of British Columbia⁴² and Ontario⁴³ both exclude a person employed in agriculture from the application of their labour relations legislation. The Alberta Labour Act⁴⁴ excludes from its application “employees employed as farm labourers and their employers while acting in the capacity of their employer”. As has been mentioned, however, s. 2(4) states that the term “farm labourers” should not include employees in an undertaking that, in the Board’s opinion, is commercial. Thus, employees on a “commercial farm”, however the Board chooses to define that term, have the protection of the Act in their attempts to

42. Labour Code of British Columbia, S.B.C. 1973, (2nd session), c. 122, s. 1(1).

43. *Supra*, note 27 at s. 2(b).

44. S.A. 1973, c. 33, s. 2(2)(d).

organize. In New Brunswick and Quebec a minimum number of employees is stipulated before an application may be made for certification of an agricultural unit; five in New Brunswick⁴⁵ and three in Quebec.⁴⁶

In the other five provinces and both Territories agricultural workers are covered by labour relations legislation. Of these only Saskatchewan and P.E.I. are agricultural provinces, and both lack any strong labour movement. The Canada Labour Code⁴⁷ also permits agricultural unions, but it only covers employees involved in industries and undertakings over which the Federal government exercises legislative jurisdiction and thus encompasses only the workers within those limits.

Unions, traditionally, have been feared by farmers, who suggest that the perishable nature of farm products would give a farm workers' union inordinate bargaining leverage in the event of conflict. Farmers also argue that unions have no place in agriculture because of the close involvement of so many farm employees with the employer's family. Workers may live with the family, work with them and, indeed, problems may arise in determining whether members of the family are employees within a potential bargaining unit.⁴⁸

Organizational activity among agricultural workers has been minimal, even where no legislative bar exists.⁴⁹ Many agricultural workers are seasonal employees who travel significant distances to work for a short period of time. In this context the traditional procedures of organizing are cumbersome and time-consuming. The employees arrive at the job with few assets and, having already made an investment in getting there they are unwilling to run the risk of not being hired, or being terminated, for union activities.

45. Industrial Relations Act, R.S.N.B. 1973, c. 1-4, s. 1(5)(a).

46. Labour Code, R.S.Q. 1964, c. 141, s. 20, as am. by S.Q. 1969, c. 47, s. 9.

47. R.S.C. 1970, c. L-1.

48. Koziara, *Collective Bargaining on the Farm* June 1968, 91 Monthly Labor Rev. 3. There some slight evidence that, as an institution, the Canadian Federation of Agriculture is opposed, although not actively, to the unionization of farm workers while the National Farmers' Union, in principle, supports such a move. Interviews to this effect with officials of the Ontario branches of the two organizations are reported in Green, *A Report on the Desirability of Extending the Coverage of the Labour Relations Acts to Agriculture Workers* (unpublished student paper, Osgoode Hall at York University).

49. For example, the Nova Scotia Labour Relations Board has issued only one certification order for a unit of employees who might be considered "agricultural": *Avon Valley and Teamsters Union, Local 927*, L.R.B. No. 1450, Dec. 1969.

Even if they can be organized they are ill-equipped to endure a strike, and they are unlikely to risk one during their key employment period.⁵⁰ If they do confront the employer their efforts will probably be ineffective because of their transitory relationship with any one employer. Most seasonal workers arrive to work, make money and leave as soon as possible. They are unfamiliar with unions and unwilling to accept them for the long-term potential. On the other hand, the 40,000 or so year-round farm labourers in Canada appear to be too dispersed to be molded into an effective union.

The Privy Council Office's Task Force on Canadian Industrial Relations, in its 1968 Report, expressed concern over the lack of any effective union presence in agriculture. It is further indicative of the state of affairs that the Task Force felt unable to formulate any strong recommendations in the area as no briefs on the topic had been received.⁵¹ Despite the lack of apparent interest, it would seem evident though that unions could be assisted to greater effectiveness in agriculture by special treatment under labour relations legislation, such as is accorded to construction trade unions for instance.⁵² Because of the transitory nature of much agricultural employment, ordinary certification procedures could be condensed in the case of an application for certification of a unit of seasonal employees, or one combining seasonal and permanent employees. The timing of votes could be arranged to prevent an employer from delaying until a temporary work force was disbanded.⁵³

In agricultural-related industries such as packing, where there are work forces of significant size, organization is not uncommon and would perhaps spread to the larger farms, dairy farms for instance, if farm worker unions were granted the protection of labour relations legislation. The increase in corporate farming, bringing with it a greater demand for skilled labour to run machinery, will also serve to increase the bargaining power of the skilled agricultural labourer who may well demand the right to unionize.

50. *Alberta's Sugar Beet Workers* January (1971), 16 Canadian Labour 15; Koziara, *Collective Bargaining on the Farm* (1968), 91 Monthly Labor Rev. 3.

51. Green, *A Report on the Desirability of Extending the Coverage of the Labour Relations Acts to Agricultural Workers* (unpublished student paper, Osgoode Hall at York University). The author quotes as authority for this fact private communication with Dr. John Crispo, a member of the Task Force.

52. See, for example, The Labour Relations Act, R.S.O. 1970, c. 232, ss. 106-124; Trade Union Act, S.N.S. 1972, c. 19, ss. 89-103.

53. Cohen, *La Huelga! Delano and After*, June 1968, 91 Monthly Labor Rev. 13.

Government assisted labour pools may provide a more compatible environment for unions as well.

If unions are to have a future in Canadian agriculture they themselves will have to depart from the traditional mold. In the United States the American National Farm Workers Association has taken an approach summarized in the term of "community unionism". The phrase, as it is used there, carries two connotations. First, it signifies that because the problems of farm workers extend beyond conditions of employment to their living standards and basic welfare on the farms, a union representing them must aim at removing ills that affect its members well beyond working hours. It must be concerned with the workers' total community. Secondly, to be successful an agricultural union must depend upon community support outside the industry. Farm workers' crippling lack of financial resources and natural solidarity has been overcome to some degree in the United States by soliciting wide community support for the cause of the seasonal migratory farm labourer. Consumer boycotts, public marches and peaceful secondary picketing have proved far more successful than traditional union procedures and weapons.⁵⁴

Even such approaches will probably be unsuccessful among seasonal farm workers in Canada, a relatively small proportion of whom, compared with their American counterparts, are really dependent upon farming for their livelihood. In the words of one writer, "Cesar Chavez would be out of place here [in the Alberta sugar beets' field], an unwanted oddity".⁵⁵ Whatever the chances of success for unions, there is no apparent justification for the exclusion of farm labourers from the scope of Canadian labour relations legislation.

2. *Minimum Wages, Hours of Work, Overtime and Vacations with Pay*

Newfoundland, the Federal jurisdiction and the Yukon and Northwest Territories alone include agricultural workers in their minimum wage legislation. In the rest of Canada, agricultural

54. *Id.*

55. Airhart, *The Beets of Wrath*, MacLean's, May, 1973. In the *Edmonton Journal*, Sept. 20, 1974 (and, no doubt, in other daily papers) the Company of Young Canadians was reported to be attempting to organize a union of migrant farm workers in Ontario.

employees are excluded from legislation entitling them to a minimum wage.⁵⁶ Only Federal⁵⁷ and Northwest Territories legislation affords agricultural workers coverage under hours and overtime provisions and even these do not afford extensive protection. The Labour Standards Ordinance of the Northwest Territories allows the employer to apply to a Labour Standards Officer if he wishes to increase the maximum working hours allowed.⁵⁸ The Canada Labour Code,⁵⁹ as mentioned previously, applies only to industries and undertakings under Federal legislative jurisdiction, and thus to virtually no farms. Furthermore, under s. 37 of the Code the employer may apply to extend minimum hours in "exceptional circumstances". In all other jurisdictions, agricultural workers are excluded from legislation regarding hours of work and overtime.

Again, only the Canada Labour Code, the Ordinances of the Territories and the Newfoundland legislation bring farm workers within the scope of their vacation with pay provisions. The relevant legislation in the Northwest Territories and the general Federal

56. Alberta Labour Act, 1973, S.A. 1973, c. 33, s. 2(2)(d); Minimum Wage Act, R.S.B.C. 1960, c. 230, s. 3(2); The Employment Standards Act, R.S.M. 1970, c. E-110, s. 2(1)(g)(ii); Minimum Wage Act, R.S.N.B. 1973, c.M.-13, s. 1; Labour Standards Code, S.N.S. 1972, c. 10, s. 5(a), and Regulations made under the Labour Standards Code, R. & R., S.N.S. 1973, p. 320, Reg. 2(3)(iv); The Employment Standards Act, 1974, S.O. 1974, c. 112, s. 65 (1)(d) and General Regulation pursuant to the Employment Standards Act, R.R.O. 1970, Reg. 244, s. 6; Prince Edward Island Labour Act, R.S.P.E.I. 1971, c. 35, s. 49(2); Minimum Wage Act, R.S.Q. 1964, c. 144, s. 2(a); The Labour Standards Act, 1969, S.S. 1969, c. 24, s. 4(2)(c).

57. In Alberta, Manitoba, New Brunswick, Prince Edward Island and Saskatchewan the exclusion of farm labourers from coverage under whatever hours and overtime legislation the provinces have is effected by their exclusion from coverage under the general labour or employment standards statute of the particular province by the sections cited in note 56, *supra*. See also Hours of Work Act, R.S.B.C. 1960, c. 182, s. 3(1), 2, definition of "industrial undertaking" and "Schedule"; Hours of Work Act, R.S.Q. 1941, c. 165, s. 2. In Newfoundland, Nova Scotia and Ontario farm labourers are excluded by Regulation, and in the Yukon they are excluded by the Labour Standards Ordinance; The Minimum Wage Act, R.S.N. 1970, No. 238, s. 6(d) and (e) and the Minimum Wage Order, 1974, Newfoundland Reg. 186/73, s. 3(2). The Labour Standards Code, S.N.S. 1972, c. 10, s. 5(a) and Regulations made under the Labour Standards Code, R. & R., S.N.S. 1973, p. 320, Reg. 2(3)(v); The Employment Standards Act, 1974, S.O. 1974, c. 112, s. 65(1)(d) and General Regulation Pursuant to The Employment Standards Act, R.R.O. 1970, Reg. 244, s. 4(i), as am. by O. Reg. 91/71, s. 1; R.O.Y.T.(1973), c. L-1, s. 5(4)(e).

58. Labour Standards Ordinance, O.N.W.T. 1967 (2nd Sess.), c. 4, s. 11(1).

59. R.S.C. 1970, c. L-1.

jurisdiction is the same as that for hours and overtime.⁶⁰ In Newfoundland it is the Annual Vacations with Pay Act;⁶¹ in the Yukon it is the Labour Standards Ordinance.⁶² In all other Canadian jurisdictions vacation provisions are not applicable to agricultural employees.⁶³

In this agriculturally rich nation it is the jurisdictions with the least extensive farming industry that give their farm employees the most extensive benefits. Perhaps their farmers are so few in number that they lack a strong lobby, or it may be that they are not involved in inter-provincial competitive markets and thus do not fear the added costs of such measures in terms of their competitive position.

3. *Protection of Pay*

Pay protection legislation, under which employees are assisted in collecting, or at least provided with cheap and expeditious means of collecting, unpaid wages and vacation pay has only recently become general in Canada. Agricultural workers have been afforded some form of wage protection in several provinces and in the Federal jurisdiction. The Alberta Master and Servants Act, 1970,⁶⁴ under which a magistrate may order the payment of wages, applies to every contract of hire or personal service, including, presumably, agricultural contracts. The Canada Labour Code and the Ordinances of the Territories contain similar provisions, with no exception being made in the case of farm workers.⁶⁵ The Wages Recovery Act of Manitoba covers agricultural workers with specific reference to crops, allowing a warrant of distress against them to the value of

60. *Supra*, notes 58 and 59.

61. R.S.N. 1970, No. 9.

62. R.D.Y.T. 1973, c. L-1.

63. In Alberta, Prince Edward Island, Quebec and Saskatchewan the exclusion of farm labourers from the provision for annual vacations with pay is effected by their exclusion from coverage under the general labour or employment standards statute of the province by the sections cited in note 56, *supra*. See also Annual and General Holidays Act, R.S.B.C. 1960, c. 11, s. 3(1)(a); The Vacations with Pay Act, R.S.M. 1970, c. V-20, s. 3(1)(b); Vacation Pay Act, R.S.N.B. 1973 c.V-1, s. 1(b). In Nova Scotia and Ontario farm labourers are excluded by Regulation: Labour Standards Code, S.N.S. 1972, c. 10, s. 5(a) and Regulations made under the Labour Standards Code, R. & R., S.N.S. 1973, p. 320, Reg. 2(3)(ii); The Employment Standards Act, 1974, S.O. 1974, c. 112, s. 65(1)(d), and General Regulation Pursuant to The Employment Standards Act 1974, R.R.O. 1970, Reg. 244, s. 18(a).

64. R.S.A. 1970, c. 228, s. 5(2).

65. Canada Labour Code, R.S.C. 1970, c. L-1, s. 71; Wages Recovery Ordinance, (R.O.Y.T. 1973, c. W-1), s. 8.

\$150.⁶⁶ In Newfoundland the Minimum Wages Act⁶⁷ and the Industrial Standards Act,⁶⁸ which on its face applies to workers and work of any nature whatsoever, both afford some protection to the farm employee. Where a magistrate convicts for failure to pay the prescribed wage he may also order that any amount owing be paid, and his order has the same effect as a civil judgment. The wage protection sections of the Nova Scotia Labour Standards Code, which provide for public assistance in the recovery of unpaid wages, apply to farm workers because the Regulation exempting farm workers does not include exemption from the pay protection sections.⁶⁹ However, since the same Regulation excludes farmers from compulsory record keeping it is questionable how effective this protection is.⁷⁰ The Ontario Employment Standards Act, 1974, which provides somewhat similar protection, also extends to agricultural employment in this respect with no exemption from the general record keeping obligations under the Act.⁷¹

Prince Edward Island and Saskatchewan exclude farm workers from gaining administrative assistance in wage recovery under pay protection provisions of the general labour standards legislation by virtue of the general excluding provisions of those statutes.⁷² In Saskatchewan, however, farm workers appear to have access to the expeditious means of wage recovery by magistrate's order under the Wages Recovery Act.⁷³

In British Columbia the Payments of Wages Act sets up a rather elaborate scheme for public recovery of unpaid wages but farm labourers are expressly excluded.⁷⁴ However, British Columbia has

66. R.S.M. 1970, c. W-10, s. 8(4).

67. R.S.N. 1970, No. 238, s. 12(2).

68. R.S.N. 1970, No 170, s. 17(2).

69. The Labour Standards Code, S.N.S. 1972, c. 10, s. 5(a) and Regulations made under the Labour Standards Code, R. & R., S.N.S.1973, p. 320 Reg. 2(3).

70. *Id.* at Reg. 2(3)(i).

71. S.O. 1974, c. 112, ss. 47-50, 59(2). S. 65(1)(d) of the Act and General Regulations Pursuant to The Employment Standards Act 1974, R.R.O. 1970, Reg. 244, excludes no employees from the protection of ss. 47-50. The employers of farm labourers are not among those excluded by s. 3 of the General Regulation from the obligation to keep records.

72. Prince Edward Island Labour Act, S.P.E.I. 1971, c. 35, s. 49(2); The Labour Standards Act, 1969, S.S. 1969, c. 24, s. 4(2)(c).

73. R.S.S. 1965, c. 296, s. 7(1)(b).

74. S.B.C. 1962, c. 45, s. 2A(1)(a). as am, by S.B.C. 1970, c. 35, s. 2; 1973 (1st sess.), c. 68, s. 4.

also enacted a Deceived Workmen Act ⁷⁵ which makes it unlawful for any employer to induce a worker to enter his employ by false pretenses, specifically by misleading him with regard to the kind of work to be done, the salary, or the conditions of employment, including sanitation. The wronged employee is given an express right of action for damages sustained as a consequence of reliance on the wrong information. Agricultural labourers are not excluded from the Act's coverage.

The pay protection area is unique in that it is one where special legislation has been enacted to ensure that farm workers or, more accurately, certain categories of farm workers, have some special security for the payment of wages. Alberta, British Columbia, and Saskatchewan all have Threshers Liens Acts,⁷⁶ and Alberta has a separate Harvesting Liens Act⁷⁷ as well. Employees in the categories covered by these statutes are granted a lien or mortgage note against the crops on which they work, to the amount of the wages owed. Quebec and New Brunswick have no special wage recovery legislation, although it may be noted that Article 1669 of the Quebec Civil Code provides: "In any action for wages by domestics or farm servants, the Master may, in the absence of written proof, offer his oath as to the conditions of the engagement and as to the fact of payment, accompanied by a detailed statement; but such oath may be refuted in the same manner as any other testimony."

The main objection that farmers put forward to coverage by pay protection legislation arises from their natural antithesis to the bookkeeping which such enactments necessitate. Protection by any labour standards legislation, it is said, would require that valuable time be spent keeping records, which is a difficult task in an industry characterized by uncertain operations and employers who lack such skills. Moreover, since the industry is characterized by casual employees and a high turnover farmers apparently feel that they are justified in withholding some portion of their labourers' wages to induce them to remain on the job until it is completed.⁷⁸

The response must be that regular payment of full wages is important to farm workers, particularly to migrants who often travel

75. R.S.B.C. 1960, c. 96.

76. R.S.A. 1970, c. 363; R.S.B.C. 1960, c. 379; R.S.S. 1965, c. 281.

77. R.S.A. 1970, c. 165.

78. Hon. Robert Andras, Minister of Manpower and Immigration: statement made Sept. 27, 1973, Ottawa.

with few assets and once they find work depend on prompt payment to buy necessities such as food. Our law has never allowed forced performance of contracts for personal service and that is what the withholding of wages may amount to, particularly in an employment relationship as casual as that between farmers and their temporary employees. Nor should agricultural employers be justified in dispensing with employment records. Without records enforcement is virtually impossible and the way is open for cheating unprotected workers. Complaints about an unmanageable increase in administrative duties and bookkeeping should carry little weight when the farm is run as a business, requiring careful bookkeeping for tax and subsidization purposes, often by management trained to some extent in administration.

4. *Employment of Children*

The Canada Labour Code and the legislation of every province contain provisions relating to the employment of children.⁷⁹ Prohibitions on the employment of persons younger than a specified age, limitation on hours and other forms of protection may be afforded by school-leaving legislation, child welfare laws, safety acts, acts governing particular industries, the general labour code of the province or by a separate child labour law. In no case where the legislation is applicable to a specified occupation, trade or industry is agricultural employment included, and in jurisdictions where there is a general prohibition or limitation on the employment of children farm work is usually excluded.⁸⁰ There is no such exclusion under the Canada Labour Code, but neither is there likely to be any situation in which it could apply. Nova Scotia's Labour Standards Code is alone among the general labour statutes which contain child labour provisions in applying those provisions to agriculture.⁸¹ However, it is not doubt of particular interest in agricultural

79. See, for example, Control of Employment of Children Act, R.S.B.C. 1960, c. 75, s. 2 and "Schedule"; The Minimum Age of Employment Act, R.S.P.E.I. 1951, c. 97, s. 1(1); Industrial and Commercial Establishments Act, R.S.Q. 1964, c. 150, ss. 2(3) and 3.

80. The Atlantic Labour Act 1973, S.A. 1973, c. 33, s. 2(2)(d); The Employment Standards Act, R.S.M. 1970, c. E-110, s. 2(1)(g)(ii); The Industrial Safety Act, 1971, S.O. 1971 (1st sess.), c. 43, s. 2(e).

81. S.N.S. 1972, c. 10, s. 65 and see s. 5(a) and Regulations made under the Labour Standards Code, R. & R., S.N.S. 1973, p. 320, Reg. 2(3).

employment that the Nova Scotia child labour provisions do not apply to employment of children by their parents in any context.⁸²

The New Brunswick Industrial Safety Act, which provides that no person under sixteen shall be employed "in a place of employment" without written authorization from the Minister of Labour is unique amongst such statutes in Canada in that it does appear to apply to farm work.⁸³ The Newfoundland Employment of Children Act also appears, on the face of it, to apply to agricultural labour, but has not, as yet, been proclaimed in force.⁸⁴

Five provinces have child welfare legislation which is for the most part inapplicable to employment in agriculture since it is generally concerned with what has been traditionally been regarded as "undesirable" employment for children, as entertainers, street vendors, pinboys and the like. Newfoundland, Saskatchewan and Manitoba welfare statutes do contain provisions of general application prohibiting employment of children at night. The fact remains that such legislation has no real impact on the employment of children in farm work.⁸⁵

The only significant regulation of the work of children on farms in Canada is achieved by the school attendance laws which make it compulsory for children between specified ages to attend school. The statutory school-leaving age is sixteen, except in British Columbia, New Brunswick, Newfoundland, Prince Edward Island and Quebec where it is fifteen. There are minor exceptions not important here, but it is of great significance that in Manitoba and Nova Scotia children over twelve, and in New Brunswick and Quebec children of any age, can be taken out of school for a period of four weeks (in the case of Manitoba) or six weeks (under the Nova Scotia and Quebec legislation) because they are required specifically for farm work. In Newfoundland, Prince Edward Island and Saskatchewan the children may simply be taken out of school if their services are needed for the maintenance of themselves or others, although in the case of Saskatchewan Ministerial approval is required.⁸⁶

82. *Id.*, s. 65(4).

83. Industrial Safety Act, R.S.N.B. 1973, C. I-5, ss. 2(1), 6.

84. The Employment of Children Act, R.S.N. 1970, No. 112.

85. Labour Canada, Legislative Research Branch, Labour Standards in Canada (December, 1973), pp. 8-10.

86. *Id.* at 3.

Should a compulsory minimum wage ever be introduced in agriculture, child workers would doubtless be the first to be dispensed with due to their low efficiency. However, until that time, they are one of the cheapest sources of labour for farmers, and their place in agriculture is established,⁸⁷ to the point of winning government approval. Agriculture Minister Eugene Whelan has been quoted as saying: "You can just imagine what it would cost for food in Canada without them; that's always been a part of farming".⁸⁸

The exploitation of child labour should no longer be justified by a twisted version of the work ethic. The benefits of scant pay earned by hard hours of physical labour are minimal to a child, compared with the opportunities of health and education unimpaired by heavy work for long hours. There is a vast difference between permitting children, who have reached the age at which they may legally be employed, to work for pocket money during their holidays and allowing children of any age to be put in a position where they are forced to work as adults. There is no reason why children working on farms should be excluded from the protection afforded to children working in other contexts.

5. *Workmen's Compensation*

Mandatory workmen's compensation coverage for Canadian agricultural employees was first provided for in Ontario in 1966,⁸⁹ fifty-one years after such legislation was enacted to cover other industries. On July 1, 1973 Newfoundland joined Ontario in providing compulsory coverage for farm workers⁹⁰ The legislation of the other provinces and of the Northwest Territories, uniformly excludes farm workers from compulsory coverage,⁹¹ but there are provisions by which they may be brought under coverage by

87. Note, *The Farm Worker; His Need for Legislation* (1970), 22 Maine Law Rev. 213, at p. 233.

88. *Time*, Sept. 3, 1973.

89. Workmen's Compensation Act, R.S.O., 1970, c. 505.

90. T. J. Brown, Workmen's Compensation Board, St. John's, personal communication, November, 1973.

91. Workmen's Compensation Act: R.S.A. 1970, c. 397, s. 94(d); R.S.M. 1970, c.W.-200, s. 3(2); R.S.N.B. (1973, c.W.-13) s. 2(3)(d); R.S.N.S. 1967, c. 343, s. 2(2)(e); R.S.P.E.I. 1951, c. 178, s. 3(1)(d); The Workmen's Compensation (Accident Fund) Act, R.S.S. 1965, c. 284, s. 7(c); Workmen's Compensation Ordinance, O.N.W.T. 1967 (1st sess.) c. 22, s. 4(1).

voluntary employer application (except in Quebec where farming is totally excluded).⁹² In British Columbia, Saskatchewan and the Northwest Territories farm workers may be brought under the Act by exercise of a general declaratory power of the Workmen's Compensation Board.⁹³ In practice, the Boards of British Columbia, Alberta, Manitoba and Prince Edward Island almost automatically grant coverage upon employer application, but very few employers apply for such coverage.

There is no Federal workmen's compensation legislation except the Government Employees' Compensation Act which applies to all civil servants, including those working for the Federal Department of Agriculture on experimental farms.⁹⁴

Application of workmen's compensation legislation to farm workers has been opposed by farmers as an unnecessary additional expense. They argue that the scheme of workmen's compensation is unduly onerous in its impact on farmers for two reasons. First the claim is that the low level of hazards in agriculture does not justify regular compulsory contributions to a collective fund. Second, they claim, with traditional paternalism, that when an employee is injured on the farm he is properly cared for by the employer as if he were a member of the family.⁹⁵

Farmers also argue that in accepting the job the farm worker accepts the risks involved, and that he will perform better if he is held responsible for injuries occurring as a result of how he conducts his work. This is an archaic argument,⁹⁶ common to every industry before the introduction of general compensation legislation, but it seems to have survived in farming.

The first two arguments are not much more serious. Agriculture can no longer be considered to have a low hazard level. The increased use of chemicals and equipment have elevated it to the rank of third most hazardous industry in the United States,⁹⁷ and as

92. R.S.Q. 1964, c. 159, s. 113. Workmen's Compensation Ordinance, R.O.Y.T. 1973 c.W-5, s. 3(1) appears to cover farm workers.

93. S.B.C. 1968, c. 59, s. 4(1)(d) R.S.S. 1965, c. 284, s. 8; O.N.W.T. 1967 (1st sess.), c. 22, s. 4(2).

94. R.S.C. 1970, c. G-8. There is also the Merchant Seamen Compensation Act, R.S.C. 1970, c. M-11.

95. Davis, *Death of a Hired Man — Agricultural Employees and Workmen's Compensation in the North Central States* (1968), 13 S. Dak. Law Rev. 1.

96. Fitzgerald, *The Status of Farm Labour in Saskatchewan*, M. A. Thesis (Econ.), McMaster University, 1926 (unpublished).

97. Note, *The Farm Worker: His Need for Legislation* (1970), 22 Maine Law Rev.

new methods are adopted the same increase can be detected in Canada. For example, the Annual Reports of the Federal Department of Labour, 1971-72, reporting on claims under the Government Employees Compensation Act,⁹⁸ state that in 1971, 786 injuries were reported from the Department of Agriculture, 313 of which were classified as disabling. This represents 8.16 injuries per hundred employees. In 1972, 653 injuries were reported, with 251 resulting in disablement; a ratio of 7.27 injuries per hundred agricultural employees. The Chairman of the Ontario Board has reported that “. . . a fair number of serious farm accidents. . . occur every year”.⁹⁹

Such high rates of disablement are particularly serious in an occupation characterized by workers with limited ability to do alternate work and who can ill afford to bear the cost of their injuries. Traditional paternalism cannot be relied upon as farming operations become less personal with increased size. In any case, reliance on the charity of the employer is not the kind of personal security generally available in the 1970's. Serious and permanent injuries probably cannot be adequately compensated for by even the most kindly farmer-employers. Moreover, the fact that some farmers have applied for voluntary coverage seems to indicate that workmen's compensation *can* be provided to farm labourers without undue cost to their employer.

In the three Maritime provinces and Saskatchewan¹⁰⁰ workmen's compensation legislation is particularly shocking in its treatment of farm labourers. It leaves them exposed to the two most invidious doctrines visited upon working men by the 19th Century common law courts: the application of the doctrine of *volenti non fit injuria* in the situation where a workman continues to work although he knows his employer has not provided a safe system of work, and the doctrine of common employment under which an employer is not vicariously liable to his employees for injuries caused by the negligence of their fellow workers. These doctrines are universally

213, at 218. See also Koziara, *Collective Bargaining on the Farm* (1968), 91 Monthly Lab.

98. R.S.C. 1970, c. G-8.

99. Michael Starr, Acting Chairman, Workmen's Compensation Board of Ontario, personal communication, Nov. 2, 1973.

100. Workmen's Compensation Act, R.S.N.B., 1973, C. W-13; Workmen's Compensation Act, R.S.N.S., 1967, C. 343; The Workmen's Compensation Act, R.S.P.E.I. 1951, c. 178, and see note 105 *infra*.

condemned by text writers, frequently as examples of the intrusion of class bias into the development of the common law. This condemnation is usually found in an historical footnote because the textbook assumption is that these doctrines have been legislated out of existence! And so they have been, except in New Brunswick, Nova Scotia, Prince Edward Island and Saskatchewan in the case of farm labourers.¹⁰¹

The doctrines of *volenti* and common employment are of no concern to employees covered in the ordinary way by the compensation provisions of workmen's compensation legislation because they have no private right of action anyway for injuries suffered on the job, the right to claim compensation from the public fund by application to their Workmen's Compensation Board having been substituted for any such right. In this respect, as well as in all other respects under workmen's compensation legislation, farm labourers in Ontario and Newfoundland are treated no differently from any other employees. In British Columbia and Manitoba, on the other hand, farm labourers are not covered and do not have access to the public fund¹⁰² but at least they, like the other employees excluded from the advantages of the public compensation fund, are permitted to bring a private damage action for injuries suffered on a job without having to overcome the twin obstacles of the common law doctrines of *volenti* and common employment. Part II of the British Columbia Act, for instance, expressly provides that workmen not covered by the major part of the Act shall have an action against their employers for injury caused by an unsafe system of work and, specifically, in section 86(4) that "A workman shall not, by reason only of his continuing in the employment of the employer with knowledge of the defect and negligence which caused his injury, be deemed to have voluntarily incurred the risk of injury."

101. Perhaps also in Alberta where the Workmen's Compensation Act, R.S.A. 1970, c. 397, makes no provision with regard to the application of the doctrines of common employment and *volenti* to persons not covered by the Act. In the provinces where farm labourers are not protected from the applications of the doctrines domestic servants are similarly unprotected. An unproclaimed amendment to the New Brunswick Workmen's Compensation Act, R.S.N.B. 1952, c. 255, in S.N.B. 1955, c. 81, s. 7, excludes the application of the doctrines of *volenti* and common employment to farm labourers but leaves them applicable to domestic or menial servants and fishermen.

102. S.B.C. 1968, c. 59; R.S.M. 1970, c. W-200.

In the same vein, section 97 specifically renders the doctrine of common employment inapplicable to employees not covered by Part I of the Act:

A workman shall be deemed not to have undertaken the risks due to the negligence of his fellow-workman, and contributory negligence on the part of a workman shall not be a bar to recovery by him or by any person entitled to damages under the *Families' Compensation Act* in an action for recovery of damages for an injury sustained by or causing the death of the workman while in the service of his employer for which the employer would otherwise have been liable.

Part II of the Manitoba Workmen's Compensation Act contains precisely similar language.¹⁰³ Indeed, only the statutes of Alberta and Quebec lack any such provision. The shocking thing about the workmen's compensation laws in New Brunswick, Nova Scotia and Prince Edward Island is that Part II of the Workmen's Compensation Act of each of those provinces is in similar terms to that of British Columbia, except that each provides, to quote the Nova Scotia Act: "s. 164. This Part shall not apply to farm labourers or domestic or menial servants or their employers."¹⁰⁴ The Saskatchewan Workmen's Compensation Act¹⁰⁵ is even more specific. There could be no more eloquent testimony to the power of

103. R.S.M. 1970, c. W-200, ss. 94(4) and 95.

104. R.S.N.S. 1967, c. 343; and see R.S.N.B. 1973, c. W-13, s. 86, and R.S.P.E.I. 1951, c. 178, s. 86.

105. The pattern of legislation in Saskatchewan is somewhat different from that of other provinces. Saskatchewan has two statutes, the Workmen's Compensation Act, R.S.S. 1965, c. 283, which expressly creates individual employer liability and (by section 6) excludes the doctrines of common employment and *volenti*, and the Workmen's Compensation (Accident Fund) Act, R.S.S. 1965, c. 284, which sets up the public fund system to which employers within the scope of the Act may be admitted upon application. In painstaking detail the first of these Acts provides:

Section 15

- (1) Notwithstanding anything hereinbefore, this Act does not apply to the employment of agriculture nor to any work performed or machinery used on or about a farm or homestead for farm purposes or for the purpose of improving such farm or homestead, and, for greater certainty, but not so as to restrict in any degree the generality of the foregoing words of this Section, this Act does not apply to any of the following employments on a farm:
 - (a) threshing, cleaning, crushing, grinding or otherwise treating grain, sawing wood, posts, lumber or other wood material or otherwise treating the same, pressing hay by any kind of machinery or motive power whether the machinery or motive power is portable or stationary and whether the same is owned and operated by the farmer or farmers for

the farm lobby in an agricultural province! But in a day when virtually all other workers are compensated for any injury out of a public fund, how in the name of civilization can this special vulnerability of the farm labourer in New Brunswick, Nova Scotia, Prince Edward Island and Saskatchewan be justified?

6. *Health and Safety Legislation*

The Industrial Safety Acts of Nova Scotia and Ontario and the Employment Safety Act of Manitoba expressly exclude farming operations from their application.¹⁰⁶ The Alberta Labour Act,¹⁰⁷ s. 2(2)(d) excludes agricultural workers from its safety provisions, unless they are employed in a commercial undertaking, as has been mentioned above. In British Columbia, Saskatchewan and the Territories, industrial safety provisions are enacted for various industries separately, and there are no statutes dealing with safety in agriculture. In the Quebec Industrial and Commercial Establishment Act, 1964,¹⁰⁸ there is no express agricultural exclusion but farm workers probably will not fall within the commercial or industrial definitions of the establishments covered.

The increasing hazard level in agriculture which makes imperative the inclusion of agricultural labour under workmen's compensation legislation demands protection under industrial safety legislation as well.

whose purpose the same is being used or by any other farmer or other person for gain, profit or reward;

- (b) the construction, repair or demolition in any farm building, windmill, dairy or other structure.
- (2) The word "factory" as defined in this Act does not include any building, workshop, place or mill on a farm used for the purposes of such farm.
- (3) The words "mine" or "quarry" as defined in this Act do not include a mine or quarry on a farm used for the purposes only of such farm.
- (4) "Engineering work" as defined in this Act does not include any ditch, drain, well or other excavation on a farm being constructed or repaired for the purposes of such farm or any adjoining farm or farms.
- (5) Notwithstanding anything in this Section, a person undertaking the construction, repair or demolition of a building upon a farm under contract with the owner or occupant of the farm shall be liable to the worker when employed by him for the compensation for injuries provided by this Act.

106. R.S.N.S. 1967, c. 141, s. 2(d); R.S.O. 1970, c. 220, s. 5(e); R.S.M. 1970, c. E-90, s. 3.

107. S.A. 1973, c. 33.

108. The Industrial and Commercial Establishments Act, R.S.Q. 1964, c. 150.

The primary sources of health standards are the Municipal Acts and the Public Health Acts of each province. Agricultural employees are not mentioned in the health legislation of any province. These statutes, which are common to all Canadian jurisdictions, serve such a broad range of purposes that a detailed consideration would be out of place here. A brief look at the provisions relevant to agricultural employment in the Nova Scotia versions of these two statutes will give an indication of the role of such legislation.

The Municipal Act¹⁰⁹ includes sanitation provisions under the section which grants powers to make by-laws. Section 191(16) gives municipal councils general power to make by-laws to preserve health and peace in the community. More specific by-laws powers are granted in section 191(22) — cleaning houses and buildings; section 191(93) — building regulations; and section 191(95) — minimum standards of sanitation. Section 191(96) provides for building inspection. Section 204 states that no one is to permit his property to be in a dangerous, unsightly or unhealthy condition, and procedure for enforcement and penalties are included.

The Public Health Act¹¹⁰ is more specific in its demands on owners of accommodation. Sections 44 and 45 require the owner of every house to ensure that there is available a supply of safe potable water and sanitary toilet facilities, and under section 34 the Municipal Board of Health can make an order to vacate an unfit dwelling. The landlord must then forego rent until the unsatisfactory conditions are removed. Section 47 provides for abatement of nuisance conditions upon order of a magistrate or the medical health officer for a municipality. Anything injurious to health or offensive to the senses may constitute a nuisance for these purposes. Furthermore, the Provincial Minister of Health has a general power under section 11(1)(n) to make regulations to prevent unsanitary and overcrowded dwellings. The Nova Scotia Act also contains one employment-oriented provision. Section 36 provides that: "No person shall establish, conduct or maintain a camp or boarding house for accommodation of his employees without a permit in writing from the medical health officer of the municipality in which the camp or boarding house is situate. Such permit shall be issued only after an inspection and may be revoked at any time by the

109. R.S.N.S. 1967, c. 192.

110. R.S.N.S. 1967, c. 247.

medical health officer if he deems that the sanitary conditions are unsatisfactory.”

It is trite to say that provisions such as this are only as effective as their enforcement procedures and personnel. That comment, however, is given force in this context by the Canada Department of Manpower and Immigration Report on “The Seasonal Farm Labour Situation in Southwestern Ontario”, which precipitated the media excitement in the summer of 1973,¹¹¹ as well as by an extensive American literature on the non-enforcement of health and safety regulations affecting agricultural workers.¹¹²

Several recent American cases raise for consideration the possibility of private rights of action based on breach of this sort of statutory duty.¹¹³ In Canadian law whether or not a breach of statute will entitle an individual injured thereby to a private right of action has traditionally been held to depend on whether the legislature may be supposed to have intended to create such a private right.¹¹⁴ The policy decision which this formula forces the court to make has, in the past, usually been based on the court’s assessment of the adequacy of the enforcement mechanisms explicitly provided by the statute. Since Canadian public health legislation commonly provides rather elaborate administrative mechanisms for enforcement and a fine for breach the chance of establishing private right of action is probably slim. Under the various provincial equivalents of the Nova Scotia Municipal Act, however, the prospects may be brighter. It has long been established that there is a private right of action for breach of municipal by-laws,¹¹⁵ at least where the action is brought by a ratepayer.

111. *Supra*, note 1 and accompanying text.

112. See, for example, Ynostronza, *The Farm Worker: The Beginning of a New Awareness* (1970-71), 20 Amer. U. Law. Rev. 39. Note, *The Farm Worker: His Need for Legislation* (1970) 22 Maine Law Rev. 213 and Hoffman and Seltzer, *Migrant Farm Labor in Upstate New York* (1968), 4 Col. J. Law and Soc. Probs. 1.

113. *Gomez v. Florida State Employment Service* (1969), 417 F. (2d) 569, and see comment by Davis in (1971) 22 Mercer Law Rev. 797. Ynostronza, *The Farm Worker: The Beginning of a New Awareness* (1970-71), 20 Amer. U. Law Rev. 39. cites several other cases filed in California and see Note (1972), 44 U. of Colo. L. Rev. 237.

114. *Orpen v. Roberts*, [1925] S.C.R. 364 at 370; quoting *Phillips v. Britannia Hygienic Laundry Co.*, [1923] 2 K.B. 832 (C.A.) at 841. Different rationales for holding that a statute grants a private right of action are surveyed in Fricke, *The Judicial Nature of the Action upon the Statute* (1960), 76 L.Q.R. 240.

115. *MacIlreith v. Hart* (1908), 39 S.C.R. 657.

The practicalities obviously preclude effective enforcement of health legislation through the suits of individual farm labourers. However, public concern, such as that aroused in the summer of 1973 over conditions on some of the farms in southwestern Ontario might lead to test case litigation.¹¹⁶

Arguments against subjecting agricultural employers to effective health and safety legislation are primarily financial. The short duration of the employment season for many of the employees, it is said, simply does not justify the large expenditures required to improve living and working conditions. It is said, too, that there are few complaints from the workers, and that if they were given better quarters they would only destroy them,¹¹⁷ although there is no hard evidence that workers are careless or destructive when given good living quarters. These are simply not valid reasons for farmers being permitted to provide substandard accommodations. A paucity of employee complaints can hardly be deemed to indicate that conditions are acceptable. It is more realistically explained by the inadequate enforcement procedures available to receive and deal with complaints and by workers' fears that complaints may result in discharge.¹¹⁸ Such arguments have not been given credence in other areas of societal improvement and they cannot be expected to survive here either. Farmers' organizations themselves are coming to recognize that generally adequate health and safety conditions are increasingly important in attracting and keeping a labour force in agriculture.

IV. General Arguments For The Exclusion Of Farm Labour From Statutory Protection

The farm is a venerable institution, not merely a place of employment. The picture of the farmer settling the land for future generations and tilling the field with his family is deeply imprinted in Canada as well as the United States. "The small farmer is precious to America's self-image; he represents hard work, enterprise, independence, and self-sufficiency. The lawmakers do

116. Recent developments liberalizing the law relating to the standing of an individual to sue for breach of legislation may make such litigation easier. See *Thorson v. A. G. Canada* (No. 2) (1974), 43 D.L.R. (3d) 1 (S.C.C.).

117. Hoffman and Selzer, *Migrant Farm Labor in Upstate New York* (1968), 4 Col. J. Law and Soc. Probs. 1.

118. *Toronto Globe and Mail*, Aug. 6, 1973.

not want to see this institution die.”¹¹⁹ Despite the decline in relative importance of the farm in our society and economy this may still be the primary reason for the legislatures’ tenderness toward the farmer as an employer.

In addition there is apparently an effective farm lobby in Canada. Farmers as a group have achieved considerable cohesion and singularity of purpose. This, combined with their traditional favoured position in the electoral systems, both Federal and provincial, has given them significant power. Politically, in the United States farmers have experienced what Ynostronza calls a “laissez-faire climate *vis-à-vis* the farm worker employees, which they have enjoyed for generations”.¹²⁰ As the specific legislation considered above demonstrates, the same is true in Canada. In Canada, farmers are organized by two national bodies: The National Farmers’ Union and The Canadian Federation of Agriculture. Together, they operate to give farmers the solidarity which their employees lack, using collective action to advance common interests and to formulate and promote national agricultural policies. No province is without a series of enactments providing for loans, government aid, and special programmes for rural development and rehabilitation during times of hardship.¹²¹

Introduction of compulsory minimum wages, workmen’s compensation, and other employee benefits all represent additional costs to be absorbed by the farmer. It is feared that they would be enough to drive many small farmers out of business, or further reduce their already below average standard of living. Farmers insist that the primary reason for the exemption from such legislation is economic: the traditionally precarious financial position of the farmer should not be further jeopardized by forcing him to bear additional labour costs. In fact, however, the small family farm is dying a natural

119. Note, *The Farm Worker: His Need for Legislation* (1970) 22 Maine Law Rev. 213 at 218.

120. Ynostronza, *The Farm Worker: The Beginning of a New Awareness* (1970-71), 20 Amer. U. Law Rev. 39 at 51. It is, apparently, common knowledge in the United States that the exclusion of farm labourers from the original National Labor Relations Act and Fair Labor Standards Act was the result of a legislative compromise necessary to get rural support to ensure that the statutes would be passed. See Kavarsky, *Increased Labor Costs and the American Farmer — A Need for Remedial Legislation?*, (1967-68) 12 St. Louis U. Law J. 564.

121. For example, see the Farm Improvement Loans Act, R.S.C. 1970, c. F-3; The Agricultural Relief Advances Act, R.S.A. 1970, c. 6; the Agriculture and Rural Credit Act, R.S.N.S. 1967, c. 4.

death. There is little evidence that compulsory worker legislation will hasten it to its grave.

In 1961 there were 480,903 farms in Canada occupied by a farming population of 2,128,400 people or 11.7% of the total Canadian population. In 1971 these figures had diminished to 336,128 and 1,489,565 and 6.9% respectively. At the same time the size of the average Canadian farm, together with its business value and the value of its equipment and machinery, showed a marked increase.¹²² These figures are indicative of the universal post-war trend in most developed countries: while its output has remained relatively stable, the agricultural industry has declined in its relative size and importance in the economic world.¹²³ Faced with increasing competition from larger farms many small farmers have abandoned or consolidated their farms in the last twenty years. The result has been a rapid shift from an industry characterized by subsistence-level, family-owned operations to one increasingly dominated by sophisticated commercial management, often taking corporate form.¹²⁴ The emergence of "agribusiness" casts a new light on the exemption of agricultural operations from labour legislation.

It appears obvious that large corporate farms should not be allowed to take advantage of the antiquated arguments originally proposed by agricultural employers operating in a very different era in order to escape obligations to their employees. If farming is moving in the direction of big business legislative exclusions in labour and employment law, based on sympathy for the tenuous economic position of the "family farmer" several decades ago, should no longer prevail to the detriment of farm employees. One solution is to make a distinction in the legislation between large farms and family farms, based perhaps on the number of employees, as is the case in the labour relations legislation of New Brunswick and Quebec.¹²⁵

Still, contemporary farmers may argue that, regardless of size, the significant costs engendered by employee legislation, coupled with the inability to pass these costs on to the consumer, are unjustly

122. D.B.S. Statistics.

123. I.L.O., *Agricultural Organizations and Development* (Geneva, 1971).

124. Atlantic Provinces Economic Council, *Agriculture and the Atlantic Economy*, Pamphlet No. 10 (1966).

125. *Supra*, notes 45 and 46.

onerous in an uncertain industry. In response, several writers have argued that labour costs can be passed on through an agricultural market, and that any price increase would be relatively negligible, labour costs amounting to a mere five to seven percent of the total retail cost at present.¹²⁶ The Honourable Robert Andras pointed out recently that doubling the wage of tomato pickers in Ontario would only add two-thirds of a cent per pound to the retail value of tomatoes.¹²⁷ However, an important corollary to the economic argument is the notion that if farmers in one province were compelled to provide worker benefits and pass the costs on to consumers it would be economic suicide in the competitive interprovincial market. No one provincial jurisdiction, therefore, will take the first step alone to extend costly benefits to agricultural employees.¹²⁸

Farmers also argue that the unique climatic and seasonal nature of their industry requires that they have maximum flexibility in managing their work forces. To be successful commercial growers must have a large body of casual manpower available on short notice during peak seasons such as the harvest. Even in season steady work may be prevented by poor weather, slow ripening, or packing-house buildups. To maintain a large harvesting force at minimum wage for regular hours during such delays would involve astronomical costs which farmers can ill afford. Farmers point out that their employees are free to refuse the work if they do not like its fluctuating nature.¹²⁹ They are aware of the difficulties of undertain operation and yet willingly accept indefinite employment on a day-to-day basis. In effect, the farm workers agree to absorb the cost of delays themselves.

The farmer's wish to be excluded from employment standards legislation also reflects his view that the farm labour force is of very low quality. Indeed, in a recent Canadian sociological study the general opinion was expressed that "Supplies of labour for this employment have depended heavily upon defects in society from

126. Note, *Maine Law Review*, *supra*, note 119 and Kavarsky, *Increased Labor Costs and the American Farmer — A Need for Remedial Legislation?* (1968) 12 St. Louis U. Law J. 564.

127. Hon. Robert Andras, Minister of Manpower and Immigration, — statement made Sept. 27, 1973, Ottawa.

128. Employers' briefs submitted to the Nova Scotia Department of Labour requesting the exemption of agriculture from the Labour Standards Code.

129. *Id.*

unemployment, under-employment, illiteracy and discrimination".¹³⁰ This lends some support to another line of employer argument against compulsory employee benefits. First, they say good men are hard to find and if they are found any farmer will meet and surpass conceivable legislative minimums in an effort to retain their services.¹³¹ In other words, good agricultural employees have nothing to fear from legislative exclusion. Indeed, according to some farm spokesmen such employees may stand to lose if compulsory minimums are introduced and lead to additional costs which may force farmers to pay a uniform minimum rate and dispense with some of the fringe benefits often enjoyed by favoured employees: free produce and housing for example.

A second aspect of this argument is that agriculture represents a residual source of employment for many who are incapable of finding steady employment elsewhere. It is said that there is a largely inefficient group of labourers, including the very old or very young, those lacking training for any other work and handicapped workers, who find a place in farming. They are commonly paid on a piece-rate basis. Farmers express the fear that compulsory employee benefit legislation and accompanying increased costs would force the exclusion of many of these workers from the agricultural labour force. Many of them are not sufficiently productive at any time to merit an hourly minimum wage, and there is general fear that a guaranteed wage would decrease their incentive significantly: a dangerous element at a crucial time such as harvesting. Supervision to ensure maximum output would be too costly. Farm employers would be encouraged to turn even more readily to mechanization and the result would be permanent unemployment for a number of farm labourers, both seasonal and year-round, who lack mobility to seek other employment.¹³²

Paradoxically, the very facts upon which agricultural spokesmen have relied in this way may well demonstrate that there is no alternative for farmers but to improve employment conditions on farms to the point where farm work is attractive enough to lure good employees away from alternative employment. Faced with a diminishing and increasingly unreliable labour force in an industry

130. Fuller and Beale, *Impact of Socio-Economic Factors on Farm Labour Supply* (1967), 15 Can. J. Agr. Eco. 1237, at 1238.

131. *Supra*, note 128.

132. *Id.*

which, by its own admission, depends on a steady supply of casual labour on short notice, agricultural employers must find a new source of labour. By providing acceptable living and working conditions for their employees farmers may attract more high quality labour and experience less turnover. If this were the result the added costs of employee benefits would be a good investment and inclusion under employee benefit legislation would bring no added cost.

Even if there is, in fact, to be a move to voluntary improvement of the farm employment situation, legislative action is necessary to overcome short-term fears of competitive disadvantage among employers and clear the bad name of agricultural employment among potential employees.¹³³ Further, if the answer lies with government-sponsored agricultural labour pools¹³⁴ there can be no question of permitting those who draw on the pools to provide substandard wages or conditions.

When all is said and done it must be accepted, however, that the farmer's lot has never been an easy one. Big or little, his livelihood is dependent on climatic factors over which he has no control. Long hours of work are required during peak periods, little or none is needed at other times and emergencies are common. A year's labour may be wiped out by drought or frost. Even with the best of conditions and a bumper crop profits can be minimal because of a market which may seem even less predictable than the weather. The most realistic and convincing arguments for exclusion from employment legislation appear to be those based on the seasonal nature of the industry and the perishable quality of the produce. The question, though, is "exclusion from which laws?". Hours of work and holiday legislation should perhaps be made in applicable, or at least molded to fit the circumstances, but the other specific types of legislation considered above are not inherently incompatible with an industry characterized by seasonal and perishable products. The issue is, of course, one of balancing employer and employee interests.

133. *Supra*, note 130.

134. (1974), 74 *The Labour Gazette*, reports at p. 543 that farm labour pools are being established in agricultural areas across the country. Under the direction of local Agricultural Manpower Boards (LAMB) these pools are designed to provide a work force that can be assigned to growers as crop conditions require.

V. Recommendations

Legislative equality for agricultural employees is overdue. In a society that is becoming highly conscious of civil rights and equality before the law it seems unlikely that the right to minimum protection on the job will continue to be denied to farm workers, particularly in view of the increasingly industrial nature of farming. Moreover, farm employers may not be able to wait for legislation if they wish to retain a stable and competent work force. When it does come, legislation may represent not so much a radical change as a means of compelling compliance by the minority of employers who are so set in their ways that they cannot be persuaded to change without legislative compulsion.¹³⁵

Federal legislation, rather than separate provincial statutes, recommends itself in agriculture for several reasons. First, the competitive market problem would be solved by the introduction of uniform standards simultaneously throughout Canada. In other words, fear that to be the first province to introduce comprehensive benefits would destroy the position of local farmers in the Canadian market would be allayed. Second, the continuing importance of inter-provincial and international migrant workers creates a demand for national uniformity which only Federal legislation can effectively secure. Finally, the Federal Department of Manpower has already taken the initiative in this area and is best equipped to carry out and enforce national policies.¹³⁶

Introduction of a broad Federal scheme of employment legislation in a traditionally provincial area is a difficult prospect, but section 95 of the BNA Act appears to give the Federal government the authority needed to accomplish this if the legislation could be characterized as an agricultural rather than a labour matter. Section 95 provides: “. . . it is hereby declared that the Parliament of Canada may from time to time make laws in relation to agriculture in all or any of the provinces. . . and any law of the legislature of a province relative to agriculture shall have effect in and for the province so long and as far only as it is not repugnant to any Act of the Parliament of Canada. . .” Section 95 has seldom been used, and no judicial guidelines exist with regard to its operation. It does appear, nevertheless, that it might be functional in

135. Federal Task Force on Agriculture, *Government Involvement in Agriculture* (Ottawa, 1968).

136. See text to notes 8-15, *supra*.

this situation, although a decision as to its use must ultimately be based on the political realities of Federal-Provincial relations.

Experience with unemployment insurance legislation,¹³⁷ enacted under the authority of a specific amendment to the BNA Act,¹³⁸ indicates that a Federal revenue scheme, spreading the cost of benefits evenly through the national market, or even a national tax base, may be the most effective and acceptable means of financing. When the Federal unemployment insurance legislation was enacted in 1940, it excluded agriculture from its provisions.¹³⁹ In the 1955 revision of the Unemployment Insurance Act agriculture was again listed as an excepted employment, but the Unemployment Insurance Commission was given power, with the approval of the Governor-in-Council, to bring any excepted employment under the Act by regulation. In this way poultry farming and horse rearing were brought under the Act in 1956 and as of April 1, 1967 coverage under the Act was extended by Regulation to cover the whole agricultural industry.¹⁴⁰ The 1971 revision of the Unemployment Insurance Act no longer lists agriculture as an excepted employment but, under the Regulations, to be eligible a farm worker must, in the preceding year, have earned at least \$250 at his agricultural employment and have worked at it for over twenty-five days.¹⁴¹ There does not appear to have been any serious employer opposition to the extension of unemployment insurance to farm labourers.

The simplest means of legislative reform would be removal of all existing agricultural exemptions in Canadian law. Difficulties would undoubtedly arise, however, if this course were followed, because of the seasonal nature of agriculture, its vulnerability to climatic conditions and competitive cost considerations. The wisest legislative approach may involve preservation of some special status

137. Unemployment Insurance Act, 1971, S.C. 1970-71-72, c. 48.

138. British North American Act, 1940, 3 & 4 Geo. VI, c. 22 (U.K.).

139. Unemployment Insurance Act, 1940, S.C. 1940, c. 44, s. 13(1) and First Schedule, Part II, "Excepted Employment".

140. Unemployment Insurance Act, 1955, Stats. Can. 1955, c. 50, ss. 26(1)(a) and 27(a), and see SOR/55-392, s. 58 and SOR/66-483, s. 1, and see also (1967), 67 *The Labour Gazette* 251.

141. Unemployment Insurance Act, 1971, S.C. 1970-71-72, c. 48, s. 3 and Unemployment Insurance Regulations, as am. by SOR/72-114 and SOR/72-221, s. 1.

and the granting of normal benefits with such modifications as are dictated by these unique factors.¹⁴²

Retention of a special status for agriculture would allow some flexibility. For example, special procedures could be provided for the certification of unions of seasonal farm workers, allowances could be made for the exemption from most of the legislation for small farmers who are able to show that their operation is, in fact, entirely family run. Provision could also be made for employer applications to extend maximum hours during peak harvesting periods and for exemption from holiday requirements. Special lay-off clauses could be geared to the irregular nature of agricultural operations.

If the consensus were that an arbitrary hourly floor for wages is not suited to the agricultural situation, some other form of protection could be enacted. In Britain, legislation in the area has provided a means of wage regulation rather than imposing an arbitrary rate. Agricultural Wage Boards, composed of employer, employee, and independent members, meet and negotiate binding wage orders at regular intervals.¹⁴³ Another suggestion has been made that legislation provide a weekly minimum wage to farm workers in amounts sufficient to see them through interim delays, but less than they would earn by regular piece-rate or hourly wages during a week. With such a weekly guarantee the employer would be entitled to line up odd jobs on the farm to fill the time. Special provisions might even be made to allow for varying standards according to employee efficiency, including a legislative piece-rate scheme, if desirable, to prevent mass unemployment in the less efficient group of farm workers.

Enforcement of employment standards will present special problems in agriculture. Fines will often be insufficient to compel compliance, and the closing of operations will all too often result in an unacceptable waste of produce. Due to the temporary nature of the work, forced compliance may well prove too slow to help the workers who in fact have made complaints, especially where the complaints are of inadequate accommodation or provisions for safety.

142. This is the course recommended in the Ontario Federation of Labour Study, "Harvest of Concern", by Robert Ward, as reported in the *Toronto Globe and Mail*, Oct. 6, 1974.

143. Agricultural Wages Act, 1948, 11 & 12 Geo. VI, c. 47 (U.K.).

Private remedies for the individual employee should probably be provided for expressly in legislation, and publicized as being available in the event of inadequate public enforcement, but public inspection and compliance orders will have to carry the real burden of enforcement, even more than in other areas of the application of employment standards. The lack of individual or collective awareness of their rights among employees will put a special premium on the administrative enforcement mechanisms even if farm unionization comes to be protected by labour relations legislation. The most effective means of forcing compliance by farmers might be to cut off offending employers from the many benefits that they receive under other legislation: loans, tax concessions and the like.

The easiest method of legislative reform would be to ignore the special features of farming and simply remove each agricultural exemption from the statute books. Special legislation, however, would appear to be the wiser course, although it will result in continuing problems of definition and application, and added expense and trouble in setting up new administrative bodies to handle enforcement. Notwithstanding the views of the Ontario Minister of Labour to the contrary,¹⁴⁴ some change is needed: “. . . the question is what standards of pay, work, and housing Canadians want to set — and, as the growers point out, are willing to pay for.”¹⁴⁵

144. As reported in the *Toronto Globe and Mail*, Oct. 5, 1974.

145. Migrant Labour — Furor on the Farms, *Time*, Sept. 3, 1973.