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Employment-Related Geographic Mobility in Canada and Collective Bargaining: A Report Prepared for the On the Move Partnership Research Team

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**EMPLOYMENT-RELATED GEOGRAPHIC MOBILITY
AND COLLECTIVE BARGAINING IN CANADA**

**Eric Tucker
and
Brendan Jowett***

Report prepared for:
On the Move, Policy Component
July, 2014

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I. Introduction

Employment-related geographic mobility encompasses a wide range of situations, ranging from workers who travel extensively for work, workers who make a daily commute of two to three hours or more, workers who commute across the country on a periodic basis and for extended periods of time, and workers who travel internationally for work in or out of Canada. Each one of these situations may pose a challenge to the ability of workers to establish and sustain an effective collective bargaining relationship with their employer because of the mismatch between their reality and the design and operation of Canada's collective bargaining laws. As well, collective bargaining itself may become a driver of E-RGM to the extent that it imposes restrictions on access to employment or mobility within a workplace that result in workers moving for work. The purpose of this report is to provide researchers with an understanding of these problems, focusing primarily on workers who commute and on workers who change jobs and employers as a result of their geographic mobility. It also provides a separate discussion of temporary foreign workers (TFWs) in Canada. As such, the report does not present a comprehensive and detailed legal analysis, but rather a broader survey that identifies and explains where problems may arise for these workers and why.

For the purposes of this research we conducted a review of legislation, case law and secondary literature. With respect to legislation, we started by scanning the 2013 consolidation of the Ontario Labour Relations Act (OLRA)¹ to identify provisions that we thought might be of particular significance to geographically mobile workers. We then searched labour board decisions from all Canadian jurisdictions without time restrictions to identify cases in which E-RGM was an issue in the interpretation and application of labour statutes. In addition to identifying issues, we also hoped that this would draw our attention to statutory provisions in other province labour relations statutes that were problematic for geographically mobile workers. Next, we turned to arbitration awards from across Canada to identify grievances in which E-RGM was an issue. At the same time, we examined the secondary literature, including labour law and arbitration texts and academic books, book chapters and journals for discussions of any problems relating to E-RGM and collective bargaining. To our surprise, apart from the issue of temporary foreign workers, these searches yielded very little. In order to make sure we had missed any important issues, we consulted with a small number of trade union officials at the beginning of the research project and circulated a draft of this report for comment to other researchers and trade union researchers.

¹ Labour Relations Act, 1995, S.O. 1995, c. 1, Schedule A.

We cannot fully explain the paucity of case law and commentary on E-RGM and collective bargaining. In part this may reflect the fact that geographic mobility has been less of an issue in the past than it is at present, but it would be wrong to assume that it is a new phenomenon. International and domestic labour migration has been a widespread phenomenon for centuries. Indeed, as we shall see, in an industry where mobility has been the norm, the construction industry, mechanisms have been developed to address this situation, and they will be described in more detail in the report. Whatever the reason for the lack of attention, it has made our task more difficult. Not only is there little analysis of the issues, but for the most part issues have not even been identified. Thus in many ways this report is a first-look at the intersection of E-RGM and collective bargaining law and we have tried to identify research questions that require fieldwork to answer.

The analysis that follows is organized in the following manner. Part II identifies structural features of Canadian collective bargaining law that are, if not incompatible with, then at least ill-suited to E-RGM. These structures include the limited regulatory role that unions play in our collective bargaining regime, the provincial basis of collective bargaining law resulting from the constitutional division of powers, and the difficulties of obtaining union representation for workers generally. These features of Canadian collective bargaining law become particularly problematic when E-RGM involves workers changing jobs or workplaces because they have left one location and moved to another. Part III then examines in more detail particular issues that may arise when geographically mobile workers need to become incorporated into the collective bargaining regime because they have moved into a non-union job or need to be re-incorporated into the regime because they have moved into a unionized workplace. Part IV briefly addresses the question of how the collective bargaining regime operates for geographically mobile workers who remain within a bargaining unit but have special needs because of their geographic mobility. A separate section, Part V, is devoted to the problem of temporary foreign workers (TFWs) and collective bargaining since their precarious immigration status creates special vulnerabilities that are not shared by persons with permanent status in Canada.

II. Structural Features of the Canadian Collective Bargaining Regime

As we noted above, the basic structures of Canadian collective bargaining law produce obstacles for all Canadian workers to establish effective collective voice, but these obstacles are particularly severe for mobile workers generally and geographically mobile workers in particular. In this part of the report, we discuss three such structures: 1) Canadian unions have

a weak regulatory function; 2) it is generally difficult to obtain union representation; and 3) there are no national labour laws.

A. Representational versus Regulatory Collective Bargaining

Trade unions can and do function in a variety of ways. Keith Ewing usefully identified five functions of trade union: 1) service; 2) representation; 3) regulatory; 4) government and 5) public administration.² For our purposes, we focus on, and compare and contrast, regulatory systems of collective bargaining with representational systems. In regulatory systems, unions participate in rule-making processes that establish terms and conditions of employment on a sectoral basis. This may be done in a variety of ways but typically it involves a union or a council of unions bargaining with a council of employers. The agreement that is reached applies to all employers in the sector even if they are not parties to the agreement. As a consequence, the terms and conditions of employment for all workers in the sector are set by the agreement, whether or not they are members of the trade union or trade unions that negotiated the agreement. For the most part, this is not the model of collective bargaining that prevails in Canada, although weak forms of regulatory unionism exist in Canada, such as under collective agreement extension legislation in some provinces (now mostly defunct)³ and in some sectors of the construction industry. For this and for other reasons, construction will receive separate treatment in this report.

Instead, in Canada we mostly have representational systems of collective bargaining. The fundamental principle of representational collective bargaining is that unions only negotiate terms and conditions of employment for members of the bargaining units they have been certified (or voluntarily recognized by the employer) to represent. Workers who are not in certified bargaining units are not covered by collective agreements and it follows that employers whose workers are not unionized and who are not parties to a collective agreement are not bound by collective agreements that apply to other employers in the same sector. It is essential, therefore, that workers unionize (bargaining unit by bargaining unit) in order for their terms and conditions to be established by collective bargaining and that unions gain representation rights in order for them to be able to fulfill their function. This model has very significant

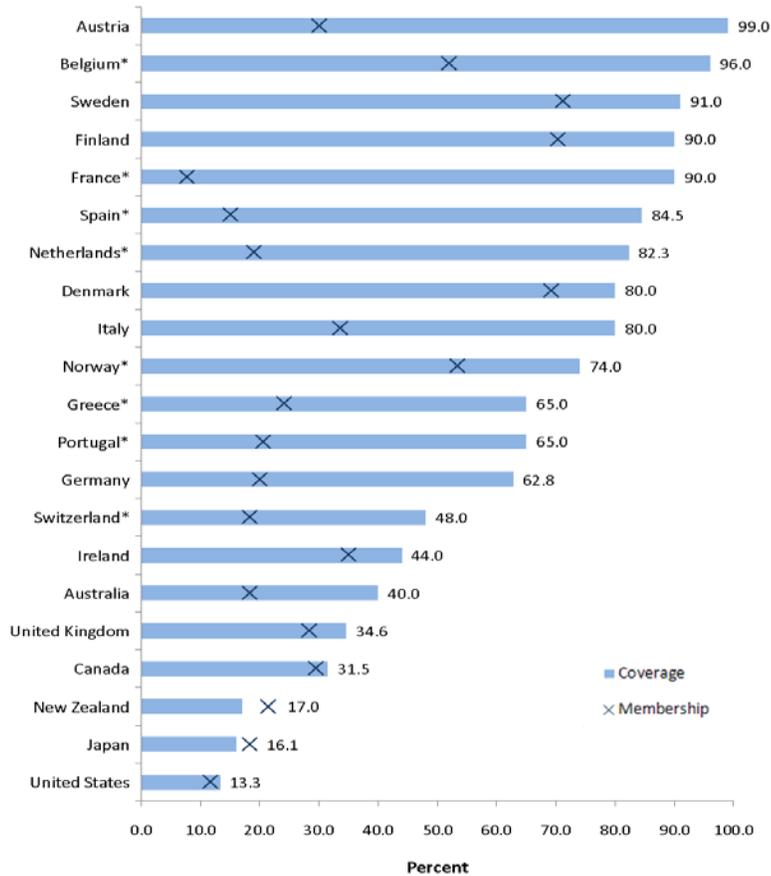
²Keith Ewing, "The Function of Trade Unions" (2005) 34 *Industrial Law Journal* 1.

³Mélanie Laroche and Gregor Murray, "Coordinated Employer Bargaining and Globalisation: A Study of the Men's Clothing Industry in Quebec, 1974-2012" (2012) 43 *Industrial Relations Journal* 472.

implications for collective bargaining coverage, as is demonstrated by the following chart, which depicts union density and collective bargaining coverage in 21 wealthy countries.⁴

Figure 1

Union Membership and Union Coverage for 21 Wealthy Countries



In countries like Canada and the United States, where unions play a representational role, collective bargaining coverage and union density are closely aligned, whereas in countries where unions serve a regulatory role, such as France and Spain, collective bargaining coverage is vastly greater than actual union membership.

The representational character of Canadian collective bargaining is so fundamental and deeply engrained as part of our industrial relations common sense that it might not seem necessary to

⁴ From John Schmitt and Alexandra Mitukiewicz, “Politics Matter: Changes in Unionization Rates in Rich Countries, 1960-2010” (November 2011: Center for Economic Policy Research), 5 available online <http://www.cepr.net/documents/publications/unions-oecd-2011-11.pdf>.

mention it. However, its implications for E-RGM are profound. In a system of regulatory unionism, geographic mobility presents fewer challenges. The principal reason is that collective bargaining coverage is likely to be significantly higher. In the strongest version of regulatory unionism, each sector of the economy would be covered by a national agreement setting terms and conditions of employment for all workers employed in that sector. Therefore, if a worker moved from one province to another or from one region to another, she would remain covered by a collective bargaining agreement, even if the move involved a change of employer. Of course not all problems would be resolved as there would still have to be rules about the transfer of seniority and other such matters, but these would be second order issues.

However, this is not our reality and so we have to recognize and confront the difficulties that a representational model poses for mobile workers generally, including geographically mobile workers. First, in representational models of collective bargaining union density is typically lower; unions must win representation rights, bargaining unit by bargaining unit, and, as will be discussed briefly below, this is hard work. Because densities are lower, there is a greater likelihood that geographically mobile workers who are changing jobs are moving from one non-unionized job to another or that if they are leaving a unionized job they will be moving to a non-unionized job. In order to gain access to collective bargaining, therefore, their new workplaces will have to become unionized. Second, in representational models the coverage of a collective agreement is likely to be quite narrow. Indeed, as will be discussed below, the Canadian model is extremely fragmented, so that typically a bargaining unit is no larger than all the employees of a particular employer in a particular municipality. As a result, even if a worker moves from one unionized job to another that worker is going to be covered by a different collective agreement and is unlikely to carry over seniority acquired at their previous job. Given the importance of seniority in unionized environments, this can leave mobile workers more vulnerable to lay-offs and disadvantaged when it comes to transfers or other seniority-based rights. Again, as we shall see, some unions, most notably in the construction industry, have tried to address this problem through collective bargaining or membership rules.⁵

It is perhaps misleading to construct a strict dichotomy between regulatory and representational collective bargaining when in principle and practice there is a continuum between the two. For example, regulatory unionism may operate on a narrower geographic or occupational basis than

⁵ The problem of loss of seniority when moving from one bargaining unit to another is not unique to geographic mobility. It affects all workers who change employers, even if they remain within the same municipality. But it is a problem that geographically mobile workers will regularly encounter.

the one we have described. Similarly, the scope of representational collective bargaining can also vary. For example, in principle we could have a certified bargaining unit that covers all employees of a particular employer across the country or a multi-employer bargaining unit. Clearly, as the size of bargaining units increases under representational unionism and the scope of agreements in regulatory unionism decreases, the differences between the two regimes diminish. But as we shall see below, because Canada embraces an extremely fragmented model of representational collective bargaining in most sectors, the difference between the regimes is pronounced.

B. Canada's Fragmented Collective Bargaining Regime

As a federal state, legislative jurisdiction is divided between the federal government and the provinces. At the time of Confederation, labour relations simply did not exist as a discrete topic and so no explicit allocation of authority was made. In fact, the question of constitutional authority really did not arise until the early decades of the twentieth century when, in response to growing concern about the impact of industrial conflict on the national economy, the federal government enacted the Industrial Disputes Investigation Act in 1907.⁶ Although its application was limited to industries that were thought to have significance for the national economy, such as railways and mines, it also applied to municipalities and it was this extension that produced the legal challenge to the federal government's constitutional authority to legislate in the area of labour relations. The majority of Canadian judges who heard the case supported federal jurisdiction, but the Judicial Committee of the Privy Council, then the highest court of appeal for Canada, took the view that labour relations were a matter of property and civil rights and thus primarily within provincial jurisdiction.⁷ As a result, each province and territory has its own labour laws and the federal government's laws only apply to those areas over which it has constitutional authority, such as inter-provincial railways, airlines, telecommunications, banking, etc., comprising about 10% of the labour force.

This structure has important implications for workers outside of the federal jurisdiction who travel from one province to another for the purposes of employment. Conceptually, the largest possible bargaining unit of a provincially regulated employer is all employees employed in the province. Of course, as we shall see, bargaining units are much more fragmented than that, but

⁶ S.C. 1907, c.20.

⁷Toronto Electric Commissioners v. Snider [1925] AC 396 (P.C.). Discussed in Blake Brown and Jennifer Llewellyn, "'Capitalist 'justice' as peddled by the 'Noble Lords': Toronto Electric Commissioners v. Snider et al.," in Eric Tucker and Judge Fudge, eds., *Work on Trial: Cases in Context*(Toronto: Irwin and the Osgoode Society for Canadian Legal History, 2010), 15-42.

leaving further fragmentation aside, the implication of provincial jurisdiction is that, for collective bargaining purposes, geographically mobile workers cannot move seamlessly from one province to another. Even if they are unionized in their prior job, when a worker moves to a different province she must leave her bargaining unit and become re-incorporated into a different bargaining unit in order to remain unionized and be covered by a collective bargaining agreement. That reincorporation may be relatively straightforward if the worker moves into another unionized job (subject to the loss of seniority), or it may require the organization of a new bargaining unit if the new job is in a non-union workplace.

Within a province, labour relations boards are tasked with determining what constitutes an appropriate bargaining unit, within fairly broad legislative parameters. For example, collective bargaining statutes will typically prohibit one-person or multi-employer bargaining units, particularly in the industrial union context.⁸ The most common criteria used by labour boards for assessing the appropriateness of a bargaining unit is whether a group of workers share a “community of interest” and whether a proposed unit will cause significant industrial relations problems for the employer. A variety of factors have been posited as being relevant to this determination, which Adams examines in detail. These include:

- 1) History of collective bargaining in the industry, geographical area or particular employer;
- 2) Similarity in skills, interest, duties and working conditions;
- 3) Nature of the employer’s organization – does the community of interest parallel the company’s internal organization?
- 4) Wishes of the parties, constrained by policy considerations.⁹

Despite the stated intention of labour relations boards to minimize bargaining unit fragmentation, in practice the application of these factors generally leads to a very fragmented bargaining structure. There is, however, considerable variation in approaches taken by labour boards in different provinces and in different industries. For example, in Ontario, the norm is all the employees of a particular employer in a particular municipality, but exceptions are made in some circumstances. In contrast, the approach in British Columbia tends to favour broader units incorporating all employees of an employer within the province. However, there are exceptions.¹⁰ The upshot of this structure is that, depending on the province, there is a high

⁸ For example, in Ontario the statute expressly prohibits one person bargaining units and by implication excludes multi-employer units by defining a bargaining unit as “a unit of employees appropriate for collective bargaining, whether it is an employer unit or a plant unit or a subdivision of either of them.” S.O. 1995, c. 1, Sch. A, ss. 1 & 9(1).

⁹George Adams, *Canadian Labour Law*, 2d ed., (Aurora, ON: Canada Law Book, looseleaf) at 7.120-7.262.

¹⁰ Adam, *ibid*, 7.270 et seq.

likelihood that even when a geographically mobile unionized employee moves from one job to another within the same province, she will leave her bargaining unit and need to become re-incorporated into the collective bargaining regime either by moving into a unionized job covered by a different collective agreement or by organizing a new bargaining unit if the new job is non-union.

Of course, the legal determination of appropriate bargaining units does not prevent a union and an employer or group of employers from agreeing to bargain on a different basis, potentially producing a national or a province-wide agreement. But if the employer refuses to negotiate on a broader basis than the appropriate bargaining unit as defined by the labour board, the union cannot legally force it to do so and, indeed, may be found to have breached its duty to bargain in good faith if it insists on a different bargaining configuration. While broader-based bargaining was sometimes practiced in Canada, most employers have pulled out of such arrangements.¹¹

C. The Acquisition of Union Representation under Canadian Labour Law

As we noted, in our model of representational collective bargaining, workers must opt into union representation in order to move from the individual contract of employment regime to the collective bargaining regime. This can happen by an employer voluntarily recognizing the union, but this is relatively uncommon in Canada and so we will focus primarily on certification procedures. Unions gain representation rights by becoming the certified bargaining agent of a group of workers defined as an appropriate bargaining unit (discussed above). Generally speaking, a union becomes certified by establishing to the satisfaction of the labour board that it enjoys majority support among the employees in the bargaining unit it seeks to represent. In some provinces and territories¹², this can be accomplished by getting a majority (50% + 1) or super-majority (e.g., 55% + 1) of the employees in the bargaining unit to sign union membership cards. In other provinces, unions must first sign up a defined percentage of the bargaining unit as members (e.g., 40%) in order to qualify for an election and then they must obtain a majority of the votes cast in the election in order to become the certified bargaining agent.¹³

There is a substantial body of research that shows that it is harder for unions to succeed under a mandatory election law. This is because under an election regime employers have a greater

¹¹ Anne Forrest, "The Rise and Fall of National Bargaining in the Canadian Meat-Packing Industry" (1989) 44 *Relations Industrielles* 393.

¹²Quebec, New Brunswick, Newfoundland and Labrador, Manitoba, Prince Edward Island, Northwest Territories, Yukon, Nunavut and in federal industries.

¹³British Columbia, Alberta, Saskatchewan, Ontario, and Nova Scotia.

opportunity to exercise their right under collective bargaining statutes to express their opposition to unionization, provided that they do not abuse their power by committing an unfair labour practice.¹⁴ Unfair labour practices include retaliating against union supporters by, for example, firing them, or using threats or intimidation to deter workers from expressing their true wishes about union representation. These rules apply to all organizing drives. We will return later to discuss particular problems that geographically mobile workers may face in the operation of this model.

III. (Re-)Incorporating Geographically Mobile Workers into Collective Bargaining

The Canadian model of collective bargaining produces a situation in which geographically mobile workers will often need to be (re-)incorporated into collective bargaining if their movement involves leaving one job and taking another. If they are not (re)incorporated then their employment relation will be governed by the individual contract of employment regime. It will be helpful at the outset to conceptually map out a number of different scenarios that may arise when geographic mobility entails a change of jobs, based on whether the job they are leaving and the job they are moving into is unionized or not. This produces a matrix of four scenarios. In Figure 2 we have identified for each scenario what we anticipate to be the primary issue faced by mobile workers in being(re) incorporated into the collective bargaining regime¹⁵:

Figure 2

Principal Problems Incorporating Geographically Mobile Workers into Collective Bargaining Based on Union Status of Previous and Destination Workplace

<i>Status of Previous Workplace</i>	Unionized	1. Organizing Problems	3. Accretion/Carry-over of seniority
	Non-Unionized	2. Organizing Problems	4. Accretion

¹⁴ Susan Johnson, “Card Check or Mandatory Representation Vote?: How the Type of Union Recognition Procedure Affects Union Certification Success” (2002) 111 *Economic Journal* 344; Chris Riddell, “Union Certification Success Under Voting Versus Card-Check Procedures: Evidence from British Columbia, 1978-1998” (2004) 57 *Industrial and Labor Relations Review* 493; Sara Slinn “Empirical Analysis of the Effects of the Change from Card-Check to Mandatory Vote Certification” (2004) 11 *Canadian Labour and Employment Law Journal* 259.

¹⁵While the scenarios apply to all mobile workers, not just geographically mobile workers, this does not diminish their significance for these workers.

Our first two scenarios are of mobile workers, whether unionized or not, moving to work in non-unionized work places. Basic intuition dictates that because there is no collective bargaining unit to begin with the primary obstacle will be organizing a union in the new workplace. As we noted earlier, organizing is always hard work, but we will examine more closely the particular difficulties for organizing geographically mobile workers.

The third scenario is where unionized workers move from one unionized job to another. Here the issue is not whether the mobile employee will be covered by a collective agreement, but whether they will carry-over any seniority rights from their prior unionized workplace. There are a number of variations on this scenario that will be explored in more detail, but as we shall see, in most instances the answer to this question is not determined by statute but rather depends on the terms of collective agreements and/or internal trade union rules. So the focus here is on incorporating mobile workers into collective bargaining *agreements*.

A fourth scenario identified in Figure 2 is when a non-unionized worker moves to a unionized workplace (or a unionized worker moves to a unionized workplace represented by a different union). In that situation, the worker will become a member of the bargaining unit at the new workplace (without seniority) and be represented by the incumbent union, provided that the new job is within the bargaining unit and covered by the recognition clause of the collective agreement. This is known as accretion.¹⁶

A. Organizing Problems: Incorporating Geographically Mobile Workers into Collective Bargaining

Our focus here is on problems that arise in organizing mobile workers so that they can successfully become certified in a new bargaining unit and gain union representation. In the previous section we briefly described the Canadian certification model, which requires proof of majority support either by card counts in the jurisdictions where they are permitted or on

¹⁶ *Ibid* at 7.780 et seq.

elections. In either case, organizing is not easy, but it is the special obstacles faced by geographically mobile workers that are our concern here.

1. Who is an Employee/Who is the Employer

Collective bargaining legislation regulates relations between employers and employees. Therefore, before mobile workers can be incorporated into the collective bargaining regime they must be legally classified as employees. The topic of who is an employee for the purposes of collective bargaining¹⁷ is too large a topic to be addressed here, but generally speaking labour boards have adopted multi-factor tests that look to control, ownership of tools and chance of profit and risk of loss in order to ascertain whether a person is an independent contractor running a business or an employee.¹⁸ Because there is not a bright line, judgments must be made at the margin and in many jurisdictions¹⁹ labour legislation provides that “dependent contractors” are employees for the purposes of the act. We are unaware of case law where the status of mobile workers has been in play or of studies of mobile workers where this question has come up. Are geographically mobile workers more likely than others to find themselves in positions where they are being cast as independent contractors or where the characteristics of their relationships are markedly different from others? We don’t know.²⁰ However, fieldworkers should be aware of this issue and we would be pleased to provide more support or advice if it does arise.

If there is an employee, then by definition there must be an entity that is legally responsible for the obligations of the employer. This formulation is, perhaps, awkward but necessary. Since the nineteenth century, employment was understood as a contractual relationship between an employee and an employer. Since the late-twentieth century, the situation is more complex. Judges and administrative decision-makers are no longer wedded to a contractual model and in some instances will hold an entity to be responsible for the obligations of an employer for the purposes of the common law or statute even in the absence of a contractual relationship. Moreover, in some instances different entities can be recognized as the employer for different

¹⁷ It should be noted that workers can be employees for some purposes but not others. Because of dependent contractor provisions in many labour relations statutes, the definition of employee for the purposes of collective bargaining is often broader than it is for other purposes, such as employment standards protection.

¹⁸ Adams, 6.440 et seq.

¹⁹ Adams, 6.10 et seq.

²⁰ While MacDonald does not address the specific question of geographic mobility and employment status precariousness, she does speak more generally of the ways in which geographic mobility may facilitate precariousness. See Martha MacDonald, “Spatial Dimensions of Gendered Precariousness: Challenges for Comparative Analysis” in Leah F. Vosko, Martha MacDonald and Iain Campbell, eds., *Gender and the Contours of Precarious Employment* (London: Routledge, 2009), 220-22.

purposes. Fortunately, we are only concerned with the question of who is the employer for the purposes of collective bargaining law and so our enquiry can be narrowed.

The identification of the employer has become more problematic in recent decades because of a phenomenon that David Weil has labeled “fissuring,” which involved companies moving work outside of the firm through outsourcing and subcontracting.²¹ So whereas in the past firms may have hired their own employees to produce something, they are now more likely to contract out all or part of the production process. Those contracted firms in turn may also sub-contract, sometimes hiring a labour supply firm to be the employer of record. However, the designation of an entity as the employer does not determine the question of whether the designated entity is the *legal* employer. In the collective bargaining context, this is a matter to be determined by a labour relations board, subject to judicial review if the court finds the board’s determination to be unreasonable.

The problem of identifying who is the employer can arise in several different contexts. One area where there has been controversy and confusion is when a company contracts with an agency for temporary employees. The issue becomes legally complicated because the temporary employees have a contractual relationship with the agency but not with the client firm where they provide service. However, the client firm exercises substantial control over the performance of the work. Labour boards have approached the issue by adopting the fundamental control test in which they determine which of the two entities exercises the most control over the employees’ based on a number of factors.²² The application of this test has often resulted in the board finding that the client is the employer. However, the existence of what is now called a triangular employment relationship causes organizing problems regardless of whether the client or the agency is the employer if only because the group of temporary employees is more likely to fluctuate and have a more precarious relationship.²³ Another scenario is a subcontracting relationship. Here the legal situation is clearer. As long as there is an arms-length relationship between the contractor and the sub-contractor, there is little likelihood that the contractor will be found to be the employee of the sub-contractor’s employees. However, the relationships can become quite murky, in which case significant difficulties may arise.²⁴

²¹ David Weil, *The Fissured Workplace* (Boston: Harvard University, 2014).

²² *York Condominium Corporation*, [1977] OLRB Rep. 645.

²³ These issues are explored at length in Timothy J. Bartkiw, “Unions and Temporary Help Agency Employment” (2012) 67 *Relations Industrielles* 453.

²⁴ For example, see *Lockerbie Management Ltd. and IBEW, Local 254 (Re)*, (1989), 2 C.L.R.B.R. (2d) 308, [1989 CLB 11833](#) (Alta.). For discussion see, Adams, 6.440 et seq.

We are aware of only one case in which the problem of who is the employer of a group of geographically mobile workers has been considered and that was in relation to a group of TFWs brought to Canada on an intra-company transfer. In that case, CW Wind Canada was a subsidiary of CS Wind, which had its headquarters in Korea. It manufactures wind towers. This requires highly skilled and specialized labour, which was not available in Canada and so Vietnamese workers, employed by CS Wind Vietnam, were brought in through the TFW program to assist in the training of new CS Wind Canada employees and to perform the work until there were enough domestic workers. An organizing drive of the permanent domestic workers was conducted by the International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers, Local 721. The employer objected to the union's proposed bargaining unit (see discussion *infra.*), which in turn raised the issue of who was the employer for the purposes of collective bargaining, CS Wind Canada or CS Wind Vietnam. In answering this question, the board first reviewed the test for determining employer status and moved away from the *York Condominium* test most commonly used toward a more comprehensive factoring test to determine which party has the most control over all aspects of the work on the specific facts of each case.²⁵ Despite the fact that in this case the TFWs had signed contracts of employment with the Vietnamese company that established many of their terms and conditions, the board concluded that the Canadian employer exercised day to day control over the working lives of the Vietnamese TFWs and on that basis held that CS Wind Canada was the employer. The result is consistent with outcomes of domestic cases involving triangular employment relations and so it is quite likely that in most instances the employer of mobile workers will be the employer who controls the worksite.

That said, as we noted, we have found only one case on point and we are not aware of any secondary literature which has discussed this issue. As with the case of determining employee status, we need to know more about the reality of geographically mobile workers' situations. We would be happy to provide further advice in the event workers in the field discover that the identification of the employer is a problem that geographically mobile workers are experiencing.

²⁵ *International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers, Local 721 v CS Wind Canada Inc*, 2014 CanLII 14887 (ON LRB), para. 99 <<http://canlii.ca/t/g6d7f>> retrieved on 2014-04-28. Frankly, we are dubious that the differences between the two tests are significant and would lead to different results.

2. Organizing Difficulties

Apart from questions of employee status and the identification of the employer, we might ask more generally whether it is more difficult to organize a group of workers that includes geographically mobile workers than one that does not. For the purposes of our discussion here we bracket the situation of temporary foreign workers because of the particular problems posed by their precarious immigration status. This group of workers will be considered separately in another section. As in the previous section, we have not identified cases in which the particular situation of mobile workers has come up as a factor in organizing, nor have we found this matter discussed in the secondary literature. Thus much of what follows is speculative.

We begin with the question of bargaining unit determination. Here we start from the assumption that there is no dispute that the geographically mobile workers are employees of the employer that is being organized (see above). The question then is whether mobile workers, including both workers who, for example, fly in and out for weeks at a time, are in the same bargaining unit as workers as more permanent workers. To our knowledge, labour boards do not have a practice of excluding mobile workers from a bargaining unit in this situation. For example, in Ontario and Alberta seasonal and casual workers are generally not excluded from an all-employee unit.²⁶

The fact that mobile workers are generally not separated out into a separate bargaining unit still leaves the question of whether there are particular challenges in organizing them. The first step in organizing is making contact with workers in the targeted bargaining unit. As a general matter unions are not entitled to be given the names and contact information of the employees in the bargaining unit they are trying to organize, unless the employer has already committed unfair labour practices and disclosure has been ordered as a remedy.²⁷ In a large workplace with multiple shifts and part-time workers, contacting employees can be a challenge. If we add to this mix the presence of a group of mobile workers who are only intermittently present, or a group of workers who spend several hours each day commuting to and from work, we hypothesize that other things being equal the difficulties would only increase.

²⁶ Jeffrey Sack, Michael Mitchell and Sandy Price, *Ontario Labour Relations Board: Law and Practice*, 3rd ed., (Markham, ON: Butterworths, 1997), 3.297 et seq.; Alberta Labour Relations Board, "Information Bulletin # 9: Bargaining Unit Descriptions" (Revised March 13, 20098), online <http://www.alrb.gov.ab.ca/bulletins/9bulletin.html>

²⁷ Once a union has been certified as the collective bargaining agent, obtaining contact information of union members becomes significantly easier, as the certified union's representational duties counterbalance privacy concerns: see *Bernard v. Canada* (2014) S.C.C. 14.

The next step would be to convince the employees to become union members. There are many factors that influence this decision and we cannot elaborate on this issue here. However, one influential view is that workers weigh the potential benefits of signing a union card against the possible risks, including employer retaliation. How might being a geographically mobile worker affect one's calculation of the benefits and costs? Given the variation among mobile workers, there is no easy answer to this question. It might be hypothesized that transient workers would expect to gain less from unionization because their attachment to the particular bargaining unit might be less than that of more permanent workers²⁸, while the costs of joining a union would be seen as being higher if they feel more vulnerable to suffering retaliation, such as not being asked to return.²⁹ Of course unfair labour practice protection makes it illegal to threaten or intimidate workers in order to deter them from choosing union representation, but employees cannot assume that their rights will be vindicated. We emphasize, however, that this is simply a hypothesis that requires field studies to be confirmed or refuted.

We next come to the question of determining who is in the bargaining unit either for the purposes of determining whether the union has obtained the level of support it needs either to trigger an election, win a card count certification where that is available or win an election. When the workforce is more or less stable this is not a problem, but where there are mobile workers this may become an issue. In most provinces, the answer is determined by who is in the bargaining unit on the day the application for certification is made. Workers who leave before that date or who arrive after do not count or get counted. There are two provinces, New Brunswick and PEI, which follow a different practice and fix a terminal date 8-10 days after the application is made. This arrangement would increase the ability of an employer to manipulate the results by either increasing or decreasing the number of mobile workers, but we do not know of any case where this allegation has been made, with either arrangement.³⁰ There is an exception to the approach articulated above and that is when there is a real likelihood that there will be a substantial increase in the size of the bargaining unit in the near future the board will

²⁸ Although this is not necessarily true. For example, many mobile workers return regularly to the same employer and expect to do so for an extended period of time. See Christine Laporte, Yuqian Lu and Grant Schellenberg, "Inter-provincial Employees in Alberta" (Statistics Canada, Analytic Studies Branch Research Paper Series, Catalogue No. 11FOO19M, no. 350, September 2013).

²⁹ For example, one study found that the use of migrant labour in Canada benefitted employers by allowing for the easy dismissal of such workers when their labour was no longer required and that Cape Breton workers who commuted to the oil patch felt more vulnerable following the recession. See Nelson Ferguson, "From Coal Pits to Tar Sands: Labour Migration between an Atlantic Canadian Region and the Athabasca Oil Sands" (2011) 17 & 18 *Just Labour* 106.

³⁰ Adams, 7.1080 et seq.

postpone the election or the card count until the build-up is substantially complete.³¹ However, we do not see this as being a substantial concern for mobile workers.

Geographically mobile workers employed at remote locations may also experience barriers to becoming unionized. One problem is that of access to the workers whose residences are located on their employer's private property, from which organizers can normally be excluded. Another is that union organizers may face considerable difficulty getting to the worksite. Indeed, outside union organizers may not even be able to reach the location without permission or authorization as in the case of an offshore drilling platform. Some but not all labour relations statutes address this problem by allowing the union to apply for a labour board order permitting organizer access in this situation.³² As well, in some situations, such as Newfoundland's offshore oil industry, interest in maintaining industrial peace resulted in special legislative provisions being made to accommodate unionization in this difficult environment.³³ The Newfoundland statute goes into detail about when it is appropriate to order access, requiring the Board to consider 1) the impracticability of accessing employees off premises and 2) the necessity of access for the purposes of organizing. It also allows the Board to make secondary orders governing access, as well as orders requiring employers to provide union representatives with food and lodging while they are on the employer's premises.³⁴

Saskatchewan's approach to this issue is, perhaps, unique in Canada. The *Saskatchewan Employment Act*,³⁵ makes it an unfair labour practice for an employer (or anyone acting on behalf of an employer) "to refuse, deny, restrict or limit the right of the employee or employees to allow access to the premises by members of any union representing or seeking to represent the employee or employees or any of them for the purpose of collective bargaining" "if one or more employees are permitted or required to live in premises supplied by, or by arrangement with, the employer." Unlike other access provisions in other statutes, in Saskatchewan's legislation provides *employees* with a right to allow access to property for trade union representatives. As well, unlike in other provinces, where the right of access only arises with a direction from the Board, in Saskatchewan no board intervention is required. In other words,

³¹ Adams, 7.1860 et seq.

³² For example, see OLRA, s. 13 and RSBC 1996, c 244, s. 7. There is no access provision in Nova Scotia and Alberta.

³³ Sean Cadigan, "Organizing Offshore: Labour Relations, Industrial Pluralism and Order in the Newfoundland and Labrador Oil Industry, 1997-2006" in Judy Fudge and Eric Tucker, eds., *Work on Trial* (Toronto: Irwin, 2010), 143.

³⁴ RSNL 1990 c L-1, s. 34.

³⁵ SS 2014, c S-15.1.

under Saskatchewan's legislation employees have an inherent right to allow access to trade union representatives, while elsewhere the right to access arises only once it is granted by the board.

But even with permission or authorization, organizing on the employer's premises may be more difficult than organizing in an environment in which meetings can take place away without the knowledge of the employer.

To conclude, while we hypothesize that there are likely to be some additional difficulties organizing workplaces with mobile workers, what is really required are case studies of organizing in this context. We will come back to look at the studies of organizing where there are temporary foreign workers, and this may shed some light on the situation of mobile workers more generally, but the fact of their precarious immigration status leads us to be cautious about generalizing from their experience.

B. Accretion of Mobile Workers into Existing Collective Agreements

When a new employee is hired by a unionized firm the question arises as to whether or not that employee is in the bargaining unit and therefore covered by the collective agreement. This is the issue of accretion. Usually, the issue is pretty straightforward. Bargaining unit descriptions are usually in terms of "all employees" subject to exclusions. This contemplates that the bargaining unit will grow or shrink as new employees are hired or existing employees leave. If issues arise, typically they are resolved through grievance arbitration.³⁶ In the absence of a dispute over whether mobile workers who transition in and out of a workplace are in the bargaining unit (which as we have noted is unlikely) we do not foresee any particular problem for mobile workers in this regard.

C. Carry Over of Seniority

When a unionized employee moves from one unionized job to another, sometimes even with the same employer in the same province, a major issue is whether they carry their seniority with them. This is an extremely important consideration because within the collective bargaining regime seniority plays an important role in allocating job benefits and risks. As a result, the issue has attracted a fair bit of attention, which is reflected in grievances and unfair labour practice complaints. Because mobility is a structural feature of work in the construction industry, special rules have often been developed to address this concern. For that reason, we

³⁶ Adams, 7.800.

first address issues of seniority carry over outside of construction and then turn examine its operation in that industry.

1. . Carry Over of Seniority – Non-construction

Once it is established that a worker has become a member of a new bargaining unit, the question may arise as to whether the new worker is entitled to carry over seniority from his or her previous job. Of course, this issue can only arise when the worker was previously employed in a unionized setting where he or she was accumulating seniority pursuant to a collective agreement. The issue arises frequently in the construction industry, where movement from one job site to another is the norm, and this context will be discussed in a separate section of the report. Here we consider the issue in other contexts.

As a preliminary matter, it will be useful to say a few words about seniority in the collective bargaining context. Seniority has been described as one of the most important features of collective bargaining in that it constrains employer prerogative by requiring the employer to take into account the length of time that the employee has been employed by that employer. According to one commonly cited arbitration award:

Seniority is one of the most important and far-reaching benefits which the trade union movement has been able to secure for its members by virtue of the collective bargaining process. An employee's seniority under the terms of a collective agreement gives rise to such important rights as relief from lay-off, right to recall to employment, vacations and vacation pay, and pension rights to name only a few. It follows, therefore, that an employee's seniority should only be affected by very clear language in the collective agreement concerned and that that arbitrators should construe the collective agreement with the utmost strictness wherever it is contended that an employee's seniority has been forfeited, truncated or abridged under the relevant sections of the collective agreement.³⁷

The above quote cites a number of the uses of seniority, but it will be helpful to distinguish between two types of uses. On the one hand, for some purposes the importance of seniority is

³⁷ *Re United Electrical Workers, Local 512 and Tung-Sol of Canada Ltd.* (1964), 15 L.A.C. 161 [*Re United Electrical Workers*] at 162, which is not a case of plant closure but was relied upon in the case of *British Columbia Fruit Packers Co-Operative v. United Food and Commercial Workers Union, Local 247* [2003] B.C.C.A.A.A. No. 149 [*BC Fruit Packers*] at para 63.

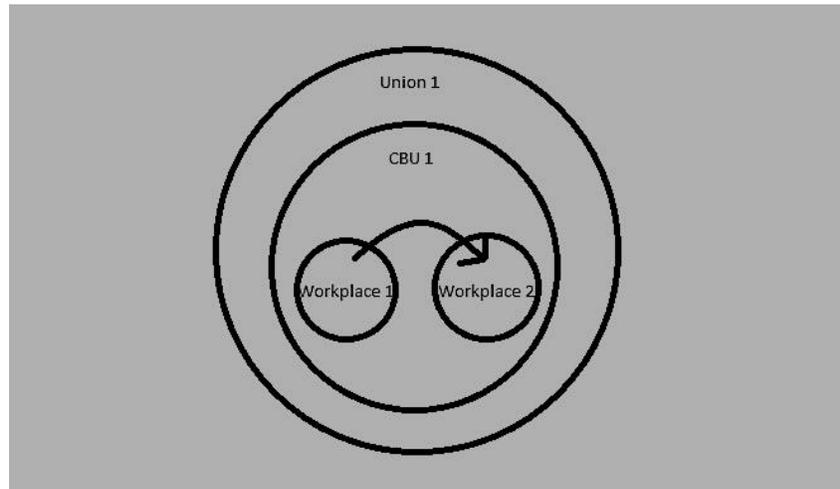
absolute, in the sense that its accumulation entitles the worker to an additional benefit regardless of how much seniority other workers have accumulated. For example, additional seniority may increase the number of weeks of vacation that a worker can take in a year or add to the worker's pension eligibility and entitlement regardless of other workers' seniority. On the other hand, sometime the importance of seniority is relative in that it establishes a pecking order of entitlement. "Last hired, first fired" is just one example of this function of seniority. As well, a more senior employee may be entitled to "bump" into a job held by a less senior employee if the more senior employee's job is terminated. These two different functions of seniority are important because of their consequences and the impact on the bargaining unit. With regard to issues where seniority is absolute, there is unlikely to be inter-worker conflict since one worker has no stake in opposing recognition of another worker's seniority. Indeed, there is likely to be solidarity in supporting recognition of seniority rights. However, when seniority rights are relative, then internecine conflict is much more likely recognition of as one worker's seniority potentially leaves another worker or group of workers worse off. It also puts unions in a difficult position, trying to balance the interests of different groups of members. Indeed, as we shall see, sometimes disputes over seniority erupt in the form of complaints against unions for failing to represent the interests of members.

A further complication of seniority is that it can be accumulated for different purposes and in different ways. For example, seniority for the purpose of calculating vacation entitlement may be determined on the basis of the length of time a worker has been in the bargaining unit, while seniority for promotion may depend on the amount of time that a person has been employment in a particular job classification. This necessarily complicates any discussion of the carry-over of seniority for mobile workers.

There are basically three different scenarios in which the carry-over of seniority arises: 1) multi-location agreements where a worker moves from one location to another; 2) intra-union transfers where an employee moves from one bargaining unit to another bargaining unit represented by the same union; and 3) inter-union transfers where an employee moves from one bargaining unit to another but each bargaining unit is represented by a different union.

- a. A worker who is part of a multi-location bargaining unit moves from one location to another within the same bargaining unit**

Figure 3



As we discussed earlier, the geographic scope of bargaining units can vary significantly from province to province and industry to industry. The broader the scope of the unit, the more likely it will cover multiple locations. What happens to seniority when an employee moves from one location to another within the same bargaining unit? This will depend on the basis on which seniority is calculated and that depends on the terms of the collective agreement. If there is a single seniority list then issues concerning transfer of seniority rarely arise. For instance while bumping between seniority lists has generally been viewed as problematic, bumping within the same seniority list, even between separate workplaces, has not raised much litigation. But it is not uncommon to find agreements that provide for separate seniority lists for different workplace locations.

Where a single individual moves from one location to another, then it is pretty clear that they do not carry seniority to the new location, at least in regard to their seniority relative to other workers at that location. More complicated scenarios may arise where one location closes and the employees at the closed location relocate to a remaining one. Collective bargaining agreements may provide that in the case of plant closures, the union and the employer will meet to discuss the result for employees. This may result in an arrangement to allow the transferred employees to retain their seniority at the new location, a practice called dovetailing, whereby seniority lists are merged based on the start date in either plant. However, employees in the receiving plant may oppose such an arrangement because it may detrimentally affect their relative seniority. This sometimes leads to allegations that the union breached its duty of fair

representation or grievances. Labour relations boards and arbitrators are generally unsympathetic to such claims, as the following passage illustrates:

Dovetailing then is ordinarily viewed as the preferred method for achieving an optimal resolution. Dovetailing accords with the principle against truncating seniority..... Its adoption by arbitrators and labour relations boards is based on a sense of fairness and a reluctance to diminish seniority rights. It appears to be a reaction to endtailing, which would place one group behind another where the most senior employee of the lesser group would be lower than the most junior employee of the other group. Endtailing would often be responsive to self-interested majority rule, as opposed to being responsive to reason. Also, it would tend to favour the receiving location which would have been selected by management for corporate and commercial reasons.³⁸

Hence in the case of *BC Fruit Packers*, when employees were transferred to a plant following a plant closure and a dovetailing arrangement was agreed upon by the union and the employer, the employees in the receiving plant were unsuccessful in their challenge.”³⁹

Of course, it is to be emphasized that just as seniority is a right that arises under the collective agreement, so too is its carry over. If a collective bargaining agreement does not permit carry over between separate locations within the same bargaining unit, then it will not be permitted. On the other hand, as we have seen, where collective agreements do not preclude dovetailing, then there is a presumption that it should be favoured in the absence of some extraordinary circumstance which would justify a departure.⁴⁰

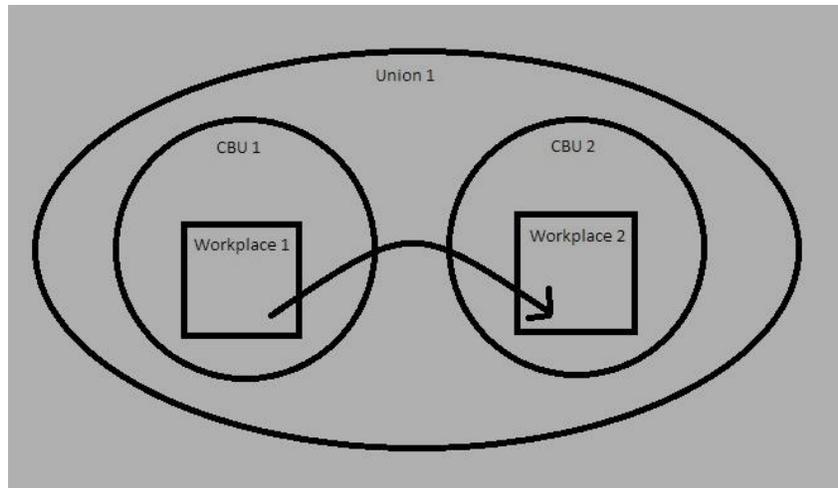
b. Intra-Union Transfer: A worker moves from one workplace to another, into a different bargaining unit represented by the same union

Figure 4

³⁸ *British Columbia Fruit Packers Co-Operative v. United Food and Commercial Workers Union, Local 247* [2003] B.C.C.A.A. No. 149, para. 72.

³⁹ *BC Fruit Packers, ibid.*

⁴⁰ *Ibid.*, para. 71.



Generally speaking, an employee who moves from one bargaining unit to another, even if those bargaining units are represented by the same union, will not be able to carry over seniority. This is because seniority rights flow from the collective agreement, not from union membership itself. This was explained in the case of *Milk and Bread Drivers*:

Employees in a particular bargaining unit do not necessarily have the same terms and conditions of employment as those in another bargaining unit - even if the other unit is represented by the same trade union - nor do employees in a particular bargaining unit necessarily have ANY RIGHTS AT ALL IN RESPECT OF JOBS IN ANOTHER BARGAINING UNIT, unless the relevant collective agreements so provide.⁴¹ (emphasis in original)

This approach also holds true in the case of plant shutdowns where workers are transferred to another location represented by the same union but where that location is in a different bargaining unit. Importantly, transfer and integration of seniority into a new CBU is governed by the collective agreement of the *receiving* workplace unless otherwise altered by an additional agreement.⁴² Here there will be a presumption that if the receiving bargaining unit opts to end-tail the incoming employees, it will not have abrogated its duty of fair representation, unless there are exceptional circumstances. In the *Beachville Lime* case, the board held:

⁴¹ *Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees Local Union 647*, [1995] O.L.R.D. No. 4015 [*Milk and Bread Drivers*] at para 14. See also *Woodbridge Foam Corp*, [2000] O.L.R.D. No. 5477 [*Woodbridge Foam*] “[s]eniority rights are acquired by membership within a bargaining unit, they are not acquired by employment with a particular employer”: *Woodbridge Foam* at para 26. *Woodbridge Foam* provides an extreme example where any transfer of seniority rights from one CBU to another was flatly rejected by the receiving CBU. Despite the leadership of the receiving CBU acting “unsympathetically,” it was found to be within their right based on the collective agreement, which had substantively similar plant closure provisions to the collective agreement of the closing plant.

⁴² *Ibid* at para 20.

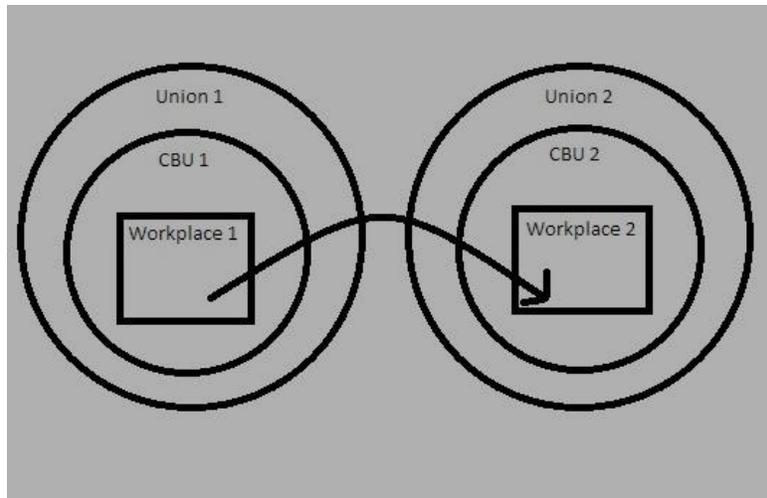
As noted ... the Board must take great care in assessing Local 3264's rationale for end-tailing the former Local 774 members, and leaving them vulnerable to the inevitable layoffs initiated by Beachville Lime Limited. Seniority rights are fundamental to the collective bargaining system, and their abrogation must be justified. On the other hand, ... it is not the Board's role to second guess, or substitute its hindsight for, the decision of a trade union faced with the problem of competing seniority interests. Often, in such cases, there is no right or wrong answer. As the Board noted, in assessing the relative merits of end-tailing and dove-tailing, "some inequities or unfairness may attach to either method of integrating seniority lists...and it is inevitably a situation where some employees will always be disadvantaged by and dissatisfied with whichever approach is taken."⁴³

Of course, this is a scenario in which the consequences of Canada's highly fragmented model of representational unionism have particularly acute consequences for mobile workers.

- c. Inter-Union Transfer: A worker moves from a workplace represented by one union to a workplace represented by another**

Figure 5

⁴³ *Beachville Lime Ltd.*, [2003] O.L.R.D. No. 3610 at para 127.



As with intra-union transfers between bargaining units, there is no presumed transfer of rights based on seniority in the case of inter-union transfer, whether we are dealing with a single individual or a group in the context of a plant shutdown. This general rule is articulated straightforwardly in the case of *Michael Burkett*, although this was not a case of geographic mobility but of labour-market mobility. The employer operated two facilities, one on Walmer Road in Toronto, the other at Don Mills, each of which was organized by a different union. When the employer closed its Walmer Road facility, employees were offered (and some accepted) an opportunity to work at the Don Mills facility; the union at the Don Mills facility took the position that the incoming employees should be end-tailed on the seniority list, prompting the incoming employees to complain that the receiving union breached its duty of fair representation. The Board found no breach: the Walmer Road employees were from a different bargaining unit; had separate legal rights; and had no legal right under any collective agreement to transfer or bump into the Don Mills facility, let alone to have their seniority at the Walmer Road plant recognized at the Don Mills plant. Although this is not a case of geographic mobility, it is⁴⁴

There are of course exceptions. While neither employers nor unions can unilaterally confer seniority, they can agree to do so. Of course, where the seniority is exercised against the employer in terms of vacation or other entitlements, the union may not object but the employer is unlikely to be amenable to such an arrangement. Where the seniority affects rights as between bargaining unit members, the employer may not object, but the trade union representing the incoming workers may be more reluctant. However, in some cases there may be agreements between trade unions to recognize the seniority rights of each other's members if

⁴⁴ [1988] OLRB Rep March 274.

they move between the unions' bargaining units. In one case, involving OPSEU and CUPE, which did not have such an agreement, the labour board commented on the logic of such a policy.

Presumably this policy is intended to protect OPSEU members who could potentially be displaced by members of other unions or who might be laid off in advance of members who had acquired seniority in another bargaining unit. From the union's point of view, that result would only be fair if the OPSEU members would have the same right *vis a vis* the members of the other union.⁴⁵

Absent terms in the collective agreement, an additional agreement, or a bilateral agreement between unions, seniority calculation will generally begin from the date of hire into the new bargaining unit.

d. Conclusion

Carryover of seniority is an issue that will affect a limited number of mobile workers who move from one unionized job to another. The question of whether such an entitlement exists is not directly governed by provincial labour relations statutes, but rather through collective agreements, additional agreements (particularly those surrounding workplace closures), internal union policies and bilateral agreements between unions. Absent clear and specific provisions to the contrary, labour relations boards have generally interpreted these agreements to preserve the seniority of workers moving between workplaces but remaining in the same bargaining units by favouring a dove-tailing of seniority lists. In the context of intra-union or inter-union transfer of employees between bargaining units, the presumption is that seniority is not carried over unless a relevant agreement contains specific language to the contrary. This will generally result in an end-tailing approach. Unions could better accommodate mobile workers by adopting a more universal approach to recognizing seniority acquired in other bargaining units, but in general they have not chosen to do so.

The construction industry and some trades, however, have addressed the issue differently because historically their members moved from job site to job site on a regular basis. Mobility was the norm, not the exception, and so different policies developed, which are considered next.

⁴⁵ *Ontario Public Service Employees Union* [1996] O.L.R.D. No. 3065 at para 33.

2. Carryover of Seniority in the Construction Context (Outside Quebec)⁴⁶

In the construction industry, work locations are inherently transitory, being generally project-based and the work product being non-transportable.⁴⁷ Workers are frequently hired for a specific project, working in different crews in different locations, and subsequently laid off; seniority may be highly determinative of the order of hire and layoff, and is therefore of major consequence in this industry. As discussed above, the construction industry in Canada provides Canada's strongest example of broader-based regulatory bargaining, with collective agreements that often apply to all employees of an employer, or all employers within a particular industry, within a specified geographical area.⁴⁸ These territories range in size, and may include a single municipality, a considerable geographical area, or even an entire province (ie. to the furthest extent of a board's jurisdiction).⁴⁹ It may therefore be possible for craft workers in the construction industry to move within vast geographical territories without ever leaving their initial bargaining unit.

Despite the promise of continuity of seniority that such a bargaining structure appears to offer for mobile workers, we have observed that in the construction context, the terms of collective agreements often complicate the carryover of seniority, even for E-RGM within the geographical

⁴⁶ This section of the report does not apply to the construction industry in Quebec which has a unique regime in that union membership is compulsory in order to work in the industry. It is beyond the scope of this report to discuss the implications of that regime for E-RGM within for Quebec construction workers moving within the province.

This report also does not address the operation of the "Ontario-Quebec Agreement on Labour Mobility and Recognition of Qualifications, Skills and Work Experience in the Construction Industry" (2006), except to note that with regard to unionization, the agreement provides:

"Ontario and Quebec agree that membership in a trade union will not inhibit labour mobility. At the same time, both provinces acknowledge that union membership may be required by provincial law or by convention within the construction industry."

The effect is that Ontario workers must prove union membership to work in the Quebec construction industry. A more detailed study of this regime would be required to fully understand how collective bargaining works in the context of Ontario-Quebec interprovincial mobility.

⁴⁷ Adams, *supra* note ??? at 15.10.

⁴⁸ See for example Ontario's *Labour Relations Act, 1995*, SO 1995, c 1, Sch A at s 128(1), which reads that "Where a trade union applies for certification as bargaining agent of the employees of an employer, the Board shall determine the unit of employees that is appropriate for collective bargaining *by reference to a geographic area* and it shall not confine the unit to a particular project." (emphasis added) Newfoundland's *Labour Relations Act*, R.S.N.L. 1990, c. L-1, contains a similar provision at s. 43(1).

⁴⁹ For example, Alberta's *Labour Relations Code*, R.S.A. 2000, c. L-1, s. 171(2) provides for province-wide collective bargaining units in any industry sub-sector which the Board finds to be appropriate for collective bargaining. In the industrial, commercial and institutional sector ['ICI sector'] in Ontario, *all* collective bargaining units are certified on a province-wide basis. Bargaining units are thus represented by either a province-wide bargaining agency or by a group of trade unions, while employers may form employer associations for the purposes of collective bargaining. Saskatchewan's construction-specific labour relations regime provides for province-wide collective bargaining without being restricted to the ICI sector: see Adams, *supra* note ??? at 15.370.

area covered by the collective agreement. While a collective bargaining region in the construction industry will always include multiple worksites, seniority will not necessarily be carried over with all movements within that region. Unlike in the industrial union context, where an analysis of carryover seniority logically begins with the question of whether the mobile worker has remained in his or her initial bargaining unit, in the construction industry a broader initial investigation is required with an eye towards the collective agreement.

We suggest that such an investigation proceed in three steps. The first step is to determine the type of seniority rights under examination. Determining carryover of seniority in the construction context is something of a moving target, as the purpose for which seniority is relevant may change the nature of the inquiry. As we noted in the previous section, seniority may be absolute, as in the accumulation of entitlements to pension benefits, or it may be relative in the sense that what matters is one's seniority relative to that of other workers, as is the case in determining who has priority in hiring and layoffs, bumping and transfers. A collective agreement may speak differentially to the various types of seniority-based rights that may accrue, thus for the sake of analytical precision it is necessary to disentangle those rights and focus the inquiry on the specific right in issue.

The second step is to determine whether the worker's mobility has led them into the employ of a new employer and, if so, whether the particular seniority-based right at issue is intended to survive the worker's movement between employers.⁵⁰ If the worker has remained with the same employer, then this will not present a barrier to continuity of seniority (although it is not determinative of continuity of seniority either). In the construction context, where collective agreements frequently apply to more than one employer (often represented by an employers' association), seemingly-broad seniority provisions such as province-wide, industry-wide seniority may be seriously curtailed when an employee changes employers. Labour boards look to the language of the collective agreement in order to determine whether the various employer and employee associations involved in reaching a collective agreement demonstrate an intention to honour seniority accrued with other employers. By way of example, a province and industry-wide collective agreement signed by multiple employers in Ontario's elevator industry provided both that "[s]eniority of an Employee is his total length of service in the industry in Ontario" and

⁵⁰ This inquiry must be distinguished from the question of "who is the employer" for the purposes of collective bargaining. In the situation considered here, the employer is known and is a signatory to the collective agreement; the issue is whether seniority rights are to be honoured when a worker moves between employers.

that “...an employee has no seniority rights with an employer for a period of six (6) months after commencing work with that employer.”⁵¹ In one case concerning that collective agreement, it was found that the six-month qualifying period had to be served with the same employer for a consecutive period of six months; clearly the intention was that seniority would not remain intact with mobility between employers.⁵² In another case concerning the same collective agreement, however, the Board wrote that “[t]he purpose of seniority on a province-wide basis... is to ensure seniority rights are not lost through mobility either between employers or between each Local’s hiring hall.”⁵³ It is open to parties negotiating collective agreements (particularly where multiple employers are involved) to provide for or disallow carryover of seniority for workers moving between employers. If the construction industry worker has changed employers but the parties did not intend for carryover of seniority between employers, then the inquiry will end here and seniority will not be maintained.

The third step is to determine what we have called the “nexus of seniority,” that is, the geographical formation to which seniority attaches and from which seniority rights are derived. In order to determine the nexus of seniority in any given case, one must look to the operative collective agreement, although the conduct of the parties may also serve to supplement or aid in the interpretation of the terms of the collective agreement, as well as to establish general practices around carryover of seniority.⁵⁴ Based on an investigation of labour case law, the following sections illustrate how different formations may serve as the nexus of seniority for the purpose of determining whether seniority rights may be carried over as a worker moves between workplaces. It should be noted that conflicts concerning carryover of seniority can be avoided where parties clearly state their intentions as to what seniority rights derive from these various formations.

a. Yards or Dispatch Sites

In the construction industry, workers will often perform work out of a particular yard or dispatch site. While actual worksites will frequently change, collective agreements may provide for continued seniority so long as the worker is dispatched from their particular yard or “home

⁵¹ *Otis Elevator Company Ltd.* [1992] OLRD no 3542 [*‘Otis Elevator’*] at para 4.

⁵² [1994] OLRD No 3547 [*‘Dover Elevator 1994’*]. The facts of this case feature an employee seeking to count two separate periods of employment with the same employer cumulatively (which the Board did not allow), although the principle stands that seniority would certainly not carry over between employers.

⁵³ *ThyssenKrupp Elevators (Canada) Ltd.* [2006] OLRD No. 2277 [*‘ThyssenKrupp Elevators 2006’*] at para 13.

⁵⁴ See for example *1130887 Ontario Inc. (c.o.b. Latta Crane Services)*, [2011] OLRD No 1324 [*‘Latta Crane Services’*].

base.” In the case of *Latta Crane Services*, a province-wide, non-ICI sector collective agreement provided for seniority on a yard-by-yard basis; seniority would accrue with work dispatched out of the particular yard which served as the employee’s home base.⁵⁵ Through conduct, the parties established that workers who transferred home bases could retain seniority only with the consent of the union. The live issue in the case is largely irrelevant here; the Board was faced with the question of whether a new yard opened by the employer (and staffed by workers from the union hiring hall) could serve as a home base for the purpose of accrual of seniority; the Board found it could. What is of interest here is that, despite continued work for the same employer and a province-wide bargaining unit, the arrangement in *Latta Crane Services* maintained a nexus between seniority and work out of a particular home base.

b. Projects

In the case of *Hydro One Inc.*,⁵⁶ the Labourers’ International Union of North America [‘LIUNA’] grieved the order in which workers were laid off from a particular project. The Ontario Labour Relations Board was faced with the question of whether a collective agreement provided for seniority (for the purpose of layoffs) across the union’s geographic jurisdiction, or whether seniority was to be applied on a project-by-project basis. The relevant language of the collective agreement was to be found in the heading of the section governing order of layoffs; a previous agreement had read “Project Layoff Procedure,” while the new agreement read simply “Layoff Procedure.”⁵⁷ The Board paid little attention to this alteration, which was never the subject of negotiation between parties; it was much more concerned with the logical interpretation of the agreement based on the intentions of the parties. The Board found that the nexus of seniority in this case was indeed a “project,” defined as “a distinct package of construction work at a particular place and time... It does not make practical or labour relations sense to deem all the work within a construction trade union’s jurisdiction to constitute one project.” The effect of finding a nexus between seniority and geographical zone for the purpose of layoff would be that, as work slowed down on a particular project, workers on other unrelated projects would have to be laid off, causing disruption to the operations of the employer. For mobile workers, the implications of project-wide seniority versus geographic region seniority may depend on their particular situation. A worker who workers moves within the geographic jurisdiction presumably would benefit from seniority based on the jurisdiction since they would be better

⁵⁵ *Ibid* at para 24.

⁵⁶ [2012] OLRD no 2626 [‘*Hydro One 2012*’].

⁵⁷ *Ibid* at para 15.

protected from lay-offs in a context in which some workers on the project came from outside the geographic region, even those ‘outside’ workers had been on the project longer.

c. Regions within the Collective Bargaining Region

A different collective agreement between Hydro One Inc. and the Canadian Union of Skilled Workers [‘CUSW’] featured an expanding nexus of seniority as seniority accrued from the employee’s “established commencement date,” particularly as it applied to layoff and bumping between geographical regions. Employees with less than two years’ seniority had no seniority rights. After two years, employees enjoyed seniority within their home geographical region, which allowed for the exercise of seniority rights within that geographical region. After five years, employees gained province-wide seniority, which allowed them to bump *between* geographical regions.⁵⁸ Since the intentions of the parties are crucial to the interpretation of collective agreements (as we have seen in *Hydro One 2012*), it is incumbent on negotiating parties to consider whether worker mobility is a foreseeable issue, and to clarify how movement within and among geographical zones will impact seniority. In this case, it is clear that seniority rights were attached to a particular geographical region, but were not industry-wide as they concerned one particular employer.

d. Local Union Jurisdiction

Even in cases where a collective agreement appears to create a province-wide, industry-wide seniority regime, the division of a territory into various union jurisdictions may render the exercise of industry-wide seniority rights elusive. Particularly where the multiple union locals who are parties to an industry-wide collective agreement keep separate seniority lists for their separate territorial jurisdictions, an analysis of carryover of seniority must consider whether this has the effect (on paper or in practice) of establishing local union jurisdiction as the operative nexus of seniority. Another case arising out of the collective agreement established in Ontario’s elevator industry centred on a dispute over order of layoffs. In addition to seniority being determined based on length of time in the industry in Ontario, a provision within that collective agreement limited the rights of industry-wide bumping to specific categories of employees. The grievors were members of those categories and believed they should have a right to bump less-senior employees in “international jurisdiction” (that is, residual territory not covered by the

⁵⁸ *Hydro One Inc.*, [2009] OLRD no 2516.

jurisdiction of any local union).⁵⁹ The local union bringing the grievance held that there is a single, province-wide seniority list which set out bumping rights; the employer held that there are separate lists for each local union and, within each local union, for each employer.⁶⁰ The board sided with the latter interpretation, writing that

[a]lthough the collective agreement states in Article 10.14.01 that seniority is comprised of an employee's total length of service in the industry in Ontario, it is clear from the evidence that the accepted practice is somewhat more refined.

The Board found that the provisions for industry-wide bumping had to be read alongside the jurisdictional provisions, which restricted the jurisdiction of the local unions to the people working within that jurisdiction.⁶¹ Where an otherwise province-wide, industry-wide collective agreement sets out specific jurisdictions for local unions, those territorial jurisdictions may serve as the nexus of seniority for certain seniority rights.⁶²

e. Industry-Wide Seniority

Again, provisions within collective agreements which allow for industry-wide seniority must be drafted and read with caution. For certain purposes, such as wage calculation and vacation entitlement, industry-wide seniority has been recognized with relatively little opposition. Other exercises of seniority-based rights have been heavily contested and significantly limited. One must consider whether other clauses in the collective agreement may conflict with such broad provisions for certain purposes, and whether the conduct of the parties indicates that seniority rights have been treated on a more limited basis, or that seniority may not be carried over with E-RGM. As seen in *Hydro One 2012*, where an interpretation of the collective agreement would result in an outcome that defies labour relations sense, parties may have difficulty establishing that this was the intended effect.

f. National (Mobility Between Provinces)

As we have discussed, Canada's federalism structure makes the prospect of nation-wide seniority impracticable, except in a limited number of federally-governed industries. Generally, collective agreements which allow for the incorporation of workers from other provinces into

⁵⁹ *Dover Corp. (Canada) Ltd.* [2000] OLRD No. 2746 [*'Dover Corp. 2000'*] at para 55. For a better overview of that collective agreement, see *Otis Elevator*, *supra* note ??? at para 4.

⁶⁰ *Ibid* at para 8.

⁶¹ *Ibid* at para 53.

⁶² See also *ThyssenKrupp Elevators 2006*, *supra* note ???.

collective bargaining regimes provide for preferential treatment of local union members and members within the province.⁶³ While it is conceivable that inter-provincial agreements could be developed allowing for continuity of seniority (for certain purposes) with out-of-province work, priority for local and provincial members is generally fiercely guarded. We are unaware of any such cases where seniority-based bumping or layoff rights have been successfully asserted by out-of-province workers. In one case, a local union member was laid off while there were still out-of-province workers on travel cards. The collective agreement provided preference in layoffs to local union members; the Board found that so long as there were workers employed on travel cards (ie. mobile workers) the local member could not be laid off.⁶⁴

IV. Collective Bargaining for Geographically Mobile Workers Who Do Not Change Jobs

As we noted, most of our analysis has focused on the situation of geographically mobile workers who change jobs and as a result need to be (re)incorporated into the collective bargaining regime. However, as we have also noted, that situation does not encompass the full spectrum of E-RGM and in particular does not speak to the situation of workers who are geographically mobile but remain covered by the same collective agreement. Commuters, for example, would fall into this category. For them, the principle issue is whether their needs as geographically mobile workers are adequately addressed by the collective agreement. What these needs are is an empirical question for which field work is required, but one might hypothesize that they would be concerned about such matters as the cost of transportation and accommodation and work scheduling. The extent to which collective bargaining agreements meet the needs of geographically mobile workers is also an empirical, not a legal question, and requires research into the contents of collective agreements and case studies of particular groups of mobile workers covered by collective agreements. To our knowledge, no such studies have been undertaken and such a study is beyond the scope of this report.

We have, however, examined a Canadian publication, *Contract Clauses*,⁶⁵ that samples existing collective agreements to provide model contract language to identify contract clauses applicable to the specific needs of geographically mobile workers. Apart from seniority and transfer rights issues, which we already considered in the previous section, we found relatively few contract

⁶³ See for example *Campbell Construction Ltd. and CJA, Local 1598 (Re)* (2004), 117 CLRBR (2d) 212 at para 9.

⁶⁴ *Sutherland and Schultz, a Vollmer Company* [2010] OLRD no 1894.

⁶⁵ Jeffrey Sack and Ethan Poskanzer, *Contract Clauses: Collective Agreement Language in Canada*, 3rd ed., (Toronto: Lancaster Books, 1996, looseleaf).

clauses attentive to the specific needs of geographically mobile workers. The most obvious ones were in relation to travel allowances and expenses. It may be self-evident, but it is conceptually useful to point out that collective agreements start from the presumption that employees will be responsible for their own travel costs and arrangements to and from the worksite. As a result, terms specific to the situation of workers who commute, work in remote locations, relocate or work at various job sites must be bargained for through the collective bargaining process.

Some collective agreements provide workers who travel out of town on their employer's business with reimbursement for food and lodging. The basis for reimbursement is explained in one collective agreement:

The purpose of the travelling provisions of the Article is to provide employees with reimbursement for reasonable out of pocket expenses incurred while engaged in work away from their normal place of work or headquarters zone. The rates paid are not intended to supplement an employee's income.⁶⁶

Other agreements provide detailed schedules regarding meal and accommodation allowances, including provisions that increase allowances when employees travel to more remote locations.

Another type of collective agreement provision that specifically addresses E-RGM is a Northern Allowance, which is paid to non-local employees. One provision defines "Northern Allowance" as a flat weekly rate to be paid to "non-local" employees (hired in a location other than the Northern locality where they are headquartered) working in a Northern Locality (as designated by the employer) in addition to their basic salary. Northern localities are categorized as either north or south of the 55th parallel, with a higher allowance paid to workers in communities further north; allowances increase after one year of service.⁶⁷ A simpler Northern Allowance clause reads:

An employee who is employed at a location north of the 57th parallel of north latitude in the Province of Alberta shall be paid in addition to his basic salary, a Northern Allowance of one hundred and sixty dollars (\$160.00) for each month served.⁶⁸

⁶⁶ IBEW, Local 2034 and Manitoba Hydro-Electric Board, *ibid* at 16-22.

⁶⁷ CTEA and Bell Canada, *ibid* at 16-23.

⁶⁸ AUPE and Government of Alberta, *ibid*.

Relocation expenses are another consideration that has been factored into collective agreements to provide for the needs of geographically mobile workers. A basic relocation expenses clause reads as follows:

When an employee is permanently transferred, at the Company's request, from one headquarters area to another, the cost of moving his household effects and the cost of personal transportation for the employee and his family shall be paid by the Company.⁶⁹

A more complex clause provides for lodging and food for the employee and his family while in transit, an allowance for miscellaneous out of pocket expenses, costs for terminating a lease, time off with pay during relocation, vehicle mileage, and legal and real estate brokerage fees.⁷⁰

Transportation allowances may also be negotiated into the collective agreement, particularly when they cover costs incurred in the course of an employee's duties. This may include a set mileage rate and may also include the cost of insurance deductibles for accidents occurring in the performance of an employee's duties.⁷¹ Generally, transportation allowances address mobility during work hours, within the course of employment, rather than travel from one's residence to a worksite or extended periods away from the place where a person regularly resides.

Of greater significance to these mobile workers are *travel* allowances, which address not only expenses incurred during transit but also compensation for time spent in transit (in this sense the travel allowance more closely resembles a wage than an allowance). One provision sets out the circumstances in which an employee must be reimbursed for time spent travelling:

Travel to and from a relief or special assignment will be in accordance with the following:

Travel time, including reasonable pre-flight and post-flight ground time if an employee is travelling by air, will be considered time worked. ...

An employee who travels on a scheduled day [off] will not be debited if travel time is less than their scheduled shifts.

All travel not requested by the Company will be done on the employee's own time.⁷²

⁶⁹ TWU and B.C. Telephone, *ibid* at 16-24.

⁷⁰ *Ibid.*

⁷¹ BCGEU and Legal Services Society, *ibid* at 16-30.

⁷² CAW and Air Ontario, *ibid* at 16-32.

Another basic travel allowance provision distinguishes between the time required to get from the employee's home to their ordinary worksite (which is the responsibility of the employee) and additional travel time required within the course of employment (which is the responsibility of the company). The provision reads that:

Employees shall be compensated for travel time in excess of the time required to travel between their residence and their regular point of assembly. Accommodation, board, lodging and transfer expenses for employees required to work away from their point of assembly shall be paid in accordance with Appendix "B".⁷³

Other provisions provide a formula for the calculation of travel time:

It is agreed that when employees are sent outside of the jurisdiction radius covered in this Agreement, travelling time will be paid at single time rate for the actual hours travelled during regular working hours. Additional travelling time up to five (5) hours will be paid at single time rates, for the actual hours travelled beyond regular working hours the first day only. If the trip requires more than one day, travelling time will be paid at single time rates for the actual hours travelled during regular working hours the second, third, or fourth day and any additional days necessary to complete a trip. Expenses incurred during trip to be paid for by the Employer.⁷⁴

Finally, collective agreements may include provisions which allow employees working in remote locations to receive travel leave with pay when proceeding on vacation or sick leave. Presumably such a provision would be in place to ensure that vacation time is not wasted in transit to and from a remote location. One such clause reads that:

An employee at an isolated post who is proceeding on vacation or sick leave shall be entitled to travel leave (leave of absence with pay) of three (3) working days or actual travel time, whichever is the lesser, for purposes of travel from his/her post to a point of departure and to return from a point of departure to his/her post.⁷⁵

⁷³ BCFMWU and B.C. Ferry Corporation, *ibid*.

⁷⁴ NEWA and National Elevator and Escalator Association, *ibid* at 16-32.1.

⁷⁵ CUPW and Canada Post, *ibid* at 18-57.

V. Temporary Foreign Workers (TFW)

As we noted earlier, the issue of collective bargaining for temporary foreign workers requires separate treatment, not because they do not have the same rights and freedoms as other Canadian workers to participate in collective bargaining, but rather because they have a much more precarious status in Canada, which creates special problems for their ability to actually exercise their rights and freedoms. It is beyond the scope of this paper to provide an in-depth discussion of the growth and status of TFWs. However, by way of introduction we do want to say a few words about the growth and characteristics of the temporary foreign worker programs in Canada.

There has been an enormous growth in the use of temporary foreign workers in Canada. In 2000, 116,540 TFWs arrived in Canada, but most left after a very short stay because they had been recruited under the Seasonal Agricultural Worker Program. As a result, on December 1, 2000, the day used to count the total number of TFWs present in Canada for the year, there were only 89,746. In 2011, 190,769 entered and there were 300,111 present, reflecting the growth of other programs, particularly the low-skill program that entitles workers to stay for a longer continuous period. Not surprisingly the growth in both the number of TFWs arriving in Canada each year and the total number present at any one time has attracted much attention and there is now a large literature looking at TFWs.⁷⁶ Our purpose here is just to briefly highlight a few salient features relevant to understanding the difficulty of incorporating them into collective bargaining.

It is important to begin by recognizing that the TFW category actually consists of several different programs each of which has its own particular characteristics. However, there are two features that are common to all TFW programs. First, TFWs do not have the same right to circulate freely in the Canadian labour market as persons with permanent status. In some cases, TFWs are tied to their contract of employment and can only change employers in limited circumstances, while in others they have open work permits but can only be hired by employers who have obtained permission to hire TFWs. Because of these limitations, the loss of one's current job can result in deportation or in having to leave Canada in the absence of a means of support. Second, subject to some exceptions, the right of TFWs to remain in Canada is time-

⁷⁶ For a small sample, see Judy Fudge and Fiona MacPhail, "The Temporary Foreign Worker Program in Canada: Low Skilled Worker as an Extreme form of Flexible Labour" (2009) 31(5) *Comparative Labour Law and Policy Journal* 843; Sarah Marsden, "The New Precariousness: Temporary Migrants and the Law in Canada" (2012) 27 *Canadian Journal of Law and Society* 209; Fay Faraday, *Made in Canada: How the Law Constructs Migrant Workers' Insecurity* (Report, Metcalf Foundation, September 2012).

limited.⁷⁷ They are required to leave Canada when the term of their work permit expires. These characteristics, among others,⁷⁸ produce high levels of immigration status insecurity that adversely affect the willingness of workers to exercise the rights they do enjoy under Canadian labour and employment law.

A. Unionizing Temporary Foreign Workers

Although we are not aware of data on the question, we are confident that most TFWs are hired into workplaces that are non-unionized. In some cases, the workforce may be comprised of all or mostly TFWs, while in others it will be a mixed workforce. In either situation, the presence of a significant number of TFWs changes the organizing environment. As well, union attitudes to TFWs has evolved over time, beginning with a view that their entry should be restricted to protect jobs for Canadians and then moving toward an understanding of TFWs as vulnerable and in need of union advocacy to protect their rights.⁷⁹ These changing attitudes presumably influence union strategy around organizing. Because TFWs enter through a number of different programs, it is difficult to generalize. In this report we will discuss three: the Live-In Caregiver Program (LICP), the Seasonal Agricultural Worker Program (SAWP) and the Low-Skill Program.

1. LICP

The LICP, as its name suggests, allows families to hire a caregiver who will live in the family home. The fact that these workers live in their employers' premises excludes them from statutory collective bargaining regimes in most jurisdictions. For example, the Ontario Labour Relations Act specifically excludes domestic workers employed in a home.⁸⁰ However, even if the exclusion is not present, most domestic workers still will not qualify to participate in collective bargaining. This is because most statutes require that a bargaining unit must consist of more than one employee and since most live-in care givers are the only employee in the

⁷⁷ For example, the Live-In Caregiver Program allows workers to apply for permanent status after completing 24 months of authorized full-time employment. Provincial Nominee Programs also provide a way for qualified TFWs to transition to permanent status.

⁷⁸ Temporary foreign workers suffer from several layers of vulnerability, in addition to their precarious migration status. For a discussion, see Malcolm Sargeant and Eric Tucker, "Layers of Vulnerability in Occupational Health and Safety for Migrant Workers: Case Studies from Canada and the UK," (2010) 7:2 *Policy and Practice in Occupational Health and Safety* 51; Michael Quinlan. Also, see Deepa Rajkumar et al., "At the Temporary-Permanent Divide: How Canada Produces Temporariness and Makes Citizens Through its Security, Work, and Settlement Policies" (2012) 16 *Citizenship Studies* 483.

⁷⁹ Jason Foster, "From 'Canadians First' to 'Workers Unite': Evolving Union Narratives of Migrant Workers" (2014) 69 *Relations Industrielles* 241.

⁸⁰ S.O. c. 1995, Chapter 1, Schedule A, s. 3(a).

household, they cannot be part of a bargaining unit.⁸¹ The absence of regulatory unionism or even a broader-based bargaining structure that would allow an association of live-in caregivers to negotiate an agreement on behalf of their members with their employers is fatal for this group of TFWs, at least in respect of participating in a statutory scheme of bargaining. In its absence, efforts have turned toward political action to protect live-in caregivers from exploitative conditions.⁸²

2. Seasonal Agricultural Workers (SAWs)

The SAWP is the oldest of Canada's temporary foreign worker programs and has not only attracted the most attention from researchers but also from activists seeking to provide assistance and advocacy. As well, there has probably been more effort to incorporate SAWs into the collective bargaining regime than any other group of TFWs and some progress has been made in recent years. Because provincial labour relations regimes vary from province to province as does the experience organizing SAWs our discussion is organized by province, focusing on Ontario, Manitoba, British Columbia and Quebec. However, before moving to a jurisdiction by jurisdiction review, it will be helpful to say a few words about some common issues.

Incorporating SAWs into collective bargaining is especially challenging because this group of workers lies at the intersection of two sets of disadvantage, those of TFWs and those of agricultural workers. Agricultural workers are sometimes disadvantaged because they are adversely treated by labour and employment law. In particular, some provinces, notably Ontario and Alberta, still exclude farm workers from their basic statutory collective bargaining schemes, while others impose special conditions. We will discuss these in more detail as they arise in our jurisdictional analysis. But even in the absence of legal disabilities, agricultural workers are difficult to organize for other reasons. They tend to work in rural settings, sometimes living on their employers' premises, making it difficult to reach them. As well, their work is often seasonal, which in some cases results in them moving periodically to a different employer, sometimes in a different province. The representational character and fragmented structure of Canadian labour law makes it a poor fit for agricultural workers generally.

⁸¹ *Ibid.*, s. 9(1).

⁸² See Judy Fudge, "Little Victories and Big Defeats: The Rise and Fall of Collective Bargaining Rights for Domestic Workers in Ontario" in Abigail B. Bakan and Daiva Stasiulis, eds., *Not One of the Family: Foreign Domestic Workers in Canada* (Toronto: Toronto University Press, 1997), 119. For a recent example of legislation that aims to protect foreign live-in caregivers, see *Employment Protection for Foreign Nationals Act (Live-in Caregivers and Others)*, 2009, S.O. 2009, c. 32.

TFWs in agriculture also suffer from additional disadvantages, in addition to their precarious immigration status. They are likely to lack proficiency in English and French and be unfamiliar with Canadian laws – this poses an impediment to both knowing and enforcing legal rights. Not only are they in rural communities, but they may be isolated from the local population and lack sources of support that Canadian workers may be able to draw on. The fact that they are only in Canada temporarily and that the opportunity to earn money while they are here is so valuable that they may be reluctant to engage in activities that could lead to the termination of their employment, even though the termination may be unlawful. Additionally, in the SAWP farmers are able to name workers who they want to return the following season. While this arrangement allows some workers to return on a regular basis, it also makes workers vulnerable due to their desire to be invited back. Finally, while SAWs are entitled to consular representation while they are in Canada, consular officials may be in a conflict of interest since they are also interested in maximizing the number of workers from their country who participate. Therefore, they too may act to discipline or at least not to support workers who wish to assert their rights. As we shall see, this issue has recently received much attention.⁸³

i. Ontario

Historically, most provinces excluded agricultural workers from protective labour and employment laws, including statutory collective bargaining schemes. Most of these exclusions have been reversed, but not all. Ontario, like Alberta, still excludes farm workers from its labour relations act.⁸⁴ Constitutional litigation in the *Dunmore* case required the Ontario government to provide agricultural workers with protection against retaliation for engaging in associational activities and to require agricultural employers to accept collective representations, but not to engage in collective bargaining. In response, the Ontario government enacted the *Agricultural Employees Protection Act* (AEPA). A subsequent round of litigation challenged this legislation on the ground that this legislation did not go far enough and that unless the government imposed a duty to bargain in good faith agricultural workers would be effectively unable to enjoy collective bargaining. The Supreme Court of Canada rejected the claim, although it did read into the AEPA a duty to consider collective representations in good faith. The result of all this constitutional litigation is that while Ontario farm workers are legally free to unionize and bargain collectively, the law does not provide the minimum support necessary for them to do so

⁸³ Kerry Preibisch, “Pick-Your-Own Labor: Migrant Workers and Flexibility in Canadian Agriculture” (2010) 44 *Int'l Migration Rev.* 404; Jill Hennebry, “Permanently Temporary? Agricultural Migrant Workers and Their Integration in Canada” (IRPP Study No. 26, 2012).

⁸⁴ S.O. 1995, Chapter 1, Schedule A, s. 3(b.1); Labour Relations Code, R.S.A. 2000, c. L-1, s. 4(e).

in the face of employer recalcitrance. Therefore, collective bargaining for agricultural workers, whether they be TFWs or persons with permanent status is not likely to occur.⁸⁵ However, the lack of legal protection does not mean that workers cannot or will not act collectively. SAWs in Ontario employed by two large greenhouse operations struck twice, in 2001 and 2003. They were both one-day actions but in each case many of the participants were repatriated early.⁸⁶ Not surprisingly, there are no other reports of SAWs engaging in such activities.

ii. Manitoba

Unlike in Ontario, farm workers in Manitoba are covered by the province's basic collective bargaining statute. This removes a major legal impediment, but leaves in place the migration status precarity of TFWs, as well as the other obstacles to organizing arising that we mentioned earlier. In this challenging environment, successes have been hard won and difficult to sustain, as the only case of unionization in Manitoba demonstrates.

In 2006, employees of a Mayfair Farms just outside of Portage la Prairie applied for certification of a bargaining unit which would consist predominantly of TFWs under the SAWP. The application was opposed by the employer who advanced three arguments that are of particular interest here: 1) that TFWs under the SAWP fell under federal, not provincial jurisdiction; 2) that TFWs are not employees under the provincial labour relations statute; and 3) that Mayfair Farms was not the employer. These arguments highlight many of the questions that arise when mobile workers, especially TFWs, seek to form or join a collective bargaining regime. In its decision, the Board allowed the application and certified the bargaining unit, addressing many of the questions surrounding the ability of TFWs to unionize.⁸⁷

The initial jurisdictional argument points to uncertainty arising out of the cleft between immigration law, a matter of federal jurisdiction which gives the federal government authority to allow TFWs into the country as aliens, and labour relations, a matter of provincial

⁸⁵ *Dunmore v. Ontario (Attorney General)* 2001 SCC 94; *Ontario (Attorney General) v. Fraser* 2011 SCC 20. For a discussion of the history of exclusion and the failure of constitutional litigation, see Eric Tucker, "Farm Worker Exceptionalism: Past, Present, and the post-*Fraser* Future" in Fay Faraday, Judy Fudge and Eric Tucker, eds., *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case* (Toronto: Irwin Law, 2012), 30-56. On the situation of farm workers in Ontario more generally, see the other chapters in that volume.

⁸⁶ Ofelia Becerril, "Transnational Work and the Gendered Politics of Labour: A Study of Male and Female Mexican Farm Workers in Canada" in Luin Goldring and Sailaja Krishnamurti, eds., *Organizing the Transnational: Labour, Politics, and Social Change* (Vancouver: UBC Press, 2007), 168-69.

⁸⁷ *United Food and Commercial Workers Union, Local No. 832 v Mayfair Farms (Portage) Ltd*, 2007 CanLII 81887 (MB LB).

jurisdiction. Following a review of cases and legislation, the Board found that the province does indeed have jurisdiction to regulate labour relations of TFWs. It rejected the employer's position that because the contracts of workers in the SAWP are governed by a Memorandum of Understanding between the Federal government and foreign governments their labour and employment falls within federal jurisdiction. The board also flatly rejected the claim that aliens are not covered by provincial laws.

The second argument considered was whether TFWs are "employees" for the purposes of The Labour Relations Act. The employer pointed to the "peculiarities" of the TFW employment relationship which differentiate TFWs from ordinary employees. One of these peculiarities is the explicit impermanence of the employment relationship, which is limited to eight months at a time with no guarantee that TFWs will return to work for that employer. The Board found that Act allows for a broad definition of the term "employee" and that its application was not restricted by immigration status. The other irregularity identified by the employer is the inability of the employer or the employee to freely contract with one another; both parties sign a standard employment agreement under the SAWP, the terms and conditions of which neither party has the ability to affect. The employer's argument was that the presence of the employment contract removed any space for a meaningful collective bargaining process, in contravention of the purpose of the act (which is to facilitate the practice of collective bargaining between bargaining units and employers). In rejecting these arguments, the Board effectively re-framed the SAWP employment contract not as an exhaustive enumeration of rights and obligations, but rather as a "floor of rights" document which set out minimum protections for TFWs. The Board found that the letter of the contract was often not enforced, at the behest of the employer, and that TFWs were regularly working more than the hours set out in the contract and not getting the days of rest to which they were entitled under that contract. Furthermore, a stipulation in the employment contract which required TFWs to be paid the same wage as Canadians in the same workplace allowed for meaningful benefits to be secured through collective bargaining; the union could negotiate higher wages for the six Canadian employees who would be members of the bargaining unit, thus improving wages for TFWs within the terms of the employment contract. There were, in other words, meaningful gains within and beyond the employment contract that could be secured through collective bargaining.

The employer's third argument was that it was not, in fact, the employer of these workers for the purposes of the Act. Here again the employer pointed to the role of the Canadian and Mexican

governments in recruiting workers and forming the employment contract. After considering the multi-factor test for who is the employer developed in the case law, the board rejected Mayfair's claim, finding that Mayfair exercised control, paid remuneration, imposed discipline, etc. As a result, it was the employer for the purposes of the Act. Having signed up more than 65% of the employees in the bargaining unit at the time the application was filed, the UFCW Local 328 was certified as the bargaining agent in June 2007.

In summer 2008 a three-year collective agreement was successfully negotiated between the union and Mayfair Farms. It marginally improved hourly rates and provided for overtime after 70 hours. In summer 2009, the workers voted unanimously to decertify the union as its bargaining agent, and certification was subsequently revoked. Some workers expressed dissatisfaction over the decision by the employer to reduce working hours to avoid overtime and the amount of union dues relative to the increase in rates. Also, the decertification vote followed a closed-door visit by the Mexican consulate, where it is alleged that Mexican officials warned SAWP workers that they could be blacklisted from the program should they not choose to decertify. There are also reports that workers are now warned not to interact with union representatives or people associated with a union. We will return to the issue of the involvement of consular officials in more detail in the context of our discussion of developments in British Columbia, but since the decertification of the Mayfair bargaining unit there have been no other successful unionization campaigns in Manitoba.⁸⁸

iii. British Columbia

In August, 2008, following a slew of accidents involving farm machinery and transportation of farm workers, including a vehicle crash that left a SAWP employee of Greenway Farms in Surrey critically injured, the SAWs voted to be represented by UFCW Local 1518.⁸⁹ In 2009, the employer, backed by several groups representing the interests of agricultural employers, applied to cancel the certification, arguing that the BC *Labour Relations Act* did not apply to foreign workers under the federally administered SAWP. While similar jurisdictional arguments against certification were advanced as in *Mayfair*, there were additional arguments that warrant

⁸⁸ Jodi Read, Sarah Zell and Lynne Fernandez, *Migrant Voices: Stories of Agricultural Migrant Workers in Manitoba* (Winnipeg: CCPA, 2013), 21, 30-31 Online at https://www.policyalternatives.ca/sites/default/files/uploads/publications/Manitoba%20Office/2013/05/Migrant%20Voices%20Report_0_0.pdf; "Canada: Unions and Migrants" (October 2009) 15:4 *Rural Migration News* Online at http://migration.ucdavis.edu/rmn/more.php?id=1488_0_4_0.

⁸⁹ Robert Russo, "Temporarily Unchained: The Drive to Unionize Foreign Seasonal Workers in Canada – A Comment on Green Way Farms and UFCW" (2011) 169 *BC Stud* 131.

consideration here. First, the standard SAWP contract is different in BC than in the rest of Canada, and includes a provision which says it cannot be modified without the written permission of employee, employer and the governments of Canada and Mexico.⁹⁰ Unlike in Manitoba, where the employment contract was found to provide a non-exhaustive enumeration of *minimum* rights, it was argued that the BC contract could not be subject to any such change. Second, it was argued that the ability of SAWP workers to form a bargaining unit for the purposes of negotiating in a particular workplace undermined the uniform, industry-wide agreement contemplated under the program.⁹¹

UFCW's response to the first argument, which was accepted by the board, was that federal intention to occupy a matter which would otherwise fall under provincial jurisdiction (that being employment contracts) required clear statutory language pointing to that intention and that no such intention was present here.⁹² In response to the second argument, the union argued that while there is no express statement within the SAWP employment contract or memoranda of understanding that indicates the intention to import a uniform, industry-wide agreement, there is clear language which says that SAWP workers are to be treated equally to Canadian workers. This includes the ability of Canadian farm workers to unionize. The Board accepted this argument as well, and in the end denied the employer's application to cancel the certification.⁹³

While the decision in *Greenway* was heralded as a victory by UFCW and other groups working towards organizing agricultural workers,⁹⁴ the after effects point to an inherent obstacle to SAWP workers organizing or being incorporated into collective bargaining units. On the same day that *Greenway* was released, the workers at Greenway filed to decertify the union. In the growing season following the original certification, Greenway hired back significantly fewer workers than is typically seen in the SAWP, implying that many of the pro-union workers were not re-hired.⁹⁵ While UFCW complained of unfair labour practices to the Labour Relations Board, the complaint was dismissed.

⁹⁰ *Greenway Farms Ltd. and United Food and Commercial Workers International Union, Local 1518* (2009) BCLRB No B135/2009 [*Greenway*] at para 11.

⁹¹ Russo, *supra* note 75.

⁹² *Greenway*, *supra* note 67 at para 110.

⁹³ *Ibid* at 132.

⁹⁴ UFCW Canada, "Seasonal farm workers in B.C. go union with UFCW Canada" online: <http://www.ufcw.ca/index.php?option=com_content&view=article&id=593&catid=5&Itemid=99&lang=en>.

⁹⁵ Russo, *supra* note 75

A second UFCW organizing campaign took place at Floralia farm in Abbotsford.⁹⁶ Shortly before a certification vote was to be held, in September 2008 fourteen workers were laid off and repatriated. The UFCW brought an unfair labour practice complaint before the Labour Relations Board, but in October the Board found that the layoffs had been economically justified.⁹⁷ Despite the repatriations, the remaining workers voted to be unionized and a collective agreement between UFCW Local 118 and Floralia Farms was established almost a year later, making this the first collective agreement in British Columbia to apply to SAWP workers.⁹⁸ However, as was the case with the Mayfair workers, a campaign to decertify the union was launched. At this point, the Floralia story begins to merge with a third organizing campaign and so we will turn our attention to the Sidhu & Sons Nursery (Sidhu) story.

There was also an organizing campaign at Sidhu in 2008 and the workers voted by a bare majority in favour of being represented by the UFCW. Lengthy litigation followed on the question of whether SAWs were an appropriate bargaining unit, given that the employer also employed permanent Canadian residents. In November 2010, the BC Labour Relations Board found that the unit was appropriate for collective bargaining on the grounds that the unique employment relationship and interests of the SAWP workers were distinct enough from domestic workers. However, in certifying the unit, the Board also restricted the scope of the bargaining rights so that the union could only negotiate over matters which were unique to that particular group.⁹⁹ A collective agreement was concluded, which contained provisions designed to introduce the principle of seniority into the selection of workers to return the following season, as well other arrangements related to the circular migration that is a feature of the SAWP.

The following spring, in 2011, workers at both Sidhu and Floralia filed decertification applications and a vote was conducted. However, the ballot boxes were sealed pending adjudication of the union's complaint that there had been employer and Mexican government interference that prevented the workers from expressing their true wishes. In particular, the union alleged that the Mexican government conspired with the employer to block the return of

⁹⁶ For a fuller discussion the background to this case, see Leah F. Vosko, "National Sovereignty and Transnational Labour: The Case of Mexican Seasonal Agricultural Workers in British Columbia, Canada" (2013) 44 *Industrial Relations Journal* 514.

⁹⁷ *Ibid.* See: *Floralia Plant Growers Ltd. v. United Food and Commercial Workers International Union, Local 118*, (2008) BCLRB No B157/2008.

⁹⁸ Russo, *supra* note 75.

⁹⁹ *Ibid.* See: *Sidhu & Sons Nursery Ltd. v. United Food and Commercial Workers International Union, Local 1518*, (2010) No. B26/2010 [Leave for Reconsideration denied in No. B64/2010].

workers believed to be union supporters and that this created a climate of fear making it impossible to ascertain whether the workers desired union representation. The Mexican government responded by claiming sovereign immunity, meaning that it was not subject to the jurisdiction of the BC Labour Board. In 2012 the board issued a decision which accepted the government's claim. However that did not end the matter since in principle the Mexican government's actions could still be scrutinized to determine whether it had tainted the decertification application, even if no order could be issued against Mexico. As well, there was still the union's claim about employer interference. The board also split the Sidhu and Floralia claims so that they would be considered separately.¹⁰⁰

In a subsequent hearing focused only on the Sidhu claim, the board heard testimony voluntarily given by former employees of the Mexican consulate, but it ultimately decided that it could not consider their evidence because of Mexican claims of diplomatic immunity.¹⁰¹ That decision was overturned in a Reconsideration decision,¹⁰² which was then challenged in court. In a lengthy judgment that focused on the scope of sovereign immunity the court upheld the board's Reconsideration decision.¹⁰³ Shortly thereafter the Board issued its judgment on the merits of the union's application dealing with whether the Mexican state and or the employer's actions prevented the workers from expressing the true wishes in the decertification election. Relying heavily on the evidence of the former consular officials, the board found that senior Mexican officials instructed consular officials to identify workers who contacted the union so that they could be prevented from returning to Canada. It found they were motivated by a concern that employers would stop requesting Mexican workers if they joined a union and that this would not only adversely affect Mexican workers but that it would also result in the loss of employment for people administering the SAWP.¹⁰⁴ While there was no evidence that Mexican officials or the employer instigated the decertification application, the Board nevertheless concluded that the impact of the action of Mexican officials in blocking the return of a worker who they believed was pro-union created a climate of fear among the returning workers so that the vote would not reflect their true wishes. As a result, the decertification application was dismissed without the ballots being counted. Although this decision does not deal with the Floralia decertification application, we can assume that it too will not be considered by the board.

¹⁰⁰ *Certain Employees of Sidhu & Sons Nursery Ltd. And Certain Employees of Floralia Plant Growers Limited*, BCLRB No. 28/2012.

¹⁰¹ BCLRB No. B194/2013.

¹⁰² BCLRB No. B54/2013.

¹⁰³ *United Mexican States v. British Columbia (Labour Relations Board)* 2014 BCSC 54.

¹⁰⁴ BCLRB No. B56/2014, para. 77. Leave for reconsideration denied, BCLRB No. B78/2014.

In sum, although on the one hand the litigation was successful and two bargaining units of SAWs remain, the experience in British Columbia highlights the enormous difficulty of organizing SAWs under the Wagner Act model. The circular migration pattern makes SAWs extremely vulnerable since their ability to return is in large measure contingent on their employer inviting them back. Moreover, as this Sidhu case demonstrates, consular officials who are supposed to enforce the protections contained in the bilateral agreements that are a feature of the SAWP have a clear conflict of interest that was manifest in an extreme form here. As well, it is a very resource intensive exercise, especially in an environment in which employers have a long history of opposing unions. However, before concluding, we need to consider the experience of organizing SAWs in Quebec, where there has been more success than in the rest of Canada.

iv. Quebec

Farmworkers in Quebec have been covered by the labour relations law since 1964. However, there was one restriction. Farmworkers could not be certified unless at least three members of the bargaining unit were “ordinarily and continuously” employed on the farm.¹⁰⁵ This effectively precluded the organization of bargaining units comprised entirely of migrant workers, foreign or domestic. However, it did leave the door open to organizing farmworkers in settings where there was a small core of permanent employees and in these situations the UFCW Local 501 was able to successfully organize a small number of greenhouse, field crop and agricultural packing facilities. As of November 2009, it had organized seven bargaining units, three covering migrant workers.¹⁰⁶

During its 2008 drive to organize SAWs the UFCW applied to represent a group of six SAWs employed on a farm that did not have any permanent employees. The agent who was charged with determining whether the conditions for certification were met refused to certify the union because three workers were not continuously employed. The matter was referred to the Commission for a hearing. Nearly two years later, in 2010, the Commission certified the union, holding that the exclusion in the act violated the workers’ freedom of association and was therefore inoperable.¹⁰⁷ The employer sought judicial review and finally in March 2013 the Quebec Superior Court upheld the Commission’s ruling on the unconstitutionality of the

¹⁰⁵ R.S.Q. c. C-27, s. 21.

¹⁰⁶ *L'Écuyer v. Côté*, 2013 QCCS 973, para. 33.

¹⁰⁷ *Travailleurs et travailleuses unis de l'alimentation et du commerce, section locale 501 c. L'Écuyer*, 2010 QCCRT 191.

exclusion. However, it suspended the declaration of invalidity for a year to give the government an opportunity to draft new legislation.¹⁰⁸ In the summer, 2014, the government tabled a bill that would apply to farms with less than three permanent employees. Instead of the normal collective bargaining regime, employees in this setting would enjoy the right to form associations and make representations about the conditions of employment of its members. The employer is required to listen to verbal representations and read those made in writing. According to the bill, “Diligence and good faith must govern the parties’ conduct at every stage of discussions...” It would seem Quebec legislators were inspired by Ontario legislation, which was interpreted and approved by the Supreme Court of Canada in its judgment in *Fraser v. Ontario (Attorney General)*.¹⁰⁹

While this has been celebrated as a victory, and it is, that should not obscure the larger picture, which is that SAWs remain extremely vulnerable to retaliation given their dependence on their employers and, in some cases, consular officials to stay in the circular migration flow. Moreover, organizing farm by farm is a daunting task such that even after legal obstacles are removed it is extremely unlikely that union density will even catch up with the low level of private sector unionization that exists in most provinces.¹¹⁰

3. Low Skill Workers

The creation and expansion of the low skill program has brought to Canada another group of TFWs, some of whom are employed in agriculture, but most in other industrial sectors, many of which are largely un-unionized. For example, after agricultural and caregivers, the four highest categories of low-skill TFWs present in Canada in 2011 were: food service counter workers (8150); light duty cleaners (1980); truck drivers (1700) and food and beverage servers (1115).¹¹¹ In most instances these workers will be working alongside permanent residents.

The presence of TFWs will potentially complicate an already difficult organizing environment. Their lack of permanent status makes low-skill TFWs particularly vulnerable because unlike other workers, if they lose their job they cannot enter the labour market like other unemployed

¹⁰⁸ *Supra.*, note 92.

¹⁰⁹ Quebec, National Assembly, Bill 8 (2014), *An Act to Amend the Labour Code with respect to certain employees of farming businesses*. 2011 SCC 20.

¹¹⁰ For a discussion of this larger problems, see Tucker, “Farm Worker Exceptionalism, *supra*.”

¹¹¹ Canada - Temporary Foreign Workers Present on Dec 1st with Occupational Skill Level C & D by Occupation (4-digit NOC), 2002-2011 (Special run provided by Citizenship and Immigration Canada, Dec. 2012).

workers but must find employment with another employer who has gotten a favourable Labour Market Opinion (LMO) and, therefore, is authorized to hire TFWs. This is not easy.¹¹² If they are unable to find legal employment then effectively they are faced with the choice of working illegally or leaving the country. As well, some TFWs hope to become permanent residents through the Provincial Nominee Program. While the requirements of each program vary from province to province, the program is essentially employer driven insofar as the TFW must be employed by the legal employer for a certain amount of time and must also have an offer of permanent employment from that employer. Loss of employment while the application is being processed may result in the application being denied. Workers in this position will likely be very cautious about engaging in activities that might displease their current employer.

Of course, the union has no control over whether TFWs are present in a non-union environment and, therefore, must address the added challenges of organizing when they are present. The union must decide whether to organize a bargaining unit consisting of all employees, including both TFWs and permanent status workers, or to organize one of these groups separately from the other (as in the Sidhu case in BC, where a separate unit of TFWs was organized). To a great extent the union's preference will be driven by strategic considerations, such as what unit the union believes it can successfully organize and the strength of the resulting bargaining unit. But those strategic choices have to be made within the legal framework governing the definition of appropriate bargaining units. In particular, we want to know whether labour boards will allow unions a choice in the matter or will insist that some configurations are appropriate while others are not.

A recent decision of the Ontario Labour Relations Board, discussed earlier in relation to the issue of who is the employer, addressed a situation in which a union, the International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers, Local 721 applied to represent a group of 160 workers employed by CS Wind Canada Inc. However, in their application the union sought to exclude a group of about 31 Vietnamese nationals, hired by CS Wind Vietnam, who were working in Canada as TFWs pursuant to an intra-company transfer

¹¹² For example, a newspaper reported that two TFWs hired by a non-union employer in British Columbia claimed they were fired for speaking to a union representative. A complaint was filed with the BC labour board. In the meantime, the union is trying to find them legal work with an Alberta employer. If no work is found, they may have to return home before the complaint is heard. Frank Luba, "Irish Steelworkers Get Labour Board Meeting after Firing Leaves Them Stranded in B.C." *The Province* (19 February 2014).

program.¹¹³ Although the case does not specify under which branch of the TFW program they worked, from the description it seems these were high, not low, skill workers. Nevertheless, the principles articulated in that case should apply to workers in the low-skill category.

The Board first set out the general principle of bargaining unit determination that it has developed in previous cases:

It is not a question of what bargaining unit would be the most appropriate nor whether the employer's or the union's preferred bargaining unit is the more appropriate one. Rather, the Board's task is to determine whether the unit sought by the Union is *an* appropriate unit such that it will be appropriate for collective bargaining and is not likely to cause serious labour relations problems for the employer (para. 115).

In this case the employer objected to the exclusion of the TFWs on the basis that it would cause them serious industrial relations difficulties and that their exclusion from this bargaining unit would make it extremely difficult for the TFWs to access collective bargaining. On the latter, point, the board was incredulous that the employer was deeply concerned about the ability of TFWs to access collective bargaining and, in any event, thought that a group of 30 workers could be organized separately if they wished to do so (paras. 146-47). The board gave greater consideration to the labour relations problems raised by the employer, but noted that it was the employer's choice to create a "fractured workforce" (para. 127) in which there was a group of permanent domestic workers and TFWs doing essentially the same work, but who were governed by different rules, partly the result of government regulation of TFWs and partly the result of the fact that the TFWs terms and conditions of employment were, to a great extent, established by their contracts with CS Wind Vietnam. In the board's view, labour relations problems would result whether the TFWs were in or out of the bargaining unit.

The general principle adopted in the CS Wind case gives the union substantial leeway in determining whether to organize units consisting exclusively of domestic permanent workers or of TFWs, or of organizing a consolidated unit, subject to the ability of the employer to demonstrate that the proposed unit would create serious labour relations issues. If other boards follow the approach taken here that will be difficult to do, since it will be open to the union to

¹¹³ *International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers, Local 721 v CS Wind Canada Inc*, 2014 CanLII 14887 (ON LRB), <<http://canlii.ca/t/g6d7f>> retrieved on 2014-04-28

argue that the labour relations difficulties stem from the employers decision to have TFWs in the workplace and that there will be problems regardless of the bargaining unit configuration.

With that in mind, we turn our attention to the only case study we only know of examining an organizing drive to unionize a joint TFW-permanent resident bargaining unit. The study, by Jason Foster and Bob Barnetson, examined an organizing drive by the Service Employees International Union (SEIU) among Bee-Clean Maintenance workers at the University of Alberta (UofA) campus in Edmonton.¹¹⁴ The campaign followed the Justice for Janitors (J4J) model, developed in California which combines grassroots activism and the targeting of the firms that contract with the janitorial service provider, in this case the UofA. TFWs comprised a significant portion of the targeted bargaining unit. Many of the workers were dissatisfied because they were working unpaid overtime and required to perform uncompensated personal services for supervisors. SEIU assisted the workers in filing claims for unpaid wages and an unfair labour practices complaint was filed alleging that Bee-Clean had terminated an employee for joining the union and for threats and intimidation. A solidarity committee was formed consisting of UofA faculty and students and political activists in the city. The workers' claim for unpaid wages was successful. The adverse publicity and pressure led Bee-Clean to begin negotiating a resolution which led to it voluntarily recognizing the union and negotiating a collective agreement that made specific provision for transparency in TFW renewals and extended leaves of absence so that workers could visit family members in the home countries.

In their examination of the campaign, Foster and Barnetson point to the embarrassment that was caused to the employer and the UofA by the mistreatment of TFWs, in a context in which the public had already been sensitized to the issue. However, they also point out that the adverse publicity surrounding Bee Clean's violations of employment standards will make it ineligible to obtain future authorizations to procure TFWs, the effect of which will be to prevent TFWs whose time in Canada is ending from being replaced by other TFWs. In other words, it will lead to a bargaining unit with no TFWs. As Foster and Barnetson point out, "[t]he irony for the TFWs is that their real and perceived vulnerability was a key factor in the success of the campaign but also reduced their ability to benefit from unionization."¹¹⁵

¹¹⁴ Jason Foster and Bob Barnetson, "Justice for Janitors in Alberta: The Impact of Temporary Foreign Workers on an Organizing Campaign" (2012) 16 *J. Workplace Rights* 3.

¹¹⁵ *Ibid*, 23.

More research is needed on the experience of organizing low-skill TFWs outside of agriculture (if there is experience) in order to draw firm conclusions, but we hypothesize that their presence in unorganized workplaces, in industries that are largely non-union, will only complicate matters. The presence of TFWs may create or exacerbate internal divisions with the workplace, especially where TFWs are assigned different and perhaps less desirable work than permanent residents. As well, as we have noted, TFWs are a vulnerable group who might be particularly reluctant to stick out their necks. Finally, even if an organizing drive is successful, its impact on the situation of TFWs is uncertain.

B. Incorporating TFWs into Unionized Workplaces

When TFWs are hired into unionized workplaces, they become members of the bargaining unit. So the focus here is on how collective agreements address the different needs of TFWs. This is not a subject about which there is much research. In the previous section, we saw that collective agreements for newly organized bargaining units with TFWs did contain some provisions addressing their particular needs, especially around the renewal process. But in most cases, the fragility of the collective bargaining relationship precluded any real examination of how well these measures worked.

The one example of TFW incorporation into an existing bargaining unit that has been widely publicized is at the Maple Leaf Foods (MLF) hog processing plant in Brandon, Manitoba. The history of the transformation of meat packing from a relatively high-wage and densely unionized industry to a low-wage, low union density industry is emblematic of the industrial restructuring common in Canada.¹¹⁶ Maple Leaf opened a large processing plant in Brandon in 1999, employing about 1,000 workers. The plant was unionized from the outset but the collective agreement with UFCW, Local 832 reflected the weak state of unions in the industry. Hourly wages for unskilled workers started at \$8.25 and for skilled workers at \$11. The combination of low wages and poor working conditions resulted in high rates of worker turnover and absenteeism. Wage increases and incentives did not solve the recruitment and retention problems, which became urgent when MLF decided to add a second shift in 2003, more than doubling the workforce when fully implemented. When recruiting efforts in the Maritimes failed to produce enough workers, MLF began turning overseas, initially recruiting workers from

¹¹⁶ Charlotte Yates and Belinda Leach, "Industrial Work in a Post-Industrial Age" in Vivian Shalla and Wallace Clement, eds., *Work in Tumultuous Times* (Montreal: McGill-Queen's University Press, 2007), 163.

Mexico and El Salvador, and then expanding its efforts to other countries including China, Guatemala, Ukraine and the Philippines. Between 2004 and 2009, 1,700 foreign workers were hired, the majority of whom came as TFWs, so that TFWs comprised the majority of the Brandon plant's workforce. Of course, their TFW status tied these workers to the workplace since to leave their jobs would result in a loss of the right to work and, practically speaking, stay in Canada. But MLF did not depend exclusively on the restricted work permit to retain their TFWs. They recruited TFWs from countries that were poor and often in turmoil and so these workers were more willing to put up with what are by Canadian standards low-paying and arduous jobs because of their desperation. More positively, MLF also engaged in efforts to facilitate settlement into the community and has been supportive of TFW employees securing permanent immigration status through the Provincial Nomination Program (PNP), which enables those who are nominated and accepted to acquire permanent status on an expedited basis. In Manitoba, unlike some other provinces, the PNP program is open to low-skill TFWs. In order to qualify, TFWs must work six months with the employer named in the work permit and obtain a formal offer of full-time employment in a permanent job. As a result, the turnover rate has been reduced to ten percent.¹¹⁷

Clearly, the decision to obtain workers through the TFW program was made by MLF, rather than the union. The role of the UFCW in the implementation of this decision is not as well documented. There is some indication the union was involved in the decision to open up the PNP to MLF TFWs. In 2009 the union and MLF signed a new five-year collective agreement which contained specific provisions to address the needs of TFWs. This included imposing a duty on the employer to process the paperwork for the PNP, to provide translators when required by foreign workers, and to translate the collective agreement and the employee handbook into any language when this was the first language for 100 workers or more. As well, an expedited arbitration process is provided for TFWs if they have been terminated so that their cases can be heard before they are forced to leave. In addition to negotiating collective agreement provisions, the union also provides other services, including English language classes

¹¹⁷ Jowett, "Rules of Disengagement: 'Low Skill', Migrant Workers, Law, and the Social Dimensions of Exclusionary Inclusion" (LLM, Osgoode Hall Law School, York University, 2014), 95-98; Delphine Nakache and Sarah D'Aoust, "Provincial/Territorial Nominee Programs: An Avenue to Permanent Residency for Low-Skilled Temporary Foreign Workers?" in Patti Tamara Lenard and Christine Straelhle, eds., *Legislated Inequality: Temporary Labour Migration in Canada* (Montreal: McGill-Queen's University Press, 2012) 158.; Economic Development Brandon, "Maple Leaf Overview," Online <http://www.economicdevelopmentbrandon.com/maple-leaf>; *Renewing Immigration: Towards a Convergence and Consolidation of Canada's Immigration Policies and Systems* (Conference Board of Canada, October 2008), 30-34).

that help TFWs become better integrated and enable them to obtain the language proficiency necessary to become permanent residents under the PNP.¹¹⁸

Nahveen Mehta, the General Counsel and Director of human rights, equity and diversity for UFCW Canada, emphasizes the importance of unionization for protecting TFWs. “The difference between a unionized and a non-unionized Temporary Foreign Worker is like the difference between the sky and the ground. Or more accurately, the sky and a mine pit.”¹¹⁹ But not all discussions of the MLF experience are so positive. For example, some critics have pointed to the fact that the ability of employers to access foreign workers enabled them to expand their workforces without having to improve conditions to a level that would have attracted workers in Canada with permanent status.¹²⁰ However, our focus here is on the integration of TFWs into the collective bargaining regime, and there seems to be little doubt that in the MLF case not only has the presence of the union strengthened the position of TFWs, but that the process of integrating TFWs into the bargaining unit and the collective bargaining regime has gone relatively smoothly. For example, while one of the TFWs at MLF that Jowett interviewed expressed some dissatisfaction with the amount of material the union had translated into Spanish, he also expressed confidence that he could turn to the union for support in enforcing his rights.¹²¹

It is unknown whether unions in other settings where TFWs have been introduced have been similarly successful. For example, TFWs were also brought into the unionized Maple Leaf poultry plant in Edmonton, Alberta. In 2008 the union struck, with the support of 80 of the 98 TFWs employed there. The union claimed that TFWs were being used to maintain an artificially

¹¹⁸ “UFCW Canada Local 832 Negotiates Landmark Protections for Migrant Worker Members,” Online http://www.ufcw.ca/index.php?option=com_content&view=article&id=674&Itemid=6&lang=en; “Local 832 Builds Bonds with Migrant Workers,” Online http://www.ufcw.ca/index.php?option=com_content&view=article&id=2334:local-832-builds-bonds-with-migrant-workers&Itemid=6&lang=en; CBC News, “Hog Workers Approve Contract that Aids Foreign Workers” (5 Jan. 2010), Online <http://www.cbc.ca/news/canada/manitoba/hog-workers-approve-contract-that-aids-foreign-workers-1.945076>. UFCW also has negotiated contract language facilitating the transition of TFWs into PNPs at other Manitoba employers, including Cargill, HyLife Foods and Olymel. See http://www.ufcw.ca/index.php?option=com_content&view=article&id=4073:canada-s-largest-food-workers-union-says-kennedy-alexander-announcement-re-temporary-foreign-workers-fails-to-fix-broken-system&catid=544&Itemid=6&lang=en.

¹¹⁹ Interview with Brendan Jowett (18 June 2013) from Jowett, “Rules of Disengagement,” 110.

¹²⁰ Critical voices are heard in Sheldon Birnie, “Maple Leaf Foods: A Revealing Look into How Immigrant Labour Helps Big Business Keep Wages Low and Working Conditions Down” (1 March 2012), Online <http://www.cireport.ca/2012/03/maple-leaf-foods-a-revealing-look-into-how-immigrant-labour-helps-big-business-keep-wages-low-and-working-conditions-down.html>

¹²¹ Jowett, “Rules of Disengagement,” 117.

low wage in the plant and that MLF had not kept promises it made to TFWs at the time they were recruited. The striking TFWs were in a particularly difficult position because they were unable to secure other work without new permits and were seeking help from a community legal clinic.¹²²

VI. Conclusion

This report provides an overview of the challenges mobile workers face becoming incorporated into the collective bargaining regime. These challenges arise in the first instance from the most basic structures of the regime. We start with a world in which individual bargaining is the default and in which workers must opt into the collective bargaining regime. Because we operate on the basis of representational rather than regulatory unionism, unions can only bargain terms and conditions that apply to the workers in bargaining units they represent. Moreover, for the most part the geographic scale of representational unionism in Canada is local. Provincial jurisdiction over labour relations, except in federally regulated sectors (covering about 10% of the labour force) prevents unions from requiring employers to bargain agreements that are national in scope. Furthermore, province-wide bargaining is exceptional as most bargaining units are limited to all workers of a single employer in a municipality. Finally, to gain bargaining rights, unions must win majority support within a bargaining unit, and in recent years there has been a shift toward requiring that support to be demonstrated in an election, which research demonstrates decreases the likelihood of union success compared to the card-count method that used to predominate.

These structures affect geographically mobile workers in several ways. First, to the extent that this structure reduces union density, it is more likely that mobile workers will leave a non-union workplace and move to a non-union workplace, making their incorporation into the collective bargaining regime more difficult. Even if they start in a unionized workplace, lower union densities make it more likely that they will move to a non-union workplace that will have to be unionized for them to re-enter the collective bargaining regime. And finally, even if they move from one unionized workplace to another, there will be many and often insurmountable obstacles to transferring their accumulated seniority.

¹²² “Abuse of Temporary Foreign Workers Underlies Labour Dispute” (7 October 2008) Online <http://oilsandstruth.org/abuse-temporary-foreign-workers-underlies-labour-dispute>; “Foreign Workers at Striking Edmonton Plant Seek New Work Permits,” (21 October 2008) Online <http://www.cbc.ca/news/canada/edmonton/foreign-workers-at-striking-edmonton-plant-seek-new-work-permits-1.757990>.

When we examined the processes for incorporating or re-incorporating workers into the collective bargaining regime within the Canadian collective bargaining regime, we identified some particular issues that might face mobile workers. For the purposes of this analysis, however, we examined TFWs as a separate category because of their migration status vulnerability. Among workers with permanent status, we examined problems that might arise with respect to their categorization as employees and in regard to the identification of who is the employer for the purposes of collective bargaining. However, we need to know more from field workers about the extent of this problem and the precise forms that it takes before drawing any conclusions or offering more specific advice. We also considered whether mobile workers encounter greater difficulty organizing unions and winning certification than other workers. Again, this is a topic that requires further field research.

When mobile workers move into unionized workplaces, they become members of the bargaining unit and access union representation. This is known as accretion and seems fairly straightforward and unproblematic, although again we would be interested in knowing from fieldwork whether geographically mobile workers have experienced difficulty in this regard. More problematic is whether unionized workers can carry over seniority when they move from one bargaining unit to another. Since this is most commonly governed by inter- or intra-union agreements and the provisions of collective bargaining agreements, and the issue only crops up occasionally in the reported case law (often as a complaint by a bargaining unit member that the union failed in its duty of fair representation) we can only offer a basic overview, without being able to estimate the prevalence of such arrangements or comment on their operation. Again, these are questions that can only be addressed after extensive fieldwork. However, we know that these arrangements are more common in the construction industry, where mobility is the norm, and so we have also provided a more detailed account of the kinds of arrangements found there. But again, fieldwork is necessary to get a better handle on how these arrangements work in particular contexts.

Finally, we turned our attention to the situation of temporary foreign workers. Here again we have had to sub-divide the topic to reflect the diversity of programs through which temporary workers enter Canada. We have not attempted to be comprehensive, nor have we tried to describe these programs in detail since that would require a very lengthy treatment and has been done elsewhere by others. Instead, we focused on a smaller selection of programs where

collective bargaining issues have arisen, primarily in relation to organizing bargaining units comprised solely or including a significant number of TFWs. Here we have found that their vulnerability is multi-layered, combining their insecure immigration status, language and cultural barriers, lack of knowledge of their legal rights, and a strong incentive to tolerate violations in order to maximize their earnings during the window of opportunity that is open to them. As well, they are often working in industries where there are substantial obstacles to unionization, even for workers with permanent status.

As we noted, this report is intended for researchers in the field. We hope that it provides them with enough information so that they are more aware of some issues they may encounter and we look forward to the opportunity to learn from their research and further develop the analysis begun here.

Appendix 1

Questions for Field Research

- 1. Do geographically mobile workers confront a problem of being categorized by their employers as independent contractors?**
- 2. Do geographically mobile workers have difficulty identifying who is the employer or in identifying a legal entity that can be held legally responsible for the obligations of the employer?**
- 3. Do geographically mobile workers experience particular difficulties when organizing a non-union workplace?**
- 4. Do geographically mobile workers experience particular difficulties being integrated into existing bargaining units?**
- 5. What are the specific collective bargaining needs of geographically mobile workers who are covered by collective agreements (e.g., housing and commuting allowances)?**
- 6. Have you identified provisions in collective bargaining agreements that address those specific needs?**
- 7. Have you identified provisions in union constitutions and by-laws or in inter-union agreements designed to accommodate geographically mobile workers?**