

**Temporary and Tied:
State-Structured Vulnerability and
Violations of Procedural Fairness
Under the SAWP**

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I. Introduction: Triple Win or Triple Loss?

Canada's Seasonal Agricultural Workers Program (SAWP) has been cast favourably as an internationally-recognized model for managed, circular migration programs, sometimes touted as a "triple win" for migrants, sending states and receiving states.¹ Within Canada, however, community organizations have long been campaigning for fundamental changes to a program that has repeatedly been shown to result in inordinate precarity for migrant workers and repeated abuses of power by Canadian employers. The SAWP is structured by a complex legal backdrop of bilateral agreements, operational guidelines, standard employment contracts and immigration legislation, for which two Canadian government agencies are responsible: Employment and Social Development Canada (ESDC) and Immigration, Refugees and Citizenship Canada (IRCC). The result of the exercise of this maze of political and administrative power is a legal framework in which SAWP workers' status in Canada is tied to a particular government-approved employer for one agricultural season at a time. Workers are allowed to stay for a maximum of eight months of the year, and are not guaranteed to return the following spring.²

Extensive social science evidence found credible by several tribunals, boards and courts across Canada has documented the detrimental effects of the SAWP's legal design on migrant

¹ Leah F Vosko, "Legal but Deportable: Institutionalized Deportability and the Limits of Collective Bargaining among Participants in Canada's Seasonal Agricultural Workers Program" (2018) ILR Review 1 at 9, online: <<https://doi.org/10.1177/0019793918756055>>.

² "Hire a temporary worker through the Seasonal Agricultural Worker Program – Overview" online: Employment and Social Development Canada <<https://www.canada.ca/en/employment-social-development/services/foreign-workers/agricultural/seasonal-agricultural.html>>.

workers. By tying workers' status in Canada to continued employment with a state-approved agricultural enterprise, the SAWP framework effectively permits workers to be terminated and repatriated at the whim of an employer. Despite the SAWP's lack of even a semblance of procedural safeguards, legal arguments stemming from procedural fairness have largely gone untested in court. In what follows, I will compare the administrative processes governing the SAWP with the standards set by Canadian jurisprudence for procedural fairness in administrative law, a juxtaposition that reveals the fundamental legal deficiencies at the core of the SAWP's design.

The purpose of my analysis is two-fold. On one level, it is intended to provide a repository of procedural fairness arguments that migrant workers, community organizations and their lawyers can draw upon in litigation over migrant workers' rights. On another level, it is intended to display the sharp contrast between generally accepted legal norms of procedural fairness in Canada and the procedural entitlements afforded to migrant workers, raising the question of whether the program as currently conceived is fundamentally incompatible with the values and norms underlying the notion of procedural fairness.³

In what follows, I will first provide an overview of the legal framework of the SAWP. After a brief summary of the doctrine of procedural fairness, I will demonstrate that a duty of procedural fairness is owed to SAWP workers under the Canadian Charter of Rights and Freedoms, the Bill of Rights and the common law. I will pair each of these three sources of procedural fairness with a scenario illustrated by facts from the case law and social science research, in order to illustrate that current procedural safeguards are deficient in light of the

³ While I have chosen to focus on the SAWP here due to constraints of space, many of the same critiques could be leveled at Canada's other "temporary foreign worker" programs, and I hope that my arguments are transferrable to some extent.

jurisprudence. These three scenarios—an inability to transfer away from abusive employers, premature repatriation, and blacklisting—contain facts that have been found credibly by a Canadian court or tribunal and well-documented by social science evidence as commonly-occurring phenomena in the SAWP. However, with the exception of one case in Ontario that was settled before proceeding to trial,⁴ these facts have not yet been litigated under the doctrine of procedural fairness. The Charter, the Bill of Rights and the common law all provide strong sources of a duty of procedural fairness and the SAWP fails on all three fronts, revealing that although some policy-makers may envision the program as a “triple win,” in the legal realm it is a triple loss.

II. Employer-Tied and Temporary: An Overview of the SAWP’s Legal Framework

The SAWP is governed by bilateral agreements between Canada and the sending states, which result in Memoranda of Understanding, operational guidelines for the program, and standard employment contracts negotiated by the Canadian government and industry associations representing Canadian employers.⁵ A significant source of influence on the legal contours of the SAWP, these employer associations are incorporated as not-for-profit entities to represent the interests of SAWP employers in three regions of Canada: Quebec’s *Fondation des Entreprises en Recrutement de la Main-d’oeuvre* (FERME), Ontario’s *Foreign Agricultural Resource Management Services* (FARMS), and British Columbia’s *Western Agricultural Labour Initiative* (WALI).

⁴ *Tigchelaar Berry Farms v Espinoza*, 2013 ONSC 1506 at 1, [2013] OJ 1250 [*Tigchelaar*].

⁵ Vosko, *supra* note 1 at 10.

An agricultural enterprise wanting to employ workers under the SAWP can apply for a Labour Market Impact Assessment (LMIA) from ESDC. If the application is successful, the employer and the worker sign a standard contract provided by ESDC.⁶ The worker agrees “to not work for any other person without the approval of ESDC/SERVICE CANADA, the GOVERNMENT AGENT and the EMPLOYER,”⁷ and if a transfer of employers cannot be found, the worker must return to their country of origin.⁸

If a worker’s employment is terminated (whether because the employer fired them or because the employer was found in breach of the SAWP requirements), their ability to retain legal status in Canada depends on a successful transfer to another SAWP employer. However, this process is mediated by employer associations rather than the government: therefore, if the employer association “decides not to or cannot execute a transfer at the time of its request by the initial employer, the process of premature repatriation of the worker will be launched.”⁹ The standard-form SAWP contract for Mexican workers makes clear that if a transfer cannot be found, the employer must arrange transport and return the worker to Mexico City.¹⁰ Thus, “a federal officer’s decision to validate an employer’s worker repatriation process puts an end to the period authorized for SAWP workers in the country...making it impossible for the individual to access the regular revocation of

⁶ Contracts depend on the worker’s country of origin and destination. For Mexican workers, see “Contract for the Employment in Canada of Seasonal Agricultural Workers from Mexico” (2018), online: Employment and Social Development Canada <https://www.canada.ca/content/dam/canada/employment-social-development/migration/documents/assets/portfolio/docs/en/foreign_workers/hire/seasonal_agricultural/documents/sawpmc2017.pdf> [*Canada-Mexico SAWP Contract 2018*].

⁷ *Ibid* at 1X(3).

⁸ *Ibid* at X(6).

⁹ Eugénie Dépatie-Pelletier, “Judicial Review and Temporary Labour Migration Programs Declared a ‘Modern Form of Slavery’: State Restrictions of (Im)migrant Workers’ Right to Liberty and Security (Not to Be Held Under Servitude) Through Employer-Tying Policies (Initial submission)” at 207, online: Migrant Workers Rights <<http://www.migrantworkersrights.net/en/resources/judicial-review-and-temporary-labour-migration-prog>>.

¹⁰ *Canada-Mexico SAWP Contract 2018*, *supra* note 6 at X(6) and XI(8).

permit/legal status procedure.”¹¹ Premature repatriation may also lead to the employer association “blacklisting” the worker by giving a poor performance evaluation, thereby preventing the worker from returning to Canada the following year.¹²

The consequences of stepping outside of the SAWP framework are criminal: the Immigration and Refugee Protection Act (IRPA) creates a prohibition against aiding or inducing a worker to perform work for another employer or to perform any kind of non-agricultural work. The standard employment contracts for the SAWP highlight this prohibition and its potentially serious consequences:

The EMPLOYER agrees and acknowledges... that the WORKERS approved under the Seasonal Agricultural Workers Program are authorized by their work permit only to perform agricultural labour for the EMPLOYER to whom they are assigned. Any person who knowingly induces or aids a foreign worker, without the authorization of ESDC/SERVICE CANADA, to perform work for another person or to perform non-agricultural work outside the scope of the Labour Market Impact Assessment (LMIA), is liable on conviction to a penalty up to \$50,000 or two (2) years imprisonment or both under the Immigration and Refugee Protection Act S 124(1)(C) and 125.¹³

Employers also control whether workers can return to Canada the following agricultural season. Employers have the power not only to decide whether to re-hire a particular worker, but also to write an evaluation of the worker to which other SAWP employers have access, as recognized by the Ontario Superior Court in *Fraser v. Canada*:

Admittance to the SAWP program is discretionary... Employers are entitled to request specific employees. For returning employees, selection takes place in part on the basis of evaluations completed by employers from the previous year ... The workers are afraid of being branded as "lazy" or "rebellious" for fear that they will be repatriated to their home countries or passed over in future years. All employers are asked to write evaluations of their SAWP workers, and those receiving negative reviews will stand "virtually no chance" of being selected again.¹⁴

¹¹ Dépatie-Pelletier, *supra* note 9 at 337.

¹² Dépatie-Pelletier, *supra* note 9 at 207.

¹³ *Canada-Mexico SAWP Contract 2018*, *supra* note 6 at VIII(2).

¹⁴ *Fraser v Canada (AG)*, [2005] OJ 5580, [2005] OTC 1127 at 3, 18.

This means that workers can be “blacklisted” from the SAWP program (and lose the opportunity to return to Canada the following year) at the whim of an employer, with no potential for appeal or review of the employer’s evaluation. The result of this legal framework is a situation of government-structured precarity, in which workers are made inordinately vulnerable to the exploitative practices of agricultural employers and are not afforded adequate procedures to mitigate the resulting harm.

III. The Foundations of Procedural Fairness

Various domains of the social sciences have found that the procedural fairness plays a key role in ensuring the legitimacy of the state’s exercise of power in the eyes of its subjects:

The finding that citizens care enormously about the process by which outcomes are reached – even unfavorable outcomes – has been replicated using a wide range of methodologies (including panel surveys, psychometric work, and experimentation), cultures (throughout North America, Europe, and Asia), and settings (including tort litigation, policing, taxpayer compliance, support for public policies, and organizational citizenship).¹⁵

Recognizing that fair procedures are intimately linked to the legitimate exercise of state powers, Canadian administrative law has slowly grown to recognize that public authorities are under an obligation of procedural fairness—and that even administrative and discretionary decisions can be judicially reviewed in accordance with this standard. In *Cardinal*, the Supreme Court made a vitally important finding: that “as a general common law principle, [there is] a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual.”¹⁶

¹⁵ Robert J MacCoun, “Voice, control, and belonging: The double-edged sword of procedural fairness” (2005) 1 Annual Rev L & Social Science 171, online:

<<https://cloudfront.escholarship.org/dist/prd/content/qt011185w5/qt011185w5.pdf>>.

¹⁶ *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643 at para 14.

In *Knight*, the Court recognized fairness as “entrenched in the principles governing our legal system,” comparing it to the principles of fundamental justice under s. 7 of the Charter.¹⁷ While some judges at first resisted imposing procedural duties on discretionary areas of administrative power, which they considered to be the realm of policy rather than law, the Supreme Court eventually recognized that *even discretion* must be exercised “in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the Charter.”¹⁸

The SAWP is a creature of executive authority, structured by policy-driven Ministerial decisions and procedures. This does not mean, however, that the executive’s role in administering the SAWP is beyond the rule of law and the requirements of procedural fairness. Even though SAWP workers are precluded from citizenship, and thus from democratic participation in the processes that shape the composition of the executive, ESDC and IRCC wield administrative power that affects the profoundly important interests of these workers. It is thus especially vital that SAWP workers be afforded participatory rights through well-crafted administrative procedure. As I will argue below, the existing structure of the SAWP consistently violates the duty of procedural fairness, particularly through the processes governing employer transfer, early repatriation, and employee evaluations (“blacklisting”).

More Than Employment: The Existence of a Duty of Procedural Fairness

Importantly, the argument here for the existence of a duty of procedural fairness is distinguishable from the unsuccessful position taken by Mr. Dunsmuir before the Supreme Court

¹⁷ *Board of Education of the Indian Head School Division No 19 of Saskatchewan v Knight* [1990] 1 SCR 653 at 683 [*Knight*].

¹⁸ *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 56, [1999] SSCI 39 [*Baker*].

in 2008. In *Dunsmuir*, the Court found that a duty of fairness is not owed in the context of contractual employment, even when the employer is a public one (which, in the SAWP, it is not).

¹⁹ The Court nonetheless made clear that “the principles expressed in *Knight* in relation to the general duty of fairness owed by public authorities when making decisions that affect the rights, privileges or interests of individuals are valid and important.”²⁰ *Knight* continues to stand for the idea that delegated statutory powers “should be put only to legitimate use” and that fair procedure is a tenet of such legitimacy.²¹ *Dunsmuir* merely adds the caveat that fairness and “legitimate use” are measured by contractual requirements in most employment contexts, rather than by an additional duty of procedural fairness under administrative law. For an agricultural worker with full and permanent Canadian status, employment disputes would be governed by contract and employment law.

However, in contrast to *Dunsmuir*, the situation of SAWP workers cannot be circumscribed by private employment law: more is at stake. The Canadian government’s choice to administer the SAWP through employer-tied work permits and seasonal status in Canada creates a structural vulnerability that gives rise to facts far more serious than those at issue in *Dunsmuir*. Temporary and employer-tied work permits give rise to an inordinate power imbalance between employers and employees, far beyond even the imbalance that already exists for employees with permanent Canadian status. As I will elaborate in greater depth below, the government’s design of the SAWP creates a host of situations that give rise to a duty procedural fairness independent of *Dunsmuir*’s limitations. Part IV will show how an inability to transfer out of abusive employment situations triggers a duty of procedural fairness under the Charter,

¹⁹ *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 81 [*Dunsmuir*].

²⁰ *Ibid* at para 114.

²¹ *Knight*, *supra* note 17 at 675.

Part V will show how premature repatriation triggers the Bill of Rights' procedural obligations, and Part VI will show how blacklisting triggers legitimate expectations of adequate procedural safeguards under the common law.

IV. Employer Transfer: Procedural Fairness Under the Charter

In 2015, two female migrant workers in Ontario won a case against their employer at the Ontario Human Rights Tribunal, convincing the Tribunal that the employer had engaged in repeated sexual harassment and abuse.²² Initially, there were complaints by seventeen workers about the same employer before the Tribunal, six of which involved sexual misconduct.²³ Some cases were settled outside of court, but two female workers took their cases to trial and eventually got a successful judgement (eight years later).²⁴ One of the workers was sent back to Mexico after resisting the employer's advances, and the other put up with the harassment until the end of the season under threats that she would also be sent back if she resisted.²⁵ Both alleged that the employer made repeated sexual advances and used his position as their employer (and the reason they had status in Canada) to pressure them into performing undesired sexual acts.

The two workers who brought this case were in Canada under the temporary foreign worker program for low-skilled occupations, which is a different category than the SAWP. They were employed at a fish-processing plant, and the work was therefore not "seasonal." However, the important legal and factual considerations for the purposes of procedural fairness are the same: they had employer-tied work permits and lived on the work premises, making them

²² *OPT v Presteve Foods Ltd*, 2015 HRTO 675 at para 230, [2015] OHR TD 682 [*Presteve Foods*].

²³ Susan Noakes, "Sex Abuse Case Highlights Vulnerability of Workers on Visas", *CBC News* (30 June 2015), online: <<http://www.cbc.ca/news/business/sex-abuse-case-highlights-vulnerability-of-workers-on-visas-1.3129909>>.

²⁴ *Ibid.*

²⁵ *Presteve Foods*, *supra* note 22 at paras 3, 6.

extremely dependent on the employer. The Tribunal relied upon the evidence of Dr. Kerry Preibisch to find that transferring employers is “practically impossible or at least very difficult” in any stream of employer-tied foreign worker programs,²⁶ and it was therefore established that the experience lived by these women was something that happens in the SAWP as well.

Additional social science evidence confirms that the problem is widespread among SAWP workers and beyond. In 2015, a woman working in the Okanagan Valley through the SAWP spoke to the media about sexual harassment by her employer, on the condition of anonymity.²⁷ Due to fear of employer retribution, however, she decided not to report the case to the police.²⁸ The same phenomenon has been documented among employer-tied farmworkers in the USA, recently coming to the attention of mainstream media after an association of female farmworkers penned a public letter to the women in Hollywood who came forward as part of the #MeToo movement:

Even though we work in very different environments, we share a common experience of being preyed upon by individuals who have the power to hire, fire, blacklist and otherwise threaten our economic, physical and emotional security. Like you, there are few positions available to us and reporting any kind of harm or injustice committed against us doesn't seem like a viable option. Complaining about anything — even sexual harassment — seems unthinkable because too much is at risk, including the ability to feed our families and preserve our reputations.²⁹

²⁶ *Ibid* at para 216.

²⁷ Amy Cohen & Susana Caxaj, “Bodies and Borders: Migrant Women Farmworkers and the Struggle for Sexual and Reproductive Justice in British Columbia, Canada” (2018) 29 *Alternate Routes: A Journal of Critical Social Research* 90 at 108, online: <<http://www.alternateroutes.ca/index.php/ar/article/viewFile/22448/18242>>.

²⁸ *Ibid*.

²⁹ “700,000 Female Farmworkers Say They Stand with Hollywood Actors Against Sexual Assault”, *Time Magazine* (10 November 2017), online: <<http://time.com/5018813/farmworkers-solidarity-hollywood-sexual-assault>>.

A study in California found that of 150 female Mexican farmworkers interviewed, 80% had experienced some form of sexual harassment.³⁰ Overall, the evidence is clear that “female temporary foreign workers face disproportionately heightened risks for sexual abuse and violence” as a result of the rigidity of their temporary and employer-tied status.³¹

“Dangerous Conditions”: Infringing Upon Security of the Person

The Supreme Court established in the early days of the Charter that procedural safeguards are encompassed within the “principles of fundamental justice” governing deprivations of life, liberty or security, and that these principles must be respected in administrative processes affecting anyone physically present in Canada—regardless of that person’s immigration status.³² The SAWP’s administrative design results in impairment to workers’ s. 7 rights, and does not provide the procedural fairness necessary to fulfil the requirements of fundamental justice.

Being trapped in an abusive employment and housing situation by one’s work permit is an infringement upon both the physical and the psychological component of the right to security of the person under s. 7. It is sometimes difficult to deploy s. 7 in contexts where immigration status is at stake: although forcible removal from a country’s territory would seem to engage liberty in the plain-language meaning of the word, the Supreme Court decided in *Medovarski* that “mere deportation” does not implicate s. 7 because “the most fundamental principle of

³⁰ Irma Morales Waugh, “Examining the Sexual Harassment Experiences of Mexican Immigrant Farmworking Women” (2010) 16:3 *Violence Against Women* 237 at 241, online: <<https://pdfs.semanticscholar.org/60c7/1b8af21cd427d397b2baba3567fd2468a8b2.pdf>>.

³¹ Chantal Robillard et al, “‘Caught in the Same Webs’—Service Providers’ Insights on Gender-Based and Structural Violence Among Female Temporary Foreign Workers in Canada” (2018) *Journal of International Migration and Integration* 1 at 18, online: <<https://doi.org/10.1007/s12134-018-0563-3>>.

³² *Singh v Canada (Minister of Employment and Immigration)*, [1985] SCJ 11 at para 34, [1985] ACS 11 [*Singh*].

immigration law is that non-citizens do not have an unqualified right to enter or remain in Canada.”³³ However, the argument here is not that s. 7 is infringed by *removal* from Canada, but rather by a legal structure which uses employer-tied work permits to trap migrant workers in abusive situations while they remain in Canada.

While there are many kinds of abuse or violence that may threaten a migrant worker’s security of the person, the example of sexual violence elaborated above is particularly salient here given the clear analogy that can be drawn with *Bedford v. Canada*. In *Bedford*, the Supreme Court was faced with a Charter challenge to three legislative provisions imposing certain constraints on selling sex, itself a legal activity. Writing for the Court, McLachlin C.J. found that the three provisions imposed inordinately dangerous conditions on a legal activity, thereby violating sex workers’ s. 7 right to security of the person.

Several analogous points can be drawn between this case and the SAWP. First, the decision shows that laws which result in an increased risk of sexual violence engage the s. 7 right to security of the person. The facts of *Presteve Foods*, the Ontario Human Rights case described above,³⁴ demonstrate that a legal structure creating employer-tied work permits results in an increased risk of sexual violence for migrant workers. While even workers with permanent status are dependent upon their employer to some degree, the legal constraints of the SAWP create increased intimacy and thus vulnerability, heightening the risk of sexual violence. According to their contract, SAWP workers must live in housing provided by their employer.³⁵ Workplaces are usually located in rural areas without reliable public transit, meaning that workers must also rely upon the employer for transportation and mobility. It is no coincidence that in *Presteve*

³³ *Medovarski v Canada (Minister of Citizenship and Immigration)* [2005] 2 SCR 539 at para 46, [2005] SCJ 31 [*Medovarski*].

³⁴ *Presteve Foods*, *supra* note 22.

³⁵ *Canada-Mexico SAWP Contract 2018*, *supra* note 6 at VIII(5).

Foods, the incidents of sexual predation happened either in the employer's car or in the housing he provided. Also contributing to a heightened risk of sexual violence is the isolation that the SAWP structure imposes on workers: when workers are dependent on their employer for transportation and are required to work long hours, it is difficult to find community outside of the workplace or to access government or community services. The impugned provisions in *Bedford* had a similar effect of constraining sex workers' location³⁶ as well as the kinds of support sex workers could access,³⁷ both of which the Court found to unjustifiably violate sex workers' security of the person by making it more difficult to protect themselves.

The second point of analogy with *Bedford* is that of causation. It might be argued that the state itself is not causing harm to SAWP workers, as the direct source of harm is a private third party. The Attorney General of Canada raised this argument in *Bedford*, but it was ultimately rejected. The Court makes clear that the direct source of harm leading to a s. 7 violation need not be the state itself: it is enough if state-imposed conditions increase the risk of harm.³⁸ The state's role need not be active, and the harm need not be foreseeable nor have a "necessary link" with the law.³⁹ In *Bedford*, the source of harm was generally sex workers' clients; in the case of the SAWP it is generally employers. However, that the direct source of harm is a third party does not negate the state's role in making, enforcing and administering law that increases the potential for harm. Creating what McLachlin C.J. called "dangerous conditions" is enough to satisfy the causality requirement and engage s. 7.⁴⁰ Similarly, although the state is presumably not actively

³⁶ Canadian Criminal Code sections 210 and 213(a) prohibited sex work from a communal indoor location and communicating in public for the purposes of selling sex, forcing sex workers to use locations that were isolated and therefore more dangerous.

³⁷ Canadian Criminal Code sections 212(a) prohibited "living off the avails of prostitution" and thus prevented sex workers from hiring anyone to administer their business or protect their safety.

³⁸ *Bedford v Canada (AG)*, 2013 SCC 72 at para 85 [*Bedford*].

³⁹ *Ibid* at para 77.

⁴⁰ *Ibid* at para 60.

trying to cause harm to migrant workers, it has created dangerous conditions in which to be a seasonal agricultural worker, creating a sufficient line of causality to engage s. 7.

Finally, *Bedford* establishes that in order to constitute a violation of s. 7, a law need not have the same detrimental effect on every single person subject to it. It was not necessary to establish that 100% of sex workers experience violence or 100% of their clients are abusive in order to establish a s. 7 violation. As McLachlin C.J. specifies, “the assessment is qualitative, not quantitative,” and if the activities prohibited by the impugned provisions “could have prevented one woman from jumping into Robert Pickton’s car, the severity of the harmful effects is established.”⁴¹ In the same way, it is not necessary to establish that every single SAWP worker exists in a state of abuse, or even that a large proportion do. There are presumably some non-abusive employers in the SAWP, but this does not negate the government’s role in fostering a situation of harm for even one worker.

Procedural Safeguards?: Employer Transfer and Compliance Inspections

ESDC proclaims to temporary foreign workers on an information webpage that “Your Rights Are Protected.”⁴² According to this webpage, ESDC envisions two pathways through which workers can protect themselves from abusive employers: by transferring employers or by reporting their employer for non-compliance with SAWP standards. If a worker wants to transfer, they must find themselves a new employer who will agree to submit a new LMIA. The LMIA is processed through employer associations: in Ontario, for example, the employer

⁴¹ *Ibid* at para 158.

⁴² “Temporary Foreign Workers: Your Rights are Protected” online: Employment and Social Development Canada <<https://www.canada.ca/en/employment-social-development/services/foreign-workers/protected-rights.html>> [*Your Rights are Protected*].

submits it to FARMS for review and pays a \$40 fee.⁴³ The employer association submits it to Service Canada, who decides whether the labour market conditions are such that the new employer can hire a foreign worker. A similar procedure has recently been implemented in British Columbia.⁴⁴

However, employee-initiated transfers almost never occur: the Ontario Human Rights Tribunal found as a fact that “the vast majority of these transfers are employer-initiated, in order to share SAWP labour among farmers with different crops and growing seasons.”⁴⁵ The Tribunal also found that because of migrant workers’ lack of mobility, resources and connections, there are “significant barriers, costs and delays encountered by SAWP workers in seeking to initiate a transfer to another employer.”⁴⁶ While possible in theory, transferring employers is not a viable solution for workers to escape abuse in most cases.

The second way in which temporary foreign workers are supposed to be able to protect their rights is by reporting non-compliant employers. The ESDC webpage instructs workers who fear for their safety to call the confidential Service Canada Confidential Tip Line, where they can leave an anonymous message.⁴⁷ Workers are assured that “all calls are taken seriously and investigated to help protect you and your rights.”⁴⁸ However, employer-tied work permits provide a disincentive for workers to speak up: tipping off the government can lead to a chain of events ending in job loss if the employer is found to be non-compliant. According to the ESDC’s guidelines, a tip can trigger an inspection of the employer for compliance with the program’s

⁴³ “Program Details”, online: Foreign Agricultural Resource Management Services <<http://farmsontario.ca/program.php>>.

⁴⁴ BC Fruit Growers’ Association, “Seasonal Agriculture Worker Program - Changes to Mexico SAWP for 2016”, online: <<http://www.bcfga.com/files/ChangestoMexicoSAWPfor2016.pdf>>.

⁴⁵ *Peart v Ontario (Community Safety and Correctional Services)*, 2014 HRTO 611 at para 138.

⁴⁶ *Ibid.*

⁴⁷ *Your Rights are Protected*, *supra* note 42.

⁴⁸ *Ibid.*

standards, which include making reasonable efforts to provide a workplace free of abuse as well as ensuring the work conditions agreed to in the contract.⁴⁹ The consequence of being found non-compliant include a temporary or permanent ban from using the SAWP and the revocation or suspension of previously-issued LMIA's.⁵⁰ The employees of a non-compliant employer may lose not only their job but also their work permit: the guidelines provide that "if an LMIA is revoked after a work permit has been issued, IRCC may also revoke the associated work permit from the foreign national."⁵¹ Workers fear that if they report their employer, they may be sent home that same year or not called back the following year. As such, neither the anonymous tip line nor the employer transfer procedure are effective in preventing or addressing breaches of s. 7 rights, and as I will argue below, neither are in accordance with the obligations of procedural fairness under the Charter.

Legitimate Infringement?: Fundamental Justice and Procedural Fairness

State infringement of security of the person is only legitimate if it is "in accordance with the principles of fundamental justice," which include principles of procedural fairness.⁵² Courts rely on common law principles of procedural fairness to interpret fundamental justice in an administrative law context,⁵³ and so in what follows I will draw in part on jurisprudence from outside of the Charter context. Once a claimant has shown that their s. 7 rights are impaired, they

⁴⁹ "Temporary Foreign Worker Program Compliance", online: Employment and Social Development Canada <<https://www.canada.ca/en/employment-social-development/services/foreign-workers/employer-compliance.html>>.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Singh*, *supra* note 32 at para 57.

⁵³ Evan Fox-Decent & Alexander Pless, "The Charter and Administrative Law Part I: Procedural Fairness" in Colleen M Flood & Lorne Sossin eds, *Administrative Law in Context* (Toronto: Emond Montgomery, 2018) 237 at 238.

are deemed to be owed a duty of procedural fairness and the content of that duty must conform to the requirements of the common law.⁵⁴

By the logic of *Bedford*, laws creating a structure that facilitates violence by third parties are an infringement upon security of the person under s. 7. The SAWP's legal structure creates vulnerability to employer abuse, and sexual violence in particular. SAWP workers are constrained by employer-tied work permits and employer-dependent recall, which create "dangerous conditions" to be an agricultural worker, much as the impugned provisions in *Bedford* created "dangerous conditions" to be a sex worker.⁵⁵ This infringement of s. 7 triggers a duty of procedural fairness under the Charter, independent of the limitations of the common law duty (particularly those in *Dunsmuir*). The government may argue that the administrative procedures through which workers can be transferred to a new employer or report non-compliant employers are enough to mitigate the risks of harm flowing from the SAWP. These processes, however, lack the procedural safeguards that the jurisprudence demands.

Stringent Protections?: Procedural Fairness's Content

The extent of procedural safeguards required depends on the importance of the interests at stake. As L'Heureux-Dubé J. wrote for the majority in *Baker*, "the more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated."⁵⁶ The jurisprudence has shown that two of the interests at stake in the remedial SAWP procedures—employment and the right to be in Canada—are important interests deserving of procedural

⁵⁴ *Ibid.*

⁵⁵ *Bedford*, *supra* note 38 at para 60.

⁵⁶ *Baker*, *supra* note 18 at para 25.

fairness and/or fundamental justice. Even before *Baker*, the foundational cases of *Nicholson* and *Knight* recognized that a loss of employment was an important interest giving rise to a duty of procedural fairness.⁵⁷ In *Kane*, the Supreme Court recognized that the content of the duty is elevated when employment is at stake: “a high standard of justice is required when the right to continue in one’s profession or employment is at stake.”⁵⁸ Although the employers were public ones in these three cases, as opposed to a private entity in the case of the SAWP, the analogy is still valid for the purposes of assessing the importance of the interest at stake. Further, a permit enabling employment can constitute a weighty interest as well, even if legally considered a privilege rather than a right: Rand J. in *Roncarelli* condemned the unjustified revoking of a restauranteur’s liquor permit as “vocation outlawry.”⁵⁹ Finally, the Supreme Court in *Baker* found that a decision on whether to grant status in Canada “has exceptional importance to the lives of those with an interest in its result...and this leads to the content of the duty of fairness being more extensive.”⁶⁰

While the required elements of procedural fairness will vary according to a judge’s assessment of each unique administrative context, the right to be heard is a basic and foundational element that should be met in every procedure where an important interest—let alone a Charter interest—is at stake. In cases where status in Canada is at stake, the duty has ranged from a right for refugee claimants to be heard orally in *Singh*⁶¹ to an right for humanitarian and compassionate grounds applicants to be heard in writing in *Baker*.⁶²

⁵⁷ *Nicholson v Haldimand-Norfolk Regional Police Commissioners*, [1979] 1 SCR 311; *Knight*, *supra* note 17.

⁵⁸ *Kane v Board of Governors of the University of British Columbia*, [1980] 1 SCR 1105 at 1113.

⁵⁹ *Roncarelli v Duplessis*, [1959] SCR 121 at 141.

⁶⁰ *Baker*, *supra* note 18 at para 31.

⁶¹ *Singh*, *supra* note 32.

⁶² *Baker*, *supra* note 18.

Emphasizing the importance of participatory rights, L'Heureux-Dubé J. found that Ms. Baker was entitled to provide “full and complete written documentation.”⁶³

Another foundational element of procedural fairness is the right to have a response to the arguments one has presented in some form of reasons. Even though *Baker* was not decided under the Charter, the Court found a duty to give reasons via the common law. In *Suresh*, a case where s. 7 interests were at stake, the Court found that procedural fairness included a duty to provide reasons responding to all relevant issues.⁶⁴ In contrast, SAWP workers are not afforded the opportunity to be heard or to know through the provision of reasons that they have been heard—even in a context where their s. 7 rights are engaged along with the important interests of employment and status in Canada. In the processes governing (a) employer transfer and (b) revoking of LMIAs for non-compliance, SAWP workers have effectively zero participatory rights.

(a) Employer Transfer

The procedural safeguards afforded to workers who want to transfer out of an abusive employment situation are minimal. As mentioned above, the worker can (at least in theory) put the transfer process in motion by finding themselves a new employer. However, if the worker is able to do this, the subsequent process becomes centered around the employer and the needs of the Canadian labour market. The process is framed as a decision on whether the new employer should be given the right to hire a temporary foreign worker, as opposed to a decision on whether the worker should be authorized to work for a new employer. ESDC and Service Canada's discretionary decision on whether to grant the LMIA and thus alter the employee's work permit

⁶³ *Baker*, *supra* note 18 at para 34.

⁶⁴ *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 [*Suresh*].

is based on information given through the standard application form for an LMIA.⁶⁵ In this form, the only information provided to the decision-maker about the worker is their name, birth date and country of residence.⁶⁶ In contrast, the form includes several pages of information about the employer's location, type of business, revenue, required skills for employees, and efforts to hire Canadian citizens or permanent residents. This form clearly shows that the transfer decision is about Service Canada attempting to balance the employer's perceived need to hire non-Canadian labour with Canadian society's perceived need to 'protect jobs from foreigners.' For a worker requesting to transfer away from a situation that threatens their s. 7 rights, the glaring absence is the lack of any information requested about why the worker is requesting the transfer, what the worker's concerns were with the previous employer, or what the consequences would be for the worker and their dependents if the transfer is not granted. Effectively, this process determines important interests of the worker without any consideration of those important interests: the worker has zero right to be heard as required in *Singh and Baker*. As a result, it is impossible to request any form of reasons that would explain how the worker's interests were weighed, as required in *Baker and Suresh*.⁶⁷

The transfer process also violates procedural fairness requirements because of its lengthiness. The new employer's application for a new LMIA must be processed twice, once by the employer association and once by Service Canada. Meanwhile, the worker must either continue in an abusive work situation or be jobless. In *Morgentaler*, the Supreme Court found that significant procedural delays violate fundamental justice when security of the person is at

⁶⁵ "Labour Market Impact Assessment Application – Seasonal Agricultural Worker Program", online: Service Canada <<https://catalogue.servicecanada.gc.ca/apps/EForms/pdf/en/ESDC-EMP5389.pdf>>.

⁶⁶ *Ibid.*

⁶⁷ *Baker*, *supra* note 18; *Suresh*, *supra* note 64.

stake.⁶⁸ If the worker is facing abuse and security of the person concerns with their original employer, the situation is analogous. While it may seem like an analogy with *Morgentaler* is a stretch given the criminal consequences at issue in that case, there are in fact criminal repercussions if employers hire a new temporary foreign worker without following the proper procedure. As mentioned above, IRPA creates an offence of informally transferring or sharing temporary foreign workers, punishable by a fine of up to \$50,000 and imprisonment.⁶⁹ This is analogous to the potential criminal consequences for a doctor who performed an unauthorized abortion pre-*Morgentaler*: in each scenario, there is one party whose security of the person is at stake (i.e. the pregnant woman or the SAWP worker) and there is another party who faces criminal consequences if they give assistance outside of the designated procedure (i.e. the doctor or the employer). The criminal consequences act as a stick to force compliance with an unfair procedure, thereby undermining the s. 7 rights of those implicated.

(b) Revoking of LMIA for Non-Compliance

The second procedure through which SAWP workers are supposedly able to protect their rights is by reporting their employer. However, this process is equally flawed. If a SAWP worker calls the Service Canada tip line to report a non-compliant employer, the worker's participation in the process ends there. Although the purpose of inspecting a workplace and potentially revoking an LMIA is to protect the rights of employees and incentivize compliance with proper working conditions, it is as if the government considers the individual workers to have no interest in the process. Workers are not given the chance to be heard as to the effect that

⁶⁸ *R v Morgentaler*, [1988] SCR 30 at 63-73.

⁶⁹ "Apply for a Labour Market Impact Assessment", online: Employment and Social Development Canada <<https://www.canada.ca/en/employment-social-development/services/foreign-workers/agricultural/seasonal-agricultural/apply.html>>.

withdrawing their employer's LMIA would have on their work permit, livelihood and status in Canada.

In contrast, the ESDC guidelines envision extensive procedural protections for the employer, including a 30-day period in which to respond to a suspected violation or the proposed consequence, information about the case that must be met, as well as the right to have any new information they provide “reviewed by a different officer that was not involved in the preliminary finding.”⁷⁰ The compliance inspection process is not without procedural safeguards, but these are afforded only to employers, despite the significant interests that workers have at stake. Given the procedural deficiencies in the transfer process and the fact that the worker is not guaranteed a new job if their employer's LMIA is revoked, it is important that workers' interests be heard in this process, or that there be a separate procedure to consider workers' needs. The lack of procedural fairness here not only fails to address the s. 7 interests at stake, but actually increases the probability of s. 7 violations by disincentivizing workers from reporting their employer's non-compliance.

In sum, the procedural design of the SAWP—including the transfer process, the involvement of employer associations, the interests considered in granting an LMIA, and the inspection process—results in a situation that is unacceptable given the standard set by the jurisprudence on procedural fairness under s. 7. The SAWP's structure creates dangerous conditions for migrant workers, which by the logic of *Beford*, violate security of the person. The interests at stake in SAWP procedures—employment and the right to be in Canada—are two of the interests that, even separately, have been hailed by the Supreme Court as requiring elevated

⁷⁰ “Process for communicating non-compliance findings and consequences for violations on or after December 1, 2015”, online: Employment and Social Development <<https://www.canada.ca/en/employment-social-development/services/foreign-workers/employer-compliance.html>>.

levels of procedural fairness. Yet, workers do not enjoy even the most fundamental element of procedural fairness: a minimal right to be heard.

V. Premature Repatriation: Procedural Fairness Under the Bill of Rights

Three seasonal agricultural workers who were dismissed by their employer and sent back to Mexico the following day brought a challenge against their employer at the Ontario Superior Court in 2010. The three workers argued that “they should have been told the reason for their dismissal and repatriation and given a meaningful opportunity to respond.”⁷¹ Due to both legal and factual deficiencies, the workers’ claims were struck by the judge at first instance.⁷² While the judge nonetheless gave the workers leave to amend the claims, as well as considerable hints on what claims he would like to hear,⁷³ the workers chose to drop their challenge, instead settling the case and waiving their right to further discuss the issue publicly.⁷⁴ We therefore do not know what the Court would have decided if the case had proceeded. However, as I will argue below using section 2(e) of the Bill of Rights, if the claims were amended and more fully supported with facts, the case would have had a good chance of success.

In addition to the facts established in this case, social science evidence has also shown that SAWP workers have repeatedly been dismissed and rapidly repatriated for a host of illegitimate reasons, including attempts to form unions, attempts to assert their rights to adequate housing, and workplace injuries. In 2005, United Food and Commercial Workers reported the following:

⁷¹ *Tigchelaar, supra* note 1 at para 1.

⁷² *Ibid* at para 56.

⁷³ *Ibid* at para 83.

⁷⁴ Dépatie-Pelletier, *supra* note 9 at 722.

In British Columbia, 40 migrant workers started a strike this year because of poor living conditions. Although the employer admitted that it was his first year in the program and that he was trying to correct a situation that raised legitimate concerns, several workers were repatriated for demanding adequate housing. The employer received no penalty.⁷⁵

In 2010, one hundred migrant workers at the same employer in Simcoe, Ontario staged a wildcat strike to demand unpaid wages of between \$1,000 and \$6,000 per worker.⁷⁶ Justicia for Migrant Workers, a grassroots community organization, reported that “the migrant workers from Mexico, Jamaica, Trinidad and Barbados came together across racial, linguistic and ethnic lines to organize this wild cat strike and strengthen their collective power.”⁷⁷ As a result, workers were first evicted from their employer-provided dwellings and then rapidly repatriated to their countries of origin.⁷⁸ When workers asked the Member of Parliament for the area to intervene, who was also the Minister of Human Resources and Development Canada at the time, they were told by a staff person of the office that “they are temporary foreign workers and are not counted as members of the constituency.”⁷⁹

Repatriation after workplace injury has also been extensively documented. A study in the Canadian Medical Association Journal Open found that 787 migrant farm workers in Ontario were terminated and repatriated for medical reasons between 2001 and 2011, only one in fifty of

⁷⁵ Travailleurs et Travailleuses Unis de l’Alimentation et du Commerce Canada, “La situation des travailleurs agricoles migrants au Canada, 2005”, online: <http://www.ufcw.ca/Theme/UFCW/files/PDF2006/TUAC_Rapport%20Migrants2005.pdf> at 15 [translated by author].

⁷⁶ Justicia for Migrant Workers, “Migrant farm workers in Ontario strike against working conditions” *Rabble* (24 November 2010), online: <<http://rabble.ca/news/2010/11/migrant-farm-workers-ontario-strike-against-working-conditions>>.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ Justicia for Migrant Workers, “Canadian Government Stands on the Side of Agri-Business and Deports Migrant Workers” *Basics Community News Service* (4 February 2011), online: <<http://basicsnews.ca/canadian-government-stands-on-the-side-of-agri-business-and-deports-migrant-workers>>.

which left Canada willingly.⁸⁰ The study found that because “the federal government will take away an individual's work visa if they get ill or hurt... [and] the provinces cut off access to health care,” migrant workers are a “unique and vulnerable occupational group.”⁸¹ No longer productive for the employer’s enterprise, workers are either “pressured to return to Mexico by both the employer and the consulate”⁸² or fired for dubious reasons without an opportunity to challenge their dismissal before being removed from Canada. One such worker displaced two vertebrae while loading machinery onto a truck, and was prescribed an operation by the doctor; however, before the operation was performed, he was repatriated.⁸³ As another worker described, “when things are good, when you’re working for them, you’re a machine to make money, but once you’re sick, they want to kick you out like a disposable object.”⁸⁴

Procedural Fairness Under the Bill of Rights

It may be difficult to argue that the Charter applies to facts like these, given that the Supreme Court has been clear that neither being forced to leave Canada⁸⁵ nor intrusions upon socioeconomic rights are infringements upon s. 7. The Bill of Rights,⁸⁶ however, provides an alternative source of procedural fairness if the affected individual cannot establish sufficient

⁸⁰ Rosa Marchitelli, "Migrant Worker Program Called 'Worse than Slavery' After Injured Participants Sent Home Without Treatment" *CBC News* (16 May 2016), online: <<http://www.cbc.ca/news/canada/jamaican-farm-worker-sent-home-in-a-casket-1.3577643>>.

⁸¹ *Ibid.*

⁸² United Food and Commercial Workers Canada, “The Status of Migrant Farm Workers in Canada, 2006-2007”, online: <<http://www.ufcw.ca/Theme/UFCW/files/PDF2007/StatusReportEN2007.pdf>> at 7 [*UFCW Report 2006-2007*].

⁸³ *Ibid.*

⁸⁴ Gwendolyn Muir, *Unmapping Recruitment: An Exploration of Canada's Temporary Foreign Worker Program in Guatemala* (MSc Thesis, Concordia University Department of Geography, Urban & Environmental Studies, 2015) [unpublished] at 83.

⁸⁵ That is, if the deportation is not towards torture. See *Medovarski*, *supra* note 33.

⁸⁶ *Canadian Bill of Rights*, SC 1960, c 44, at para 2(e) [*Bill of Rights*].

infringements of their s. 7 interests.⁸⁷ While procedural fairness obligations under the common law do not empower judges to override legislation, the procedural obligations in the Bill of Rights cannot be ousted by statute unless the statute explicitly declares that it “shall operate notwithstanding the Canadian Bill of Rights.”⁸⁸ As such, while the Bill of Rights is not often argued, “litigants ignore it at their peril,”⁸⁹ as it can be a powerful source of procedural rights outside of the Charter context. Section 2(e) of the Bill declares that “no law of Canada shall be construed or applied so as to ... deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations.”⁹⁰ In order to find a breach of procedural fairness under this provision, the law at issue must be a federal one, and it must be determinative of rights or obligations, rather than privileges.⁹¹

The legal authority from which the repatriations described above stem is a federal one: s. 85 of the IRPR gives an immigration officer the authority to “impose, vary or cancel the following specific conditions on a temporary resident: ... (b) the work that they are permitted to engage in, or are prohibited from engaging in, in Canada, including ... (ii) the employer.”⁹² If a migrant worker’s status in Canada is granted on the condition of employment with a certain employer, then a dismissal from employment effectively revokes the worker’s status in Canada. While a loss of employment will not necessarily trigger deportation in the usual sense of detention and forcible removal by the Canadian Border Services Agency, SAWP workers who have been dismissed are often effectively deported by their employer. As the employer is

⁸⁷ Fox-Decent and Pless, *supra* note 53 at 239.

⁸⁸ *Ibid* at 239-40.

⁸⁹ *Ibid* at 240.

⁹⁰ *Bill of Rights*, *supra* note 86 at para 2(e).

⁹¹ *Singh*, *supra* note 32 at para 97.

⁹² *Immigration and Refugee Protection Regulations*, SOR/2002-227, s 185(b)(ii).

required by contract to pay for the worker's flight home and to book it through a designated travel agency,⁹³ the employer thus effectively controls the worker's transportation options.

The legal interest at issue in situations of repatriation is a right rather than a privilege. While “courts have consistently held that immigration is a privilege not a right,”⁹⁴ the issue here is not whether the workers can enter Canada, nor whether they can stay indefinitely, but whether they can stay until the originally-envisioned end of their permit. The jurisprudence does not categorically foreclose the consideration of immigration law issues as rights rather than privileges: for example, whereas a discretionary decision to have a deportation order stayed has been held to be a “privilege” not protected by s. 2(e),⁹⁵ the determination of whether to grant refugee status and its associated rights has been held to be a right falling within the ambit of s. 2(e).⁹⁶ In the context of the SAWP, the issue is whether the right to live and work in Canada for the agricultural season can be taken away without proper procedural safeguards—*after* having been granted. In *Hassouana*, the Federal Court found that a citizenship revocation involved a determination of rights for the purposes of section 2(e), asserting that “citizenship is a privilege only when it has not yet been obtained.”⁹⁷ By analogy, a work permit is a privilege only when it has not yet been obtained: once it is held, it confers rights to its holder.

Repatriation Procedures and the Content of the Duty of Fairness

A SAWP worker thus has their rights determined by a hearing that applies federal law, and therefore must not be deprived of “the right to a fair hearing in accordance with the

⁹³ *Canada-Mexico SAWP Contract 2018*, *supra* note 6 at VII(1).

⁹⁴ *Singh*, *supra* note 32 at para 49.

⁹⁵ *Prata v Minister of Manpower & Immigration*, [1976] 1 SCR 376 at 380.

⁹⁶ *Singh*, *supra* note 32 at para 97.

⁹⁷ *Hassouana v Canada (Citizenship and Immigration)*, 2017 FC 473 at para 75.

principles of fundamental justice” as required by section 2(e). As under the Charter, the procedural content of the principles of fundamental justice is determined by “the nature of the legal rights at issue and the severity of the consequences to the individuals concerned.”⁹⁸ Here, as in the above Charter analysis, the interests at stake are ones that have been recognized by the case law as deserving of a high level of procedural fairness: the ability to continue in one’s employment and the ability to stay in Canada.

Like the employer transfer and LMIA revocation processes analyzed above, the dismissal and repatriation process does not afford SAWP workers even minimal procedural entitlements. A SAWP work permit, granted via an immigration officer’s discretion s. 185(b)(ii) of the IRPR, ties the worker to one specific employer. After dismissal, the SAWP worker may not work for another employer without going through the transfer process that, as argued above, is centered around the interests of the employer and the Canadian labour market, neglecting procedural safeguards to ensure fairness to the worker. In addition, even if the process were fair, the time constraints at play in a situation of dismissal ensure that going through the transfer process is effectively impossible. As the employer is contractually mandated to provide the worker’s housing, the employer has the incentive to remove them from the country as quickly as possible. The employer’s role in paying for and arranging the worker’s travel back to their country of origin allows the employer to book an immediate return flight. Thus, while a situation of repatriation is not a deportation in the strict sense of the word, a worker is effectively shepherded out of the country by their employer, leaving them no other option than to comply, or else to go underground and work without legal authorization. Unlike a situation of deportation by state border agents, there is no possibility for a worker to legally contest their repatriation before a court or immigration officer before they are removed. While even

⁹⁸ *Singh, supra* note 32 at para 103.

the procedural safeguards for public deportations are flawed, here workers are not afforded even a minimal hearing before undergoing what is effectively privately-enacted deportation. Workers are not heard by an immigration officer in writing, as was required in *Baker*, nor are they given any sort of oral hearing as required in *Singh*.⁹⁹ No one even considers their case before they are removed from the country. As such, no reasons are provided as required in *Baker* and *Suresh*:¹⁰⁰ not for a worker's dismissal from their first employer, not for a lack of transfer to a new employer, and not for an immediate repatriation. It is hard to imagine a scenario with lower levels of procedural safeguards. The procedural safeguards afforded are certainly not in proportion to the importance of the interests at stake, and thus are not in accordance with the principles of fundamental justice as s. 2(e) of the Bill of Rights requires.

Section 185(b)(ii) of the IRPR, which allows for employer-tied work permits, should thus be declared inoperative to the extent that it deprives SAWP workers of their rights under s. 2(e). If SAWP workers' status were not tied to a particular employer, they would have the right to stay and work in Canada until the expiration of their permit, and would at least have the benefit of the (admittedly still flawed) procedures surrounding publicly-enacted deportation. As an alternative, the government could also establish a process to review any premature repatriation of SAWP workers; however, this would be likely expensive, slow and cumbersome, and it would leave workers without a place to live or work while waiting for the outcome of that procedure. Giving SAWP workers permanent status upon arrival (or at the very least an open work permit) would remove the excessive power that employers have over workers to take away not only their job but also their housing and immigration status on a whim. From a policy perspective, it would

⁹⁹ *Baker*, *supra* note 18 at para 34.

¹⁰⁰ *Baker*, *supra* note 18; *Suresh*, *supra* note 64.

prevent the government from having to put in place a new procedural system to make the SAWP comply with the Bill of Rights.

VI. Threats of Blacklisting: Procedural Fairness Under the Common Law

On the same day that SAWP workers in BC won the right to collective bargaining at the BC Labour Relations Board,¹⁰¹ workers employed by the defendant employer Greenway Farms voted to decertify their union.¹⁰² Officials at United Food and Commercial Workers International Union (UFCW) noticed that many of the pro-union workers from the previous year had not been recalled by their employer.¹⁰³ It became apparent that employers' power over whether workers stay or return to Canada was being used as a threat against workers' unionization across Canada:

In September 2008, Floralia Plant Growers in Abbotsford laid off and repatriated fourteen SAWP workers shortly before a certification vote. The UFCW filed a complaint to the [Labour] Board, but it ruled that Floralia was economically justified in laying off the SAWP workers. In August 2008, a bargaining unit at a Manitoba farm composed largely of SAWP workers voted to decertify just weeks after a successful certification vote.¹⁰⁴

This phenomenon has been repeatedly observed and documented by UFCW. In 2006, a worker who had been with the same employer for six years was asked to sign a letter stipulating that he did not want to be represented by UFCW.¹⁰⁵ It was the night before the worker was returning to Mexico for the end of the season. When he refused to sign the letter, the employer reported him

¹⁰¹ *Greenway Farms Ltd v United Food and Commercial Workers International Union, Local 1518* (29 June 2009) 58520, online: BCLRB <<http://canlii.ca/t/24nkr>>.

¹⁰² Robert Russo, "Case comment: Temporarily Unchained: The Drive to Unionize Foreign Seasonal Agricultural Workers in Canada - A Comment on Greenway Farms and UFCW" (2011) 169 *BC Studies* at 137.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid* at 138.

¹⁰⁵ *UFCW Report 2006-2007*, *supra* note 82 at 9.

as having behavioural problems, effectively preventing him from participating in the SAWP program in subsequent years.¹⁰⁶

SAWP employers can choose whether to recall workers, and can also give each worker an evaluation that all other potential SAWP employers can see. “Blacklisting” is when an employer gives a poor evaluation and thereby effectively ensures that the worker will not return to Canada the following year. One migrant worker, when describing the high degree of compliance fostered by the evaluation, characterized it metaphorically as “a passport that allows you to return the following year.”¹⁰⁷ These evaluations are administered through employer associations, whose mission is to “facilitate and coordinate the processing of requests for foreign seasonal agricultural workers.”¹⁰⁸ These employer associations are authorized by ESDC to “administer the SAWP,”¹⁰⁹ which includes administering the process of hiring, evaluating, and transferring workers.

Legitimate Expectations Under the Common Law

The practice of blacklisting is contrary to the legitimate expectations of SAWP workers under the common law duty of procedural fairness. The doctrine of legitimate expectations functions as “an extension of the rules of natural justice and procedural fairness.”¹¹⁰ As described by the Supreme Court in *CUPE*, the doctrine allows a reviewing court to “grant appropriate procedural remedies” to respond to a legitimate expectation if certain conditions are fulfilled.¹¹¹

¹⁰⁶ *Ibid.*

¹⁰⁷ Fay Faraday, Judy Fudge & Eric Tucker, *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case* (Toronto: Irwin, 2012) at 96.

¹⁰⁸ “Foreign Agricultural Resource Management Services”, online: <<http://farmsontario.ca/index.php>>.

¹⁰⁹ “Application Process”, online: Foreign Agricultural Resource Management Services <<http://farmsontario.ca/application.php?divname=ApplicationProcess>>.

¹¹⁰ *Reference re Canada Assistance Plan (BC)*, [1991] 2 SCR 525 at 557.

¹¹¹ *CUPE v Ontario (Minister of Labour)*, 2003 SCC 29 at 131.

A legitimate expectation must stem from the conduct of “a Minister or other public authority in the exercise of a discretionary power” that induces in a complainant a “reasonable expectation that they will retain a benefit or be consulted before a contrary decision is taken.”¹¹² The discretionary power at issue here is ESDC and IRCC’s power to administer the SAWP, which is an immigration stream created not by legislation or regulations but by Ministerial discretion. The benefit that SAWP workers can reasonably expect is that ESDC and IRCC will process their request to transfer employers or to be recalled the following year—fairly at the Ministers’ own initiative and discretion, without employers and employer associations interfering with the process.

A legitimate expectation must stem from a practice, conduct or representation that “can be characterized as clear, unambiguous and unqualified.”¹¹³ In the context of the SAWP, typical state practice or conduct is not desirable to rely upon; thus, I will focus here on Ministerial representations. The ESDC’s webpage for temporary foreign workers can be considered as Ministerial representations about workers’ legal entitlements, including their procedural entitlements. Promising that “Your Rights Are Protected,” the webpage tells workers, “you are allowed to change employers. Your employer cannot penalize or deport you for looking for another job.”¹¹⁴ It also proclaims that “your employer cannot ... take your passport or work permit away from you, have you deported from Canada or change your immigration status.”¹¹⁵ These representations give workers a legitimate expectation that they can transfer employers and that their employer cannot interfere with their right to be in Canada.

¹¹² *Ibid.*

¹¹³ *Ibid.*

¹¹⁴ *Your Rights are Protected*, *supra* note 42.

¹¹⁵ *Ibid.*

While all of this is technically true according to the substantive black-letter law, the lack of procedural protections in the SAWP renders these promises hollow. As in *Morgentaler*, “the straightforward reading of this statutory scheme is not fully revealing” of the way it functions in practice.¹¹⁶ The promises that the Minister proclaims do not account for the role of employer associations in controlling the processes of worker transfer and blacklisting. In reality, employer associations exercise excessive control over these processes. FARMS’ website explains that a \$40 fee is owed for transferring a worker, and that it assumes significant control over the process in exchange for that fee:

The Labour Market Impact Assessment (LMIA) applications MUST be completed in full, signed and either mailed or faxed to F.A.R.M.S. The application goes through a clearance process and when complete with all attachments it is sent to Service Canada. F.A.R.M.S. is available to assist with completing the initial and subsequent applications.¹¹⁷

In addition, FARMS administers the process through which employers can recall specific workers the next year. An information webpage for employers instructs:

At the end of each year a summary of all the workers employed in that season is sent to each employer. Employers are asked to use the summary to identify named workers [whom they wish to recall the following year]...Draw a line through the names not being requested...Send the summary of worker names to F.A.R.M.S. with the completed application.¹¹⁸

The central role of employer associations in these processes means that the rights promised to SAWP workers often go unrealized, as in the post-unionization blacklisting scenarios described above. SAWP workers have a legitimate expectation that the processes through which they are promised transfers and a lack of employer bullying will be handled impartially and fairly by public mechanisms, rather than by private, employer-driven ones.

¹¹⁶ *Morgentaler*, *supra* note 68 at 65.

¹¹⁷ “How to Apply”, online: Foreign Agricultural Resource Management Services <<http://farmsontario.ca/application.php>>.

¹¹⁸ *Ibid.*

As the Supreme Court explains in *Agraira*, “if representations with respect to a substantive result have been made to an individual, the duty owed to him by the public authority in terms of the procedures it must follow before making a contrary decision will be more onerous.”¹¹⁹ While legitimate expectations cannot give rise to a specific substantive outcome—for example, a guaranteed transfer or guaranteed recall—they do give rise to heightened procedural rights.¹²⁰ The only procedural entitlements that could prevent situations of blacklisting are ones that would check the excessive power exercised by employers and employer associations and determine workers’ potential recall or transfer in accordance with fair and open public procedures that provide migrant workers with a hearing in accordance with the principles of procedural fairness.

VII. Conclusion

While procedural fairness may have “many faces,”¹²¹ we see none of them reflected in the SAWP. While the government carefully cares for the procedural rights of SAWP employers, workers’ interests are at the mercy of administrative authority exercised without the procedural safeguards that exist in other contexts, allowing for employers to wield an inordinate amount of power. As we have seen in the jurisprudence canvassed above, individual case-based litigation has brought significant (if insufficient) advancement in judicially-enforceable procedural entitlements throughout the history of Canadian administrative law. *Singh*, for example, led to an overhaul of Canada’s refugee determination process in favour of heightened participatory rights. Given the strong jurisprudential foundations, extensive social science evidence and collective

¹¹⁹ *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 94.

¹²⁰ *Ibid* at 97.

¹²¹ *Dunsmuir*, *supra* note 19 at para 77.

organizing energy of migrant workers and their allies, the time may be ripe for a similar challenge to the SAWP.

While I hope that the arguments above can be used towards a partial alleviation of the harmful effects of the SAWP through litigation, procedural remedies are ultimately band-aids to flawed underlying policy mentalities surrounding circular migration. A high view of procedural fairness demands an interrogation of the fundamental philosophy behind the SAWP program. If procedural fairness is ultimately about a legitimate exercise of public power in a trust-based relationship between institution and individual,¹²² then it is unacceptable for the Canadian state to make use of migrant labour while withholding the protections associated with permanent and full legal status. The procedural deficiencies of the SAWP are mere symptoms of the underlying ways in which managed circular migration “normalizes the exclusion of workers from full status”¹²³ and renders them second-class (non)citizens. The SAWP’s deficiencies according to administrative law standards suggest that a true remedy would better come through immigration policy: as community organizations have long advocated, giving migrant workers permanent residency upon arrival to Canada would go a long way toward minimizing the potential for employer abuse. Permanent status would help to remedy the “state-constructed precarity”¹²⁴ that currently characterizes temporary foreign worker programs, rather than plastering it with procedural band-aids.

The stark procedural deficiencies of the SAWP cannot be understood without a perspective from political economy that inquires into whose interests the Canadian state has

¹²² Evan Fox-Decent, “Democratizing Common Law Constitutionalism” (2010) 55:1 McGill LJ 511 at 521, online: <<https://www.erudit.org/en/journals/mlj/2010-v55-n3-mlj1497435/1000622ar.pdf>>.

¹²³ Muir, *supra* note 84 at iii.

¹²⁴ *Ibid* at 18.

privileged in designing the SAWP. Temporary foreign worker programs have been explicitly praised from a perspective of legal economics as providing important benefits for not only employers but the receiving state as a whole. According to Eric Posner and Adam Cox:

The lack of portability [of work permits between employers] might be defended as a method for rewarding employers for undertaking the task of screening on behalf of the government. The employer must invest in finding foreign workers that suit its needs and then must underwrite the cost of the migration process. An employer will not incur these costs unless it can be guaranteed a return—in the form of wages that are below the prevailing American wages. ...If the employer rather than the temporary migrant receives the surplus, that money will ultimately benefit (mostly) Americans (shareholders, customers who receive lower prices) rather than (mostly) foreigners, who will benefit from remittances and the worker's expenditures after she returns to her country.”¹²⁵

Clearly, the policy choices underlying employer-tied and temporary migrant worker programs are informed by an outsized interest in the receiving country’s own economic growth. Critics of temporary foreign worker programs have argued that “it is the ‘foreignness’ of workers...that legitimizes their state-constructed precarity,”¹²⁶ and Posner’s analysis explicitly confirms this. The commoditization of labour and movement underlying the SAWP can arguably never be elevated to a point where it truly fulfills the values and ideals underlying the doctrine of procedural fairness, so long as the government considers migrant workers as “temporary” “foreign” workers and not permanent and fully-fledged members of Canadian society.

¹²⁵Adam B Cox & Eric A Posner, “Delegation in Immigration Law” (2012) 79:4 Chicago J Intl L 1285 at 1309.

¹²⁶ Muir, *supra* note 84 at 18.