Court File No. : A-223-12, A-169-12, A-170-12, A-171-12, A-172-12, A-173-12, A-174-12, A-175-12, A-176-12, A-177-12, A-178-12, A-179-12, A-180-12, A-181-12, A-182-12, A-184-12, A-185-12, A-186-12, A-188-12, A-189-12, A-190-12, A-197-12, A-198-12, A-199-12, A-200-12, A-201-12, A-202-12, A-203-12, A-204-12, A-205-12, A-206-12, A-207-12, A-208-12, A-209-12, A-210-12, A-211-12, A-212-12, A-213-12, A-214-12, A-215-12, A-216-12, A-217-12, A-218-12, A-219-12, A-220-12, A-221-12, A-222-12, A-224-12, A-225-12, A-226-12, A-227-12, A-228-12, A-229-12, A-230-12, A-231-12, A-232-12, A-233-12, A-234-12, A-235-12, A-236-12, A-237-12, A-238-12, A-239-12, A-240-12, A-241-12, A-242-12, A-243-12, A-244-12, A-245-12, A-246-12, A-247-12, A-248-12, A-249-12, A-250-12, A-251-12, A-252-12, A-253-12, A-254-12, A-255-12, A-256-12, A-257-12, A-258-12, A-259-12, A-260-12, A-261-12, A-262-12, A-263-12, A-264-12, A-265-12, A-266-12, A-267-12, A-268-12, A-269-12, A-270-12, A-271-12, A-272-12, A-273-12, A-274-12, A-275-12, A-276-12, A-277-12, A-279-12

FEDERAL COURT OF APPEAL

BETWEEN:

GENARO CRUZ DE JESUS, AINSWORTH PUGH, AINSWORTH PUGH, ALBERTO MUNGULA ALVAREZ, ARTURO HERNANDEZ GARCIA, ALVIN SOLOMON, BACILIO BAUTISTA HERNANDEZ, ANDRES GUZMAN SOSA, BLANCA ESTHELA CASILLAS, ANGELA ROSAS HERNANDEZ, BENITO HERNANDEZ GALINDO, ANTHONY VALENCE MILLS, BRANDFORD RUSSELL, ANTHONY WESTON, BRANDFORD RUSSELL, ANTHONY WESTON, ARACELI MOLINA ZARATE, BURNETT CLARKE, CLAUDIUS GIVANS, CLAUDIUS GIVANS, COWANS JUNIOR ROY, GIL ALDACO OTHERO, EDGAR OLIVARES ESPEJEL, EVERTON DUNKLEY, ELISHA STEELE, CRISPIN MARTINEZ PEREZ, GIL SALINAS GUTIERREZ, ERIKA CARREON ACOSTA, EVERTON WALTERS, ERROL ROWE, ESTANISLAO CASIRO MERCED, FELIPE SANCHEZ OTERO, GLENDON SANCHEZ, CRISTOBAL MUNUZ ORTIZ, ESTANISLAO CASIOR MERCED, HOWARD STONE, EUSEBIO DE LA C MOTA, CRISTOBAL MUNUZ ORTIZ, FRANCISCO CASTILLION HERNANDEZ, GREGORIO PINA SANTIAGO, EUSEBIO MARC ACATITLA, EUSEBIO MARC ACATITLA, HUMBERTO SALVADOR TORRES, BAGINO ZAVALA CORRALES, FREDY SANTOS REFUGIO, EUSEBIO MARC ACATITLA, GREGORIO PINA SANTIAGO, DAWNUS DUFF, IGNACIO CASTANEDA ZAMARRI, GALINDO GARCIA ALBINO, GUILLERMO MORALES, DAVID SPARKS, GERA CAMPBELL, DELVIN LEE CLEGHORN, IGNACIO CASTANEDA ZAMARRI, HECTOR MARTINEZ SANCHEZ, GIL ALDACO OTHERO, DENTON CUNNINGHAM, DELVIN LEE CLEGHORN, DERRICK SCARLETT, HENRY LENFORD, ISRAEL MENDEZ VELAZQUEZ, DERRICK SCARLETT, HORACE SMITH, JESUS MINERO CAHVANTZI, MIGUEL PINZON DE LA CRUZ, HOWARD

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Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

APPLICATION UNDER *Federal Courts Act RSC 1985, c. F-7*, s. 28(1)(m) and *Employment Insurance Act* SC 1996, c 23, s. 118

APPLICANTS' MEMORANDUM OF FACT AND LAW

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PART I: STATEMENT OF FACT

> *Distinguishing features of agricultural workers are their political impotence, their lack of resources to associate without state protection and their vulnerability to reprisal by their employers; as noted by Sharpe J., agricultural workers are "poorly paid, face difficult working conditions, have low levels of skill and education, low status and limited employment mobility."*
>
> *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94 at para. 41.

A. Overview

1. The Applicants are all migrant workers in the Seasonal Agricultural Workers Program ("SAWP").

2. Each of the Applicants applied for parental benefits available through the Employment Insurance ("EI") program and requested that their applications be backdated to the date of eligibility. The EI Commission denied the "antedate" request in all 102 cases. The Board of Referees heard each case separately, granted appeals in almost every case, and ordered that the parental benefit be paid. Umpire appeals were commenced in each case. The Umpire heard the 102 appeals consecutively. In one judgment applicable to all the appeals, the Umpire held that none of the SAWP workers were entitled to retro-active parental benefits. This is an application for judicial review from that decision.

3. Applicants for EI parental benefits are entitled to retro-active eligibility if they establish that they had "good cause for delay." The Umpire concluded that none of the Applicants had met that test and that the extraordinary barriers to both knowing about and applying for benefits faced by this group of workers – a group the Supreme Court has identified as amongst the most disenfranchised – were irrelevant to the determination. It is submitted that in so finding, the

Umpire unreasonably ignored relevant evidence, failed to give individual consideration to any of the Applicants, and made key findings in the absence of any supporting evidence.

B. The Seasonal Agricultural Workers Program

4. The SAWP is a long-standing program that brings workers from other countries to Canada to work in the agricultural sector. Through a set of bilateral agreements between the Canadian government and participating countries, Canada issues temporary work permits to selected migrant workers. In these cases, the participating countries are Mexico, Trinidad and Jamaica. The maximum duration of the work permits is eight months. Workers are required to leave Canada immediately at the end of their contract. SAWP workers may only work for the employer named on their work permit.

> *Fraser v. Canada (Fraser 1)*, 2005 CanLII 47783 (Ont. C.A.) at para. 2.
> *Immigration and Refugee Protection Regulations*, SOR/2002-227, ss. 200-209.

5. "Liaisons" from sending countries are responsible for the recruitment, selection and documentation of workers. Employers have the authority to name workers they wish to employ, and workers are not guaranteed jobs for the following year. This system of "perpetual recruitment" is dependent upon workers maintaining employer good will.

> F. Faraday (2012), "Made In Canada: How the law constructs migrant workers' insecurity" (Metcalf Foundation) at pp. 5, 38, 40, 74.
> *Fraser v. Canada (Fraser 1)*, 2005 CanLII 47783 (Ont. C.A.) at para. 3.

6. In *Dunmore*, the Supreme Court recognized that, as a group, farm workers are amongst the most marginalized workers in Canada. They are "politically impotent", vulnerable to reprisal by employers, poorly paid, face difficult working conditions, have low levels of skill and education, low status and limited employment mobility. Migrant workers – a sub-set of agricultural workers

– face even greater social and economic insecurity.

Dunmore v. Ontario (Attorney General), 2001 SCC 94 at para. 41.

7. The Honourable Madam Justice Abella, in *Fraser (2)*, described SAWP workers as "the most vulnerable of workers" who work in "relentlessly arduous working conditions." She concluded that agricultural workers are "among the most economically exploited and politically neutralized individuals in our society."

Ontario (Attorney General) v. Fraser (Fraser 2), 2011 SCC 20 at paras. 350-351.

C. The applications for parental benefits

8. The structure of the SAWP program ensures that while SAWP workers make contributions to the EI program with every paycheck, they will virtually never be eligible for EI benefits. Subject to a few narrow exceptions, in order to qualify for regular and sickness EI benefits, a claimant must be residing in Canada. Because of the nature of their contracts, SAWP workers are necessarily physically present in Canada only for the period during which they are employed.

Employment Insurance Act, SC 1996, c 23, ss. 7, 18, 37(b).
Employment Insurance Regulations, SOR/96-332, s. 55.
Fraser v. Canada (Fraser 1), 2005 CanLII 47783 (Ont. C.A.) at para. 7.

9. Parental benefits have been one exception. Claimants receiving parental benefits are not obligated to establish that they are available for work, as the purpose of the benefit is to allow parents to care for their children. As a result, claimants who are outside of Canada are eligible for parental benefits.[1] However, knowledge of this eligibility was virtually unknown. The

1. As of December 9, 2012, section 55(4) of the EI Act was amended. It now provides that claimants outside of Canada are eligible for parental benefits only if their SIN card has not expired. Temporary migrant workers have SIN cards with expiry dates. The expiry date depends upon whether they applied for the SIN from inside or outside of Canada. In the former case, it expires with their authorization to be in Canada. In the latter, it is valid for five years.

Record includes evidence of SAWP workers, the United Food and Commercial Workers ("UFCW"), employers, and country liaisons that were unaware that SAWP workers could qualify for parental benefits until the period shortly before the EI applications in issue were filed.

Employment Insurance Act, S.C. 1996, c. 23, s. 55(4).

Fraser v. Canada (Fraser 1), 2005 CanLII 47783 (Ont. C.A.) at paras. 8, 10, 12.

Applicants' Record, Volume 8, Tab 41: Letter from Alexes Barillas Zuniga (March 18, 2010), p. 2651.

Applicants' Record, Volume 4, Tab 2: Transcript of Proceedings before the Board of Referees (March 16, 2010), RE Brandford Russell (09-0395; 09-0396); Ainsworth Pugh (09-400; 09-0401); Renaldo Rodriguez Lopez (09-0402) and Pedro Cruz Lopez (09-0394) at pp. 1117-1118, 1128, 1131-1135, 1149.

Applicants' Record, Volume 4, Tab 2: Email correspondence between Ingrid Zea of the AWA and Donna Rothwell of Service Canada (May 20, 2009), pp. 1093-1094.

Applicants' Record, Volume 12, Tab 90: Mervyn Parris (A-266-12) Appeal Docket, pp. 4283-4285, 4317-4318, 4320, 4325; Glendon Sanchez (A-208-12) (Volume 7, Tab 33, pp. 2357, 2369).

10. These applications for judicial review arise from 102 applications for parental benefits submitted on behalf of 73 SAWP workers between 2008 and 2010. In each case, the Applicants requested that their applications be antedated, for periods ranging between six months and 18 years. Each of the antedates were denied by the EI Commission, although the Applicants otherwise qualified for the parental benefit.

Applicants' Record, Volume 13, Tab 103: Summary of Parental Benefit Applications.

11. Ninety-four of the applications were submitted with the assistance of the UFCW. Six of the remaining applications were completed by the Trinidad liaison (Weston, A-181-12 & A-184-12; Charles A-254-12 & A-258-12; Parris A-266-12; Chaitram, A-277-12), one with the assistance of the employer (Sanchez, A-208-12) and one applicant received help from his Canadian spouse (Taylor, A-264-12).

12. The UFCW has played a central role in informing SAWP workers of their eligibility for EI

benefits and assisting with the application process. Although SAWP workers are not unionized, commencing in 2002 the UFCW began developing seven "Migrant Worker Support Centres" in four provinces. That was also the first year that any SAWP worker received EI benefits of any kind. Prior to 2002, the UFCW informed SAWP workers that they were not eligible for EI benefits. Subsequently, the UFCW advised SAWP workers that antedate applications for EI parental benefits could not be made for children born prior to 2000.

> *Fraser v. Canada (Fraser 1)*, 2005 CanLII 47783 (Ont. C.A.) at paras. 8, 10, 12.
>
> Applicants' Record, Volume 6, Tab 22: UFCW, "The Status of Migrant Farm Workers in Canada: 2006-2007" at pp. 1946, 1948.
>
> Applicants' Record, Volume 4, Tab 2: Transcript of Proceedings before the Board of Referees (March 16, 2010), RE Brandford Russell (09-0395; 09-0396); Ainsworth Pugh (09-400; 09-0401); Renaldo Rodriguez Lopez (09-0402) and Pedro Cruz Lopez (09-0394) at pp. 1128, 1134-1135.

13. Unfortunately, the centres operate with limited resources and cannot reach or assist all SAWP workers in their area. The Virgil Centre, which assisted almost all of the Applicants to prepare their EI applications, opened in 2004. It operates only during the growing season. The Centre is not able to see all workers who attended their drop-in. Most workers attend on Sundays, their most common day off.

> Applicants' Record, Volume 6, Tab 22: UFCW, "The Status of Migrant Farm Workers in Canada: 2006-2007" at pp. 1946-1948.
>
> Applicants' Record, Volume 4, Tab 2: Transcript of Proceedings before the Board of Referees (March 16, 2010), RE Brandford Russell (09-0395; 09-0396); Ainsworth Pugh (09-400; 09-0401); Renaldo Rodriguez Lopez (09-0402) and Pedro Cruz Lopez (09-0394) at p. 1124, 1127, 1129.
>
> Applicants' Record, Volume 4, Tab 2: Email from Stan Raper dated November 30, 2009, p. 1092.

14. It was not until May 2009 that the UFCW became aware that SAWP workers had the right to apply for children born as early as 1990. The Virgil Centre began to publicize this option in and around this time.

> Applicants' Record, Volume 8, Tab 41: Letter from Alexes Barillas Zuniga (March 18, 2010), p. 2651.

Applicants' Record, Volume 4, Tab 2: Transcript of Proceedings before the Board of Referees (March 16, 2010), RE Brandford Russell (09-0395; 09-0396); Ainsworth Pugh (09-400; 09-0401); Renaldo Rodriguez Lopez (09-0402) and Pedro Cruz Lopez (09-0394) at pp. 1117-1118, 1131-1133, 1149.

Applicants' Record, Volume 4, Tab 2: Email correspondence between Ingrid Zea of the AWA and Donna Rothwell of Service Canada (May 20, 2009), pp. 1093-1094.

15. Initially, the EI Commission granted many antedate applications from migrant workers. For unknown reasons, this changed in 2008/2009 when many such applications were denied, leading to the 102 applications before this Court.

D. The Hearings before the Board of Referees

16. All of the Applicants appealed the denial of their parental benefit applications to the Board of Referees. In all but 18 cases, the Board of Referees agreed that the Applicants had shown good cause for delay in applying, and granted the antedate.

Applicants' Record, Volume 13, Tab 103: Summary of Parental Benefit Applications.

E. The Hearings before the Umpire

17. All of the decisions of the Board of Referees were appealed to the Office of the Umpire.

18. The Umpire heard all 102 appeals consecutively, with each case argued individually and on the basis of its own unique facts. The appeals were grouped into three distinct fact patterns for the purposes of argument. Category One included first-time claims for children born after 2000. Category Two appeals arose from parental benefit claims pre-dating 2000. The significance of this date was that, as noted above, it was not until May 2009 that the UFCW became aware that applications for antedates could be made for children born before 2000. Claimants in Category Three had applied for parental benefits previously for other children and then subsequently

requested antedated benefits for different children. The reasons provided for subsequent antedate applications were all different, but generally reflected misinformation from various sources.

19. While "illustrative claimants" were identified in each category, they were not "representative" claimants in the sense that findings in their cases would automatically apply to the remainder.

20. The Umpire issued 102 separate decisions, but only one set of reasons. The reasons given in the appeal of Cruz De Jesus were to apply to all the other proceedings:

> The appeal of Mr. Cruz De Jesus was part of a group of 102 appeals involving 73 claimants as 13 appellants had two files and one appellant had three files …. As the issue under appeal in all cases was the same, that is whether the claimants were entitled to an antedate of their claims, this decision will apply to all 102 appeals.
>
> Applicants' Record, Volume 3, Tab 103: Decision of the Umpire, p. 920.

21. The Umpire denied the antedate applications on the basis that the claimants "had not taken any steps to inform themselves of their rights and obligations." The decision did not address the particular facts of any the Applicants.

> Applicants' Record, Volume 3, Tab 103: Decision of the Umpire, p. 930.

PART II: POINTS IN ISSUE

22. The only issue to be determined is whether the Umpire's conclusion that none of the Applicants had established good cause for delay in applying for EI parental benefits was reasonable.

PART III: LEGAL SUBMISSIONS

A. Standard of Review

23. The legal issue in these appeals is whether there was "good cause for delay" in commencing parental benefit claims. This is a question of mixed fact and law that is reviewed on the standard of reasonableness.

> *Canada v. Albrecht* (1985), A-172-85 (Fed. C.A.) at p. 3.
> *Canada v. Burke*, 2012 FCA 139 at para. 9.

B. Statutory Overview

24. Parental benefits are payable in order to allow new parents to care for their children. These benefits are an integral part of Canada's employment insurance scheme, and like regular EI benefits, serve to alleviate the poverty associated with unemployment. As noted by the Supreme Court, the provision of parental benefits also reflects a public policy commitment to protect the important reproductive function shared by both parents and to protect equality rights:

> I see no reason why parental benefits should be characterized differently from maternity benefits. In both cases, the benefits relate to the function of the reproduction of society… All parents have equal obligations….The inclusion of this type of benefits in the unemployment insurance plan is an extension of the plan that is made necessary by the equality rights that are also an integral part of our Constitution.
>
> *Reference re Employment Insurance Act (Can.)*, ss. 22 and 23, 2005 SCC 56 at paras. 73-75.
> *Employment Insurance Act*, S.C. 1996, c. 23, ss. 23(1) – 23(2).

25. There is no statutory "limitation period" within which a claim for EI benefits must be made. Rather, in the case of parental benefits, a parent becomes <u>eligible</u> in the first week of unemployment following the birth/adoption of their child. However, a parent only becomes <u>qualified</u> for EI benefits in the week that they actually apply, even if they were eligible at an earlier date.

Employment Insurance Act, S.C. 1996, c. 23, ss. 9, 23(2).

26. The *Act* explicitly provides that claims can be backdated to the date of eligibility. Pursuant to s. 10(4) of the *Act*, a claimant wishing to "antedate" their benefit claim must establish that there was "good cause for the delay":

> s. 10(4) An initial claim for benefits made after the day when the claimant was first qualified to make the claim shall be regarded as having been made on an earlier day if the claimant shows that the claimant qualified to receive benefits on the earlier day and that there was good cause for the delay throughout the period beginning on the earlier day and ending on the day when the initial claim was made [emphasis added].

Employment Insurance Act, S.C. 1996, c. 23, ss. 10(1) and 10(4).

C. The legal test: "good cause for the delay"

27. The Commission automatically grants all antedate requests up to four weeks. This policy implicitly recognizes that it is reasonable to expect that the typical claimant will require up to a month in order to take the necessary steps to apply for benefits. For antedate requests greater than four weeks, a claimant must establish that they meet the test set out in the legislation; that is: "there was good cause for the delay throughout the period."

Service Canada, "Digest of Benefit Entitlement Principles - Chapter 3: Antedates" at s. 3.1.1.

28. In light of the important social function that EI benefits play, the antedating provisions ensure that unemployed persons are not denied benefits on mere "technical grounds". As with the *Act* generally, the "good cause" provisions must be interpreted generously, liberally and with any ambiguity resolved in the claimant's favour.

Confederations des syndicates nationaux v. Canada (Attorney General), 2008 SCC 68 at para. 31.
Reference re Employment Insurance Act (Can.), ss. 22 and 23, 2005 SCC 56 at paras. 47, 60.
Abrahams v. Attorney General of Canada, 1983 CanLII 17 (SCC) at p. 10.

29. The following principles in respect of "good cause for delay" can be distilled from the statute and jurisprudence:

a. The language in the statute is mandatory. That is, where good cause is established the antedate must be granted.

b. Good cause must be shown to have existed throughout the whole period of the delay. It is not necessary to account for every single day but it must be readily concluded that there was good cause without any break for the whole period.

c. Good cause does not "rust." That is, where good cause is established, it endures until it is displaced. There is no time limit following which good cause can no longer be established.

d. The reason for the delay need not be the same throughout the period. There may be a succession of reasons provided each is considered to be good cause.

e. The cumulative effect of reasons provided for delay must be considered.

f. Good cause for delay is not a "rigidly closed concept", but rather is flexible and circumstantial.

g. As stated in *Trinh*, barring "exceptional circumstances", a claimant is expected to take reasonably prompt steps to understand their obligations under the Act. However, a strict application of the antedate provisions could impose on claimants financial losses that are not justified by administrative efficiency. The object of the antedate provisions is to ensure flexibility.

Canada v. Albrecht (1985), A-172-85 (Fed. C.A.) at p. 1.

Canada v. Trinh, 2010 FCA 335 at para. 10.

Canada v. Dickson, 2012 FCA 8 at paras. 2, 5.

Service Canada, "Digest of Benefit Entitlement Principles - Chapter 3: Antedates" at s. 3.2.1.

Rettie v. Employment and Immigration Commission (1996), CUB 35066 at p. 3.

[Claimant Unidentified] v. Canada (2007), CUB 69621.

Bouchard v. Canada (1989), CUB 17192 at p. 3.

30. One of the most commonly litigated antedate issues arises in circumstances in which a claimant's delay in applying for benefits arose because they were not aware of their entitlement. *Albrecht* established that ignorance of the law can satisfy the requirement of "good cause" where

the claimant can show that they "did what a reasonable person in his situation would have done to satisfy himself as to his rights and obligations under the Act." The Court stated that "each case must be judged on its own facts."

> *Canada v. Albrecht* (1985), A-172-85 (Fed. C.A.) at p. 5.

31. Thus, in assessing whether there was "good cause for delay", the relevant point of view is that of the reasonable person. The "reasonable person" test is both subjective and objective. A "reasonable person" is one who is "dispassionate and fully apprised of the circumstances, possessed of similar attributes to, and under similar circumstances as, the claimant" [emphasis added].

> *Canada v. Albrecht* (1985), A-172-85 (Fed. C.A.) at p. 5.
> *Law v. Canada (Minister of Employment and Immigration)*, 1999 CanLII 675 (S.C.C.) at paras. 60-51.

D. The Umpire's Decision is "Unreasonable"

32. It is submitted that in ruling that none of the Applicants had established good cause for delay, the Umpire made the following fundamental errors:

i. The Umpire explicitly refused to consider relevant evidence, and thus failed to apply the "reasonable person test"

33. The "reasonable person" test has not been without controversy, as a result of concern that the test could impose discriminatory and inappropriate standards that disadvantage vulnerable groups. As the Supreme Court of Canada has warned, the "subjective-objective" nature of the test ensures that the reasonable person test is not a vehicle for the "imposition of community prejudices":

> I am aware of the controversy that exists regarding the biases implicit in some applications of the "reasonable person" standard. It is essential to stress that the appropriate perspective is not solely that of a "reasonable person" – a perspective

> which could, through misapplication, serve as a vehicle for the imposition of community prejudices. The appropriate perspective is subjective-objective. Equality analysis under the *Charter* is concerned with the perspective of a person in circumstances similar to those of the claimant, who is informed of and rationally takes into account the various contextual factors which determine whether an impugned law infringes human dignity, as that concept is understood for the purpose of s. 15(1) [emphasis added].
>
> *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para. 61.

34. Equality and non-discrimination principles are not only an important element of the reasonable person test, but are at the very foundation of the parental benefit itself. Further, there can be no question that SAWP workers are in a position of historical disadvantage, compounded by their racialization and citizenship. Appellate Courts have consistently described SAWP workers using language such as: "vulnerable"; "among the least powerful"; "political impotence"; and, "surely amongst the most marginalized of non-citizens."

> *Fraser v. Canada (Fraser 1)*, 2005 CanLII 47783 at para. 112. See also paras. 17-18, 89, 111.
> *Ontario (Attorney General) v. Fraser (Fraser 2)*, 2011 SCC 20 at paras. 350-351.
> *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94 at para. 41.

35. In respect of the very social benefit in issue, the EI benefit, SAWP workers already experience a significant disadvantage in respect of access. As noted above, despite paying premiums with every paycheck, SAWP workers are ineligible for most EI benefits. The Ontario Superior Court has held that, as a result, the eligibility provisions in the *Act* have a "disproportionate impact on [SAWP workers] as non-citizens and as persons from particular national origins."

> *Fraser v. Canada (Fraser 1)*, 2005 CanLII 47783 at para. 72.
> Applicants' Record, Volume 6, Tab 22: UFCW, "The Status of Migrant Farm Workers in Canada: 2006-2007" at p. 1949.

36. The jurisprudence on "good cause for delay" cannot be applied uncritically to the circumstances faced by migrant workers. Virtually all of this jurisprudence involves citizens and permanent residents of Canada who have access to regular EI benefits. Even for such claimants, it has been found to be reasonable for a recent immigrant to err in their understanding of Canadian law. However, a comparison with recent immigrants does not capture the broad and unique range of barriers that prevent SAWP workers from knowing about their entitlement to EI parental benefits and/or taking steps to inform themselves of their eligibility.

Pellichero v. Canada (2001), CUB 52237 at pp. 1-2.

37. The intense vulnerability and social isolation of SAWP workers arises from a combination of the structure of SAWP itself, the harsh realities of the workplace, and statutory exclusions from worker protections and social benefit entitlements.

38. Migrant workers are not permitted to circulate freely in the labour market. This restriction grants employers tremendous power over SAWP workers. Employers can dismiss SAWP workers for "non-compliance, refusal to work, or any other sufficient reason." Once dismissed, SAWP workers are deported, usually within 24-48 hours. Employers have repatriated workers for reasons that include falling ill, questioning wages, refusing unsafe work, and complaints about living conditions.

Applicants' Record, Volume 6, Tab 22: UFCW, "The Status of Migrant Farm Workers in Canada: 2006-2007" at p. 1948.

Applicants' Record, Volume 12, Tab 88: Mark Taylor Appeal Docket (A-264-12), pp. 4199, 4202, 4216-4221.

Fraser v. Canada (Fraser 1), 2005 CanLII 47783 (Ont. C.A.) at para. 4.

J. Hennebry & K. Preibisch (2010), "A Model for Managed Migration? Re-examining best practices in Canada's Seasonal Agricultural Worker Program" *International Migration* DOI: 10.1111/j.1468-2435.2009.00598.x at pp.9-10, 17-18.

North-South Institute (2006), *Migrant Workers in Canada: A review of the Canadian Seasonal Agricultural Workers Program* at p. 13.

K. Preibisch (May 2007), "Patterns of Social Exclusion and Inclusion of Migrant Workers in Rural Canada" at p. 11.

39. Employers can impose "farm rules" that bar workers from leaving the grower's property or restrict the entry of visitors. Employers frequently force workers to surrender their passports and health cards to them upon arrival. Workers rely heavily on their employer's willingness to provide them with a telephone, help fill out forms, take them to town, or do their banking.

Applicants' Record, Volume 12, Tab 88: Mark Taylor Appeal Docket (A-264-12), pp. 4199, 4202, 4216-4221.

Applicants' Record, Volume 6, Tab 22: UFCW, "The Status of Migrant Farm Workers in Canada: 2006-2007" at pp. 1944, 1950.

K. Preibisch (May 2007), "Patterns of Social Exclusion and Inclusion of Migrant Workers in Rural Canada" (prepared for the North-South Institute; http://www.nsi-ins.ca/english/pdf/Exclusion_Inclusion_Migrant.pdf) at p. 13.

North-South Institute (2006), Migrant Workers in Canada: A review of the Canadian Seasonal Agricultural Workers Program at pp. 11, 18.

40. The work itself is physically demanding and dangerous, the hours are long, and workers are isolated in rural locations with limited access to transportation. Some migrants do not enjoy a day off, especially during the harvest. These workers simply do not have the opportunity to access government offices during business hours – not in person, not by phone, not by computer.

Applicants' Record, Volume 12, Tab 88: Mark Taylor Appeal Docket (A-264-12), pp. 4199, 4202, 4216-4221.

K. Preibisch (May 2007), "Patterns of Social Exclusion and Inclusion of Migrant Workers in Rural Canada" (prepared for the North-South Institute; http://www.nsi-ins.ca/english/pdf/Exclusion_Inclusion_Migrant.pdf) at p. 13.

41. These conditions, amongst others, led the Ontario Superior Court in *Fraser (1)* to reflect that SAWP workers are "surely amongst the most marginalized of non-citizens":

Fraser v. Canada (Fraser 1), 2005 CanLII 47783 (Ont. C.A.) at para. 112. See also paras. 17-18, 89, 111.

42. This position of dependence and vulnerability is exacerbated by the statutory labour relations

scheme in Ontario, which systematically excludes SAWP workers from many of the other social benefits and protections that are generally available to other workers, including:

a. Exemptions from legal minimum standards relating to maximum hours of work, daily and weekly rest periods, statutory holidays and overtime pay.

*O. Reg 285/01 (*to *Employment Standards Act*), ss. 2(2), 24-27.

b. Denial of the right to unionize and engage in collective bargaining under the *Labour Relations Act*. Instead, SAWP workers have access to an anaemic version of unionization under the *Agricultural Employees Protection Act*, which does not impose any obligation on employers to bargain. No collective agreements have been reached for any SAWP workers in Ontario.

Agricultural Employees Protection Act, 2002, S.O. 2002, c. 16.

O. Reg. 552, R.R.O 1990, s. 5(2).

F. Faraday (2012), "Made In Canada: How the law constructs migrant workers' insecurity" (Metcalf Foundation) at p. 85.

c. The protections of Ontario's *Occupational Health and Safety Act* were not extended to farm workers until June 2006, after the UFCW began a legal challenge. Despite this step forward, it remains the case that workers on smaller farms are excluded from the protections of the Act.

Occupational Health and Safety Act, R.S.O. 1990, c. 0.1, s. 3(2).

O. Reg 414/05, "Farming Operations".

Applicants' Record, Volume 6, Tab 22: UFCW, "The Status of Migrant Farm Workers in Canada: 2006-2007" at p. 1951.

d. Migrant worker deaths are not the subject of an independent coronial inquest, unlike the deaths of workers in other similar industries – despite very high rates of serious workplace accidents and fatalities.

Coroner's Act, R.S.O. 1990, C. C.37, s. 10(5).

Peart v. Ontario, 2010 HRTO 644 (CanLII) at paras. 10-12.

e. Canada is not a signatory to International Conventions protecting migrant worker rights: the *Migration for Employment Convention (Revised)* (1949); *Migrant Workers (Supplement Provisions)* Conventions (1975); "International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families" (1990).

J. Hennebry & K. Preibisch (2010), "A Model for Managed Migration? Re-examining best practices in Canada's Seasonal Agricultural Worker Program" *International Migration* DOI: 10.1111/j.1468-2435.2009.00598.x at p. 20.

43. In light of these exclusions, agricultural workers possess what the Supreme Court has characterized as a "limited sense of entitlement". After reviewing similar statutory exclusions in Québec, the "Commission des droits de la personne et des droits de la jeunesse Québec" concluded that "all migrant workers are subject to systemic discrimination."

Dunmore v. Ontario (Attorney General), 2001 SCC 94 at para. 45.

Commission des droits de la personne et des droits de la jeunesse Québec (2011), "Systemic Discrimination Towards Migrant Workers: Summary" at pp. 19, 26.

44. All of these factors operate to establish significant barriers to accessing social benefits. In the context of occupational safety, an Ontario government-appointed panel recently concluded that "These groups of vulnerable workers faced various barriers to enforcing their rights including: lack of knowledge about their rights, including the right to refuse unsafe work; lack of training; and in particular 'being unable to exercise rights or raise health and safety concerns for fear of losing one's job, or in some cases, being deported.'"

F. Faraday (2012), "Made In Canada: How the law constructs migrant workers' insecurity" (Metcalf Foundation) at p. 93.

45. The circumstances of Canadian citizens, who reside year-round in Canada and are entitled to the full spectrum of social benefits and worker rights, simply have no bearing on the social conditions faced by migrant workers who live, as recognized by the Ontario Superior Court, at the "outer margins of Canadian society."

> *Fraser v. Canada (Fraser 1)*, 2005 CanLII 47783 (Ont. C.A.) at paras. 117, 119.

46. In light of the foregoing, an objective-subjective "reasonable person" for the purpose of these cases is one who shares the following characteristics:

a. Is not eligible for and has not had any experience with regular EI benefits. Note that past experience of ineligibility for EI has been found to justify delay in applying (see *Canada v. Schoeck* (1994), CUB 25879 at p. 2).
b. Is excluded from most other social benefits and worker protections.
c. Resides in Canada for only part of each year, in rural and isolated locations with little contact with Canadian society. Lack of access to services due to a rural residence can be a factor justifying the granting of an antedate application (see *Scott v. Commission* (2001), CUB 51453).
d. Returns to their home country immediately upon completing their contract in Canada.
e. Does not have reasonable access to Service Canada centres, which even if located nearby, do have not hours of operation that would allow SAWP workers to attend for assistance or information.
f. Has not had the benefit of any outreach by Service Canada to ensure that migrant workers have information about the parental benefit. While there is not typically a positive obligation upon Service Canada to provide information, in a context in which Service Canada was aware of the extreme difficulty these disenfranchised and vulnerable workers have in accessing the benefits, Service Canada ought to have taken additional steps or should adopt an antedate determination policy that responds to this reality.
g. Is functionally illiterate.
h. In the case of the Mexican claimants, lacks functional English language skills.
i. Has a low level of formal education.
j. Is socially isolated while in Canada.
k. Lacks access to transportation to urban centres.
l. Fears reprisal, including deportation and black-listing in future years, if [s]he tries to enforce the rights [s]he does have.

m. Works in an industry requiring extremely difficult physical labour with long hours and little free time.

n. Lacks access to telephones and/or computers.

o. Is not represented by a union.

p. Lacks reliable and unbiased assistance from Liaison officers.

q. Faces barriers to access AWA Centres, which are themselves under-resourced.

r. Is not provided with a Record of Employment at the conclusion of their contract. This is significant because the Record of Employment form includes a warning that claims for EI should be made immediately. Employees who do not receive this form do not receive this warning (see *Canada v. Tuck* (2003), CUB 59482; *Canada v. Koo* (2006), CUB 65711)

s. Is completely disenfranchised from the Canadian political system.

t. Has no experience with a similar benefit in their home countries.

47. The Umpire quoted the above list and acknowledged that it was "uncontested" that the Applicants "worked in very difficult conditions." The Umpire concluded that the Applicants were individually impacted by some, if not all, of the above-identified barriers: "Although all of these conditions did not apply to all the claimants involved in the appeals, several of them did apply to all of them". The Umpire did not identify which "conditions" affected each individual Applicant, in his view. Nor did the Umpire identify those conditions that apply to "all the claimants."

Applicants' Record, Volume 3, Tab 103: Decision of the Umpire, pp. 920, 922.

48. Regardless, the Umpire explicitly refused to consider any of these barriers as part of the "reasonable person" test, stating that: "These working conditions may well provide grounds for complaints and legal actions pursuant to human rights and/or labour standards legislations. <u>This, on the other hand, is not the issue relevant to the current appeals</u>. The only issue here is whether the claimants had established good cause for their delay in applying for benefits that would warrant an antedate of their claims" [emphasis added]. The Umpire added later, "The particular

socio-economic circumstances of these claimants that led them to accept to come to Canada and work in difficult conditions might be the subject of other claims and actions, but this is not relevant to the issue at bar" [emphasis added].

Applicants' Record, Volume 3, Tab 103: Decision of the Umpire, pp. 927-929.

49. In so finding, the Umpire made a serious error that went to the heart of the analysis. These barriers constituted more than simply "difficult work conditions." Rather, they were fundamental considerations for the reasonable person test. The Umpire was obliged to consider what a reasonable person faced with such barriers would have done. Thus the above barriers were directly relevant to the legal test.

50. In this case, the Umpire denied the antedate applications because the claimants "had made no effort whatsoever to inform themselves of their rights and obligations." Instead, the Umpire ruled that they could have asked about their entitlement arising from EI payroll deductions, in part because of an assumption that they had the sophistication to make arrangements to come to Canada:

> In all the cases at bar, the claimants had made no effort whatsoever to inform themselves of their rights and obligations, for almost a year in a few cases and for several years in most cases. Although the claimants may well have had problems resulting from their difficult working conditions and with the English language in some cases, this would not have prevented them from at least making some effort to obtain information in regard to claim for benefits. These were workers who were able to make all the arrangements to come to Canada to work and later return to their countries. They knew employment insurance deductions were taken from their salary. Their total inaction to at least inform themselves of their rights and obligations in relation to a possible claim for such long periods cannot be said to represent what a reasonable person would have done in the claimants' circumstances (emphasis added).

Applicants' Record, Volume 3, Tab 103: Decision of the Umpire, p. 930.

51. However, there was no evidence to support the Umpire's statement that SAWP workers make their own travel arrangements. To the contrary, travel is arranged centrally through a single travel agency in accordance with the SAWP operating guidelines. The liaison officers are responsible for obtaining visas and work permits and filing tax returns. Moreover, the capacity to participate in the SAWP program administered by their home countries is not determinative of the claimants' knowledge or capacity in respect of a Canadian social benefit program.

> Applicants' Record, Volume 12, Tab 88: Mark Taylor Appeal Docket (A-264-12), p. 4199.
>
> Faraday (2012), "Made In Canada: How the law constructs migrant workers' insecurity" (Metcalf Foundation) at p. 94.

52. It is only by wholly ignoring the contextual information and barriers faced by SAWP workers that the Umpire could conclude that SAWP workers both knew about and could have asked about their EI deductions. The Umpire sidestepped questions such as who they would ask, how they would ask (in light of transportation, literacy, language and technological barriers), what would they would ask about (in light of their ignorance of the program) and whether the information they could obtain was reliable.

53. Indeed, the evidence before the Umpire was that it was not until September 2008 that Service Canada informed representatives of the employers and governments participating in the SAW program that migrant workers were both eligible for parental benefits and that eligibility dated back as far as 1990. Jean Smith, a SAWP employer and representative of Applicants Mervyn Parris and Glendon Sanchez advised the Umpire that:

> Prior to September 2008, and I would venture to say perhaps even to this day, had Mr. Parris or any other migrant worker been able to find their way to a Service Canada office to inquire about EI benefits, they would have been informed that they were not eligible to claim benefits. And until, at the earliest, September 2008, Mr. Parris' employers would have provided him with that same

information.

Applicants' Record, Volume 7, Tab 33: Letter from Jean Smith (dated August 14, 2010) at pp. 2380.

54. Employers, the UFCW and liaisons did not know that SAWP workers were eligible for parental benefits, until (in some cases) as late as 2009. How could the workers – with virtually none of the resources of these groups – be expected to know more than the individuals they relied upon for information?

55. The situation faced by these Applicants is truly the "exceptional situation" contemplated in *Trinh*, in which ignorance of the law can justify delay in applying for the parental benefit. It is precisely such a contextual analysis that recently led the Human Rights Tribunal of Ontario to grant an extension of time to a migrant farm worker who commenced an application three years after the termination of his employment:

> In this case the applicant provides two reasons for the delay in filing the Application: that he was threatened by the personal respondent that he would be repatriated if he took action against the termination of his employment, and that as a migrant farm worker he was socially and politically excluded and therefore had difficulties exercising legal protections against discrimination. In his submissions, the applicant explains that as a migrant farm worker from St. Lucia he has no secure immigration status. The applicant asserts that employers of migrant farm workers are empowered to make unilateral decisions to terminate a worker's employment and repatriate them to their countries of origin. He states that it was only when he received assistance from a friend and migrant rights activist that he was able to develop the courage and confidence to report the incident.
>
> Based on the applicant's submissions alone, it is not plain and obvious to me that the delay in filing the Application was not incurred in good faith. Therefore, the Tribunal will continue to process this application.

Casimir v. Double Diamond Acres Ltd., 2010 HRTO 2549 at paras. 8-9.

56. Indeed, Justice Ducharme gave a strong warning that the circumstances of SAWP workers

must be considered when determining legal entitlements:

> Nor am I persuaded that the SAWP worker's fears of reprisal are irrational and should therefore be discounted or ignored. First, I would note that the AG did not take issue, in any way, with the suggestion that some SAWP workers have been treated badly by their farmer-employers and their home consulates. This alone provides a rational basis for fear on the part of them all. Second, fear can be a barrier even if it is not rational. It is asking too much to require vulnerable, unsophisticated individuals living at the margins of society to make decisions as if they were fully rational actors operating in a perfect marketplace of information and ideas (emphasis added).
>
> *Fraser v. Canada (Fraser 1)*, 2005 CanLII 47783 (Ont. C.A.) at paras. 117, 119.

57. It would be reasonable for a person in the circumstances of SAWP workers to have no knowledge of their entitlement to parental benefits unless they were specifically advised of such and obtained assistance to apply. Until these conditions are in place, a good faith reason for the delay in applying exists. In almost every case, the Applicants applied within days or weeks of learning of their entitlement.

58. The Umpire explicitly ignored the significant barriers preventing the claimants from taking steps to inform themselves. It is submitted that in so ruling, the Umpire committed the very error that Justice Ducharme warned against: The Umpire "required vulnerable, unsophisticated individuals living at the margins of society to make decisions as if they were fully rational actors operating in a perfect marketplace of information and ideas." Such a finding is "indefensible in respect of the facts and the law", and thus unreasonable.

> *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII) at para. 47.

ii. The Umpire failed to give individual consideration to each Applicant

59. It is submitted that the shared characteristics of marginality and vulnerability identified above

are sufficient to establish that the Applicants had good cause for delay. However, even if these shared characteristics are not sufficient, that should not end the analysis. The Umpire was tasked with adjudicating 102 different appeals, with 102 different stories. The Umpire was required to consider the additional unique circumstances of each Applicant and render an individual decision. As this Honourable Court has noted in another recent antedate case, *Bradford*, "the jurisprudence of this Court is clear: each case must be judged on its own facts."

Bradford v. Canada, 2012 FCA 120 at para. 18.

60. Instead, the Umpire made legal and factual findings that applied to all 102 Applicants without considering their individual claims, simply because the "issue under appeal in all cases was the same." The Umpire merely alluded to the fact that some of the "difficult working conditions" impacted upon each Applicant, without any elaboration.

Applicants' Record, Volume 3, Tab 103: Decision of the Umpire, p. 920.

61. Mr. Cruz De Jesus's claim was the only one that received any individual attention in the Umpire's reasons. However, this consideration was brief, limited to the following three sentences: "The claimant worked for Frank Eborall from April 12 until November 19, 2008. On June 28, 2009, he applied for parental benefits and requested to have his claim antedated to November 20, 2008. The Commission refused to antedate the application because the claimant had not shown good cause for his delay in applying for benefits."

Applicants' Record, Volume 3, Tab 103: Decision of the Umpire, p. 919.

62. An examination of the evidence respecting his antedate claim highlights the unreasonable nature of the Umpire's approach, because there was evidence in his case that was in direct contrast to the factual findings that the Umpire applied to all 102 cases:

> I am a Mexican migrant farm worker and I have been coming to work seasonally in Canada for 24 years now. I do not remember my first and last day worked for most of those years since my employer did not give my ROEs. However, until recently, June 2009, no one had ever told me that I have a right to apply for parental benefits. Now that I know about it, I would like to apply for my baby born in 2008. That is why I requested for my 2008 ROE and I got it. The employer issues ROE, only upon request. This is my first time applying for EI benefits.
>
> Moreover, I do not speak neither English nor French and require someone fluent in both English and Spanish to assist me in filling out the application. Also I never got EI benefits information from any government agency in Spanish which is the only language I understand.
>
> Due to my language barrier I do not understand the deductions terminology. So I know that my employer takes money from my biweekly payment. But I do not know where that money goes to [emphasis added].
>
> For the above reasons, I did not apply on time.
>
> Applicants' Record, Volume 4, Tab 1: Application to antedate claim for benefit, p. 1052.
>
> See also Applicants' Record, Volume 4, Tab 1: Intake Sheet, p. 1057.

63. Thus, contrary to the Umpire's central finding that all of the Applicants "knew employment insurance deductions were taken from their salary", the evidence pertaining to Mr. Cruz De Jesus established that he was not provided with "records of employment" that would have included information about EI deductions, and that due to language barriers he did not know where the deductions from his paycheck went to. Without an individual assessment of the facts of his case, it is not known why the Umpire rejected this first-time, Spanish-speaking claimant seeking a seven-month antedate.

64. There were a significant number of other appeals that included explicit evidence that individual Applicants were unaware that deductions from their paycheques went to EI, including that of Anthony Valence Mills, who stated that:

> I have to say that I did not know what a pay stub was, what a tax form is, or even that we were required to submit a tax return. Furthermore, I didn't even know that they were deducting E.I. from my pay cheques. If I was unaware of these facts, how can I want to seek clarification? In my arguments, I have to say that if anyone asks about anything having to do with the "farm program", he is looked at in a funny way. If anyone is going to question anything on his pay cheque he would be blacklisted, which means his chances of coming back next year are slim. This is another factor why I didn't know about my eligibility for E.I. benefits.
>
> Applicants' Record, Volume 5, Tab 12: Anthony Valence Mills (A-179-12) Appeal Docket, p. 1517.
>
> See also: Applicants' Record: Alberto Munguia Alvarez (A-171-12) (Volume 4, Tab 4, pp. 1212, 1214); Arturo Hernandez Garcia (A-172-12) (Volume 4, Tab 5, p. 1244); Benito Hernandez Galindo (A-178-12) (Volume 5, Tab 11, pp. 1425-1426); Edgar Olivares Espejel (A-198-12) (Volume 6, Tab 23, p. 1981); Eusebio De La Cruz Mota (A-212-12) (Volume 7, Tab 37, p. 2505); Humberto Salvador Torres (A-220-12) (Volume 8, Tab 45, p. 2776); Dawnus Duff (A-224-12) (Volume 8, Tab 48, p. 2881); Leoncio Vaszuez-Fores (A-246-12) (Volume 10, Tab 70, p. 3578); Jose Gonzalez-Hernandez (A-247-12) (Volume 10, Tab 71, p. 3618); Jose Juan Angul Arias (A-250-12) (Volume 11, Tab 75, p. 3727); Jose Miguel Ayala Viazgasa (A-251-12) (Volume 11, Tab 75, p. 3760); Juan Rios Orozco (A-255-12) (Volume 11, Tab 79, p. 3884); Sergio Tellez Rojas (A-270-12) (Volume 13, Tab 94, p. 4454); Rufino Sanchez Gonzalez (A-279-12) (Volume 13, Tab 102, p. 4734),

65. Jose Castillo Blancas indicated that he did not know what his payroll deductions were for and that he was afraid to ask for fear of reprisal. As noted in *Fraser (1)*, in light of the economic and social insecurity of migrant workers, such fears are reasonable: "Nor am I persuaded that the SAWP worker's fears of reprisal are irrational and should therefore be discounted or ignored."

> *Fraser v. Canada (Fraser 1)*, 2005 CanLII 47783 (Ont. C.A.) at para. 117.
>
> Applicants' Record, Volume 13, Tab 93: Jose Castillo Blancas (A-273-12) Appeal Docket, p. 4566.

66. The Umpire did not address any of the evidence of claimants who were unaware of their EI contributions.

67. There are numerous other examples of individual claims that conflict with factual findings made by the Umpire, or that included unique features that were never addressed. Several examples are described below, although these are by no means the only examples in the Record.

68. First, the Umpire stated that the claimants who were applying for subsequent children "indicated that they had been provided misinformation by liaison officers from their respective countries to the effect that there was no money to pay for benefits for children who were the subject of the new applications." This was not the case for all subsequent claimants, as each case was different. For example, both Mervyn Parris and Glendon Sanchez explained that their Liaison Branch had been informed by Service Canada that migrant workers were not allowed to apply for EI. Mr. Parris' Record includes evidence directly from the Consulate General of Trinidad and Tobago:

> We, the Consulate General of Trinidad and Tobago, Labour Liaison Branch, disagree with the decision to disallow the claim for the above named migrant worker for the reasons stated: The Trinidad and Tobago Labour Liaison Branch was previously informed by Service Canada that migrant workers were not allowed to apply for Employment Insurance Benefits. We were later informed otherwise via a meeting with representatives from Service Canada in September, 2008. The Labour Liaison Branch conveyed the information to the Farm Programme Unit, Ministry of Labour, Trinidad and Tobago, who then informed Mr. Parris. Mr. Parris does not have access to a computer to enable the online filing of his application in a timely manner. We were authorized by Mr. Parris via Farm Programme Unit in Trinidad and Tobago to apply on his behalf and hence the delay in applying. Please note and I must emphasize the fact that had Mr. Parris been informed several years ago that migrant workers were eligible to receive parental benefits he would most certainly have applied. The basic EI principles for eligibility regarding parental benefits are being applied to Mr. Parris. However this seems unfair since Mr. Parris does not have access to HRSDC facilities in Canada (i.e. outreach offices, availability of information, publications, etc.) since he resides in Trinidad and Tobago.
>
> Applicants' Record, Volume 12, Tab 90: Mervyn Parris (A-266-12) Appeal Docket, pp. 4317-4318, 4320, 4325; Glendon Sanchez (A-208-12) (Volume 7, Tab 33, pp. 2357, 2369).

69. Although Service Canada's antedate policy provides that it is not unreasonable to seek information from an experienced and knowledgeable third party, the Umpire did not address whether Mr. Parris or Mr. Sanchez acted reasonably in relying upon the advice Service Canada provided to his Consulate.

Service Canada, “Digest of Benefit Entitlement Principles - Chapter 3: Antedates” at s. 3.3.1.

70. Mr. Sanchez further explained that he believed that his application had been submitted much earlier, because he had provided the documentation to his Liaison who had undertaken to submit it. When he returned to Canada for the next growing season, the Liaison advised him that it had not and would not submit the application on his behalf. The Umpire did not explain why this explanation for delay was not accepted in Mr. Sanchez’s case.

Applicants’ Record, Volume 7, Tab 33: Glendon Sanchez Appeal Docket, p. 2357.

71. Second, Blanca Esthela Casillas learned about her pregnancy after she had returned to Mexico at the end of a growing season. She gave birth while outside of the country, but could not apply for parental benefits because she did not know of her entitlement. Even had she known, she explained that she lives in a remote part of Mexico, making applying impossible.

Applicants’ Record, Volume 4, Tab 9: Blanca Esthela Casillas Appeal Docket, pp. 1364, 1365.

72. Third, Parkes Clifton Stephenson explained that he was delayed in applying because he of difficulties registering his child’s birth due to his wife’s illness.

Applicants’ Record, Volume 13, Tab 93: Parkes Clifton Stephenson Appeal Docket (A-269-12) , pp. 4418, 4426.

73. Finally, many of the Applicants explained that they lacked the ability to read or write in French or English – either due to illiteracy or language barriers. The Umpire does not explain why each of these Applicants should have been able to read and then ask questions about their payroll deductions in such circumstances, particularly in light of all their other barriers.

74. It is apparent that the Umpire did not consider any of the claims individually. Rather he made

global factual findings without examining any of the records.

75. As this Honourable Court observed in *Vancouver International Airport Authority*, an adjudicator's reasons must provide an assurance to the parties that their submissions have been considered. In that case, an adjudicator was tasked with assessing whether 66 positions fell within a bargaining unit. Each of the 66 positions involved highly specific facts. The adjudicator found that 23 of the positions fell within the bargaining unit, but did not give specific reasons in each case. This Court held that the adjudicator's reasons were unreasonable because the applicants in that case had "no idea why they lost … this Court is unable to conduct any meaningful supervisory role, and there is no transparency, justification or intelligibility …. All we have are conclusions, laudably definitive, but frustratingly opaque."

> *Vancouver International Airport Authority and YVR Project Management Ltd. v. Public Service Alliance of Canada*, 2010 FCA 158 (CanLII) at paras. 14, 20, 23-24.

76. As was the case in *Vancouver International Airport Authority*, the Umpire failed to consider the discrete facts of any of these cases, and as such his reasons lacked transparency, justification or intelligibility. The Umpire's decision was unreasonable and these cases should be sent back for re-determination.

> *Canada v. Wegg*, 2012 FCA 6 at para. 8.

iii. The Umpire failed to consider the material differences between parental EI benefits and Regular EI benefits.

77. The Umpire placed considerable weight on concerns that antedating would undermine the "integrity of the system." The Umpire quoted *Brace* in support of the principal that "a sound and equitable administration of the system requires that the Commission engage in a quick

verification that is as contemporaneous as possible with the events and circumstances giving rise to the claim for benefits….Otherwise the Commission finds itself in the difficult position of having to engage in a job or process of reconstruction of the events, with the costs and hazards pertaining to such a process."

> Applicants' Record, Volume 3, Tab 103: Decision of the Umpire, pp. 929-930.
> *Canada (Attorney General) v. Brace*, 2008 FCA 118 (CanLII).

78. The Umpire relied upon such considerations in order to justify an extraordinarily strict approach to the requirement to provide "good reason for delay." In effect, the Umpire's approach precludes any finding of "good cause" unless the claimant is actively seeking out information throughout the entire material period.

79. However, claimants for special benefits are not required to prove that they are available for work during the period of eligibility and, unlike recipients of regular benefits, they are not required to submit reports every two weeks. As such, the potential for prejudice to the Commission is simply not as significant a concern in the case of special benefits.

> *Spurrell v. Employment and Immigration Commission* (1991), CUB 19242 at p. 2.
> *Johnston v. Employment and Immigration Commission* (1966), CUB 14019 at p. 2-3.

80. Moreover, special benefits are not of such a nature that one would expect there to be broadly based knowledge of their availability. For example in *Johnston*, an Umpire held that it was reasonable for a real estate agent to delay applying for sickness benefits in circumstances in which she had no experience with EI and had not been apprised of the existence of the benefit. The Umpire in that case held that there was no conceivable prejudice to the EI regime in paying the delayed special benefits claim. Such considerations are important in the context of these

applications, because not only did the Applicants have no experience with EI, but their eligibility for EI parental benefits was a little-known exception: they are ineligible for virtually all other EI benefits.

Johnston v. Canada (1987), CUB 14019 at pp. 2-3.

81. Indeed, Service Canada itself has recognized that "a slightly more lenient approach is applicable when the claim is one for special benefits", such as parental benefits. As a result, longer periods of delay will be tolerated than is the case for regular EI benefits.

Service Canada, "Digest of Benefit Entitlement Principles - Chapter 3: Antedates" at s. 3.3.1.

82. Thus, jurisprudence concerning the antedating of regular EI benefits cannot be applied uncritically to claims involving parental benefits. Different considerations arise, and a more flexible approach is warranted. The Umpire erred by failing to take these different considerations into account.

PART IV: ORDER SOUGHT

83. It is therefore respectfully requested that this Honourable Court set aside the decisions of the Umpire and return these applications to the Chief Umpire or one of their designates for redetermination with such directions as this Honourable Court considers appropriate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 8th DAY OF FEBRUARY 2013.

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Jackie Esmonde

Co-Counsel for the Applicants

PART V: LIST OF AUTHORITIES

1. *Fraser v. Canada (Fraser 1)*, 2005 CanLII 47783 (Ont. C.A.).
2. Faraday (2012), "Made In Canada: How the law constructs migrant workers' insecurity" (Metcalf Foundation).
3. *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94.
4. *Ontario (Attorney General) v. Fraser (Fraser 2)*, 2011 SCC 20 at paras. 350-351.
5. *Canada v. Albrecht* (1985), A-172-85 (Fed. C.A.).
6. *Canada v. Burke*, 2012 FCA 139.
7. *Confederations des syndicates nationaux v. Canada (Attorney General)*, 2008 SCC 68.
8. *Reference re Employment Insurance Act (Can.), ss. 22 and 23*, 2005 SCC 56.
9. *Abrahams v. Attorney General of Canada*, 1983 CanLII 17 (SCC).
10. Service Canada, "Digest of Benefit Entitlement Principles - Chapter 3: Antedates".
11. *Rettie v. Employment and Immigration Commission* (1996), CUB 35066.
12. *[Claimant Unidentified] v. Canada* (2007), CUB 69621.
13. *Canada v. Trinh*, 2010 FCA 335.
14. *Bouchard v. Canada* (1989), CUB 17192.
15. *Canada v. Dickson*, 2012 FCA 8.
16. *Law v. Canada (Minister of Employment and Immigration)*, 1999 CanLII 675 (S.C.C.).
17. *Pellichero v. Canada* (2001), CUB 52237.
18. J. Hennebry & K. Preibisch (2010), "A Model for Managed Migration? Re-examining best practices in Canada's Seasonal Agricultural Worker Program" *International Migration* DOI: 10.1111/j.1468-2435.2009.00598.x.
19. North-South Institute (2006), *Migrant Workers in Canada: A review of the Canadian Seasonal Agricultural Workers Program*.
20. K. Preibisch (May 2007), "Patterns of Social Exclusion and Inclusion of Migrant Workers in Rural Canada".
21. *Peart v. Ontario*, 2010 HRTO 644 (CanLII).

22. Commission des droits de la personne et des droits de la jeunesse Québec (2011), “Systemic Discrimination Towards Migrant Workers: Summary”.

23. *Canada v. Schoeck* (1994), CUB 25879.

24. *Scott v. Commission* (2001), CUB 51453.

25. *Canada v. Tuck* (2003), CUB 59482.

26. *Canada v. Koo* (2006), CUB 65711.

27. *Casimir v. Double Diamond Acres Ltd.*, 2010 HRTO 2549.

28. *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII).

29. *Bradford v. Canada*, 2012 FCA 120.

30. *Vancouver International Airport Authority and YVR Project Management Ltd. v. Public Service Alliance of Canada*, 2010 FCA 158 (CanLII).

31. *Canada v. Wegg*, 2012 FCA 6.

32. *Canada (Attorney General) v. Brace*, 2008 FCA 118 (CanLII).

33. *Spurrell v. Employment and Immigration Commission* (1991), CUB 19242.

34. *Johnston v. Employment and Immigration Commission* (1966), CUB 14019.

APPENDIX A: LEGISLATION

***Employment Insurance Act, SC 1996, c 23*, ss. 7(1)-7(4), 9, 10 (1), 10(4), 18, 23(1)-23(2), 37, 55(4), 115.**

s. 7. (1) Unemployment benefits are payable as provided in this Part to an insured person who qualifies to receive them.

(2) An insured person, other than a new entrant or a re-entrant to the labour force, qualifies if the person

(*a*) has had an interruption of earnings from employment; and

(*b*) has had during their qualifying period at least the number of hours of insurable employment set out in the following table in relation to the regional rate of unemployment that applies to the person.

TABLE

Regional Rate of Unemployment	Required Number of Hours of Insurable Employment in Qualifying Period
6% and under	700
more than 6% but not more than 7%	665
more than 7% but not more than 8%	630
more than 8% but not more than 9%	595
more than 9% but not more than 10%	560
more than 10% but not more than 11%	525
more than 11% but not more than 12%	490
more than 12% but not more than 13%	455
more than 13%	420

(3) An insured person who is a new entrant or a re-entrant to the labour force qualifies if the person

(*a*) has had an interruption of earnings from employment; and

(*b*) has had 910 or more hours of insurable employment in their qualifying period.

(4) An insured person is a new entrant or a re-entrant to the labour force if, in the last 52 weeks before their qualifying period, the person has had fewer than 490

(*a*) hours of insurable employment;

(*b*) hours for which benefits have been paid or were payable to the person, calculated on the basis of 35 hours for each week of benefits;

(*c*) prescribed hours that relate to employment in the labour force; or

(*d*) hours comprised of any combination of those hours.

s. 9. When an insured person who qualifies under section 7 or 7.1 makes an initial claim for benefits, a benefit period shall be established and, once it is established, benefits are payable to the person in accordance with this Part for each week of unemployment that falls in the benefit period.

s. 10(1). A benefit period begins on the later of

(*a*) the Sunday of the week in which the interruption of earnings occurs, and

(*b*) the Sunday of the week in which the initial claim for benefits is made.

s. 10(4). An initial claim for benefits made after the day when the claimant was first qualified to make the claim shall be regarded as having been made on an earlier day if the claimant shows that the claimant qualified to receive benefits on the earlier day and that there was good cause for the delay throughout the period beginning on the earlier day and ending on the day when the initial claim was made.

s. 18. A claimant is not entitled to be paid benefits for a working day in a benefit period for which the claimant fails to prove that on that day the claimant was

(*a*) capable of and available for work and unable to obtain suitable employment;

(*b*) unable to work because of a prescribed illness, injury or quarantine, and that the claimant would otherwise be available for work; or

(*c*) engaged in jury service.

s. 23(2). Subject to section 12, benefits under this section are payable for each week of unemployment in the period

(*a*) that begins with the week in which the child or children of the claimant are born or the child or children are actually placed with the claimant for the purpose of adoption; and

(*b*) that ends 52 weeks after the week in which the child or children of the claimant are born or the child or children are actually placed with the claimant for the purpose of adoption.

s. 37. Except as may otherwise be prescribed, a claimant is not entitled to receive benefits for any period during which the claimant

(*a*) is an inmate of a prison or similar institution; or

(*b*) is not in Canada.

s. 115(1). An appeal as of right to an umpire from a decision of a board of referees may be brought by

(*a*) the Commission;

(*b*) a claimant or other person who is the subject of a decision of the Commission;

(*c*) the employer of the claimant; or

(*d*) an association of which the claimant or employer is a member.

(2) The only grounds of appeal are that

(*a*) the board of referees failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(*b*) the board of referees erred in law in making its decision or order, whether or not the error appears on the face of the record; or

(*c*) the board of referees based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

Employment Insurance Regulations, SOR/96-332 (Between June 20, 2012 and December 8, 2012)

55. (1) Subject to section 18 of the Act, a claimant who is not a self-employed person is not disentitled from receiving benefits for the reason that the claimant is outside Canada

(*a*) for the purpose of undergoing, at a hospital, medical clinic or similar facility outside Canada, medical treatment that is not readily or immediately available in the claimant's area of residence in Canada, if the hospital, clinic or facility is accredited to provide the medical treatment by the appropriate governmental authority outside Canada;

(*b*) for a period of not more than seven consecutive days to attend the funeral of a member of the claimant's immediate family or of one of the following persons, namely,

(i) a grandparent of the claimant or of the claimant's spouse or common-law partner,

(ii) a grandchild of the claimant or of the claimant's spouse or common-law partner,

(iii) the spouse or common-law partner of the claimant's son or daughter or of the son or daughter of the claimant's spouse or common-law partner,

(iv) the spouse or common-law partner of a child of the claimant's father or mother or of a child of the spouse or common-law partner of the claimant's father or mother,

(v) a child of the father or mother of the claimant's spouse or common-law partner or a child of the spouse or common-law partner of the father or mother of the claimant's spouse or common-law partner,

(vi) an uncle or aunt of the claimant or of the claimant's spouse or common-law partner, and

(vii) a nephew or niece of the claimant or of the claimant's spouse or common-law partner;

(*c*) for a period of not more than seven consecutive days to accompany a member of the claimant's immediate family to a hospital, medical clinic or similar facility outside Canada for medical treatment that is not readily or immediately available in the family member's area of residence in Canada, if the hospital, clinic or facility is accredited to provide the medical treatment by the appropriate governmental authority outside Canada;

(*d*) for a period of not more than seven consecutive days to visit a member of the claimant's immediate family who is seriously ill or injured;

(*e*) for a period of not more than seven consecutive days to attend a *bona fide* job interview; or

(*f*) for a period of not more than 14 consecutive days to conduct a *bona fide* job search.

(1.1) Only the periods set out in paragraphs (1)(*b*) and (*d*) may be cumulated during a single trip outside Canada, and only if the member of the claimant's immediate family whom the claimant visits under paragraph (1)(*d*) is the person whose funeral the claimant attends under paragraph (1)(*b*).

(2) For the purposes of subsections (1) and (1.1), the following persons are considered to be members of the claimant's immediate family:

(*a*) the father and mother of the claimant or of the claimant's spouse or common-law partner;

(*b*) the spouse or common-law partner of the father or mother of the claimant or of the claimant's spouse or common-law partner;

(*c*) the foster parent of the claimant or of the claimant's spouse or common-law partner;

(*d*) a child of the claimant's father or mother or a child of the spouse or common-law partner of the claimant's father or mother;

(*e*) the claimant's spouse or common-law partner;

(*f*) a child of the claimant or of the claimant's spouse or common-law partner;

(*g*) a ward of the claimant or of the claimant's spouse or common-law partner; and

(*h*) a dependant or relative residing in the claimant's household or a relative with whom the claimant permanently resides.

(3) [Repealed, SOR/2001-290, s. 3]

(4) A claimant who is not a self-employed person is not disentitled from receiving benefits in respect of pregnancy, the care of a child or children referred to in subsection 23(1) of the Act, the care or support of a family member referred to in subsection 23.1(2) of the Act or while attending a course or program of instruction or training referred to in paragraph 25(1)(*a*) of the Act, for the sole reason that the claimant is outside Canada.

(5) A major attachment claimant who is not a self-employed person and whose most recent interruption of earnings before making a claim for benefits is from insurable employment outside Canada is not disentitled from receiving benefits for the sole reason that the claimant is outside Canada if

(*a*) the benefits are in respect of pregnancy, the care of a child or children referred to in subsection 23(1) of the Act or the care or support of a family member referred to in subsection 23.1(2) of the Act;

(*b*) the claimant proves that they are incapable, by reason of illness, injury or quarantine, from performing the duties of their regular or usual employment or of other suitable employment.

(6) Subject to subsection (7), a claimant who is not a self-employed person and who resides outside Canada, other than a major attachment claimant referred to in subsection (5), is not disentitled from receiving benefits for the sole reason of their residence outside Canada if

(*a*) the claimant resides temporarily or permanently in a state of the United States that is contiguous to Canada and

(i) is available for work in Canada, and

(ii) is able to report personally at an office of the Commission in Canada and does so when requested by the Commission; or

(*b*) the claimant is qualified to receive benefits under Article VI of the *Agreement between Canada and the United States respecting Unemployment Insurance*, signed on March 6 and 12, 1942, and resides temporarily or permanently in one of the following places in respect of which the Commission has not, pursuant to section 16 of the *Employment and Immigration Department and Commission Act*, suspended the application of that Agreement, namely,

(i) the District of Columbia,

(ii) Puerto Rico,

(iii) the Virgin Islands, or

(iv) any state of the United States.

(7) Subject to subsection (10), the maximum number of weeks for which benefits may be paid in a benefit period, in respect of a claimant referred to in subsections (5) and (6) who is not disentitled from receiving benefits, is

(*a*) in the case of benefits that are paid for a reason referred to in subsection 12(3) of the Act, the applicable number of weeks referred to in subsections 12(3) to (6) of the Act; and

(*b*) in any other case, in respect of the number of hours of insurable employment in the claimant's qualifying period set out in column I of the table to this subsection, the corresponding number of weeks set out in column II of that table.

TABLE

Column I	Column II

Item	Number of Hours of Insurable Employment	Number of Weeks of Benefits
1.	420 - 454	10
2.	455 - 489	10
3.	490 - 524	11
4.	525 - 559	11
5.	560 - 594	12
6.	595 - 629	12
7.	630 - 664	13
8.	665 - 699	13
9.	700 - 734	14
10.	735 - 769	14
11.	770 - 804	15
12.	805 - 839	15
13.	840 - 874	16
14.	875 - 909	16
15.	910 - 944	17
16.	945 - 979	17
17.	980 - 1,014	18
18.	1,015 - 1,049	18
19.	1,050 - 1,084	19
20.	1,085 - 1,119	19
21.	1,120 - 1,154	20
22.	1,155 - 1,189	20
23.	1,190 - 1,224	21
24.	1,225 - 1,259	21
25.	1,260 - 1,294	22
26.	1,295 - 1,329	22
27.	1,330 - 1,364	23
28.	1,365 - 1,399	23
29.	1,400 - 1,434	24
30.	1,435 - 1,469	25
31.	1,470 - 1,504	26

	Column I	Column II
Item	Number of Hours of Insurable Employment	Number of Weeks of Benefits
32.	1,505 - 1,539	27
33.	1,540 - 1,574	28
34.	1,575 - 1,609	29
35.	1,610 - 1,644	30
36.	1,645 - 1,679	31
37.	1,680 - 1,714	32
38.	1,715 - 1,749	33
39.	1,750 - 1,784	34
40.	1,785 - 1,819	35
41.	1,820 or more	36

(8) Subject to subsection (10), a claimant referred to in subsections (5) and (6), for whom a benefit period has been established and who subsequently becomes resident in Canada, continues to be entitled to receive benefits for not more than the maximum number of weeks referred to in subsection (7).

(9) Subject to subsection (10), the maximum number of weeks for which benefits may be paid in the benefit period, in respect of a claimant for whom a benefit period has been established in Canada and who subsequently becomes a claimant referred to in subsection (6), is the greater of

> (*a*) the number of weeks for which the claimant has already received benefits in Canada; and
>
> (*b*) the number of weeks to which the claimant would have been entitled under subsection (7) if the claimant had been temporarily or permanently resident in a place referred to in subsection (6) when the benefit period was established.

(10) In a claimant's benefit period, a claimant who is not in Canada or a claimant referred to in subsection (8), subject to the applicable maximums set out in paragraphs (7)(*a*) and (*b*), may combine the weeks of benefits to which the claimant is entitled, but the total number of weeks of benefits shall not exceed 50. If the benefit period:

> (*a*) is extended under subsection 10(13) of the Act, the maximum number of combined weeks is 65;
>
> (*b*) is extended under subsection 10(13.1) or (13.2) of the Act, the maximum number of combined weeks is 56; and

(*c*) is extended under subsection 10(13.3) of the Act, the maximum number of combined weeks is 71.

(11) A claimant who is not a self-employed person is not disentitled from receiving benefits for the sole reason that the claimant is outside Canada if the claimant is outside Canada, with the approval of the Commission, in the course of the claimant's employment under the Self-employment employment benefit established by the Commission under section 59 of the Act or under a similar benefit that is provided by a provincial government or other organization and is the subject of an agreement under section 63 of the Act.

(12) Subject to subsection (13), where a claimant makes a claim for the purposes of this section, the claim shall be sent in an envelope or package addressed to the Commission, by mail or by means of a confirmed delivery service.

(13) Where a claim is sent by the claimant to the Commission in a manner other than the manner required by subsection (12), the claim shall be reviewed by an employee of the Commission at the time of importation.

55.01 (1) A self-employed person is not disentitled from receiving benefits for the reason that the self-employed person is outside Canada

(*a*) for the purpose of undergoing, at a hospital, medical clinic or similar facility outside Canada, medical treatment that is not readily or immediately available in the self-employed person's area of residence in Canada, if the hospital, clinic or facility is accredited to provide the medical treatment by the appropriate governmental authority outside Canada;

(*b*) for a period of not more than seven consecutive days to attend the funeral of a member of the self-employed person's immediate family or of one of the following persons, namely,

(i) a grandparent of the self-employed person or of the self-employed person's spouse or common-law partner,

(ii) a grandchild of the self-employed person or of the self-employed person's spouse or common-law partner,

(iii) the spouse or common-law partner of the self-employed person's son or daughter or of the son or daughter of the self-employed person's spouse or common-law partner,

(iv) the spouse or common-law partner of a child of the self-employed person's father or mother or of a child of the spouse or common-law partner of the self-employed person's father or mother,

(v) a child of the father or mother of the self-employed person's spouse or common-law partner or a child of the spouse or common-law partner of the father or mother of the self-employed person's spouse or common-law partner,

(vi) an uncle or aunt of the self-employed person or of the self-employed person's spouse or common-law partner, and

(vii) a nephew or niece of the self-employed person or of the self-employed person's spouse or common-law partner;

(*c*) for a period of not more than seven consecutive days to accompany a member of the self-employed person's immediate family to a hospital, medical clinic or similar facility outside Canada for medical treatment that is not readily or immediately available in the family member's area of residence in Canada, if the hospital, clinic or facility is accredited to provide the medical treatment by the appropriate governmental authority outside Canada; or

(*d*) for a period of not more than seven consecutive days to visit a member of the self-employed person's immediate family who is seriously ill or injured.

(1.1) Only the periods set out in paragraphs (1)(*b*) and (*d*) may be cumulated during a single trip outside Canada, and only if the member of the self-employed person's immediate family whom the self-employed person visits under paragraph (1)(*d*) is the person whose funeral the self-employed person attends under paragraph (1)(*b*).

(2) For the purposes of subsections (1) and (1.1), the following persons are considered to be members of the self-employed person's immediate family:

(*a*) the father and mother of the self-employed person or of the self-employed person's spouse or common-law partner;

(*b*) the spouse or common-law partner of the father or mother of the self-employed person or of the self-employed person's spouse or common-law partner;

(*c*) the foster parent of the self-employed person or of the self-employed person's spouse or common-law partner;

(*d*) a child of the self-employed person's father or mother or a child of the spouse or common-law partner of the self-employed person's father or mother;

(*e*) the self-employed person's spouse or common-law partner;

(*f*) a child of the self-employed person or of the self-employed person's spouse or common-law partner;

(*g*) a ward of the self-employed person or of the self-employed person's spouse or common-law partner; and

(*h*) a dependant or relative residing in the self-employed person's household or a relative with whom the self-employed person permanently resides.

(3) A self-employed person is not disentitled from receiving benefits in respect of pregnancy, the care of a child or children referred to in subsection 152.05(1) of the Act or the care or support of a family member referred to in subsection 152.06(1) of the Act for the sole reason that the self-employed person is outside Canada.

Employment Insurance Regulations, SOR/96-332 (Since December 14, 2012)

55. (1) Subject to section 18 of the Act, a claimant who is not a self-employed person is not disentitled from receiving benefits for the reason that the claimant is outside Canada

(*a*) for the purpose of undergoing, at a hospital, medical clinic or similar facility outside Canada, medical treatment that is not readily or immediately available in the claimant's area of residence in Canada, if the hospital, clinic or facility is accredited to provide the medical treatment by the appropriate governmental authority outside Canada;

(*b*) for a period of not more than seven consecutive days to attend the funeral of a member of the claimant's immediate family or of one of the following persons, namely,

(i) a grandparent of the claimant or of the claimant's spouse or common-law partner,

(ii) a grandchild of the claimant or of the claimant's spouse or common-law partner,

(iii) the spouse or common-law partner of the claimant's son or daughter or of the son or daughter of the claimant's spouse or common-law partner,

(iv) the spouse or common-law partner of a child of the claimant's father or mother or of a child of the spouse or common-law partner of the claimant's father or mother,

(v) a child of the father or mother of the claimant's spouse or common-law partner or a child of the spouse or common-law partner of the father or mother of the claimant's spouse or common-law partner,

(vi) an uncle or aunt of the claimant or of the claimant's spouse or common-law partner, and

(vii) a nephew or niece of the claimant or of the claimant's spouse or common-law partner;

(*c*) for a period of not more than seven consecutive days to accompany a member of the claimant's immediate family to a hospital, medical clinic or similar facility outside Canada for medical treatment that is not readily or immediately available in the family member's area of

residence in Canada, if the hospital, clinic or facility is accredited to provide the medical treatment by the appropriate governmental authority outside Canada;

(*d*) for a period of not more than seven consecutive days to visit a member of the claimant's immediate family who is seriously ill or injured;

(*e*) for a period of not more than seven consecutive days to attend a *bona fide* job interview; or

(*f*) for a period of not more than 14 consecutive days to conduct a *bona fide* job search.

(1.1) Only the periods set out in paragraphs (1)(*b*) and (*d*) may be cumulated during a single trip outside Canada, and only if the member of the claimant's immediate family whom the claimant visits under paragraph (1)(*d*) is the person whose funeral the claimant attends under paragraph (1)(*b*).

(2) For the purposes of subsections (1) and (1.1), the following persons are considered to be members of the claimant's immediate family:

(*a*) the father and mother of the claimant or of the claimant's spouse or common-law partner;

(*b*) the spouse or common-law partner of the father or mother of the claimant or of the claimant's spouse or common-law partner;

(*c*) the foster parent of the claimant or of the claimant's spouse or common-law partner;

(*d*) a child of the claimant's father or mother or a child of the spouse or common-law partner of the claimant's father or mother;

(*e*) the claimant's spouse or common-law partner;

(*f*) a child of the claimant or of the claimant's spouse or common-law partner;

(*g*) a ward of the claimant or of the claimant's spouse or common-law partner; and

(*h*) a dependant or relative residing in the claimant's household or a relative with whom the claimant permanently resides.

(3) [Repealed, SOR/2001-290, s. 3]

(4) A claimant who is not a self-employed person is not disentitled from receiving benefits in respect of pregnancy, the care of a child or children referred to in subsection 23(1) of the Act, the care or support of a family member referred to in subsection 23.1(2) of the Act or while attending a course or program of instruction or training referred to in paragraph 25(1)(*a*) of the Act, for the sole reason that the claimant is outside Canada, unless their Social Insurance Number Card has expired.

(5) A major attachment claimant who is not a self-employed person and whose most recent interruption of earnings before making a claim for benefits is from insurable employment outside Canada is not disentitled from receiving benefits for the sole reason that the claimant is outside Canada if

(*a*) the benefits are in respect of pregnancy, the care of a child or children referred to in subsection 23(1) of the Act or the care or support of a family member referred to in subsection 23.1(2) of the Act;

(*b*) the claimant proves that they are incapable, by reason of illness, injury or quarantine, from performing the duties of their regular or usual employment or of other suitable employment.

(6) Subject to subsection (7), a claimant who is not a self-employed person and who resides outside Canada, other than a major attachment claimant referred to in subsection (5), is not disentitled from receiving benefits for the sole reason of their residence outside Canada if

(*a*) the claimant resides temporarily or permanently in a state of the United States that is contiguous to Canada and

(i) is available for work in Canada, and

(ii) is able to report personally at an office of the Commission in Canada and does so when requested by the Commission; or

(*b*) the claimant is qualified to receive benefits under Article VI of the *Agreement between Canada and the United States respecting Unemployment Insurance*, signed on March 6 and 12, 1942, and resides temporarily or permanently in one of the following places in respect of which the Commission has not, pursuant to section 16 of the *Employment and Immigration Department and Commission Act*, suspended the application of that Agreement, namely,

(i) the District of Columbia,

(ii) Puerto Rico,

(iii) the Virgin Islands, or

(iv) any state of the United States.

(7) Subject to subsection (10), the maximum number of weeks for which benefits may be paid in a benefit period, in respect of a claimant referred to in subsections (5) and (6) who is not disentitled from receiving benefits, is

(*a*) in the case of benefits that are paid for a reason referred to in subsection 12(3) of the Act, the applicable number of weeks referred to in subsections 12(3) to (6) of the Act; and

(*b*) in any other case, in respect of the number of hours of insurable employment in the claimant's qualifying period set out in column I of the table to this subsection, the corresponding number of weeks set out in column II of that table.

TABLE

	Column I	Column II
Item	Number of Hours of Insurable Employment	Number of Weeks of Benefits
1.	420 - 454	10
2.	455 - 489	10
3.	490 - 524	11
4.	525 - 559	11
5.	560 - 594	12
6.	595 - 629	12
7.	630 - 664	13
8.	665 - 699	13
9.	700 - 734	14
10.	735 - 769	14
11.	770 - 804	15
12.	805 - 839	15
13.	840 - 874	16
14.	875 - 909	16
15.	910 - 944	17
16.	945 - 979	17
17.	980 - 1,014	18
18.	1,015 - 1,049	18
19.	1,050 - 1,084	19
20.	1,085 - 1,119	19
21.	1,120 - 1,154	20
22.	1,155 - 1,189	20
23.	1,190 - 1,224	21
24.	1,225 - 1,259	21
25.	1,260 - 1,294	22
26.	1,295 - 1,329	22
27.	1,330 - 1,364	23
28.	1,365 - 1,399	23

Item	Column I Number of Hours of Insurable Employment	Column II Number of Weeks of Benefits
29.	1,400 - 1,434	24
30.	1,435 - 1,469	25
31.	1,470 - 1,504	26
32.	1,505 - 1,539	27
33.	1,540 - 1,574	28
34.	1,575 - 1,609	29
35.	1,610 - 1,644	30
36.	1,645 - 1,679	31
37.	1,680 - 1,714	32
38.	1,715 - 1,749	33
39.	1,750 - 1,784	34
40.	1,785 - 1,819	35
41.	1,820 or more	36

(8) Subject to subsection (10), a claimant referred to in subsections (5) and (6), for whom a benefit period has been established and who subsequently becomes resident in Canada, continues to be entitled to receive benefits for not more than the maximum number of weeks referred to in subsection (7).

(9) Subject to subsection (10), the maximum number of weeks for which benefits may be paid in the benefit period, in respect of a claimant for whom a benefit period has been established in Canada and who subsequently becomes a claimant referred to in subsection (6), is the greater of

(*a*) the number of weeks for which the claimant has already received benefits in Canada; and

(*b*) the number of weeks to which the claimant would have been entitled under subsection (7) if the claimant had been temporarily or permanently resident in a place referred to in subsection (6) when the benefit period was established.

(10) In a claimant's benefit period, a claimant who is not in Canada or a claimant referred to in subsection (8), subject to the applicable maximums set out in paragraphs (7)(*a*) and (*b*), may combine the weeks of benefits to which the claimant is entitled, but the total number of weeks of benefits shall not exceed 50. If the benefit period:

(*a*) is extended under subsection 10(13) of the Act, the maximum number of combined weeks is 65;

(*b*) is extended under subsection 10(13.1) or (13.2) of the Act, the maximum number of combined weeks is 56; and

(*c*) is extended under subsection 10(13.3) of the Act, the maximum number of combined weeks is 71.

(11) A claimant who is not a self-employed person is not disentitled from receiving benefits for the sole reason that the claimant is outside Canada if the claimant is outside Canada, with the approval of the Commission, in the course of the claimant's employment under the Self-employment employment benefit established by the Commission under section 59 of the Act or under a similar benefit that is provided by a provincial government or other organization and is the subject of an agreement under section 63 of the Act.

(12) Subject to subsection (13), where a claimant makes a claim for the purposes of this section, the claim shall be sent in an envelope or package addressed to the Commission, by mail or by means of a confirmed delivery service.

(13) Where a claim is sent by the claimant to the Commission in a manner other than the manner required by subsection (12), the claim shall be reviewed by an employee of the Commission at the time of importation.

55.01 (1) A self-employed person is not disentitled from receiving benefits for the reason that the self-employed person is outside Canada

(*a*) for the purpose of undergoing, at a hospital, medical clinic or similar facility outside Canada, medical treatment that is not readily or immediately available in the self-employed person's area of residence in Canada, if the hospital, clinic or facility is accredited to provide the medical treatment by the appropriate governmental authority outside Canada;

(*b*) for a period of not more than seven consecutive days to attend the funeral of a member of the self-employed person's immediate family or of one of the following persons, namely,

(i) a grandparent of the self-employed person or of the self-employed person's spouse or common-law partner,

(ii) a grandchild of the self-employed person or of the self-employed person's spouse or common-law partner,

(iii) the spouse or common-law partner of the self-employed person's son or daughter or of the son or daughter of the self-employed person's spouse or common-law partner,

(iv) the spouse or common-law partner of a child of the self-employed person's father or mother or of a child of the spouse or common-law partner of the self-employed person's father or mother,

(v) a child of the father or mother of the self-employed person's spouse or common-law partner or a child of the spouse or common-law partner of the father or mother of the self-employed person's spouse or common-law partner,

(vi) an uncle or aunt of the self-employed person or of the self-employed person's spouse or common-law partner, and

(vii) a nephew or niece of the self-employed person or of the self-employed person's spouse or common-law partner;

(*c*) for a period of not more than seven consecutive days to accompany a member of the self-employed person's immediate family to a hospital, medical clinic or similar facility outside Canada for medical treatment that is not readily or immediately available in the family member's area of residence in Canada, if the hospital, clinic or facility is accredited to provide the medical treatment by the appropriate governmental authority outside Canada; or

(*d*) for a period of not more than seven consecutive days to visit a member of the self-employed person's immediate family who is seriously ill or injured.

(1.1) Only the periods set out in paragraphs (1)(*b*) and (*d*) may be cumulated during a single trip outside Canada, and only if the member of the self-employed person's immediate family whom the self-employed person visits under paragraph (1)(*d*) is the person whose funeral the self-employed person attends under paragraph (1)(*b*).

(2) For the purposes of subsections (1) and (1.1), the following persons are considered to be members of the self-employed person's immediate family:

(*a*) the father and mother of the self-employed person or of the self-employed person's spouse or common-law partner;

(*b*) the spouse or common-law partner of the father or mother of the self-employed person or of the self-employed person's spouse or common-law partner;

(*c*) the foster parent of the self-employed person or of the self-employed person's spouse or common-law partner;

(*d*) a child of the self-employed person's father or mother or a child of the spouse or common-law partner of the self-employed person's father or mother;

(*e*) the self-employed person's spouse or common-law partner;

(*f*) a child of the self-employed person or of the self-employed person's spouse or common-law partner;

(*g*) a ward of the self-employed person or of the self-employed person's spouse or common-law partner; and

(*h*) a dependant or relative residing in the self-employed person's household or a relative with whom the self-employed person permanently resides.

(3) A self-employed person is not disentitled from receiving benefits in respect of pregnancy, the care of a child or children referred to in subsection 152.05(1) of the Act or the care or support of a family member referred to in subsection 152.06(1) of the Act for the sole reason that the self-employed person is outside Canada, unless their Social Insurance Number Card has expired.

***Immigration and Refugee Protection Regulations, SOR/2002-227*, ss. 200-209.**

s. 200(1). Subject to subsections (2) and (3) — and, in respect of a foreign national who makes an application for a work permit before entering Canada, subject to section 87.3 of the Act — an officer shall issue a work permit to a foreign national if, following an examination, it is established that

(*a*) the foreign national applied for it in accordance with Division 2;

(*b*) the foreign national will leave Canada by the end of the period authorized for their stay under Division 2 of Part 9;

(*c*) the foreign national

(i) is described in section 206, 207 or 208,

(ii) intends to perform work described in section 204 or 205 but does not have an offer of employment to perform that work,

(ii.1) intends to perform work described in section 204 or 205, has an offer of employment to perform that work and an officer has determined

(A) that the offer is genuine under subsection (5), and

(B) that during the two-year period preceding the day on which the application for the work permit is received by the Department,

(I) the employer making the offer provided each foreign national employed by the employer with wages, working conditions and employment in an occupation that were substantially the same as the wages, working conditions and occupation set out in the employer's offer of employment to the foreign national, or

(II) in the case where the employer did not provide wages, working conditions or employment in an occupation that were substantially the same as those offered, the failure to do so was justified in accordance with subsection 203(1.1), or

(iii) has been offered employment, and an officer has made a positive determination under paragraphs 203(1)(*a*) to (*e*); and

(*d*) [Repealed, SOR/2004-167, s. 56]

(*e*) the requirements of section 30 are met.

(2) Paragraph (1)(*b*) does not apply to a foreign national who satisfies the criteria set out in section 206 or paragraph 207(*c*) or (*d*).

(3) An officer shall not issue a work permit to a foreign national if

(*a*) there are reasonable grounds to believe that the foreign national is unable to perform the work sought;

(*b*) in the case of a foreign national who intends to work in the Province of Quebec and does not hold a *Certificat d'acceptation du Québec*, a determination under section 203 is required and the laws of that Province require that the foreign national hold a *Certificat d'acceptation du Québec*;

(*c*) the specific work that the foreign national intends to perform is likely to adversely affect the settlement of any labour dispute in progress or the employment of any person involved in the dispute, unless all or almost all of the workers involved in the labour dispute are not Canadian citizens or permanent residents and the hiring of workers to replace the workers involved in the labour dispute is not prohibited by the Canadian law applicable in the province where the workers involved in the labour dispute are employed;

(*d*) the foreign national seeks to enter Canada as a live-in caregiver and the foreign national does not meet the requirements of section 112;

(*e*) the foreign national has engaged in unauthorized study or work in Canada or has failed to comply with a condition of a previous permit or authorization unless

(i) a period of six months has elapsed since the cessation of the unauthorized work or study or failure to comply with a condition,

(ii) the study or work was unauthorized by reason only that the foreign national did not comply with conditions imposed under paragraph 185(*a*), any of subparagraphs 185(*b*)(i) to (iii) or paragraph 185(*c*);

(iii) section 206 applies to them; or

(iv) the foreign national was subsequently issued a temporary resident permit under subsection 24(1) of the Act;

(*f*) in the case of a foreign national referred to in subparagraphs (1)(*c*)(i) to (iii), the issuance of a work permit would be inconsistent with the terms of a federal-provincial agreement that apply to the employment of foreign nationals;

(*g*) the foreign national has worked in Canada for one or more periods totalling four years, unless

(i) a period of forty-eight months has elapsed since the day on which the foreign national accumulated four years of work in Canada,

(ii) the foreign national intends to perform work that would create or maintain significant social, cultural or economic benefits or opportunities for Canadian citizens or permanent residents, or

(iii) the foreign national intends to perform work pursuant to an international agreement between Canada and one or more countries, including an agreement concerning seasonal agricultural workers; or

(*h*) the foreign national intends to work for an employer whose name appears on the list referred to in subsection 203(6) and a period of two years has not elapsed since the day on which the determination referred to in subsection 203(5) was made.

(4) A period of work in Canada by a foreign national shall not be included in the calculation of the four-year period referred to in paragraph (3)(*g*) if the work was performed during a period in which the foreign national was authorized to study on a full-time basis in Canada.

(5) A determination of whether an offer of employment is genuine shall be based on the following factors:

(*a*) whether the offer is made by an employer, other than an employer of a live-in caregiver, that is actively engaged in the business in respect of which the offer is made;

(*b*) whether the offer is consistent with the reasonable employment needs of the employer;

(*c*) whether the terms of the offer are terms that the employer is reasonably able to fulfil; and

(*d*) the past compliance of the employer, or any person who recruited the foreign national for the employer, with the federal or provincial laws that regulate employment, or the recruiting of employees, in the province in which it is intended that the foreign national work.

s. 201. (1) A foreign national may apply for the renewal of their work permit if

(*a*) the application is made before their work permit expires; and

(*b*) they have complied with all conditions imposed on their entry into Canada.

(2) An officer shall renew the foreign national's work permit if, following an examination, it is established that the foreign national continues to meet the requirements of section 200.

s. 202. A foreign national who is issued a work permit under section 206 or paragraph 207(*c*) or (*d*) does not, by reason only of being issued a work permit, become a temporary resident.

s. 203. (1) On application under Division 2 for a work permit made by a foreign national other than a foreign national referred to in subparagraphs 200(1)(*c*)(i) to (ii.1), an officer shall determine, on the basis of an opinion provided by the Department of Human Resources and Skills Development, if

(*a*) the job offer is genuine under subsection 200(5);

(*b*) the employment of the foreign national is likely to have a neutral or positive effect on the labour market in Canada;

(*c*) the issuance of a work permit would not be inconsistent with the terms of any federal-provincial agreement that apply to the employers of foreign nationals;

(*d*) in the case of a foreign national who seeks to enter Canada as a live-in caregiver,

(i) the foreign national will reside in a private household in Canada and provide child care, senior home support care or care of a disabled person in that household without supervision,

(ii) the employer will provide adequate furnished and private accommodations in the household, and

(iii) the employer has sufficient financial resources to pay the foreign national the wages that are offered to the foreign national; and

(*e*) during the period beginning two years before the day on which the request for an opinion under subsection (2) is received by the Department of Human Resources and Skills Development and ending on the day on which the application for the work permit is received by the Department,

(i) the employer making the offer provided each foreign national employed by the employer with wages, working conditions and employment in an occupation that were substantially the same as the wages, working conditions and occupation set out in the employer's offer of employment, or

(ii) in the case where the employer did not provide wages, working conditions or employment in an occupation that were substantially the same as those offered, the failure to do so was justified in accordance with subsection (1.1).

(1.1) A failure referred to in subparagraph (1)(*e*)(ii) is justified if it resulted from

(*a*) a change in federal or provincial law;

(*b*) a change to the provisions of a collective agreement;

(*c*) the implementation of measures by the employer in response to a dramatic change in economic conditions that directly affected the business of the employer, provided that the measures were not directed disproportionately at foreign nationals employed by the employer;

(*d*) an error in interpretation made in good faith by the employer with respect to its obligations to a foreign national, if the employer subsequently provided compensation — or if it was not possible to provide compensation, made sufficient efforts to do so — to all foreign nationals who suffered a disadvantage as a result of the error;

(*e*) an unintentional accounting or administrative error made by the employer, if the employer subsequently provided compensation — or if it was not possible to provide compensation, made sufficient efforts to do so — to all foreign nationals who suffered a disadvantage as a result of the error; or

(*f*) circumstances similar to those set out in paragraphs (*a*) to (*e*).

(2) The Department of Human Resources and Skills Development shall provide the opinion referred to in subsection (1) on the request of an officer or an employer or group of employers, other than an employer whose name appears on the list referred to in subsection 203(6), if a period of two years has not elapsed since the day on which the determination referred to in subsection 203(5) was made. A request may be made in respect of

(*a*) an offer of employment to a foreign national; and

(*b*) offers of employment made, or anticipated to be made, by an employer or group of employers.

(2.1) An opinion provided by the Department of Human Resources and Skills Development shall consider the matters set out paragraphs (1)(*a*) to (*e*) but, for the purposes of this subsection, the period referred to in paragraph 1(*e*) shall be considered to end on the day that the request for the opinion is received by the Department of Human Resources and Skills Development.

(3) An opinion provided by the Department of Human Resources and Skills Development with respect to the matters referred to in paragraph (1)(*b*) shall be based on the following factors:

(*a*) whether the employment of the foreign national is likely to result in direct job creation or job retention for Canadian citizens or permanent residents;

(*b*) whether the employment of the foreign national is likely to result in the creation or transfer of skills and knowledge for the benefit of Canadian citizens or permanent residents;

(*c*) whether the employment of the foreign national is likely to fill a labour shortage;

(*d*) whether the wages offered to the foreign national are consistent with the prevailing wage rate for the occupation and whether the working conditions meet generally accepted Canadian standards;

(*e*) whether the employer has made, or has agreed to make, reasonable efforts to hire or train Canadian citizens or permanent residents; and

(*f*) whether the employment of the foreign national is likely to adversely affect the settlement of any labour dispute in progress or the employment of any person involved in the dispute.

(3.1) An opinion provided by the Department of Human Resources and Skills Development shall indicate the period during which the opinion is in effect for the purposes of subsection (1).

(4) In the case of a foreign national who intends to work in the Province of Quebec, the opinion provided by the Department of Human Resources and Skills Development shall be made in concert with the competent authority of that Province.

(5) If an officer determines under subparagraph 200(1)(*c*)(ii.1) or paragraph (1)(*e*) that, during the period set out in paragraph (1)(*e*), an employer did not provide wages, working conditions or employment in an occupation that were substantially the same as those offered and that the failure to do so was not justified in accordance with subsection (1.1), the Department shall notify the employer of that determination.

(6) A list shall be maintained on the Department's website that sets out

(*a*) the names and addresses of employers referred to in subsection (5); and

(*b*) the day on which the determination referred to in that subsection was made in respect of an employer.

s. 204. A work permit may be issued under section 200 to a foreign national who intends to perform work pursuant to

(*a*) an international agreement between Canada and one or more countries, other than an agreement concerning seasonal agricultural workers;

(*b*) an agreement entered into by one or more countries and by or on behalf of one or more provinces; or

(*c*) an agreement entered into by the Minister with a province or group of provinces under subsection 8(1) of the Act.

s. 205. A work permit may be issued under section 200 to a foreign national who intends to perform work that

(*a*) would create or maintain significant social, cultural or economic benefits or opportunities for Canadian citizens or permanent residents;

(*b*) would create or maintain reciprocal employment of Canadian citizens or permanent residents of Canada in other countries;

(*c*) is designated by the Minister as being work that can be performed by a foreign national on the basis of the following criteria, namely,

(i) the work is related to a research, educational or training program, or

(ii) limited access to the Canadian labour market is necessary for reasons of public policy relating to the competitiveness of Canada's academic institutions or economy; or

(*d*) is of a religious or charitable nature.

s. 206. A work permit may be issued under section 200 to a foreign national in Canada who cannot support themself without working, if the foreign national

(*a*) has made a claim for refugee protection that has been referred to the Refugee Protection Division but has not been determined; or

(*b*) is subject to an unenforceable removal order.

s. 207. A work permit may be issued under section 200 to a foreign national in Canada who

(*a*) is a member of the live-in caregiver class set out in Division 3 of Part 6 and meets the requirements of section 113;

(*b*) is a member of the spouse or common-law partner in Canada class set out in Division 2 of Part 7;

(*c*) is a protected person within the meaning of subsection 95(2) of the Act;

(*d*) has applied to become a permanent resident and the Minister has granted them an exemption under subsection 25(1), 25.1(1) or 25.2(1) of the Act; or

(*e*) is a family member of a person described in any of paragraphs (*a*) to (*d*).

s. 208. A work permit may be issued under section 200 to a foreign national in Canada who cannot support themself without working, if the foreign national

> (*a*) holds a study permit and has become temporarily destitute through circumstances beyond their control and beyond the control of any person on whom that person is dependent for the financial support to complete their term of study; or
>
> (*b*) holds a temporary resident permit issued under subsection 24(1) of the Act that is valid for at least six months.

s. 209. A work permit becomes invalid when it expires or when a removal order that is made against the permit holder becomes enforceable.

***Employment Standards Act, 2000, O. Reg 285/01*, ss. 2(2), 24-27**

s. 2(2). Subject to sections 24, 25, 26 and 27 of this Regulation, Parts VII, VIII, IX, X and XI of the Act do not apply to a person employed on a farm whose employment is directly related to the primary production of eggs, milk, grain, seeds, fruit, vegetables, maple products, honey, tobacco, herbs, pigs, cattle, sheep, goats, poultry, deer, elk, ratites, bison, rabbits, game birds, wild boar and cultured fish.

s. 24. Sections 25, 26 and 27 apply to an employee who is employed on a farm to harvest fruit, vegetables or tobacco for marketing or storage.

s. 25(1). For each pay period, the employer shall pay a minimum wage of not less than the amounts set out in subsection 5 (1), (1.1), (1.2) or (1.3), as the case may be.

(2) The employer shall be deemed to comply with subsection (1) if employees are paid a piece work rate that is customarily and generally recognized in the area as having been set so that an employee exercising reasonable effort would, if paid such a rate, earn at least the amounts set out in subsection 5 (1), (1.1), (1.2) or (1.3), as the case may be.

(3) Subsection (2) does not apply in respect of an employee described in paragraph 1 of subsection 5 (1), (1.1), (1.2) or (1.3), as the case may be.

(4) For the purposes of this section,

> "piece work rate" means a rate of pay calculated on the basis of a unit of work performed.

(5) If an employer provides room or board to an employee, the following are the amounts which shall be deemed to have been paid by the employer to the employee as wages for the purposes of determining whether the minimum wage set out in subsection 5 (1), (1.1), (1.2) or (1.3), as the case may be, has been paid:

Serviced housing accommodation	$99.35 a week.
Housing accommodation	$73.30 a week.
Room	$31.70 a week if the room is private and $15.85 a week if the room is not private.
Board	$2.55 a meal and not more than $53.55 a week.
Both room and board	$85.25 a week if the room is private and $69.40 a week if the room is not private.

(6) The amount provided in subsection (5) in respect of housing accommodation shall be deemed to have been paid as wages only if the accommodation,

(a) is reasonably fit for human habitation;

(b) includes a kitchen with cooking facilities;

(c) includes at least two bedrooms or a bedroom and a living room; and

(d) has its own private toilet and washing facilities.

(7) The amount provided in subsection (5) in respect of serviced housing accommodation shall be deemed to have been paid as wages only if,

(a) the accommodation complies with clauses (6) (a) to (d); and

(b) light, heat, fuel, water, gas or electricity are provided at the employer’s expense.

(8) The amount provided in subsection (5) in respect of a room shall be deemed to have been paid as wages only if the room is,

(a) reasonably furnished and reasonably fit for human habitation;

(b) supplied with clean bed linen and towels; and

(c) reasonably accessible to proper toilet and wash-basin facilities.

(9) Room or board shall not be deemed to have been paid by the employer to an employee as wages unless the employee has received the meals or occupied the room.

s. 26(1). If an employee has been employed by the employer for 13 weeks or more, the employer shall, in accordance with Part XI of the Act,

(a) give the employee a vacation with pay; or

(b) pay the employee vacation pay.

(2) An employee entitled to vacation pay under subsection (1) earns vacation pay from the commencement of his or her employment.

(3) Section 41 of the Act does not apply to the employee.

s. 27(1). Part X of the Act applies to an employee who has been employed by an employer for a period of 13 weeks or more.

(2) For the purposes of this section, an employee shall be deemed to be employed in a continuous operation.

***Health Insurance Act, RRO 1990, Reg. 552*, s. 5(2).**

s. 5(2). Subject to section 6.1, and to subsection 11 (2.1) of the Act, a person who takes up residence in Ontario immediately after residing in another province or territory of Canada where he or she was insured under a publicly funded health care insurance plan is subject to a waiting period that ends at the end of the last day of the second full month after he or she becomes a resident.

***Agricultural Labour Relations Act, 1994, S.O. 1994*, s. 3.**

s. 3(1). The following provisions of the *Labour Relations Act* shall be deemed to form part of this Act:

Section	Description
1, except (2)	Definitions
2.1	Purposes
3, 4	Freedoms
5	Application for certification
6, except subss.	Appropriate bargaining unit

(2.3), (3)	
7	Combining bargaining units
8-10	Certification
11, 11.1, except subs. 11.1 (3)	Rights of access
13	Unions no certification
14, 15	Negotiation of agreements
41.1	Duty to bargain adjustment plan
42-44.1	Mandatory collective agreement provisions
45, 46	Arbitration provisions
46.1	Consensual mediation-arbitration
47, except clause (4) (d)	Permissive collective agreement provisions
48	Religious objections
49	No collective agreement where employer support
49.1	Discrimination prohibited
50-54, 56	Operation of collective agreements
57-61	Termination of bargaining rights
62, except clauses (1) (b) and (2) (c) and subs. (3)	Timeliness of representation applications
63	Successor union
64-64.2	Sale of business
65-72	Unfair labour practices
76-80, except subs. 78 (2)	Unlawful strike or lock-out
81	Working conditions—no alteration
81.2	No dismissal or discipline without just cause
82	Witnesses’ rights
83	No removal, etc., of notices
84	Trusteeship over local unions

85	Filing of collective agreements
86	Filing of union documents
87, 88	Union duty to file financial statements
89	Representative for service process
90	Publications
91	Contravention of the Act
92	Definition of “person”
92.1	Interim orders
92.2	Complaints during organizing activities
94	Declaration of unlawful strike
95	Declaration of unlawful lock-out
96	Court enforcement
97	Arbitration of damages after unlawful strike or lock-out
98-103	Prosecution of offences
104	Administration by Ontario Labour Relations Board
105	Powers and duties of Board
106	Mistakes in names of parties
107	Proof of status of trade unions
108	Board jurisdiction
109	Minister’s reference to Board
110	Board orders not subject to review
111, 112	Non-compellability in civil suits
113	Secrecy of union membership
113.1	Competency as witness
114	Ministerial delegation
115	Mailed notices, release of documents
116	Technical irregularities
117	Administration cost
118	Regulations

(2) References in any section of the *Labour Relations Act* referred to in subsection (1) to “accredited employer’s organization”, “construction industry”, section 93 or any section following section 118 of the *Labour Relations Act* do not apply to the interpretation or application of this Act.

(3) For the purposes of this Act,

(a) section 15 of the *Labour Relations Act* applies to the bargaining that follows the giving of a notice referred to in section 54 of that Act;

(b) subsection 60 (2), clauses 62(1)(a) and (2)(b), subsection 64(2.2) and sections 113, 113.1 and 115 shall be read as if they did not refer to a conciliation officer or conciliation board.

(4) In the event of any conflict between this Act and the *Labour Relations Act*, this Act prevails.

***Labour Relations and Employment Statute Law Amendment Act, 1995, S.O. 1995, c. 1*, s. 80 (1)-80(4).**

s. 80. (1) The *Agricultural Labour Relations Act, 1994* is repealed.

(2) On the day on which this section comes into force, a collective agreement ceases to apply to a person to whom that Act applied.

(3) On the day on which this section comes into force, a trade union certified under that Act or voluntarily recognized as the bargaining agent for employees to whom that Act applies ceases to be their bargaining agent.

(4) On the day on which this section comes into force, any proceeding commenced under that Act is terminated."

***Agricultural Employees Protection Act, 2002, S.O. 2002, c. 16*, ss. 1(2), 18.**

Purpose of this Act

s. 1. (1) The purpose of this Act is to protect the rights of agricultural employees while having regard to the unique characteristics of agriculture, including, but not limited to, its seasonal nature, its sensitivity to time and climate, the perishability of agricultural products and the need to protect animal and plant life.

Same

(2) The following are the rights of agricultural employees referred to in subsection (1):

1. The right to form or join an employees' association.

2. The right to participate in the lawful activities of an employees' association.

3. The right to assemble.

4. The right to make representations to their employers, through an employees' association, respecting the terms and conditions of their employment.

5. The right to protection against interference, coercion and discrimination in the exercise of their rights. 2002, c. 16, s. 1 (2).

Interpretation

s. 2. (1) In this Act,

"agriculture" includes farming in all its branches, including dairying, beekeeping, aquaculture, the raising of livestock including non-traditional livestock, furbearing animals and poultry, the production, cultivation, growing and harvesting of agricultural commodities, including eggs, maple products, mushrooms and tobacco, and any practices performed as an integral part of an agricultural operation, but does not include anything that was not or would not have been determined to be agriculture under section 2 of the predecessor to the *Labour Relations Act, 1995* as it read on June 22, 1994; ("agriculture")

"employee" means an employee employed in agriculture; ("employé")

"employees' association" means an association of employees formed for the purpose of acting in concert; ("association d'employés")

"employer" means,

(a) the employer of an employee, and

(b) any other person who, acting on behalf of the employer, has control or direction of, or is directly or indirectly responsible for, the employment of the employee; ("employeur")

"Tribunal" means the Agriculture, Food and Rural Affairs Appeal Tribunal continued under section 14 of the *Ministry of Agriculture, Food and Rural Affairs Act.* ("Tribunal")

Status of associations, organizations

(2) An employees' association, an employers' organization or any other entity that may be a party to a proceeding under this Act shall be deemed to be a person for the purpose of any provision of the *Statutory Powers Procedure Act* or of any rule made under that Act that applies to parties.

Persuasion during working hours

s. 3. Nothing in this Act authorizes any person or entity to attempt at the place at which an employee works to persuade the employee during the employee's working hours to become or refrain from becoming or continuing to be a member of an employees' association.

Private property

s. 4. Subject to section 7, nothing in this Act confers any new right to enter on, occupy or use private property.

Rights of Agricultural Employees

Representations

s. 5. (1) The employer shall give an employees' association a reasonable opportunity to make representations respecting the terms and conditions of employment of one or more of its members who are employed by that employer.

Same

(2) For greater certainty, an employees' association may make its representations through a person who is not a member of the association.

Reasonable opportunity

(3) For the purposes of subsection (1), the following considerations are relevant to the determination of whether a reasonable opportunity has been given:

1. The timing of the representations relative to planting and harvesting times.

2. The timing of the representations relative to concerns that may arise in running an agricultural operation, including, but not limited to, weather, animal health and safety and plant health.

3. Frequency and repetitiveness of the representations.

Same

(4) Subsection (3) shall not be interpreted as setting out a complete list of relevant considerations.

Same

(5) The employees' association may make the representations orally or in writing.

Same

(6) The employer shall listen to the representations if made orally, or read them if made in writing.

Same

(7) If the representations are made in writing, the employer shall give the association a written acknowledgment that the employer has read them.

Duty of employees' association

s. 6. An employees' association shall not act in bad faith or in a manner that is arbitrary or discriminatory in the representation of its members.

Right of access

s. 7. (1) This section applies where employees of an employer reside on the property of the employer, or on property to which the employer has the right to control access.

Same

(2) On a written application by any person or entity, the Tribunal may make an order allowing access to the property described in subsection (1) for the purpose of attempting to persuade the employees to join an employees' association.

Hearing

(3) The Tribunal shall hold a hearing to determine what order, if any, to make.

Parties

(4) The parties to the hearing shall be,

(a) the applicant;

(b) the employer who owns the property or has the right to control access to it; and

(c) any other person or entity that the Tribunal specifies as a party.

Same

(5) The order may be subject to such terms and conditions as the Tribunal considers appropriate.

Limitation

(6) The Tribunal shall not make an order allowing access to property under subsection (2) unless the person or entity applying for the order satisfies the Tribunal that the order is necessary to

effectively communicate with employees for the purposes of forming an employees' association or recruiting members.

Same

(7) The Tribunal, in making an order allowing access, shall ensure that the access does not unduly interfere with,

(a) normal agricultural practices, including agricultural practices intended to control the quality of agricultural products;

(b) agricultural practices that are innovative or experimental;

(c) human health and safety;

(d) animal health and safety;

(e) plant health;

(f) planting, growing and harvesting;

(g) bio-security needs; or

(h) privacy or property rights.

Protections

Employers, etc., not to interfere with employees' associations

s. 8. No employer, employers' organization or person acting on behalf of an employer or an employers' organization shall interfere with the formation, selection or administration of an employees' association, the representation of employees by an employees' association or the lawful activities of an employees' association, but nothing in this section shall be deemed to deprive an employer of the employer's freedom to express views so long as the employer does not use coercion, intimidation, threats, promises or undue influence.

Employers, etc., not to interfere with employees' rights

s. 9. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

(a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of an employees' association or was or is exercising any other right under this Act;

(b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of an employees' association or exercising any other right under this Act; or

(c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of an employees' association or to cease to exercise any other right under this Act.

Intimidation and coercion

s. 10. No person, employees' association, employers' organization or other entity shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of an employees' association or of an employers' organization or to refrain from exercising any right under this Act or from performing any obligations under this Act.

Complaints Re Contraventions

Complaint to Tribunal

s. 11. (1) An employee, an employees' association, an employer, an employers' organization or any other person or entity directly involved in an activity related to the exercise of a right under this Act may file a written complaint with the Tribunal alleging that there has been a contravention of this Act.

Hearing

(2) The Tribunal shall hold a hearing to inquire into the complaint.

Parties

(3) The parties to the hearing shall be,

(a) any employee, employees' association, employer, employers' organization, or other person or entity who filed the complaint;

(b) any employee, employees' association, employer, employers' organization, or other person or entity who is alleged in the complaint to have contravened this Act; and

(c) any other person or entity that the Tribunal specifies as a party.

Limited rights of participation

(4) The Tribunal may order that a person or entity who is not a party to the hearing has limited rights of participation in the hearing, as specified by the Tribunal.

Orders and remedies

(5) Where the Tribunal is satisfied that an employee, an employees' association, an employer, an employers' organization or any other person or entity has acted contrary to this Act, it shall determine what, if anything, the employee, employees' association, employer, employers' organization, or other person or entity shall do or refrain from doing with respect to the contravention.

Same

(6) Without limiting the generality of subsection (5), a determination under that subsection may include any one or more of,

> (a) an order directing the employee, employees' association, employer, employers' organization, or other person or entity to cease doing the act or acts complained of;
>
> (b) an order directing the employee, employees' association, employer, employers' organization, or other person or entity to rectify the act or acts complained of; or
>
> (c) an order to reinstate in employment or hire the person or employee concerned, with or without compensation, or to compensate instead of hiring or reinstatement for loss of earnings or other employment benefits in an amount that may be assessed by the Tribunal against the employee, employees' association, employer, employers' organization, or other person or entity, jointly or severally.

Interest

(7) Any party may request the Tribunal for an order on account of interest and the Tribunal may make such an order if the Tribunal considers it just to do so in all the circumstances.

Same

(8) For the purposes of subsection (7), sections 127 to 130 of the *Courts of Justice Act* apply with appropriate modifications.

General

Application of ss. 14-14.2, Ministry of Agriculture, Food and Rural Affairs Act

s. 12. Sections 14 to 14.2 of the *Ministry of Agriculture, Food and Rural Affairs Act* apply to a proceeding under section 7 or 11 of this Act.

Dismissal of proceeding

s. 13. (1) A panel of the Tribunal appointed under subsection 14 (3.1) of the *Ministry of Agriculture, Food and Rural Affairs Act* may dismiss, without a hearing, an application under section 7 or a complaint under section 11 if it appears to the panel that,

(a) the matter is one that could or should be more appropriately dealt with under an Act other than this Act;

(b) the application or the complaint is trivial, frivolous, vexatious or made in bad faith;

(c) the application or the complaint is not within the jurisdiction of the Tribunal;

(d) some aspect of the statutory requirements for bringing the proceeding has not been met; or

(e) in the case of a complaint under section 11, the facts upon which the complaint is based occurred more than six months before the complaint was filed, unless the Tribunal is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person or entity affected by the delay.

Same

(2) This section applies instead of section 4.6 of the *Statutory Powers Procedure Act*, except that subsections 4.6 (2) to (6) apply with necessary modifications and, for the purpose,

(a) the reference to clause 4.6 (1) (b) in clause 4.6 (2) (a) of the *Statutory Powers Procedure Act* shall be read as a reference to clauses (1) (a), (c) and (e) of this section;

(b) the reference to rules under section 25.1 in subsection 4.6 (6) of the *Statutory Powers Procedure Act* shall be read as a reference to rules under subsection 14.1 (6) of the *Ministry of Agriculture, Food and Rural Affairs Act*; and

(c) the reference to subsection 4.6 (1) in clause 4.6 (6) (a) of the *Statutory Powers Procedure Act* shall be read as a reference to subsection (1) of this section.

Interim orders and decisions

s. 14. Despite section 16.1 of the *Statutory Powers Procedure Act*, the Tribunal shall not make an interim order or decision requiring an employer to hire a person or employee or to reinstate an employee in employment.

Burden of proof

s. 15. On an inquiry by the Tribunal into a complaint under section 11 that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to the person’s employment, opportunity for

employment or conditions of employment, the burden of proof that any employer or employers' organization did not act contrary to this Act lies upon the employer or employers' organization.

Decision final and binding

s. 16. A decision of the Tribunal is final and binding on the parties and any other person or entity that the Tribunal may specify.

Limitation

s. 17. The Tribunal has no jurisdiction under this Act to make a decision altering the terms and conditions of employment of employees, except as permitted under sections 7 and 11.

Non-application of the Labour Relations Act, 1995

s. 18. The *Labour Relations Act, 1995* does not apply to employees or employers in agriculture.

***Labour Relations Act, 1995, S.O. 1995, c. 1*, s. 3(b.1) & 3(c)**

s. 3. This Act does not apply,

…

(b.1). to an employee within the meaning of the *Agricultural Employees Protection Act, 2002*.

(c) to a person, other than an employee of a municipality or a person employed in silviculture, who is employed in horticulture by an employer whose primary business is agriculture or horticulture;

***Occupational Health and Safety Act, R.S.O. 1990, c. 0.1*, s. 3(2)**

s. 3(2). Except as is prescribed and subject to the conditions and limitations prescribed, this Act or a Part thereof does not apply to farming operations.

Occupational Health and Safety Act, R.S.O. 1990, c. 0.1, O. Reg 414/05

Application of Act to farming operations

s. 1. Subject to the limitations and conditions set out in this Regulation, the Act applies to farming operations.

Exception

s. 2. Despite section 1, the Act does not apply to a farming operation operated by a self-employed person without any workers.

Limitations, joint health and safety committees

s. 3. (1) Despite section 1, subsection 9 (2) of the Act applies only to farming operations where 20 or more workers are regularly employed and have duties that include performing work related to one or more of the operations specified in subsection (2).

(2) The following are the operations referred to in subsection (1):

1. Mushroom farming.

2. Greenhouse farming.

3. Dairy farming.

4. Hog farming.

5. Cattle farming.

6. Poultry farming.

(3) Despite section 1, where a joint health and safety committee is required at a farming operation, the requirement for certified members set out in subsection 9 (12) of the Act applies to that farming operation only if 50 or more workers are regularly employed at it.

Application of certain regulations

s. 4. (1) Despite section 1 and subject to subsection (2), the regulations made under the Act do not apply to farming operations.

(2) The following regulations apply to farming operations:

1. Regulation 834 of the Revised Regulations of Ontario, 1990 (Critical Injury — Defined) made under the Act.

2. Ontario Regulation 780/94 (Training Programs) made under the Act.

3. Ontario Regulation 572/99 (Training Requirements for Certain Skill Sets and Trades) made under the Act. O. Reg. 414/05, s. 4 (2).

***Coroner's Act*, R.S.O. 1990, C. C.37.**

Notice of death resulting from accident at or in construction project, mining plant or mine

s. 10(5) Where a worker dies as a result of an accident occurring in the course of the worker's employment at or in a construction project, mining plant or mine, including a pit or quarry, the person in charge of such project, mining plant or mine shall immediately give notice of the death to a coroner and the coroner shall hold an inquest upon the body.