

Unionization of Agricultural Workers in British Columbia

by

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LL.B., University of Saskatchewan, 2005  
B.Hum., Carleton University, 2000

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## Abstract

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This thesis provides a multi-method – historical, quantitative, qualitative, and jurisprudential – socio-legal case study of the unionization of agricultural workers in British Columbia. Agricultural employees have access to the *Labour Relations Code of British Columbia*. A historical examination of exclusion of agricultural workers from labour relations legislation from 1937 to 1975 explores the rationale behind labour relations laws and the political context of the legislative exclusion. Next, economic aspects of BC’s agricultural sector are described, with a focus on employment characteristics and the regionalised nature of agricultural production. Finally, this thesis explains the legal aspects of an ongoing campaign by the United Food and Commercial Workers (UFCW) to unionize migrant and resident agricultural workers. The union organizing campaign shows how legal labour relations processes operate in relation to migrant workers in a sector with low rates of unionization and high rates of precarious and low-paid, dangerous work.

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# Chapter 1

## Introduction

### Introduction

This thesis looks at the unionization of agricultural workers in British Columbia by examining the history of labour relations legislation as it affects agricultural workers, highlighting the geographic and economic features of agricultural employment in BC, and, finally, analysing an ongoing contemporary unionization campaign undertaken by the trade union United Food and Commercial Workers (“UFCW”) in BC. Since at least 1980, UFCW has worked to organize and unionize agricultural workers in Canada. Much of UFCW’s high-profile work has occurred in Ontario, where UFCW’s legal efforts have focused on inclusion of agricultural workers in provincial labour relations legislation to facilitate these workers’ ability to unionize and bargain collectively.<sup>1</sup> The union’s campaign for legislative equality for agricultural workers in Ontario raises an often-overlooked question. How and to what extent does the law protect the ability of agricultural workers to form and maintain trade unions and to participate in collective bargaining, in jurisdictions where agricultural workers are included in labour relations legislation? British Columbia is one such jurisdiction in Canada. Since 1975, agricultural workers in BC have had access to the provincial labour relations legislation.<sup>2</sup> However, despite this protection, organizing agricultural workers has not been an easy task, and the UFCW has faced a range of challenges in their efforts to organise workers. This thesis will document and analyze how the law has functioned in UFCW Local 1518’s campaign to unionize of agricultural workers in BC, from 2007 to 2012.

In this introductory chapter, I explain the main questions that this study addresses and the inter-related approaches used to answer those questions. I also define several key concepts employed in this thesis, including those related to precarious employment, migrant work, and the role of unions and collective action. I then discuss briefly the

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<sup>1</sup> *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5, *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, 2001 SCC 94, *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3. See also Fay Faraday, Judy Fudge and Eric Tucker (eds.), *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case* (Toronto: Irwin Law, 2012) and Jonah Butovsky and Murray E.G. Smith, “Beyond Social Unionism: Farm Workers in Ontario and Some Lessons from Labour History” (2007) 59 *Labour/Le Travail* 69.

<sup>2</sup> *Labour Code of British Columbia Amendment Act, 1975*, S.B.C. 1975, c.33, s.1.

research methodologies employed in this study, and explain the historical, statistical and qualitative sources relied upon in conjunction with legal analysis of decisions of the BC Labour Relations Board. I end the chapter with a roadmap for the remainder of the thesis.

### **Precarious Work, Migration and Trade Unions**

While analysing the constitutionality of the exclusion of agricultural workers from labour relations legislation in Ontario, Supreme Court of Canada Justice Bastarache wrote that the “[d]istinguishing 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”.<sup>3</sup> Without legislation that protects agricultural workers from interference, coercion and discrimination by employers and others when they participate in the activities of a trade union, agricultural workers have been unable to form and maintain associations in the current Canadian context.<sup>4</sup> The Supreme Court of Canada in *Dunmore v. Ontario (Attorney General)* concluded that “the evidence is that the ability of agricultural workers to associate is only as great as their access to legal protection.”<sup>5</sup>

This thesis provides a detailed look at how the BC *Labour Relations Code*<sup>6</sup> operates in relation to agricultural workers and the extent of legal protection provided to agricultural workers who attempt to unionize and participate in collective bargaining in BC. While the legal regulation of labour relations in agriculture in BC is provincial, increasingly agricultural workers are temporary foreign workers who move across national borders in order to work. As such, this study is also about how localized legal processes respond to a trans-border and global workforce, and provides an example of how a traditional North American union organizes precarious workers involved in processes of globalization. Over the last several decades, globalization and trans-border migration of workers has shaped work and employment in Canada, thus changing the conditions under which unions operate and transforming unions themselves.<sup>7</sup> As much as this study is about

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<sup>3</sup> *Dunmore v. Ontario (Attorney General)*, *supra* note 1 per Bastarache J. at para.41. Also quoted in *Ontario (Attorney General) v. Fraser*, *supra* note 1 per Abella J. (in dissent) at para.349.

<sup>4</sup> *Dunmore*, *ibid.*, at para.67, also quoted in *Fraser*, *ibid.*, by Abella J. at para.323.

<sup>5</sup> *Dunmore*, *ibid.* at para.45.

<sup>6</sup> R.S.B.C. 1996, c. 244.

<sup>7</sup> For a discussion of how unionizing precarious migrant workers may have a transformative effect on trade unions, see Ronaldo Munck, “Beyond North and South: Migration, Informalization, and Trade Union Revitalization” (2011) 14 *WorkingUSA: The Journal of Labor and Society* 5.

recent<sup>8</sup> practices of using migrant workers and new forms of globalized employment, it is also about historically-entrenched labour relations issues. Many of the problems with delays in legal processes, employer resistance and preservation of a non-unionized status quo have been features of North American legalized labour relations regimes since the 1930s. These problems remain central in UFCW Local 1518's ongoing campaign to unionize agricultural workers in BC.

As the continued exclusion of agricultural workers from the provincial labour relations regimes in Alberta and Ontario highlights, inclusion in labour relations legislation is a precondition to a study of the kind undertaken here. Therefore, I begin in chapter 2 with a historical examination of how agricultural workers in BC came to be included in the provincial labour relations law. I explore how the particular political ideologies, personalities and broader societal attitudes towards unions and agriculture in the 1930s contributed to the exclusion of agricultural workers when the BC government passed comprehensive labour relations legislation in 1937. Even at that time, the exclusion of agricultural workers from labour relations legislation was contested. Members of the Co-operative Commonwealth Federation ("CCF"), the third party in the Legislative Assembly, argued agricultural workers ought to be included in labour relations legislation as they were among the most vulnerable workers at the time. Similarly, the change to include agricultural workers in labour relations legislation in the 1970s was contested. Members of the opposition and even the government's Minister of Labour questioned whether union activity was compatible with agricultural production. Official political documents and media reports at the time reflect the role of vocal advocates for the inclusion of agricultural workers in employment-related legislation, as well as the influence of a general shift in Canada away from exclusion of agricultural workers from labour relations legislation. This historical chapter also describes the government's purposes in enacting labour relations law. Many of these purposes continue to be relevant to understanding current labour relations law in BC.

Historically and today, many agricultural workers in BC experience precarious employment. The standard employment model experienced by industrial workers in

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<sup>8</sup> Temporary foreign workers, under the Seasonal Agricultural Worker Program, began to be employed in British Columbia in 2003. In Ontario, the use of trans-border migrant agricultural workers has a much longer history.

North America in the twentieth century was characterized by continuous, full-time, indefinite contracts of employment with one employer, often in a unionized industry and with a degree of regulatory protection and an adequate wage and benefits package.<sup>9</sup> This standard employment model was never the norm for agricultural workers. Agricultural employment in BC, particularly berry and other crop hand harvesting, is often characterized by exemption from basic employment standards, remuneration by piece rates sometimes averaging below minimum wage rates, continuing instances of child labour, inadequate access to toilets and sanitation facilities, substandard housing on grower property, and unsafe employer-supplied transportation.<sup>10</sup> Substandard working conditions are not a new phenomenon for waged agricultural workers in BC, or indeed, in Canada.<sup>11</sup> The lives of agricultural workers are made precarious by seasonal and casual low-wage work for multiple employers, formally or practically outside of regulatory protections, sometimes in isolation from family and social supports.

Beginning in 2003, the precarious nature of waged agricultural work in BC was compounded by the introduction of migrant workers.<sup>12</sup> In this thesis, “migrant worker” refers to a temporary worker recruited internationally to work in Canada, whose admission to Canada is limited to the duration of her or his employment contract. A migrant worker’s legal right to stay in Canada is directly connected to her or his employment. Linking a person’s legal right to be in Canada to continuity of employment with one employer amplifies a person’s dependence on the employer’s private authority. The negative consequences of displeasing the employer and loss of the job are increased exponentially.

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<sup>9</sup> Judy Fudge and Rosemary Owens, “Precarious Work, Women, and the New Economy: The Challenge to Legal Norms” in Judy Fudge and Rosemary Owens (eds.), *Precarious Work, Women, and the New Economy: The Challenge to Legal Norms* (Oxford and Portland, Oregon: Hart Publishing, 2006) 3 at 10-12.

<sup>10</sup> Graeme Moore, *Hand-Harvesters of the Fraser Valley Berry Crops: New Era Protection of Vulnerable Employees* (British Columbia Federation of Labour, 2004) at 31-38; Luis L. M. Aguiar, Patricia Tomic and Ricardo Trumper, *Mexican migrant agricultural workers and accommodations on farms in the Okanagan Valley, British Columbia* (Working Paper No. 11-04, Metropolis British Columbia, Centre for Excellence for Research on Immigration and Diversity, 2011).

<sup>11</sup> Kathryn Neilson and Innis Christie, “The Agricultural Labourer in Canada: A Legal Point of View” (1975) 2 *Dalhousie Law Journal* 330.

<sup>12</sup> The different programs under which migrant agricultural workers are admitted into Canada are outlined in chapter 3. In some other provinces, notably Ontario and Quebec, the admission of migrant agricultural workers began much earlier, in the 1960s and 1970s.

Although the number of migrant agricultural workers in BC rose to over 4,700 workers in 2011,<sup>13</sup> resident workers still comprise the majority of BC's agricultural workforce. "Resident workers" refers to those workers who have citizenship or permanent residency status in Canada, and therefore, their ability to stay in the country is not tied to their contract of employment. The term resident worker refers to the worker's legal citizenship status, and does not necessarily imply that the worker is integrated into the local community in which the workplace is located. Both historically and currently in BC, movement across local, provincial and international borders has been an important part of the life history of many resident agricultural workers. Workers have often moved from one region of Canada to BC, and particularly from Quebec to the Okanagan, in order to work in the fruit harvest. Resident workers also move from urban or suburban to field locations in order to do agricultural work.<sup>14</sup> Resident agricultural workers are often first-generation immigrants to Canada. For some, agricultural work is a stepping stone to year-round, less precarious employment. For other resident workers, seasonal and precarious agricultural work is a more permanent employment status.

Understanding the structure of employment relations and the economics of the agricultural sector in BC helps explain how UFCW Local 1518's campaign to unionize agricultural workers has unfolded and helps explain the collective bargaining priorities of agricultural workers who have unionized. In chapter 3, I provide a profile of the agricultural industry in BC, with special attention to the role of waged labourers. The idea of the "family farm" employing one or two family members is not reflected in the current data about agricultural production in BC, where large numbers of seasonal employees work in greenhouses, nurseries, or hand-harvesting in fields adjacent to urban areas. The distinct geographical limitations to agricultural production and the mix of commodities produced in BC affect the location and structure of agricultural employment in the province. In turn, the location and structure of employment explain the location and structure of the UFCW's union organizing campaign. Although agricultural production and employment in BC appears to share many characteristics with agricultural

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<sup>13</sup> Human Resources and Skills Development Canada. "Labour Market Opinion (LMO) Statistics, 2008-2011", online: <[www.hrsdc.gc.ca/eng/workplaceskills/foreign\\_workers/stats/annual/table10aa.shtml](http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/stats/annual/table10aa.shtml)>.

<sup>14</sup> As is clear from the concentration of agricultural operations in BC in the greater metropolitan Vancouver area, as demonstrated in chapter 3 and Appendix A, it is somewhat misleading to characterize all primary agriculture producing locations as "rural".

employment in Ontario and parts of the United States, it has several distinctive features, which cause particular challenges to any organization that works with or advocates on behalf of agricultural employees. The profile of the agricultural sector in chapter 3, then, provides the contextual background to understand the details of UFCW Local 1518's unionization campaign in BC and will assist other researchers and organizers in evaluating how the union's experiences in BC may be learned from and applied in other contexts.

In chapter 4, I describe in detail the legal aspects of the UFCW Local 1518's campaign to unionize agricultural workers in BC. The narrative of this campaign begins in 2007, with the opening of the first Agricultural Workers Alliance ("AWA") centre in BC, supported by UFCW Canada, and UFCW Local 1518's first application involving agricultural workers to the BC Labour Relations Board in 2008. A major theme running through the first five years of this campaign is migrant workers' fears of negative consequences at various junctures on their global path, linked to the uncertain reach of legal protections across jurisdictional boundaries. Migrant workers do not voluntarily or happily accept substandard working conditions. The precarious nature of migrant workers' lives and their super-dependence on their employers create conditions under which a significant component of the workforce does not claim existing rights. Rights are not claimed for many reasons. Unorganized and unrepresented migrant workers may lack the resources – knowledge, language, and other social capital resources – necessary to claim rights to which they are formally entitled.

If rights and basic employment standards are to be actualized, they must be claimed. Unions, particularly following social and community union models, support and enable migrant workers to make such claims, and in so doing, help stop the erosion of employment standards generally. Unionization can ameliorate the destructive nature of precarious work on several dimensions.<sup>15</sup> Through collective representation, workers can obtain a greater degree of control over wages, the pace of work, and other working conditions. Furthermore, the union can be a political voice to lobby for greater regulatory protection and to ensure the enforcement of existing regulations. As is demonstrated

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<sup>15</sup> The dimensions referred to here are explained in greater detail in Fudge and Owen, "Precarious Work, Women, and the New Economy", *supra* note 9 at 11.

through the collective agreement analysed in chapter 4, a union can also work towards assuring greater continuity of employment, despite the seasonal rhythm of agricultural work. In such a way, then, all workers have an interest in ensuring migrant workers individually and as a group are able to demand compliance with the basic minimum employment standards that apply to them, and to organize to improve their conditions.<sup>16</sup>

To the extent that globalization and structural changes in Canada's economy are contributing to more precarious employment in all sectors of the economy, UFCW Local 1518's efforts to organize and unionize agricultural workers documented in this thesis contribute to a more general understanding the challenges facing many trade unions. A close study of the legal aspects of an ongoing campaign to unionize and organize agricultural workers in BC reveals the potential for Canadian unions to respond and meet the challenges of globalization, temporary migration and precarious employment relationships.

Organizing agricultural workers has pushed UFCW beyond traditional organizing models supported by current labour relations legislation and administrative practices. Agricultural Workers Alliance centres link hundreds of agricultural workers in BC, and are organizing points around which seasonal agricultural workers can gather, associate, share knowledge and experiences, receive services, and make legal and other claims. These AWA centres exist outside of the standard tripartite union-employer-government relationships, and are sites for broad-based sector-wide organizing not structured around a single employer and not directly facilitated by the existing labour relations regime. As is clear from the details provided in chapter 4, only a minority of the workers who associate with AWA centres access the formal unionization processes supported and enabled through the *Labour Code*. Organizing and supporting the voice of migrant and seasonal precarious workers has transformed aspects of the union as an institution, but has had less evident impact on domestic law and the administration of legal processes in BC to this point in time. Indeed, the focus on legal processes taken in this study somewhat obscures the role and importance of the AWA centres and community unionism practices in the union's campaign.

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<sup>16</sup> See Jennifer Gordon, "Tensions in Rhetoric and Reality at the Intersection of Work and Immigration" (2012) 1 UC Irvine Law Review 125 at 127.

In the next section, I outline how I conducted my research and what sources I rely upon to explore the issues described above.

### **Methodological Considerations**

In my research to document unionization of agricultural workers in BC, I use mixed research methods combining historical, statistical and qualitative research with traditional jurisprudential approaches. Through this research, I present a multi-dimensional account of the legal structuring of union organizing of precarious workers, situated in its particular historical and economic context.

In chapter 2, I explore the legislative history of the exclusion and inclusion of agricultural workers in BC's labour relations legislation. In order to do this, I rely on official documents of the Legislative Assembly of BC, supplemented by archival research into the papers of the politicians involved, contemporary newspaper articles, contemporary legal commentary and interpretation of the labour legislation, and academic historical work. The resulting historical narrative is contoured by the materials that have survived the passage of time. Notably, the political papers of the key political actors involved in the rewriting of BC's labour relations legislation and the subsequent amendment to include agricultural workers in the 1970s have not been archived.

Chapter 2 presents a picture of individual politicians as the primary agents of legislative change, responding to and attempting to control societal currents. To the extent that workers, unions and employers appear in the historical narrative, they are confined to roles as lobbyists, letter writers, constituents to be consulted, or instigators of social unrest to be controlled or contained through governmental action. In the slice of legislative history presented, however, the focus is on the legislation itself and its creation through the political process. Detailed attention to the official documents and political agents reveals the contingency of the exclusion when it arose and the consistency across almost four decades in the arguments for and against the exclusion of agricultural workers from labour relations legislation.

The profile of the BC's agricultural sector in chapter 3 provides context necessary to understand the location of agricultural work in the province and the potential for unionization in the Lower Mainland and Okanagan regions. In this chapter, I rely on information gathered through the Statistics Canada 2011 Census of Agriculture. The first

data release from this Census was in May 2012, and it represents the most up-to-date comprehensive information about BC's agricultural sector available at the time of writing. The Census of Agriculture information provides a large-grained account, and often presents a cumulative and average picture. The resulting account of the agriculture sector is to a large degree de-personalized. Furthermore, the outliers, particularly the few largest and most profitable agricultural operations in the province, are not described precisely but often blend into the hundreds of very small and economically not self-sustaining farms and residential acreages with small amounts of agricultural activity. Despite the shortcomings of a statistical approach, the account provided in chapter 3 of this thesis provides an explanation of the physical location of agricultural work in the province and the role of labour in agricultural production.

In the account of the ongoing UFCW Local 1518 unionization campaign in BC found in chapter 4, I rely primarily on the published decisions of the British Columbia Labour Relations Board. To supplement the record in these published decisions, I searched local newspapers, websites and other media reports involving agricultural workers in BC. I also sought to interview key persons involved on behalf of the unions and employers. My efforts to conduct interviews with informants from a variety of perspectives were not entirely successful, as I was not able to interview any employer representatives. I did conduct semi-structured interviews with two coordinators of Agricultural Workers Alliance Centres, one UFCW Local 1518 union staff representative who was responsible for collective agreement negotiations and other aspects of the unionization campaign, and the secretary-treasurer of the Canadian Farmworkers Union, which organized agricultural workers in the 1980s. In my research, I also requested access to documents from the files of the Labour Relations Board, including applications, responses, reports prepared by officers of the Board, and other documents filed by the parties in proceedings before the Labour Relations Board. Under the Board's disclosure policies, I was only able to obtain from the Board copies of written orders made by the Board and public notices the Board required to be posted.<sup>17</sup>

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<sup>17</sup> My request for access to the Board's files was made informally, rather than through a formal freedom of information request. For more information and rationale behind the Board's policy not to disclose exhibits, pleadings, submissions or other documents on the files of the BC Labour Relations Board, see *Re KFCC/Pepsico Holdings Ltd.*, BCLRB No B232/97.

Chapter 4 presents a case study of the legal aspects of UFCW Local 1518's campaign to unionize agricultural workers from 2007, when the first AWA centre opened in the province, to mid-2012. Whenever a particular set of events is presented, there is some danger that the particular case may be understood as representative of a broader experience, when the case may be atypical.<sup>18</sup> The account of UFCW Local 1518's efforts to use the processes of the *Labour Relations Code* to unionize agricultural workers in BC ought to be seen as atypical in some aspects. Approximately two hundred of the over forty-five thousand agricultural employees<sup>19</sup> in BC were involved in the decisions of the Labour Relations Board described in chapter 4. Unionization and involvement in Labour Relations Board processes are not the usual experience of agricultural workers in BC. The events recounted also should not necessarily be seen as typical of every union organizing campaign, or even typical of unionization campaigns involving migrant workers (although we may be on sturdier ground on this last point).

In part to understand why so few agricultural workers in BC have taken formal steps to unionize under the *Code*, in chapters 4 and 5, I draw generalizations about how the *Code* has functioned in relation to those workers who have tried to unionize. In this way, my research is presented as a significant experience capable of informing future action, without closing the door to the possibility that other unionization campaigns could progress along quite different paths. In this way, I understand my research to be representative of a category of experience under the *Code*, but not of the paradigmatic experience.

### **Structure of the Thesis**

In this thesis, I seek to document and analyze the legal regulation of unionization of agricultural workers in BC. As outlined in this introductory chapter, I approach the research from three inter-related perspectives. In chapter 2, I look at how agricultural workers in BC came to be included in the general provincial labour relations legislation. The result is a legislative history of the exclusion and eventual inclusion of agricultural workers, with a focus on the political actors involved in the legislative change and the

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<sup>18</sup> Martha Minow, "Stories in Law" in Peter Brooks and Paul Gewirtz (eds.), *Law's Stories: Narrative and Rhetoric in the Law* (New Haven and London: Yale University Press, 1996) 24 at 35-6 and Paul Gewirtz, "Narrative and Rhetoric in the Law" in *Law's Stories*, *ibid.* 2 at 2.

<sup>19</sup> Statistics Canada, *2011 Census of Agriculture, Farm and Farm Operator Data*, catalogue no. 95-640-XWE.

purposes invoked to justify labour legislation. In chapter 3, I examine agricultural production and employment from an economic and geographic perspective. I provide a profile the salient features of the primary agricultural industry, as a basis for understanding where in BC agricultural employees are located and how waged labour fits into the economics of the agricultural sector. In chapter 4, I approach the unionization of agricultural workers from the perspective of the legal mechanisms of the current provincial labour relations regime. Chapter 4 builds on the historical and economic perspectives in the earlier chapters, and contains a detailed account of the agricultural worker unionization campaign pursued by United Food and Commercial Workers Local 1518 from 2007 to 2012, and reaches some conclusions about the jurisdictional challenges of unionizing migrant workers. Chapter 5 provides a summary of the main findings of this research and draws brief conclusions based on those findings.

## Chapter 2

# A History of the Exclusion of Agricultural Workers from BC Labour Relations Legislation

### Introduction

Access to the legal protections of labour relations legislation during the process of forming a trade union and collective bargaining with an employer is generally seen as a prerequisite to unionization of agricultural workers in Canada.<sup>1</sup> BC is now one of eight Canadian provinces that include agricultural workers in provincial labour relations legislation, but BC's agricultural workers have not always been included in the province's labour laws.<sup>2</sup> When BC first enacted comprehensive provincial labour relations legislation in 1937, agricultural workers were excluded.<sup>3</sup> In this chapter, I look at the circumstances present when this legislative exclusion was created, and the factors that came together when agricultural workers were included in BC's labour relations legislation in 1975.<sup>4</sup> Before examining how BC's provincial labour relations legislation functions in relation to agricultural workers – the focus of chapter 4 of this thesis – I examine in this chapter the how agricultural workers came to be included in the province's labour relations legislation. This historical examination agricultural workers and labour relations legislation in BC explores the political forces in play that resulted in thirty-eight years of exclusion of agricultural workers from labour relations legislation and in their eventual inclusion in 1975.

This chapter begins with a discussion of the problem the BC government was responding to when it introduced new labour relations legislation in 1937. In the next section of this chapter, I examine the role of agriculture in BC's economy in the 1930s and some characteristics of agricultural workers. This context helps explain why agricultural workers were excluded from the BC *Industrial Conciliation and Arbitration*

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<sup>1</sup> See *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, 2001 SCC 94.

<sup>2</sup> Alberta and Ontario exclude farmworkers from their general provincial labour legislation. In Ontario, workers are covered by the *Agricultural Employees Protection Act, 2002*, S.O. 2002, c. 16, which does not provide the same rights and protections as contained in Ontario's *Labour Relations Act*. This legislation was subject of a *Charter* challenge in *Ontario (A.G.) v. Fraser*, 2011 SCC 20.

<sup>3</sup> *Industrial Conciliation and Arbitration Act*, S.B.C. 1937, c.31. Domestic servants were also excluded from this legislation.

<sup>4</sup> *Labour Code of British Columbia Amendment Act, 1975*, S.B.C. 1975, c.33, s.1.

*Act.* I then turn to the political record. I trace a pattern of exclusion of agricultural workers from employment-related legislation, and I describe the 1937 debates in the Legislative Assembly regarding the exclusion of agricultural workers from the labour relations legislation. Agricultural workers continued to be excluded until the mid-1970s, when the efforts of a few NDP backbenchers were successful in persuading the labour minister of the day that agricultural workers ought to be included in provincial collective bargaining laws. At least as far as labour relations law was concerned, formal legislative equality was achieved. I conclude the chapter with some comments about the conditions that came together in 1975 when agricultural workers were brought into the *Labour Code of British Columbia*.

### **New Labour Relations Laws of the 1930s**

In the 1930s, governments throughout North America faced a problem of instability in labour relations. Workers could, and did, join together to protest against their employer and working conditions through strikes and other concerted activity. Employers could, and did, refuse to hire union members and fire workers for participating in strikes. The existing labour relations laws did not apply to many sectors of the economy, and the legislated conciliation and mediation processes often were dependent on the consent of the employer and union.<sup>5</sup> Frequently, this consent did not occur. The existing laws did little to prevent and solve industrial disputes over union recognition, contract negotiation and administration without strikes, lockouts and mass firings.

In September 1937, BC's Labour Minister George S. Pearson wrote a memorandum to newly re-elected Premier T.D. (Duff) Pattullo, setting out the reasons why the government needed new legislation in the area of labour relations.<sup>6</sup> BC's voters had returned the provincial Liberal party to government on June 1, 1937.<sup>7</sup> The official

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<sup>5</sup> For a detailed examination of the labour relations regimes existing before 1937, see Judy Fudge and Eric Tucker, *Labour Before the Law* (Don Mills, ON: Oxford University Press, 2001). See also A.W.R. Carrothers, *Collective Bargaining Law in Canada* (Toronto: Butterworth & Co., 1965) and H.D. Woods and Sylvia Ostry, *Labour Policy and Labour Economics in Canada* (Toronto: McMillan of Canada, 1962).

<sup>6</sup> Memorandum from George Pearson to Duff Pattullo, dated September 10, 1937 (British Columbia Archives, Pattullo Papers, GR 1222, Box 142, File 142-7). George Pearson, who was a Nanaimo wholesale grocer before being elected, has been described as a "progressive reformist" within the Liberal cabinet: Martin Robin, *Pillars of Profit: the Company Province 1934-72* (Toronto: McClellan and Stewart, 1973) at 12 and 13.

<sup>7</sup> See Robin Fisher & David J. Mitchell, "Patterns of Provincial Politics Since 1916" in Hugh J. M. Johnston, ed., *The Pacific Province* (Vancouver: Douglas & McIntyre, 1996) 254 at 259. For an account of the

opposition was Conservative, and the Co-operative Commonwealth Federation (“CCF”) was the third party in the Legislative Assembly.

In his memo to the Premier, Minister Pearson said that the province’s ability to deal with labour disputes was “practically nil”.<sup>8</sup> Despite large and sometimes violent demonstrations and protests in Vancouver and elsewhere by thousands of unemployed workers from relief camps in the mid-1930s, Minister Pearson described labour relations in the fall of 1937 as “fairly peaceful”.<sup>9</sup> Table 2.1 below compiles the numbers of individual labour disputes and employees directly affected in the decade leading up to the legislation. In the years before 1937, the numbers of disputes were reasonably stable and even declining.

**Table 2.1 Labour Disputes in BC, 1928-1937**

Year	Number of strikes and lockouts in BC	Total number of employees affected	Total number of working days lost
1928	8	2,662	30,506
1929	12	691	9,876
1930	7	231	3,149
1931	21	3,576	85,894
1932	18	4,409	38,295
1933	15	2,403	27,392
1934	22	4,249	140,787
1935	20	6,740	117,937
1936	15	5,709	75,122
1937	18	1,583	46,244

*Data compiled from Canada Department of Labour, The Labour Gazette (Ottawa: J.O. Patenaude)1929-38*

Minister Pearson was concerned, however, with increased organizing activity of labour unions in the fall of 1937. In particular, he wanted tools to deal with what he perceived to be the rising influence of the Communist Party as a “forceful element in the labour unions in this Province.”<sup>10</sup> Minister Pearson drew a connection between the influence of Communism within the organized labour and employer resistance to unions

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Liberal’s first term in government and the “Work and Wages” reformist program of “socialized capitalism”, see Margaret A. Ormsby, *British Columbia: a History* (Vancouver: MacMillan, 1964) and Robin, *supra* note 6.

<sup>8</sup> Memo Pearson to Pattullo, *supra* note 6. See also Andrew Parnaby, “What’s Law Got to Do with It? The IWA and the Politics of State Power in British Columbia, 1935-1939” (1999) 4 *Labour/Le Travail* 9 at 9-10.

<sup>9</sup> Memo Pearson to Pattullo, *supra* note 6.

<sup>10</sup> Memo Pearson to Pattullo, *ibid.*

and collective bargaining:

The activity of the communists, latterly the C.I.O. has caused the great majority of larger employers in British Columbia to resist any kind of organizing for the purpose of negotiations between employer and employee. This condition, however, cannot stand for long as it is an unnatural condition. Every sensible person will admit the justice of the claim of men to organize themselves for the purpose of discussing their problems with their employers and negotiating terms of employment. This being the case I am convinced that as labour conditions settle themselves in the United States a definite attack will be made upon British Columbia to completely organize it under the two great international organization, the A.F. of L. and its offspring, the C.I.O. During this attempt industry will suffer tremendously in this Province, through strikes, unless we are prepared to meet it.<sup>11</sup>

Minister Pearson's comments reflect many of the reasons often put forward to justify labour relations legislation more generally.

The Labour Minister was convinced of the "justice of the claim of men to organize themselves for the purpose of discussing their problems with their employers and negotiating terms of employment."<sup>12</sup> Through collective bargaining, workers have a voice and the ability to participate in the decisions that govern their working lives. Collective bargaining processes recognize the human dignity inherent in labour and refuse to treat labour as only a commodity. Working relationships are not wholly contained within commercial contractual relations, but instead exist within a system of self-government. The importance of workers' ability to be involved in decisions that affect their working lives has importance apart from any of the instrumental goals of collective bargaining processes.<sup>13</sup>

Minister Pearson's comments also reflect an understanding of trade union activity and collective bargaining based on principles of freedom of contract. Men organize, he wrote, in order to negotiate terms of employment.<sup>14</sup> In a legal system that values freedom of contract, statutory support for collective bargaining can be justified on the basis that it puts employers and employees in a more equal bargaining relationship, where a real

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<sup>11</sup> Memo Pearson to Pattullo, *ibid.* C.I.O. stands for the Congress of Industrial Organizations. The A.F. of L. stands for the American Federation of Labor. The two organizations merged in 1955.

<sup>12</sup> Memo Pearson to Pattullo, *ibid.*

<sup>13</sup> See for example, H.D. Woods, "Canadian Collective Bargaining and Dispute Settlement Policy: An Appraisal" (1955) 21 *The Canadian Journal of Economics and Political Science* 447 at 453.

<sup>14</sup> Memo Pearson to Pattullo, *supra* note 6.

discussion and agreement over terms and conditions of employment is possible.<sup>15</sup>

Although an employer may disregard the demands of one individual worker without negative consequence, an employer will have more difficulty ignoring all the workers together. In this way, collective bargaining may address some of the inequalities of bargaining power in the employment relationship while maintaining a commitment to freedom of contract and to the idea that parties themselves, rather than an external agency, know best how to manage their affairs.

The most often repeated theme in Minister Pearson's memorandum to Premier Pattullo was that industry and the provincial economy would suffer unless the government had the ability to prevent and control strikes. In the absence of labour legislation, collective bargaining processes often involve workers collectively stopping work to pressure an employer to recognize the union and accept shared control over labour relations issues, to negotiate and resolve the substantive content of the collective bargaining agreement, and to resolve disputes over the application of the collective agreement.<sup>16</sup> Strikes and lockouts disrupt not only the workers and employers directly involved. They also affect the services and goods available to the public and the stability of the economy generally. In order to ensure stable and predictable conditions in a wage-labour economy, the 1937 BC government legislated in an attempt to reduce or eliminate the disruptive effects of industrial disputes and work stoppages.<sup>17</sup>

Labour Minister Pearson and the government of the day had several legislative models from which they could draw when designing BC's new labour relations legislation in the

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<sup>15</sup> A version of this justification of North American labour legislation can be found in Harry H. Wellington, *Labor and the Legal Process* (New Haven: Yale University Press, 1968) 28-32. In many typical individual employment contractual relations, the worker does not have real alternatives. She or he cannot choose to walk away from the working conditions set by the employer and be without income. The employer's ability to impose terms and conditions is not adequately counter-balanced to protect against potential coercion and exploitation. A "free" labour market assumes the presence of many imaginary preconditions: all parties have accurate information regarding labour's worth, going rates, and the degree of competition; an employee can choose to move from employer to employer without negative consequences related to the work or otherwise; and new employers can afford to enter the labour market and "buy up" underpaid workers. Individual freedom of contract in an unfettered labour market is, for most workers, as imaginary as these preconditions.

<sup>16</sup> This characterization of the major types of industrial disputes is explored in greater detail in Woods, *supra* note 13 at 447.

<sup>17</sup> See Woods, *ibid.* and Paul Graham Knox, "The Passage of Bill 39: Reform and Repression in British Columbia's Labour Policy" (M.A. Thesis, University of British Columbia, 1974). The government of BC was not entirely successful in this aim, and amended the legislation many times to deal with perhaps unintended and unanticipated consequences of the more repressive aspects of its legislative scheme.

fall of 1937. Labour legislation models from New Zealand and Queensland, Australia, recognized a legitimate and legal role for trade unions in setting terms and conditions of employment, and created mandatory conciliation and arbitration procedures to resolve industrial disputes.<sup>18</sup> Canadian federal legislation similarly provided a model focused on the resolution of disputes through government-assisted investigation and conciliation procedures, which on the initiative of the employer or union required both parties to sit down together in an attempt to resolve their issues.<sup>19</sup> American legislation provided a different model, focused on creating a framework for an ongoing relationship, rather than a solution to the immediate dispute. The American *National Labor Relations Act*<sup>20</sup> or the “Wagner Act” of 1935 created mechanisms for employees to choose union representation free from employer interference, gave the union the exclusive right to bargain with the employer, and compelled an employer to recognize and bargain with the union.<sup>21</sup>

Three Canadian provinces had also passed new labour relations legislation earlier in 1937. The Nova Scotia *Trade Union Act*<sup>22</sup> required employers to recognize and bargain with unions and relied on statutory penalties enforced by the courts as a compliance mechanism. The Alberta *Freedom of Trade Union Association Act*<sup>23</sup> recognized as legal the formation of trade unions and the process of collective bargaining but did not contain detailed enforcement mechanisms. These two acts followed to some extent the draft model trade union legislation recommended by the Trades and Labour Congress of

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<sup>18</sup> Noel S. Woods, *Industrial Conciliation and Arbitration in New Zealand* (Wellington: R.E. Owen, Government Printer, 1963); Queensland, Australia, *Industrial Conciliation and Arbitration Act of 1932*, 23 Geo. V. no. 36.

<sup>19</sup> *The Industrial Disputes Investigation Act, 1907*, S.C. (6-7 Ed. VII), c.20, was available to regulate negotiation of collective agreements in the mining, transportation, communication, and public service utility sectors. It applied throughout Canada until the 1925 decision *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396, [1925] 2 D.L.R. 5 (J.C.P.C.). The BC Legislative Assembly extended the federal legislation to sectors of the provincial economy through the *Industrial Disputes Investigation Act (British Columbia)*, S.B.C. 1925, c.19. The *IDIA (B.C.)* was repealed by the *Industrial Conciliation and Arbitration Act* in 1937.

<sup>20</sup> 49 Stat. 449.

<sup>21</sup> James R. Watson, *Legislative History of the Exclusion of Agricultural Employees from the National Labor Relations Act of 1935 and the Fair Labor Standards Act of 1938*; National Labor Relations Board, *Legislative History of the National Labor Relations Act, 1935* vol. 1 (Washington: United States Government Printing Office, 1949).

<sup>22</sup> S.N.S. 1937, c.6. The Act was passed on April 17, 1937.

<sup>23</sup> S.A. 1937, c. 75. The Act received royal assent on April 14, 1937.

Canada at the time.<sup>24</sup> The *Manitoba Strikes and Lockouts Prevention Act*<sup>25</sup> did not explicitly recognize trade unions as legal or require collective bargaining and did not follow the Trades and Labour Congress of Canada model legislation. Instead, it created mandatory conciliation procedures and prohibited strikes or lockouts during the conciliation process, similar in some respects to the BC legislation.<sup>26</sup>

A preliminary draft of the BC *Bill respecting the Right of Employees to organize and providing for Conciliation and Arbitration of Industrial Disputes* from early November 1937 contains a note that it was based mainly on industrial relations legislation from New Zealand, Queensland, and Nova Scotia.<sup>27</sup> The BC legislation appears to have drawn upon many models.

The BC *Industrial Conciliation and Arbitration Act*<sup>28</sup> recognized collective bargaining as lawful and created penalties for employers who refused to bargain with employees (but not trade unions). The Act also set up conciliation and arbitration machinery which could be set in motion by employees, the employer or the Minister of Labour. Once a dispute was in conciliation or arbitration, strikes and lockouts were prohibited until conciliation and arbitration processes were complete. Neither side, however, was compelled to accept recommendations from the conciliation or arbitration process. The Act failed to provide machinery to resolve jurisdictional disputes between unions or to resolve disputes relating to the identity of the parties to the collective bargaining relationship. In other words, the Act did not address disputes in which the employer refused to recognize the union or association representing the majority of workers. The *Industrial Conciliation and Arbitration Act*, as originally enacted, has been described as primarily “a device to prevent strikes and lockouts.”<sup>29</sup>

The *Industrial Conciliation and Arbitration Act* applied broadly to the private sector, except in the areas of domestic service and agriculture. Was there something about

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<sup>24</sup> A copy of this model draft legislation can be found among the documents in the folder devoted to 1937 labour legislation in the Pattullo Papers preserved in the British Columbia Archives, GR 1222, Box 142, File 142-7.

<sup>25</sup> S.M. 1937, c. 40. This Act received royal assent on April 17, 1937.

<sup>26</sup> The Manitoba legislation did not have mandatory interest arbitration. Neither did it expressly recognize the formation of trade unions as lawful nor prohibit interference in the formation of a trade union. *Ibid.*

<sup>27</sup> A full copy of this draft, date stamped November 3, 1937, can be found in the Pattullo Papers, *supra* note 24.

<sup>28</sup> *Supra*, note 3.

<sup>29</sup> Carrothers, *Collective Bargaining Law*, *supra* note 5 at 51.

agriculture or agricultural workers at the time that explains the exclusion?

### **British Columbia's Agricultural Workers in the 1930s**

Unlike much of the rest of Canada, BC's economy in the early twentieth century was not primarily agricultural. Instead, it was highly dependent on fishing, forestry and mining. Because of BC's mountainous geography, the vast majority of BC is unsuited to agriculture. High elevation, low rainfall, poor soil, or geographic isolation made agricultural production impossible or uneconomical in most of the province. Agriculture in BC was concentrated in pockets on Vancouver Island, the Lower Mainland, and the Okanagan Valley.<sup>30</sup> The greenhouses, fruits and berries that would in the future make up such an important component of BC's agricultural sector were not yet prominent. At the start of the 1930s, 12.8% of agricultural land was field crops, 1.3% orchards, 0.2% market gardens, 34.2% woodlands and 38% grasses or natural pasture.<sup>31</sup>

Primary agriculture employed a relatively small proportion of the provincial workforce.<sup>32</sup> In 1931, the primary agriculture sector accounted for 14% of the total BC workforce, including owner-farmers, some unpaid family members, foremen and paid labourers.<sup>33</sup> Paid labourers – the employees with an interest in collective bargaining with their employer owner-farmers – accounted for 4% of the total BC workforce at the time.<sup>34</sup> Wages for farm labourers in BC in the 1930s were above the Canadian average for agriculture but still behind the average wages for labourers in other sectors in BC. For example, in 1934, the average wages and board for a male agricultural labourer in the

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<sup>30</sup> See Jean Barman, *The West Beyond the West: A History of British Columbia*, 3rd ed. (Toronto: University of Toronto Press, 2007) at 256-8.

<sup>31</sup> Canada Dominion Bureau of Statistics, *Seventh Census of Canada, 1931* (Ottawa: J.O Patenaude, 1931) volume VII at xl.

<sup>32</sup> In the 1920s, one in 3 men were employed in agriculture across Canada, except in BC, where it was one in six: Barman, *supra* note 30 at 256-7.

<sup>33</sup> *Census of Canada, 1931*, *supra* note 31, volume VII at table 40, page 168-9. The total workforce for all gainfully occupied aged 10 and over was 262,515 men and 43,748 women. Of these, 42,209 men and 1,429 women were occupied in agriculture. 12,613 men and 195 women were counted as waged farm labourers. See also the comments in footnotes 34 and 38, below, regarding the under-counting of women working on farms in the 1931 Census.

<sup>34</sup> In 1931, occupation was treated by the Census as a fixed characteristic, rather than an activity that changes over time. As such, temporary, casual and part-time workers were more likely to be uncounted or listed as unemployed. As a result, labourers who worked for only part of the year on farms were not necessarily captured in census counts. Frank T. Denton and Sylvia Ostry, *Historical Estimates of the Canadian Labour Force* (Ottawa: Dominion Bureau of Statistics, 1967) at 3.

summer was \$43 per month.<sup>35</sup> A general labourer employed by the city of Vancouver was paid between \$60 and \$93.60 per month.<sup>36</sup> A construction labourer in Vancouver was paid between \$56 and \$88 per month.<sup>37</sup> Rates for general labourers in other cities in BC were within a similar range, if not slightly higher. The average 1934 agricultural worker's wages and board were equivalent to 46% to 77% of what general labourers in other sectors of the economy in BC were paid in wages.

In the 1930s, the BC agricultural workforce was ethnically mixed. In 1931, the male<sup>38</sup> agriculture workforce, including owner-farmers and hired labourers, was 56% British, 10% Chinese, 6% Scandinavian, 6% German and Austrian, 5% Indian, 5% Eastern European, 4% Japanese, 2% French, and 4% other ethnic origin. According to the 1931 Census, Chinese, Indian and Japanese men made up 14% of the total BC male workforce, but represented 18% of the male agricultural workforce. There was a slight concentration of Asian and South Asian worker in agriculture, but not as great a concentration as in forestry, fishing and trapping sectors in which 28% of the male workforce was of Chinese, Japanese or Indian ethnicity.<sup>39</sup>

The agricultural workforce of the 1930s was a relatively small and poorly paid segment of the workforce. Agricultural labourers were a diverse group of workers, but not more so than workers in other sectors of the workforce that were included in labour legislation. These characteristics do not provide definitive clues why agriculture was excluded from the *Industrial Conciliation and Arbitration Act*.

Labour Minister Pearson's primary stated concern in proposing new labour legislation was a need for more tools to deal with labour disputes. One may ask, then, whether there were any labour disputes in agriculture at the time. From 1928-1937, three out of the 115 strikes and lockouts in BC reported in the *Labour Gazette*<sup>40</sup> were in the agricultural

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<sup>35</sup> Canada, Department of Labour, *Wages and Hours of Labour in Canada, 1929, 1934, 1935*, Report No. 19, Supplement to *The Labour Gazette*, January, 1936 (Ottawa: J.O. Patenaude, 1936).

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> The 1931 Census of Canada did not count women who worked occasionally or for short time each day in farm, dairy livestock or poultry work as "farm labourers". See *Census of Canada, 1931*, *supra* note 31, volume VII at page xi. As such, the 1931 Census likely does not provide a precise representation of the productive agricultural work done by women at the time.

<sup>39</sup> *Census of Canada, 1931*, *ibid.*, volume VII at table 62, pages 954-5. Note that forestry workers were covered by the *Industrial Conciliation and Arbitration Act* and other employment-related legislation in BC.

<sup>40</sup> Canada Department of Labour, *The Labour Gazette* (Ottawa: J.O. Patenaude)1929-38.

sector.<sup>41</sup> Keeping in mind that agricultural workers only accounted for 4% of the workforce at the time, labour disputes in agriculture were few in number but not unknown. A brief consideration of the details of these three strikes shows how the agricultural sector at the time exemplified some of the concerns Minister Pearson had with communist influences, some employers' refusal to bargain collectively with employees, and disruption and instability for employers, employees and the general public.

In 1933, approximately 1,200 hop pickers in the Fraser Valley struck for two days.<sup>42</sup> At least some of the workers involved in this strike were affiliated with the Workers' Unity League, which was connected to the Communist Party of Canada. The workers demanded an increase in the piece-rate from 1.25 cents to 2 cents per pound, a weigh scale in the field, clean drinking water, fire protection, and no discrimination for having participated in the strike. The piece-rate was increased to 1.75 cents per pound and the employees succeeded in their other demands.

In the spring of 1934, a total of 93 hop field workers in Chilliwack and Sardis struck for increased wages, clean drinking water, improved living conditions and an end to the contract labour system.<sup>43</sup> Rain would have prevented work in six of seven strike days. The workers achieved their goals, including an increase in the hourly wage rate from 20 to 25 cents.

A third strike occurred on September 6, 1937.<sup>44</sup> Thirty-eight fruit pickers in Vernon struck for increased wages. The employer fired all 38 workers on the first day of the strike. The employer hired replacement workers and the strike ended.

These three instances of strike activity demonstrate the barriers workers faced when they organized without statutory support for union recognition and collective bargaining. Like other workers, agricultural workers were free to form associations and refuse to

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<sup>41</sup> Union activity and labour disputes appear to have been rare in agriculture not only in BC, but across Canada at the time. A notable exception was sugar beet growing in Alberta: see John Herd Thompson & Allen Seager, "Workers Growers and Monopolists: The 'Labour Problem' in the Alberta Beet Sugar Industry During the 1930s" (1978) 3 *Labour/Le Travail* 154.

<sup>42</sup> Canada Department of Labour, *The Labour Gazette*, vol.33 (Ottawa: J.O. Patenaude, 1933) at 984. For a discussion on the role of hired labour in the production of hops, see Paige Raibmon, "The Practice of Everyday Colonialism: Indigenous Women at Work in the Hop Fields and Tourist Industry of Puget Sound" (2006) 3:3 *Labor: Studies in Working-Class History of the Americas* 23.

<sup>43</sup> Canada Department of Labour, *The Labour Gazette*, vol.34 (Ottawa: J.O. Patenaude, 1934) at 502.

<sup>44</sup> Canada Department of Labour, *The Labour Gazette*, vol.37 (Ottawa: J.O. Patenaude, 1937) at 1075.

work in order to pressure the employer to accept their demands. As the Vernon fruit picker strike illustrates, employers were also free to fire striking workers and replace them with other workers. In two of the strikes, agricultural workers successfully persuaded the employer to negotiate with the workers. These strikes involved large numbers of workers (1,200 and 93) at time-sensitive moments of seeding and harvest. Without legislation prohibiting employers from firing workers for strike activity, collective action puts workers' jobs on the line and has the potential to create significant social instability. Where workers are easily replaceable, an employer's unregulated freedom to replace workers effectively ended workers' ability to have a collective say in their working conditions.<sup>45</sup>

Industrial disputes had occurred in BC's agricultural sector in the years and months leading up to the introduction of the *Industrial Conciliation and Arbitration Act*, and therefore, it is not enough to say that labour relations in agriculture were entirely different from labour relations in industrial sectors nor that instances of collective action and labour disputes did not occur in agriculture at the time. In order to look for an explanation of the exclusion of agricultural workers from that Act, I turn to the political record and legislative debates that surrounded the creation of the *Industrial Conciliation and Arbitration Act*.

### **Patterns of Exclusion in the Legislative Record**

In his November 1937 budget speech, Premier Pattullo said his government had legislated in its first term "to improve the lot of the working man" and had added "millions to the industrial payroll."<sup>46</sup> In the same budget speech, the Premier said that in its first term, the government had also tried to improve difficult agriculture conditions by legislating for orderly marketing boards.<sup>47</sup> In the Premier's speech and in the

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<sup>45</sup> As the Supreme Court of Canada noted in its 2001 analysis of the exclusion of agricultural workers from Ontario's labour relations regime, "without the necessary protection, the freedom to organize could amount 'to no more than the freedom to suffer serious adverse legal and economic consequences'." *Dunmore*, *supra* note 1 at para.22, *per* Bastarache J. for the majority. *Dunmore* challenged the exclusion of agricultural workers from Ontario's labour relations legislation on the basis that it offended *Charter*-protected freedom of association. Bastarache J. also stated: "history has shown, and Canada's legislatures have uniformly recognized, that a posture of government restraint in the area of labour relations will expose most workers not only to a range of unfair labour practices, but potentially to legal liability under common law inhibitions on combinations and restraints of trade." *Ibid.* at para.20.

<sup>46</sup> T.D. Pattullo, "Speech on the Budget Debate" (BC Archives MSS 3, Vol. 55, File 22, November 24, 1937).

<sup>47</sup> *Ibid.*

government's legislative agenda, labour and agriculture were treated as separate categories of governmental concern, and the waged labourer within agriculture was left out of both.

From 1933 to 1937, Premier Pattullo and the Liberal government had pursued a reformist agenda of "socialized capitalism" under the banner "Work and Wages," to respond to mass unemployment and the pressures of the 1930s Depression. The legislation of this first term established a pattern of excluding agricultural workers. The 1934 *Male Minimum Wage Act*<sup>48</sup> and *Female Minimum Wage Act*<sup>49</sup> created gender-, industry- and region-specific minimum wages. The minimum wage legislation stated it applied to all employees in any industry, business, trade, or occupation, but exempted male "farm-labourers and domestic servants" and female "farm-labourers, fruit-pickers and domestic servants".<sup>50</sup> The 1935 *Act respecting the Hours of Work in Industrial Undertakings*<sup>51</sup> limited work to 8 hours per day and 48 hours per week in industry, business and trade. It also did not apply to agriculture. Finally, although never implemented,<sup>52</sup> the 1936 *Health Insurance Act*<sup>53</sup> would have provided health insurance coverage to most BC resident employees who earned less than \$1800 per annum. Again, agricultural labourers were excluded.<sup>54</sup>

Premier Pattullo used his November 1937 budget speech to tell the Legislative Assembly about the government's agenda in its second term. He said the government would further "improve conditions of labour, to make for better understanding between

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<sup>48</sup> S.B.C. 1934, c.47.

<sup>49</sup> S.B.C. 1934, c.48.

<sup>50</sup> Note that the exemption of agricultural workers from the minimum wage and hours of work legislation was not achieved through the same legislative wording as the *Industrial Conciliation and Arbitration Act*, which excluded agricultural workers from the definition of "employee".

<sup>51</sup> S.B.C. 1935, c.30.

<sup>52</sup> The *Health Insurance Act* was passed in the first term of Pattullo's government. It was supported by the CCF and organized labour, but opposed by boards of trade, chambers of commerce and the BC Medical Association. In order to avoid alienating business, professionals, and workers in the lead up to elections in June of 1937, the government suspended implementation of the Act and held a referendum on the Act at the same time as the election. Although almost 59% favoured implementation of the Act, the government continued to defer its implementation. The Act never came into force. See Robin, *supra* note 6 at 20, 29, 30, 34, 38 and Robin Fisher, *Duff Pattullo of British Columbia* (Toronto: University of Toronto Press, 1991) at 308.

<sup>53</sup> S.B.C. 1936, c.23.

<sup>54</sup> *Ibid.*, s.4. The Act also would have exempted certain Christian Scientists and members pre-existing industrial medical service plans. The Act also gave Cabinet the discretion to exempt domestic servants, casual workers, part-time workers, and other industries or establishments in which application of the Act would be "unnecessary or inexpedient". *Ibid.*

employer and employees, provision for more effective and expeditious means of adjustment of difference between employer and employees so that there need be no resort to strike.”<sup>55</sup> He was referring to the *Industrial Conciliation and Arbitration Act*, which would continue the pattern of excluding agricultural workers from employment-related legislation.

This pattern of exclusion was not unique to BC.<sup>56</sup> Not all of the labour relations legislative models from other jurisdictions excluded agricultural workers, but many did. The New Zealand legislation did not exclude agricultural workers on the face of the statute, but the same effect was achieved through the New Zealand labour arbitration court’s discretionary policy decision not to apply the legislation to agriculture.<sup>57</sup> The American *National Labor Relations Act* or the Wagner Act excluded from the definition of employee “any individual employed as an agricultural laborer, or in the domestic service [...]”.<sup>58</sup> Canadian federal legislation prior to 1937 was not generally applicable and instead specified the sectors of the economy that came under its authority, including public utilities and coal mines.<sup>59</sup> It did not apply to agriculture, nor to many other industries. Two out of three of the other provincial statutes enacted in 1937 included agricultural workers. The Nova Scotia *Trade Union Act*<sup>60</sup> and the Alberta *Freedom of Trade Union Association Act*,<sup>61</sup> both modelled on the Trades and Labour Congress of Canada model legislation, included agricultural workers.<sup>62</sup> The Manitoba *Strikes and Lockouts Prevention Act* excluded agricultural workers by defining employee as “any person employed by an employer to do any work for hire or reward in an employment to

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<sup>55</sup> T.D. Pattullo, “Speech on the Budget Debate”, *supra* note 46 at 15.

<sup>56</sup> See also Eric Tucker, “Farm Worker Exceptionalism: Past, Present, and the post-Fraser Future” in Fay Faraday, Judy Fudge and Eric Tucker (eds.), *Constitutional Labour Rights in Canada* (Toronto: Irwin Law, 2012) 30.

<sup>57</sup> Woods, *Industrial Conciliation and Arbitration in New Zealand*, *supra* note 18 at 13-14, 74-76.

<sup>58</sup> See Watson, *supra* note 21 at 1; see also Michael H. LeRoy and Wallace Hendricks, “Should ‘Agricultural Laborers’ Continue to be Excluded from the National Labor Relations Act?” (1999) 48 *Emory Law Journal* 489 at 505, National Labor Relations Board, *Legislative History of the National Labor Relations Act, 1935*, vol 1, *supra* note 21 at 1085-86 and Austin P. Morris, “Agricultural Labor and National Labor Legislation” (1966) 54 *California Law Review* 1939 at 1952.

<sup>59</sup> See for example, *The Industrial Disputes Investigation Act, 1907*, *supra* note 19.

<sup>60</sup> *Supra* note 22. The Act defined employees as excluding officers, officials or persons employed in a confidential capacity, and the Act did not apply to mines covered by the *Coal Mines Regulation Act*.

<sup>61</sup> *Supra* note 23. This Act did not exclude any category of employee.

<sup>62</sup> A copy of the Trades and Labour Congress model draft legislation can be found among the documents in the folder devoted to 1937 labour legislation in the Pattullo Papers preserved in the British Columbia Archives, *supra* note 24.

which this Act applies, but does not include employees in domestic service or in agriculture.”<sup>63</sup> The BC *Industrial Conciliation and Arbitration Act* defined employees, and thus excluded agricultural workers, using precisely the same words found in the Manitoba Act.<sup>64</sup>

The *Industrial Conciliation and Arbitration Act* was passed and proclaimed into force on December 10, 1937, the final day of the 1937 legislative session.<sup>65</sup> Despite being before the Legislative Assembly for only four days, the bill was amended a number of times.<sup>66</sup> These amendments included revisions penned in during a late night sitting on December 9, 1937, lasting until 1:25 a.m.<sup>67</sup> In the short time for debate, the exclusion of agricultural workers (and domestic workers) was raised. Co-operative Commonwealth Federation leader Harold E. Winch proposed amending the legislation to include domestic and agricultural workers.<sup>68</sup> Labour Minister Pearson agreed that conditions for both domestic and agricultural workers were “unsatisfactory,” but said that if every ranch was organized, there would be turmoil.<sup>69</sup> Members of the government also claimed that if agricultural workers could organize, BC farmers would no longer be able to compete with producers in other Pacific countries, especially Russia and Japan where labour was cheap.<sup>70</sup> The *Vancouver Daily Province* reported on legislative debate on exclusion of agricultural workers from the legislation as follows:

Hon. G.S. Pearson, Minister of labor, was also unable to accept an amendment

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<sup>63</sup> *Supra* note 25.

<sup>64</sup> *Industrial Conciliation and Arbitration Act*, *supra* note 3, s.2.

<sup>65</sup> British Columbia, Legislative Assembly, *Journals of the Legislative Assembly*, 19th Leg., 1st Sess., vol. 67 (7 December 1937 and 10 December 1937) at 134, 164.

<sup>66</sup> The Legislative Assembly amended how collective bargaining representatives were to be chosen, restricted arbitrators under the Act to British subjects, shortened the time arbitrators had to prepare a report to 14 days, and grandfathered in existing collective agreements: “Compulsory Arbitration Bill has Passed Through the House” *The Vancouver Daily Province* (19 December 1937).

<sup>67</sup> *Journals of the Legislative Assembly*, vol. 67, *supra* note 65 at 160. Among these last-minute amendments was the expansion of the Act from only workplaces with 10 or more employees to all workplaces large and small: “Small Firms Now Affected” *The Vancouver Daily Province* (10 December 1937).

<sup>68</sup> “New Labor Bill Made Law Today” *Times Victoria Daily* (10 December 1937). Harold Winch, who was unemployed and on relief before he was first elected in 1933, also proposed eliminating prohibitions on strike activity during the conciliation and arbitration process. The CCF also opposed the exclusion of domestic workers. The same newspaper article reported: “Mrs. D.G. Steeves, CCF, North Vancouver, thought if domestics were included in the Act it would be an aid to their organization. If they were not included she felt the psychological effect on them would be that the government was not interested in them. They needed organization more than anyone else, she said.” *Ibid.*

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*

proposed by Mr. Winch extending the scope of the act to domestic servants and agricultural laborers. Although expressing sympathy with the intentions of the amendment, the minister of labor declared conditions in the agricultural industry and among domestic servants were in such an unorganized and unsettled state he would prefer to see one year's working of the act before branching beyond its present scope.<sup>71</sup>

As it proved, both domestic servants and agricultural workers had much longer than one year to wait before they were included in labour relations legislation.

The *Industrial Conciliation and Arbitration Act* provoked public reaction, particularly from unions. In his September 1937 memorandum, Labour Minister Pearson anticipated that both employers and trade unions would oppose parts of the legislation. He wrote:

On the outside opposition will be encountered from organized labour because they are opposed to any Government measure which takes the power to deal with labour disputes out of their hands, and we may encounter some opposition from a certain type of employer who has not yet realized that the day must come when he must recognize the right of his employees to discuss as a body with him their respective rights. This Bill, while granting much wider privilege to employees than they have at the present time, places responsibilities upon them which make it impossible for them to disrupt industry without there having been a thorough enquiry into the merits of the dispute.<sup>72</sup>

As Minister Pearson predicted, labour generally opposed the *Industrial Conciliation and Arbitration Act* when the details of the legislation became known. Throughout 1937, labour organizations had demonstrated and met with members of the CCF to urge the government to pass trade union legislation drafted and endorsed by the Trades and Labor Congress of Canada.<sup>73</sup> On November 2, 1937, the BC Executive of the Trades and Labour Congress of Canada met with Premier Pattullo and members of government to ask for legislation recognizing the right of trade unions to organize and prohibiting

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<sup>71</sup> "Compulsory Arbitration Bill has Passed Through the House" *supra* note 66. Prior to 1970, debates and committee proceedings were not recorded or reported in *Hansard* in BC. Further, in the 1930s, not all bills were printed or bound in the official records. As such, newspaper reports for the time are a significant source of information regarding the content of debates and amendments made by the BC Legislative Assembly.

<sup>72</sup> Memo Pearson to Pattullo, *supra* note 6.

<sup>73</sup> "Labor Unions Lay Proposals Before B.C. Cabinet Here" *The Daily Colonist* (3 November 1937); "Labor Plea to Mr. Pattullo" *The Vancouver Sun* (27 November 1937); "BC Labor to Meet Over Trades Code" *The Vancouver Daily Province* (29 October 1937); Canada Department of Labour, *The Labour Gazette*, vol.37 (Ottawa: J.O. Patenaude, 1937) at 171.

interference with trade union activities through intimidation.<sup>74</sup> After a summary of the *Industrial Conciliation and Arbitration Act* was published in the paper, over 20 local unions wrote to the Premier to protest the legislation, particularly the inclusion of compulsory arbitration.<sup>75</sup>

Business and employer opposition to the *Industrial Conciliation and Arbitration Act* was not so apparent. In a letter addressed to the Minister of Labour dated December 10, 1937, Wendell B. Farris, a lawyer who represented employers, wrote: “the legislation should be considered satisfactory from the standpoint of the employer. [...] my advice to my clients is that the act as now drawn is in their best interests.”<sup>76</sup>

None of the letters preserved in the Premier’s papers from either unions or employers comment on the exclusion of agricultural workers.

### **Agricultural Worker Exclusion from 1937-1975**

Since 1937, BC’s labour relations statute has been the subject of much legislative activity. The original *Industrial Conciliation and Arbitration Act* required employers to bargain with employees, but not with trade unions. The Act was amended in 1938 and 1943 to recognize trade unions as bargaining agents and to strengthen the status of trade unions under the Act.<sup>77</sup>

The Liberal-Conservative Coalition government, led by Premier John Hart from 1941-1947 and by Premier Byron Johnson from 1947 to 1952,<sup>78</sup> continued the exclusion of agricultural workers from labour relations legislation. In 1944, the operation of the *Industrial Conciliation and Arbitration Act* was suspended (except for matters pending), to make way for the provincial application of the federal *Wartime Labour Relations*

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<sup>74</sup> Memorandum on Conciliation and Arbitration Act presented to the BC Cabinet on June 24, 1938, presented by the British Columbia Executive of the Trades and Labour Congress of Canada (E.H. Morrison, Chairman, M. Stewart, H. Pearson, B. Showler, P.R. Bengough) at page 1. British Columbia Archives, Pattullo Papers, *supra* note 24.

<sup>75</sup> British Columbia Archives, Pattullo Papers, *supra* note 24.

<sup>76</sup> Letter to George S. Pearson from Wendell B. Farris, dated December 10, 1937. British Columbia Archives, Pattullo Papers, *supra* note 24.

<sup>77</sup> See *Industrial Conciliation and Arbitration Act Amendment Act, 1938*, S.B.C. 1938, c.23. The change involved the question of whether employees could bargain through officers of a trade union, although limited unions to those established as of December 1938. See also, *Industrial Conciliation and Arbitration Act Amendment Act, 1943*, S.B.C. 1943, c.28 which further strengthened the status of trade unions under the Act.

<sup>78</sup> See Fisher & Mitchell, *supra* note 7.

*Regulations*, P.C. 1003.<sup>79</sup> P.C. 1003 maintained the exclusion of agricultural workers from the labour relations legislation, by excluding a person employed in agriculture from the definition of employee.<sup>80</sup> In BC, the *Wartime Labour Relations Act* and the *Industrial Conciliation and Arbitration Act (1937)* were both replaced by the *Industrial Conciliation and Arbitration Act, 1947*<sup>81</sup> on April 3, 1947. The definition of employee excluded a person employed in agriculture and horticulture.<sup>82</sup> This exclusion was unchanged when that Act was amended a year later.<sup>83</sup>

Premier W.A.C. Bennett and his Social Credit government, in power from 1952 to 1972, positioned themselves as in favour of free enterprise, in contrast to the socialist CCF and later New Democratic Party (“NDP”).<sup>84</sup> In 1954, the *Labour Relations Act* replaced the *ICAA 1947*. The exclusion of workers in agriculture and horticulture was maintained.<sup>85</sup> Subsequent amendments<sup>86</sup> and additions to the BC labour relations legislative regime<sup>87</sup> in the 1950s and 1960s did not alter the situation for agricultural workers.

In the 1972 general election campaign, NDP candidates Colin Gabelmann (Vancouver-Seymour) and Harold Steves (Richmond) promised that, if elected, agricultural workers would be included in labour relations legislation. Gabelmann was former BC Federation of Labour director of legislation and political education. Steves was viewed as a member of the more radical Waffle wing of the NDP.

On August 30, 1972, Premier David Barrett and the New Democratic Party were

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<sup>79</sup> *Wartime Labour Relations Regulations Act*, S.B.C. 1944, c.18.

<sup>80</sup> The *Wartime Labour Relations Regulations* defined employee as “a person employed by an employer to do skilled or unskilled manual, clerical or technical work; but does not include (i) a person employed in a confidential capacity or having authority to employ or discharge employees; or (ii) a person employed in domestic service, agriculture, horticulture, hunting or trapping;” *Wartime Labour Relations Regulations*, P.C. 1003, attached as a schedule to *Wartime Labour Relations Regulations Act*, S.B.C. 1944, c.18.

<sup>81</sup> *Industrial Conciliation and Arbitration Act, 1947*, S.B.C. 1947, c.44.

<sup>82</sup> “Employee” was defined in the 1947 Act as follows: “a person employed by an employer to do skilled or unskilled manual, clerical, or technical work, but does not include: -- (a.) a person employed in a confidential capacity or a person who has authority to employ or discharge employees: (b.) A person who participates in collective bargaining on behalf of an employer, or who participates in the consideration of an employer’s labour policy: (c.) A person serving an indenture of apprenticeship under the “Apprenticeship Act”: (d.) A person employed in domestic service, agriculture, horticulture, hunting, or trapping.” *Ibid.*

<sup>83</sup> *Industrial Conciliation and Arbitration Act, 1947, Amendment Act, 1948*, S.B.C. 1948, c.31.

<sup>84</sup> Fisher & Mitchell, *supra* note 7 at 266.

<sup>85</sup> S.B.C 1954, c.17, s.2.

<sup>86</sup> *Labour Relations Act Amendment Act, 1961*, S.B.C. 1961, c.31.

<sup>87</sup> *Trade-unions Act*, S.B.C. 1959, c.90; *Mediation Commission Act*, S.B.C. 1968, c.26.

elected into government and set to work on an extensive agenda of legislative change. An overhaul of BC's industrial relations climate and legislation was part of the government's agenda.<sup>88</sup> The *Labour Code of British Columbia*, enacted 1973, was a substantial revision of the province's labour legislation.<sup>89</sup> The 1973 *Labour Code of British Columbia*, however, still contained a definition of "employee" that excluded agricultural workers.<sup>90</sup>

The government faced ridicule from the Social Credit opposition, who said that the NDP was going back on its election promise to include agricultural workers in reformed labour legislation.<sup>91</sup> In legislative debates, NDP members Gabelmann and Steves were joined by Rosemary Brown (NDP, Vancouver-Burrard) in speaking out against their own government's continued exclusion of agricultural and domestic workers.<sup>92</sup> They argued all workers ought to be treated the same and that exploitative conditions for agricultural workers should not be used to subsidize farm employers or consumers. Harold Steves expressed particular concern for class-based discrimination, for the exploitation of Chinese and other immigrant labourers, and for agricultural working conditions which he described as "near slave labour".<sup>93</sup> Steves said: "The long tradition in agriculture has been to attract immigrants to the province and the country to work for low wages. [...] they come over here and find that they have to work for low wages until they find their way in the community and get a job elsewhere. And so then, more immigrants come in and work for these same low wages."<sup>94</sup> Steves analyzed the continuation of the exclusion of agricultural workers as creating and maintaining the marginalization of immigrant and racialized groups in the province.

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<sup>88</sup> Paul Weiler, *Reconcilable Differences* (Toronto: Carswell, 1980) at 3.

<sup>89</sup> For a description of the *Labour Relations Code* as enacted in 1973, see H.W. Arthurs, "The Dullest Bill: Reflections on the Labour Code of British Columbia" (1974) 9 *University of British Columbia Law Review* 280.

<sup>90</sup> S.B.C. 1973, c.122, s.1. "Employee" was defined as not including "a person who, in the opinion of the board, [...] is employed in domestic service, agriculture, hunting or trapping".

<sup>91</sup> British Columbia, Legislative Assembly, *Official Report of the Debates (Hansard)*, 30th Parl., 3rd Sess. (17 October 1973) at 694-5 (Chabot).

<sup>92</sup> British Columbia, Legislative Assembly, *Official Report of the Debates (Hansard)*, 30th Parl., 3rd Sess. (30 September 1973) at 126 (Brown); British Columbia, Legislative Assembly, *Official Report of the Debates (Hansard)*, 30th Parl., 3rd Sess. (4 October 1973) at 459 (Gabelmann); British Columbia, Legislative Assembly, *Official Report of the Debates (Hansard)*, 30th Parl., 3rd Sess. (9 October 1973) at 495 (Steves) and at 512 (Skelly); British Columbia, Legislative Assembly, *Official Report of the Debates (Hansard)*, 30th Parl., 3rd Sess. (17 October 1973) at 705 (Gabelmann) and at 707 (Steves).

<sup>93</sup> British Columbia, Legislative Assembly, *Official Report of the Debates (Hansard)*, 30th Parl., 3rd Sess. (17 October 1973) at 707 (Steves).

<sup>94</sup> *Ibid.*

Labour Minister William King attempted to explain the continued exclusion in the 1973 labour legislation. He pointed to the status quo: agricultural and domestic workers had never been included in BC's labour legislation.<sup>95</sup> Minister King said special problems arose when labour relations law included agricultural and domestic workers because of family ties between the agricultural employer and worker.<sup>96</sup> He suggested further research was needed. Minister King said the government's legislative agenda at the time included a number of measures to help the agriculture sector. Once these measures were in place, he said, agricultural employers "might be better able to afford competitive prices for labour costs" and "many of the obstacles to providing fair and adequate wages in the agricultural sector will be eliminated."<sup>97</sup> Like the Liberal government in the 1930s, the NDP government in 1973 perceived that both labour and agriculture needed legislative assistance. Again, labour and agriculture were treated as separate categories of legislative concern and the waged labourer within agriculture was left out.<sup>98</sup> Labour Minister King's comments also reflect a view that the low wages of the working poor in agriculture are made necessary and perhaps even justified by the structural economics of agriculture.

When the section of *Labour Code* which contained the exclusion of agricultural employees came to a vote, both Colin Gabelmann and Harold Steves voted with the opposition and against their own government. They said that they could not support labour legislation that excluded agricultural workers and domestic employees.<sup>99</sup>

The following year, Minister King followed up on his suggestion that more research into the inclusion of agricultural workers was needed. On June 17, 1974, he made a motion to have the Select Standing Committee on Labour and Justice examine the exclusion of agricultural and domestic workers from the *Labour Code* and other employment-related legislation to determine if reform was needed.<sup>100</sup> The Committee

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<sup>95</sup> British Columbia, Legislative Assembly, *Official Report of the Debates (Hansard)*, 30th Parl., 3rd Sess. (9 October 1973) at 516 (King).

<sup>96</sup> *Ibid.*

<sup>97</sup> British Columbia, Legislative Assembly, *Official Report of the Debates (Hansard)*, 30th Parl., 3rd Sess. (17 October 1973) at 708 (King).

<sup>98</sup> See Marjorie Nichols, "Farm, labour bills pledged: Throne speech launches 'full working session'" *The Vancouver Sun* (13 September 1973), the first line of which reads: "Legislative action was promised by the NDP government today to deal with "urgent problems" facing agriculture and labor."

<sup>99</sup> "2 NDP backbenchers vote against gov't on bill" *The Vancouver Sun* (19 October 1973).

<sup>100</sup> British Columbia, Legislative Assembly, *Journals of the Legislative Assembly*, 30th Leg., 4th Sess., vol. 61 (17 June 1974) at 257-58.

toured the province in October of 1974 and received submissions from the agricultural industry, trade unions, political organizations, agricultural workers and domestic workers.

Colin Gabelmann was chairperson of the Select Standing Committee on Labour and Justice when it presented its report on April 10, 1975.<sup>101</sup> He summarized the main argument in favour of the inclusion agricultural workers in the *Labour Code* in terms of universal coverage and formal equality. He reasoned that it would be just and fair to apply the same legislative regime to all workers. During its tour of the province, the Committee heard arguments against the inclusion of agricultural workers in the *Code*. Opponents told the Committee that higher wages as a result of worker unionization would force agricultural producers out of business and cause more unemployment, that workers were already paid what they were worth, and that piece-rates and child labour were necessary in the agricultural sector. The Committee's response to these arguments was, in part, as follows:

The over-riding philosophy of the argument [against inclusion] is that relatively cheap food prices for the consuming public at large are socially more important than the welfare of those producing it. In addition, it also implies that there may be some justification for obliging a class of workers in our society to subsidize producers who may be inefficient or whose operations may not be otherwise economically viable. Thus, those people engaged in food production must continue to be content with poor wages and working conditions. The Committee considers this position unacceptable. Exploitation of a pool of low-skilled workers should not be required at a time when numerous modern technologies and management methods are available to accomplish the tasks of production and distribution.<sup>102</sup>

In relation to the *Labour Code* specifically, the Committee reported:

While most farmers do not favour trade unions, there are no valid reasons why agricultural or domestic workers should not be covered by the Code. Opposition voiced to this Act was largely on the basis of "personal" employee/employer relationships traditionally prevalent in agriculture, and a "gut feeling" that unions

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<sup>101</sup> British Columbia, Legislative Assembly, *Journals of the Legislative Assembly*, 30th Leg., 5th Sess., vol. 62 (10 April 1975) at 76-82.

<sup>102</sup> *Ibid.* at 77-78. Several NDP and Liberal members spoke in the Legislative Assembly in support of the change: see for example, British Columbia, Legislative Assembly, *Official Report of the Debates (Hansard)*, 30th Parl., 5th Sess. (25 June 1975) at 3977 (Anderson), at 3980 (Gabelmann), at 3981 (Gibson), at 3981 (Steves), at 3986 (Brown).

would destroy these relationships.<sup>103</sup>

The Committee recommended that twelve employment-related laws<sup>104</sup> be amended to include agriculture and domestic workers.

On June 26, 1975, the Legislative Assembly repealed the agricultural exclusion from the *Labour Code*.<sup>105</sup> Since then, agricultural workers in BC have had access to the general provincial labour relations legislation.

The inclusion of agricultural workers in the *Labour Code* was apparently met with little opposition from agricultural employers. The manager of the BC Federation of Agriculture, Richard Stocks, said: “I don’t think this is going to be a serious problem for farm owners. We’re not opposed to farm labourers coming under the labor code. We feel they should be paid the same rates as other workers.”<sup>106</sup> Similarly, the Fraser Valley Milk Producers Association president and the BC Fruit Growers’ president were also reported as not opposing the inclusion of agricultural workers in the *Labour Code*.<sup>107</sup>

No changes were made to the other employment standards legislation considered by the Select Standing Committee on Labour and Justice.<sup>108</sup> As a result, BC agricultural workers continued to be excluded from minimum wage, statutory holiday, hours of work, workplace health and safety and other employment-related legislation. Inclusion in collective bargaining legislation without extending the basic minimum employment standards protection had the effect of maintaining the status quo for most agricultural employers and workers. The North American model of labour relations legislation preserves non-unionized workplaces as the norm. Unless agricultural workers take

<sup>103</sup> *Journals of the Legislative Assembly*, vol. 62, *supra* note 69 at 79. This is the entire portion of the report dealing with the *Labour Code*.

<sup>104</sup> The twelve acts were the *Annual and General Holidays Act*, R.S.B.C. 1960, c.11, *Control of Employment of Children Act*, R.S.B.C. 1960, c.75, *Hours of Work Act*, R.S.B.C. 1960, c.182, *Labour Code*, S.B.C. 1973, c.122, *Maternity Protection Act*, S.B.C. 1966, c.25, *Minimum Wage Act*, R.S.B.C. 1960, c.230, *Payment of Wages Act*, S.B.C. 1962, c.45, *Truck Act*, R.S.B.C. 1960, c.388, *Employment Agencies Act*, R.S.B.C. 1960, c.127, *Workers’ Compensation Act*, S.B.C. 1968, c. 59, and *Factories Act*, 1966, S.B.C. 1966, c.14.

<sup>105</sup> *Labour Code of British Columbia Amendment Act, 1975*, *supra* note 4. The exclusion of domestic workers and certain professionals was also repealed. At the same time, several changes were made to the remedial powers available to the Labour Relations Board.

<sup>106</sup> Rod Mickleburgh, “Labor code changes hit over new raiding rules” *The Vancouver Sun* (17 May 1975).

<sup>107</sup> *Ibid.* The *Sun* reported Milk Producers Association president Gordon Park as saying “You can’t be opposed to that in this day and age. I suppose everyone should have the opportunity to organize.” BC Fruit Growers’ Association president Charles Bernhardt of Summerland said trade union organizing was “something that is happening everywhere and if it helps to provide us with a continuous source of supply of labor, then it’s a step forward.”

<sup>108</sup> *Re South Peace Farms*, [1977] B.C.L.R.B.D. No. 11 (QL).

positive steps and meet the many administrative requirements set up by the *Labour Code*, the non-unionized status quo, in which the employer has unfettered private authority to make decisions governing the workplace, is preserved.

### **British Columbia's Agricultural Workers in the 1970s**

Who were BC's agricultural workers when they were included in the *Labour Code* in 1975? The agricultural workforce was an even smaller proportion of the overall BC workforce than it was in the 1930s. In 1931, the agricultural sector employed 14% of the overall workforce, while in 1976, just 2.2% of workers in BC were employed in agriculture,<sup>109</sup> a figure which included owner-operators and managers. Paid agricultural labourers accounted for only 0.7% of employment in the province.<sup>110</sup> The agricultural sector comprised a very small proportion of the overall provincial workforce by the 1970s, but hired agricultural workers represented a much greater proportion of the primary agriculture workforce. In contrast to the 1950s, when paid workers represented approximately 24% of the primary agriculture workforce in BC, by 1974 paid employees made up 43% of workers in agriculture.<sup>111</sup> Unpaid family workers still made up approximately 22% of the agriculture workforce in 1974.<sup>112</sup> By 1977, this had dropped to 18%.<sup>113</sup> Paid agricultural labour (as opposed to owners and unpaid family members) was becoming a relatively larger and more important component of the agricultural workforce.

Not all agriculture operations in BC hired employees. In 1976, 45% of farms in BC, approximately 5,912 farms, reported hiring workers.<sup>114</sup> The BC Legislative Assembly Select Standing Committee on Agriculture found that BC relied more on hired agricultural workers than any other province in Canada in the 1970s, and had the greatest proportion of seasonal agricultural workers in Canada.<sup>115</sup> Only 12% of all BC farms (or

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<sup>109</sup> British Columbia Legislative Assembly Select Standing Committee on Agriculture, *The Impact of Labour on the British Columbia Food Industry: Phase III Research Report* (Richmond, B.C.: Legislative Assembly, Select Standing Committee on Agriculture, 1979) at 26. This includes paid workers, farm owners, and unpaid family members working on farms. Most figures in this report are taken from Statistics Canada.

<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid.* at 22.

<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid.* at 23.

<sup>114</sup> *Ibid.* at 27.

<sup>115</sup> *Ibid.* at 28.

approximately 1,582 farms) hired workers on a year-round basis.<sup>116</sup>

The ethnicity of the agricultural workforce was somewhat mixed and matched fairly closely the ethnic mix of BC's workforce overall at the time, as can be seen from the table below.

**Table 2. 2 Primary Ethnicity of Workers in BC, 1971**

	All Occupations		Agricultural labourers		Farmers (owners)	
	Men	Women	Men	Women	Men	Women
British	57 %	60 %	49 %	40 %	44 %	52 %
French	5 %	4 %	3 %	3 %	3 %	3 %
German	10 %	9 %	11 %	18 %	18 %	16 %
Italian	3 %	2 %	3 %	1 %	1 %	0 %
Jewish	0.6 %	0.7 %	0.2 %	0 %	.07 %	0 %
Netherlands	3 %	3 %	7 %	9 %	13 %	4 %
Polish	1 %	2 %	1 %	2 %	1 %	3 %
Scandinavian	5 %	5 %	5 %	5 %	7 %	5 %
Ukrainian	3 %	3 %	2 %	3 %	2 %	3 %
Other European	6 %	5 %	7 %	8 %	6 %	5 %
Asian & South Asian						
Asian	4 %	4 %	6 %	7 %	4 %	5 %
Aboriginal	1 %	1 %	3 %	2 %	0.8 %	2 %

*Compiled from Statistics Canada, 1971 Census of Canada, Occupations, Cat. 94-733, Vol. 3, part 3, January 1975, Table 5: Labour Force, 15 years and over, by Occupation Minor Groups and Sex, showing Birthplace, Period of Immigration and Ethnic group for regions, 1971. Some totals may not add due to rounding.*

As is shown in Table 2.2, British men and women were slightly under-represented in the agriculture sector generally. German women were over-represented as agricultural labourers and owners, and German men over-represented in the category of farmer. Dutch workers made up a greater proportion of agricultural workers compared with the proportion of Dutch workers in all occupations. Aboriginal, Asian and South Asian workers were slightly over-represented in the agricultural sector.

Similar to the 1930s, agricultural workers were still paid less than workers in other sectors. BC's agricultural workers earned an average of \$4.20 per hour in 1977, when the average manufacturing wage was \$8.27.<sup>117</sup>

<sup>116</sup> *Ibid.* at 27.

<sup>117</sup> *Ibid.* at 26.

Unlike Ontario, which had begun hiring migrant labourers from the Caribbean and Mexico in the 1970s, BC's agricultural labour needs were met from within Canada. The supply of agricultural labour was not, however, left open to market forces without governmental intervention. The Canada Farm Labour Pool was a federal program established to assist with labour supply problems, by assisting with recruitment and transporting workers from other regions of Canada. The Canada Farm Labour Pool had BC offices in Abbotsford, Armstrong, Duncan, Victoria, Penticton, and Kelowna.<sup>118</sup> BC was also dependent on recent immigrants to Canada from other countries to fill lower paying and seasonal work. Farm labour contractor arrangements were also common in the Lower Mainland region.<sup>119</sup>

### **Organizing Agricultural Workers under the *Labour Code***

After the *Labour Code* was changed to include agricultural workers, the first application for certification<sup>120</sup> of a unit of agricultural workers occurred on December 3, 1976.<sup>121</sup> The employer objected to the certification application, arguing in the Labour Relations Board that collective bargaining was inherently incompatible with agricultural production. In the resulting written decision, *Re South Peace Farms*,<sup>122</sup> a panel of the Labour Relations Board headed by vice-chairperson John Baigent rejected each of these arguments. While vice-chairperson Baigent acknowledged that the time-sensitive demand for labour at harvest makes an agricultural operation particularly vulnerable to strike activity, he also explained that canneries, food processing plants and packing sheds all experience similar dynamics and all have long histories of collective bargaining without frequent work stoppages or food spoilage.<sup>123</sup> The difficulty agricultural employers have in increasing the sale price for products is not unique to the agricultural sector, but is experienced by many primary resource employers who face product prices set by the

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<sup>118</sup> *Ibid.* at 34.

<sup>119</sup> *Ibid.* at 35-37. Farm labour contractor arrangements are discussed at greater length in the next chapter.

<sup>120</sup> Certification refers to the process in which the Labour Board assesses whether the union represents a majority of employees in the bargaining unit, and if so, issues a certification order. Once a certification order is issued, the employer is required to bargain with the union.

<sup>121</sup> *Re South Peace Farms*, *supra* note 108. The Oil, Chemical and Atomic Workers International Union, Local No. 9-686, applied to be certified as the bargaining representative of an all-employee unit comprised of 16 employees of South Peace Farms. South Peace Farms operated a 38,000 acre mixed farm, including 1,000 head of cattle and grain and fescue operations, with approximately 10 permanent employees and a further 8 seasonal employees.

<sup>122</sup> *Ibid.*

<sup>123</sup> *Ibid.*

world market. Moreover, even in the 1970s, the small family farm was of declining importance in primary agricultural production in BC. The employer involved in the particular certification application was a sophisticated agribusiness operation. Vice-chairperson Baigent also commented that chronic agricultural labour shortages perhaps ought not to be seen as an argument against collective bargaining in agriculture, but instead, an argument for better working conditions and inclusion of agricultural workers in minimum employment standards protections.<sup>124</sup> The Labour Board rejected the employer's arguments against collective bargaining in the agricultural industry,<sup>125</sup> and issued a certification order. And thus, the modern era of unionization of agricultural workers under BC's labour legislation began.

### **Conclusion**

A combination of factors contributed to the inclusion of agricultural workers in labour relations legislation in 1975. The NDP government of the time had a very active legislative agenda and was intent on changing and experimenting with the labour relations regime in the province. At least two members of the NDP caucus had a strong commitment to the inclusion of agricultural workers in labour relations and employment-standards legislation, so much so that they made individual campaign promises and voted against their own government when the 1973 *Labour Code* maintained the exclusion. Although the Select Standing Committee on Labour and Justice report suggested many farmers did not favour unionization of their workers, there does not appear to have been a strong agricultural employer lobby against inclusion at the time. Indeed, presidents of several farm-owner associations publicly supported the change. Agriculture also accounted for an even smaller proportion of the workforce and economy of BC compared with the 1930s.

The inclusion of agricultural workers fit into a trend across Canadian provinces in the 1960s and 1970s. Quebec, New Brunswick and Prince Edward Island had all included agricultural workers in labour relations legislation, and in 1975, a minority of provinces

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<sup>124</sup> *Ibid.*

<sup>125</sup> The employer also argued that agricultural labour relations fell exclusively in federal jurisdiction, that the proposed unit was not appropriate, and that the specific union was not suited to represent agricultural workers.

excluded agricultural workers from labour relations legislation.<sup>126</sup> As NDP member of the Legislative Assembly Harold Steves noted, British Columbians generally supported Cesar Chavez and the United Farm Workers organizing grape pickers in California, making it more difficult to argue against organizing rights for agricultural workers in BC.<sup>127</sup> The time was ripe to include agricultural workers in labour relations legislation.

Despite agricultural workers being covered by the provincial labour relations statute, bargaining units in the agricultural sector have proved unstable and the rate of unionization in primary agriculture remains low in BC and across Canada generally.<sup>128</sup> After BC's first unit of agricultural workers was certified in 1976, there have been two targeted, engaged and sustained campaigns to organize agricultural workers in BC. In the early 1980s, the Canadian Farmworkers Union organized and filed several certification applications with the Labour Relations Board. Collective agreements were signed with several employers, but collective bargaining relationships did not persist for long. In less than a decade, the Canadian Farmworkers Union no longer was the certified bargaining representative of any agricultural workers under the BC *Labour Code*. This unionization campaign is described briefly in chapter 4 of this thesis, and has been documented at length elsewhere.<sup>129</sup> In 2012, parts of the Canadian Farmworkers Union organization continue to exist as a platform to advocate for agricultural workers' health and safety.

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<sup>126</sup> New Brunswick and PEI included farmworkers in 1971, Quebec in 1964, Newfoundland in 1952, Manitoba in 1948 and Saskatchewan in 1944. Nova Scotia included farmworkers in 1987. See Tucker, *supra* note 56 at 51.

<sup>127</sup> See "2 NDP backbenchers vote against gov't on bill", *supra* note 99.

<sup>128</sup> In 1967, 32.3% of the non-agricultural paid workers in Canada were union members, compared 1% of paid agricultural workers in the same year. In 2009, 29.5% of all paid employees were union members, and 31.6% covered by collective agreements in Canada. In the private sector, 16.1% were union members, and 17.7% covered by collective agreements in 2009. The agriculture sector still had significantly lower union density in 2009: 5.3% union members and 6.3% covered by a collective agreement. See H.D. Woods, *Canadian Industrial Relations: The Report of Task Force on Labour Relations* (Ottawa: Queen's Printer, 1969) at 24, 26 and Statistics Canada, "Unionization" (August 2009) Perspective on Labour and Income 27 at 30. See also Tucker, *supra* note 56.

<sup>129</sup> For more information see: E. M. Colbert, *The Canadian Farmworkers' Union* (Geneva: International Labour Organisation, 1988), Murray Bush and Canadian Farmworkers' Union, *A History of the Canadian Farmworkers Union* (Surrey, B.C.: Canadian Farmworkers' Union, 1995), "1,200 of 13,00 workers signed up: B.C. farm union faces long, tough battle" *The Globe and Mail* (6 October 1981) P3; Human Rights Commission of British Columbia, "*What this Country did to us, it did to itself*": *A Report of the B.C. Human Rights Commission on the Farmworkers & Domestic Workers* (February 1983), reprinted in *Racial discrimination, B.C. farmworkers, and suggested reform of laws affecting farmworkers* (Abbotsford: Farmworkers Legal Services Project, Matsqui Abbotsford Community Services, 1984). A new history of the union's activities is currently being written by Craig Berggold: Interview of Charan Gill by author (23 April 2012).

The United Food and Commercial Workers Union (“UFCW”) has been actively organizing and providing advocacy and support services to agricultural workers in BC, particularly Mexican temporary migrant agricultural workers, since 2007.<sup>130</sup> The inclusion of agricultural employees in the provincial labour relations regime and the regionalized nature of agricultural production in BC have both shaped the course of the UFCW’s activities. The UFCW Local 1518’s unionization campaign has been concentrated in the Lower Mainland and, to a lesser extent, Okanagan regions. In the next chapter, I sketch a profile of the provincial agricultural sector, focusing on the characteristics of agricultural employment, location of production, types of commodities produced, and the general profitability of agricultural operations. The distinctive features of BC’s agricultural sector, including the concentration of labour-intensive agricultural production surrounding the City of Vancouver, use of farm labour contractors and the relatively recent use of trans-border temporary migrant labour, are key elements of agricultural sector that have structured UFCW’s unionization campaign. Then, in chapter 4, I look at the details of the legal processes engaged in UFCW’s campaign to unionize agricultural workers, a campaign that could not exist in the same form if the protections and provisions of the *Labour Code* had not been extended to include agricultural workers in BC.

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<sup>130</sup> Similarly, UFCW filed a number of certification applications, and was successful in reaching some collective agreements. One by one, decertification applications have been filed and the union has alleged improper and illegal interference of the employer and government of Mexico. See generally UFCW Canada, *The Status of Migrant Farm Workers in Canada 2006-07* (Rexdale, Ontario: UFCW Canada, 2007) at 5.

## **Chapter 3**

### **Profile of BC's Agriculture Sector**

#### **Introduction**

As illustrated in the previous chapter, employment in the agricultural sector has not always been subject to the same degree of legal regulation as other sectors of the economy in British Columbia. In order to understand how the current system of legal regulation of labour relations operates in BC's agricultural sector, this chapter looks at the economics, geography and nature of employment in BC's agricultural sector. This portrait of the agricultural sector dispels some of the common misconceptions of an agricultural sector comprised of small, rural, owner-operated farms in which family members provide the majority of labour. Modern agricultural employment in BC is not primarily a situation of a farmer employing one or two family members, who are envisioned as eventually taking over the operation as an owner. Instead, and especially in greenhouse, field vegetable, fruit and berry production, agricultural operations hire many seasonal and temporary employees. Migrant workers<sup>1</sup> from Mexico and elsewhere make up a significant minority of agricultural employees in the province. Especially in the Fraser Valley, agricultural employers may also contract with farm labour contractors, and obtain a crew of workers without entering into a direct employment relationship.

Agricultural employment in BC is structured, in part, by the patterns of agricultural production and demands of producing particular agricultural commodities. Certain crops, for example dairy and livestock, require relatively small numbers of workers, but may provide year-round employment. Greenhouse production also may require employees year-round or almost year-round. In contrast, fruit and field vegetable growing and hand-harvesting requires large numbers of employees for a short period of time. Therefore, the type of agricultural commodity produced and the location of the agricultural operation are central to understanding where agricultural employees are located, where unions may be

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<sup>1</sup> The term "migrant workers" is used to refer to workers from outside of Canada, who legally enter Canada for a limited period of time in order to work in Canada but do not have permanent resident status. Canadian residents who move from one region of Canada to another for work are not included in this group. See chapter 1.

best able to organize agricultural workers, and the seasonal factors that influence an organizing campaign.<sup>2</sup>

This chapter proceeds from the premise that employment and labour relations are not the same across all sectors in the economy, and that the structure of employment and labour relations in any sector is not solely the result of individual choices at the level of the enterprise or firm.<sup>3</sup> The agricultural sector has a degree of consistent practices and internal similarities and also diversity within the sector, depending on the commodity produced, geographic location of production, and local histories. The location and structure of employment in agriculture is a result of physical geography, demographic and economic factors, as well as the political choices made on topics as diverse as land use, immigration policy and international trade.<sup>4</sup>

The first section of this chapter contains an overview of agriculture in BC as a whole in the national Canadian context. Among the provinces, BC employs the third largest number of agricultural employees and it is a major producer of berries and fruits, vegetables and ornamental plants. In the second section, I explore the nature of employment in BC's agricultural sector, with attention to role of agricultural operators, employees, migrant workers and farm labour contractors. The third section describes the commodities and proportion of agricultural production that occurs in the most important regions of agricultural production in the province: the Lower Mainland, Thompson-Okanagan and Vancouver Island regions.

Unless otherwise noted, the data contained in this chapter are drawn from the Statistics Canada 2011 Census of Agriculture.<sup>5</sup>

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<sup>2</sup> A region-by-region detailed description of the agricultural sector in BC can be found in Appendix A to this thesis.

<sup>3</sup> See Mark Bray and Peter Waring, "The (Continuing) Importance of Industry Studies in Industrial Relations" (2009) 51 *Journal of Industrial Relations* 617 at 619.

<sup>4</sup> An in-depth analysis of all the factors driving BC's contemporary agriculture sector is beyond the scope of this study. For example, the creation of the British Columbia Agricultural Land Commission, aimed at protecting agricultural land in the province, has had a profound effect on the availability and price of agricultural land in some regions of the province. This issue, and a number of issues related to the cost of entry and capital investments in agriculture are not brought into this study.

<sup>5</sup> Statistics Canada, *2011 Census of Agriculture, Farm and Farm Operator Data*, catalogue no. 95-640-XWE. The 2011 Census of Agriculture was taken on May 10, 2011 and reflects either data for the 2010 year or takes a snapshot of agricultural data on May 10, 2011. The first release of data occurred on May 10, 2012. Statistics Canada rates the data quality resulting from the 2011 Census of Agriculture as very good. Statistics Canada reported a response rate of 95.9% and an under-coverage rate estimated at 1.8%. In other words, Statistics Canada estimates that it attempted to obtain census information from 98.2% of all

## The Structure of the BC Agricultural Industry

In 2011, BC accounted for 8.7% of the total number of individual agricultural operations in Canada and 4.2% of the total land area in Canada used for agricultural production. Six and a half million acres in BC were devoted to producing agricultural products for sale.<sup>6</sup> This represents approximately 2.8% of the province's total landmass.<sup>7</sup> The province has 19,759 agricultural operations, a decrease of 0.4% since 2006.<sup>8</sup> Compared with Canada as a whole, in which the number of agricultural operations decreased 10.3% between 2006 and 2011, the number of agricultural operations in BC has remained fairly stable.

BC's agricultural production is concentrated in pockets along the southern edge of the province, a ribbon through its centre, and a clump along the north-central Alberta border. BC's mountains render much of the province unsuitable for agriculture because of poor soil quality, high elevation, too few frost-free days, and physical isolation from markets.<sup>9</sup> As a result, agricultural production in BC has a regionalized quality. As illustrated in Figure 3.1, below, the greatest number of BC's agricultural operations is found in the Lower Mainland region, encompassing the Vancouver area and the lower Fraser Valley, followed closely by the Okanagan region.

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Canadian operations producing agricultural products for sale and received a response from 95.9% of those agricultural operations. Statistics Canada, "Data Quality" in *2011 Census of Agriculture*, online at <<http://www.statcan.gc.ca/pub/95-640-x/2012006-eng.htm>>. Data generated from cross-referencing the population census with the census of agriculture was not available at the time this chapter was written. In this chapter, "agricultural operation" means an operation in which agricultural products are produced for sale. This includes greenhouses, mushroom-growing facilities, Christmas tree farms, market gardens, grain and hay farms, livestock operations and horse riding stables. This is the same as the "census farm" definition employed by Statistics Canada in the *2011 Census of Agriculture*.

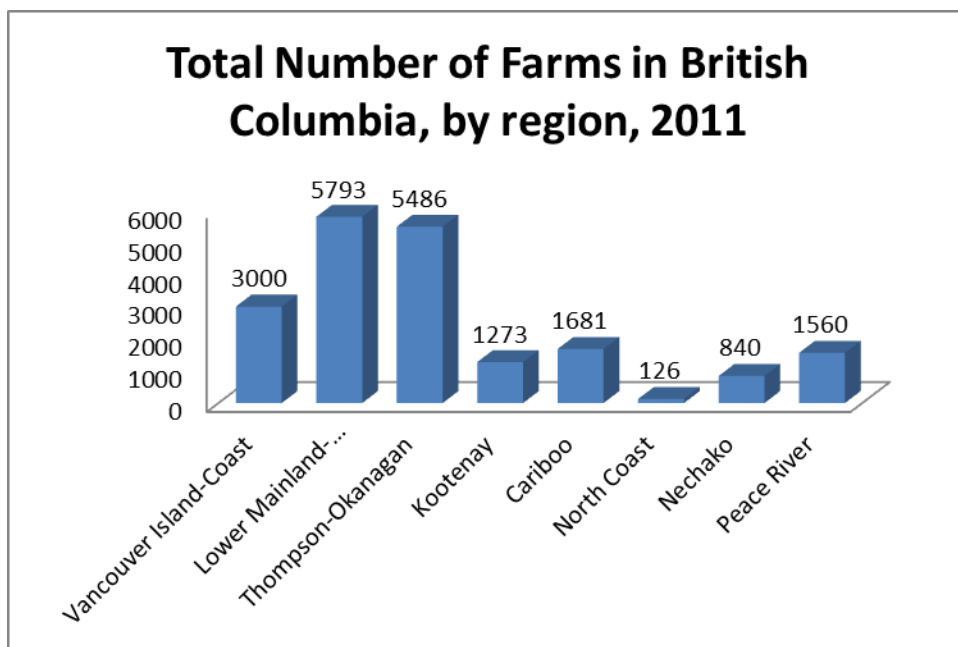
<sup>6</sup> Statistics Canada, "Over a quarter of gross farm receipts from greenhouse and nursery production in British Columbia" in *Highlights and Analyses, 2011 Census of Agriculture*, online: <<http://www.statcan.gc.ca/pub/95-640-x/2012002/prov/59-eng.htm>>.

<sup>7</sup> Statistics Canada, *2011 Census of Agriculture*. See also Brett McGillivray, *Geography of British Columbia: People and Landscapes in Transition* (Vancouver: UBC Press, 2011) at 212.

<sup>8</sup> *Ibid.* and Statistics Canada, "A Snapshot of Canadian Agriculture" in *2006 Census of Agriculture*, online at: <<http://www.statcan.gc.ca/ca-ra2006/articles/snapshot-portrait-eng.htm>>.

<sup>9</sup> *2011 Census of Agriculture*, *supra* note 5.

**Figure 3. 1 Agricultural Operations in BC by Region**



Data from: Statistics Canada, *2011 Census of Agriculture, Farm and Farm Operator Data*, catalogue no. 95-640-XWE

The average land area for an individual agricultural operation in BC is 327 acres.<sup>10</sup> This is similar to the average land area in Ontario (244 acres), Quebec (280 acres), and the Maritime Provinces, but much smaller than the average in Manitoba, Saskatchewan and Alberta.<sup>11</sup>

Taken together, all primary agricultural operations in BC took in almost three billion dollars in gross receipts in 2010.<sup>12</sup> This amount represents 6% of national gross farm receipts. BC's agricultural industry is the sixth largest grossing in Canada, behind Ontario, Alberta, Saskatchewan, Quebec and Manitoba.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.* Average farm sizes for other provinces are: PEI 398 acres; Nova Scotia 261 acres; New Brunswick 359 acres; Quebec 280 acres; Ontario 244 acres; Manitoba 1,135 acres; Saskatchewan 1,668 acres; Alberta 1,168 acres.

<sup>12</sup> The exact figure is \$2,935,906,056. Gross receipts refers to all money received by the farm before any expenses are deducted, including all receipts from all agricultural products sold, all payments received under agricultural assistance programs, and all money received by an agricultural operation for custom agricultural work, such as seed cleaning. See Statistics Canada, *2011 Census of Agriculture Census Questionnaire* at Step 31, page 14, online at [http://www5.statcan.gc.ca/access\\_acces/alternative\\_alternatif.action?l=eng&loc=/ca-ra2011/201108/q11-eng.pdf](http://www5.statcan.gc.ca/access_acces/alternative_alternatif.action?l=eng&loc=/ca-ra2011/201108/q11-eng.pdf).

Almost half (49%) of BC's agricultural operations had gross receipts under \$10,000 in 2010. BC has a greater proportion of lower grossing agricultural operations when compared with Canada as a whole. Across Canada in 2010, only 21% of agricultural operations in Canada had annual gross agricultural operation receipts under \$10,000. These low-grossing operations fall more in the category of hobby farms or residential acreages on which a small amount of agricultural production for sale occurs.<sup>13</sup> In 2010, average farm net income was negative (in other words, a loss) for agricultural operations grossing under \$100,000.<sup>14</sup>

At the top end, 3% of operations in BC had gross receipts over one million dollars, compared with 5% in Canada as a whole. Despite the small number of individual operations, these large-grossing operations make up a large proportion of the economic activity generated in the agricultural sector. Agricultural operations in BC grossing over \$500,000 make up only 6% of the total number of agricultural operations in the province, but account for 74% of all gross farm receipts in BC.<sup>15</sup> Figure 3.2, below, categorizes the province's agricultural operations by the amount of gross receipts for each individual operation.

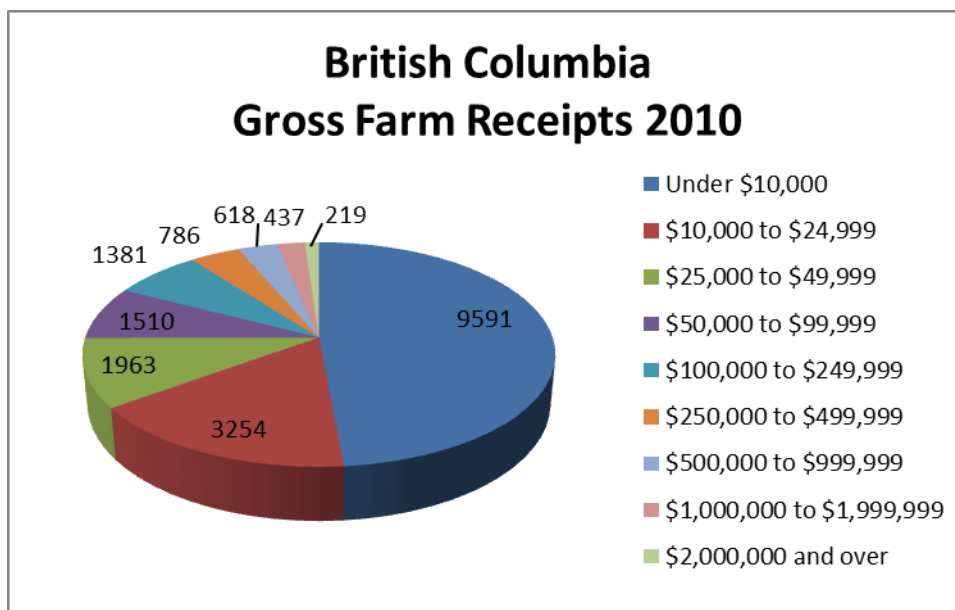
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<sup>13</sup> Agricultural operations grossing less than \$10,000 per year are no longer included in the Statistics Canada Farm Financial Survey, although they are still included in the Census of Agriculture. Even operations grossing between \$10,000 and \$100,000 per year are on average not financially viable businesses in BC, and on average, do not make a profit. See Statistics Canada, *Farm Financial Survey 2010*, catalogue no. 21F0008X at Table 9.

<sup>14</sup> *Ibid.*

<sup>15</sup> "Over a quarter", *supra* note 6.

**Figure 3. 2 BC Agricultural Operations by Revenue Class**



Data from: Statistics Canada, *2011 Census of Agriculture, Farm and Farm Operator Data*, catalogue no. 95-640-XWE

Gross receipts alone provide limited information as to the financial health of the industry. For every dollar BC's agricultural operators received, they incurred an average of 89 cents in expenses.<sup>16</sup> In 2010, BC had the highest aggregate ratio of operating expenses to receipts among all the provinces.<sup>17</sup> The Canada-wide expenses to receipts ratio was 0.83. Saskatchewan had the lowest average ratio, spending 76 cents for every dollar received. The ratio of expenses to receipts varies greatly between the agricultural regions within BC. On average, agricultural operations are most profitable, with the lowest expenses to receipts ratio, in the Lower Mainland region.

The difference in average expenses to receipts ratios across Canada and within BC can be explained in part by differences in the commodities produced. Table 3.1 sets out the Canadian average ratio of expenses to receipts by type of agricultural product.

<sup>16</sup> Statistics Canada includes in the category "farm business operating expenses" wages, salaries, custom and contract work, fertilizers, herbicides, seeds, livestock purchases, feed, veterinary costs, equipment repair, electricity, telephone, rental of land or equipment, fuel, and other business expenses. Depreciation and capital cost allowance are not included in operating expenses.

<sup>17</sup> Statistics Canada, "Snapshot" *supra* note 8.

**Table 3. 1 Canadian Expense-to-Receipts, 2010**

<b>Agricultural operation Type</b>	<b>Expenses-to-receipts ratio, 2010</b>
Dairy	.73
Oilseed and grain	.76
Vegetable and melon	.84
Poultry and egg	.84
Greenhouse and nursery	.86
Other animal	.88
Other crop	.89
Fruit and tree nut	.90
Hog and pig	.92
Beef	.93
Sheep and goat	1.01
All agricultural operations	.83

*Data from: Statistics Canada, 2011 Census of Agriculture, Farm and Farm Operator Data, catalogue no. 95-640-XWE*

Dairies have the lowest ratio. Oilseed and grain agricultural operations have the next lowest expenses to receipts ratio. Greenhouse and nursery, “other animal” production, and fruit and tree nut farms all have higher expenses to receipts ratios.

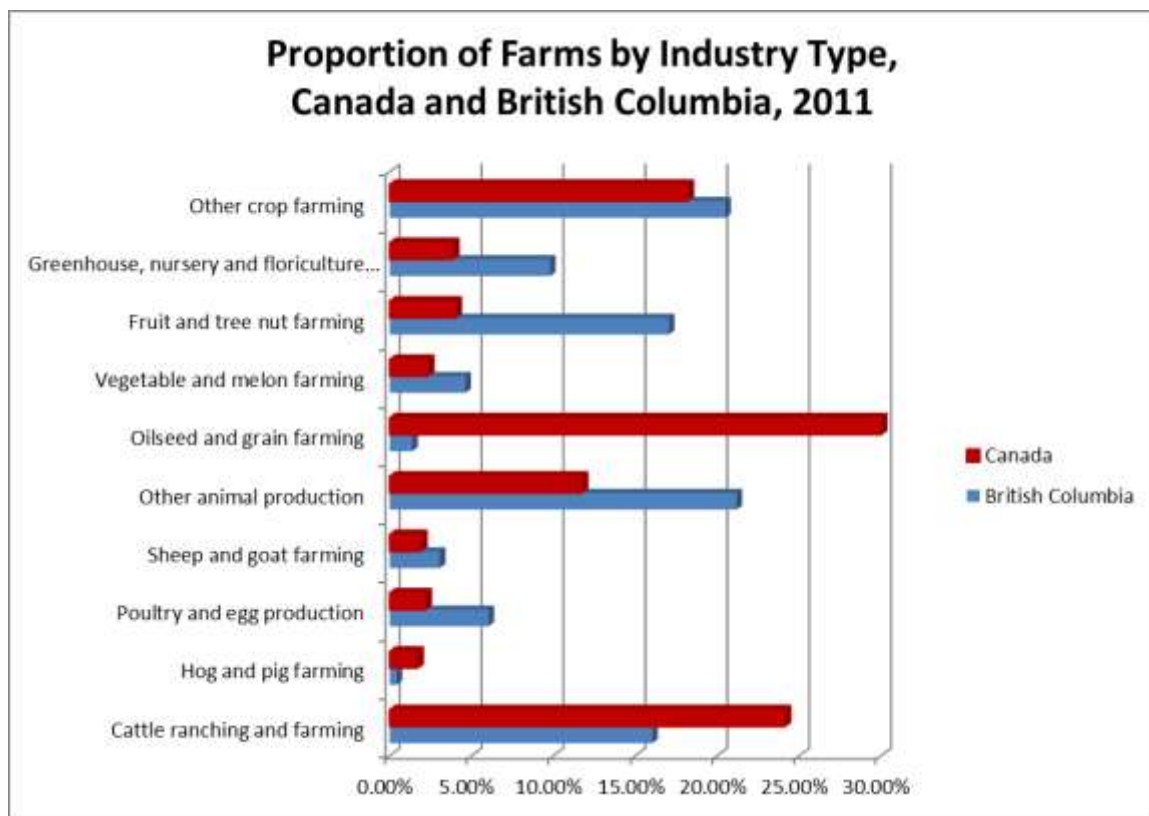
Compared with the Canadian average, BC has a greater proportion of individual agricultural operations involved in fruit and tree nut, poultry and egg, greenhouse and nursery, vegetable, and “other animal”<sup>18</sup> production, all of which have higher than average expenses to receipts ratios. In BC, only 3% of agricultural operations are primarily dairy producing.<sup>19</sup> A very small proportion of agricultural operations in BC grow wheat, barley, rye, canola or other grains and oilseeds as the primary crop. Figure 3.3 compares the percentage of agricultural operations in each major industry group in BC with the corresponding percentages in Canada as a whole. Across Canada, agricultural operations primarily produce, in descending order, grains and oilseeds, beef cattle, hay and alfalfa crops, dairy, fruits and tree nuts, and greenhouse and nursery products.<sup>20</sup>

<sup>18</sup> The category “other animal” includes horses, riding stables, bees, pets, elk, deer and exotic animals.

<sup>19</sup> In 2011, British Columbia had 587 dairies, 372 of which were located in the Lower Mainland. In Figure 3.3, dairy production is included in the cattle industry category.

<sup>20</sup> The Census of Agriculture classifies farms by industry type, based on the product that makes up the majority of the gross receipts on the particular farm. This can create a somewhat skewed picture where operations are mixed, producing several products on one operation.

**Figure 3. 3 Agricultural Operations by Industry Type, Canada and BC**



Data from: Statistics Canada, *2011 Census of Agriculture, Farm and Farm Operator Data*, catalogue no. 95-640-XWE

Across BC, a little under one-half of all operators reported agricultural operation income as their sole source of income in 2010. This proportion was highest in the Lower Mainland region of the province, where exactly one-half of operators reported no paid off-farm income, followed closely by the Thompson – Okanagan region. The lowest proportion of operators for whom agriculture was their sole source of income was in the Nechako region where 40% of operators report no off-farm income, followed by 41% in the Peace River region.

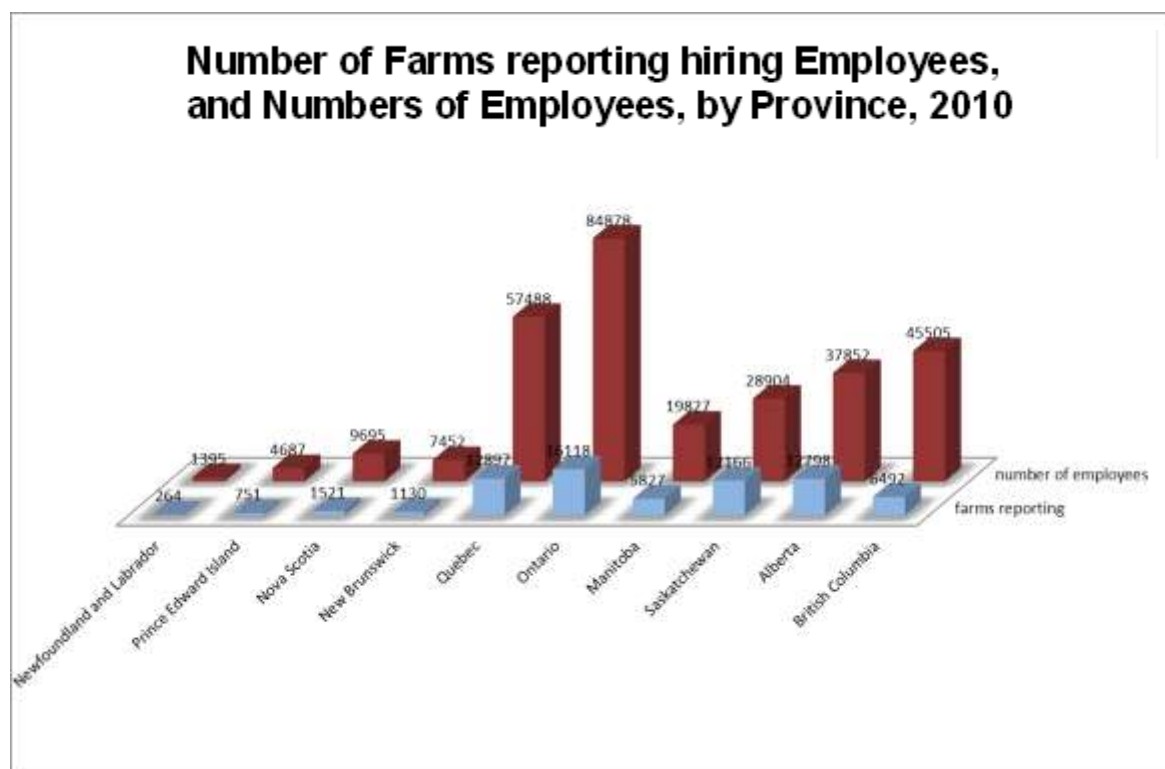
Only one-third<sup>21</sup> of all agricultural operations in Canada hire employees, and BC tracks the national average exactly. At the national level, wages and salaries represented 10% of total operating expenses in 2010. In BC, wages and salaries take up a greater share of all operating expenses. Wages and salaries were 21% of all operating expenses

<sup>21</sup> Statistics Canada, “Snapshot” *supra* note 8.

incurred by all agricultural operations in the province. Because not all agricultural operations incur wage and salary expenses, the aggregated figure understates the wages and salary expenses as a proportion of the operating expenses incurred by those operations that hire employees.

Across Canada, agricultural operations hired a total of 297,683 employees on either a full year or seasonal basis in 2010. Figure 3.4 shows the number agricultural operations that hired employees and the total number of employees, broken down by province. The greatest number of agricultural employees, 28% of the national total, was in Ontario, followed by Quebec with 19%, and then BC with 15%. More individual agricultural operations in Saskatchewan and Alberta hired employees, but BC agricultural employers hired a greater number of employees.

**Figure 3. 4 Agricultural Operations Hiring Employees, by Province**



Data from: Statistics Canada, *2011 Census of Agriculture, Farm and Farm Operator Data*, catalogue no. 95-640-XWE

6,492 agricultural operations in BC reported hiring employees in 2010. These agricultural operations hired a total of 45,505 employees. Stating the numbers of

employees hired by agricultural operations does not reveal who those employees are and the role of labour in primary agricultural production. It would be a mistake to think of these employees as a homogenous group. In the pages that follow, I examine who is included and excluded in Statistics Canada's count of employees in agriculture and discuss the role of owner-employees, seasonal workers, migrant workers and workers employed by farm labour contractors.

### **The Agricultural Sector Workforce**

Some the workers that the Census of Agriculture counts as "employees" are also owners or managers of the agricultural operation. 28% of agricultural operations in BC are organized as partnerships and 17% as corporations.<sup>22</sup> In many cases, and particularly with smaller operations, one or more of the partners in the partnership and one or more of the owners of the corporation will also do productive work on the farm as employees. In these cases, the Census of Agriculture counts the same person as an employee and also as an operator. This dynamic is important to remember when understanding the many small operations throughout the province with one or two employees. The overlap of owner and employee also connects to the count of agricultural employees who are family members.

Although owner-operator employees account for some of the 45,505 agricultural employees in 2010, the majority of agricultural employees are neither owners nor family relatives of owners. 74% of wages and salaries paid by agricultural employers were paid to non-family members.

Seasonal and temporary employment is the norm in BC's agricultural industry. 71% of employees were seasonal or temporary. BC had a higher proportion of seasonal workers compared to the Canadian average of 62%. Provinces with higher proportions of fruit and tree nut and outdoor vegetable production, including BC, require larger numbers of employees for short periods of time during the growing season and harvest and tend to have more seasonal workers.<sup>23</sup>

Currently, approximately 10% of employees of agricultural operations are temporary foreign migrant workers. Migrant agricultural workers come from outside Canada under a visa that limits their legal right to stay in Canada to the term of their employment.

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<sup>22</sup> 15% are family corporations and 2% are non-family corporations. 54% of agricultural operations were sole proprietorships in 2011.

<sup>23</sup> Statistics Canada, "Snapshot" *supra* note 8.

Agricultural operations in BC first began using transnational temporary migrant workers in 2003. In 2011, Human Resources and Skills Development Canada approved a total of 4,705 temporary foreign worker agricultural positions in BC.<sup>24</sup> Of these, 3,985 were under the Seasonal Agricultural Worker Program (“SAWP”), 380 under the agricultural stream of the Temporary Foreign Worker Program (“TFWP”), 55 under the higher skilled stream of the TFWP, and 285 under the lower skilled stream of the TFWP.<sup>25</sup>

Both the SAWP and the TFWP are governed by the *Immigration and Refugee Protection Act*<sup>26</sup> and *Regulations*<sup>27</sup> and jointly administered by Human Resources and Skills Development Canada (“HRSDC”) and Citizenship and Immigration Canada. Before a migrant worker can be hired under either program, an agricultural employer must request and obtain a positive Labour Market Opinion from HRSDC. In the Labour Market Opinion, HRSDC looks at the wage rate, working conditions and the employer’s ability to recruit workers in Canada. The stated purpose of the Labour Market Opinion is to ensure the employment of the temporary foreign worker has a “neutral or positive effect on the Canadian labour market”.<sup>28</sup>

The Seasonal Agricultural Worker Program operates under agreements between the government of Canada and the sending country.<sup>29</sup> The governments and representatives of Canadian agricultural employers annually negotiate a mandatory contract of employment that sets conditions of employment, with variations according to the sending

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<sup>24</sup> Human Resources and Skills Development Canada, “Labour Market Opinion (LMO) Statistics, 2008-2011” <[www.hrsdc.gc.ca/eng/workplaceskills/foreign\\_workers/stats/annual/table10aa.shtml](http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/stats/annual/table10aa.shtml)>.

<sup>25</sup> See Human Resources and Skills Development Canada, “Temporary Foreign Worker Program: Hiring Foreign Agricultural Workers in Canada.” Online at <[http://www.hrsdc.gc.ca/eng/workplaceskills/foreign\\_workers/sawp.shtml](http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/sawp.shtml)>. The Low Skill Pilot is divided into the Agricultural Stream for employers producing fruits and vegetables (includes canning/processing), greenhouses, and nurseries, apiary products, Christmas trees, flowers, canola, sod, tobacco, beef, dairy, duck, poultry, sheep, horse, mink, and the regular stream for other agricultural and non-agricultural employers.

<sup>26</sup> S.C. 2001, c. 27.

<sup>27</sup> *Immigration and Refugee Protection Regulations*, SOR/2002-227, ss. 194-204.

<sup>28</sup> Human Resource and Skills Development Canada, “Roles and Responsibilities,” under “What is the role of Human Resources and Skills Development Canada/Service Canada?” online at: <[http://www.hrsdc.gc.ca/eng/workplaceskills/foreign\\_workers/ei\\_tfw/tr\\_tfw.shtml](http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/ei_tfw/tr_tfw.shtml)>.

<sup>29</sup> Under this program, migrant workers can only be hired from participating source countries: Mexico, Anguilla, Antigua and Barbuda, Barbados, Dominican, Granada, Jamaica, Montserrat, St. Kitts-Nevis, St. Lucia, St. Vincent, and Trinidad and Tobago.

country and destination province.<sup>30</sup> No independent migrant worker representative participates in the negotiation of the contract.

The 2012 SAWP contract that applies to migrant workers from Mexico working in BC sets a minimum work term of 240 hours and a maximum work term of 8 months in one year.<sup>31</sup> Mexican workers must be paid at least the provincial minimum hourly wage or minimum piece-rate. The employer must provide “suitable” accommodation and can charge the worker no more than \$589 in rent for the entire stay.<sup>32</sup> The employer must also provide to the worker at no cost protective clothing if the worker is required to use chemicals or pesticides. The employer pays round trip airfare. The SAWP migrant worker is prohibited from working in any non-agriculture job and prohibited from working for any other employer unless the worker’s present employer, HRSDC and a representative of the sending country agree to a transfer. A representative from the sending country has a presence in Canada, ostensibly to assist migrant workers during their stay in Canada and to ensure the terms of the agreement are followed. A SAWP worker’s legal right to stay in Canada is tied to her or his employment, and the worker must return to the sending country when the job ends. Migrant workers often return to work in Canada for several seasons, but their time working in Canada does not provide a path to permanent residency status in Canada.

In BC, the majority of SAWP workers come from Mexico. Compared to SAWP workers in Ontario and Quebec, SAWP workers in BC are more likely to be from rural areas of Mexico and speak Indigenous languages.<sup>33</sup> Because of the limited term of employment and isolation from family and other dependents in the sending country,

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<sup>30</sup> Veena Verma, *The Regulatory and Policy Framework of the Caribbean Seasonal Agricultural Workers Program* (The North-South Institute, 2007) at 5. As an example of the types of variation and terms of employment provided for under the Seasonal Agricultural Worker Program, Caribbean migrant workers in BC are required to send mandatory remittances back to the sending country equivalent to one-quarter of the workers’ wages, a portion of which is returned to them upon their return to the sending country. Mexican migrant workers have no mandatory remittances deducted from their wages.

<sup>31</sup> Human Resources and Skills Development Canada, “Agreement for the Employment in Canada of Seasonal Agricultural Workers from Mexico in British Columbia for the Year 2012” online at <[http://www.hrsdc.gc.ca/eng/workplaceskills/foreign\\_workers/contracts-forms/sawpmcbc2012.shtml](http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/contracts-forms/sawpmcbc2012.shtml)>.

<sup>32</sup> For more on accommodations for migrant agricultural workers in BC, see Luis L. M. Aguiar, Patricia Tomic and Ricardo Trumper, *Mexican migrant agricultural workers and accommodations on farms in the Okanagan Valley, British Columbia* (Working Paper No. 11-04, Metropolis British Columbia, Centre for Excellence for Research on Immigration and Diversity, 2011).

<sup>33</sup> Gerardo Otero and Kerry Preibish, *Farmworker Health and Safety: Challenges for British Columbia* (Final Research Report, Simon Fraser University and University of Guelph, August 2010) at 60.

SAWP workers often have a strong incentive to work long and intensive hours, averaging 12 hours per weekday and 8 hours per weekend day in peak season.<sup>34</sup> Many researchers report a generalized perception among SAWP workers that reporting illness, injury or problems in working or living conditions could threaten the worker's current position and future participation in the SAWP.<sup>35</sup>

Migrant agricultural workers can also be hired through the less regulated Temporary Foreign Worker Program.<sup>36</sup> The TFWP is available in all provinces and territories, and allows employers to hire from any source country. Unlike SAWP, the TFWP does not involve the governments of Canada and the sending country in negotiating the terms of employment. Because the source country is not involved, there is no role for an in-Canada representative from the sending country. TFWP workers can stay in Canada for a maximum cumulative employment term of four years, after which they are required to leave the country and cannot be issued another temporary work permit in Canada for the following four years.<sup>37</sup> Like the SAWP workers, the legal right of migrant workers under the TFWP to be in Canada is tied to their employment.

Not all agricultural operations employ migrant workers, and not all agricultural operations hire employees directly. Two-thirds of agriculture operations in BC – 13,267 out of 19,759 – reported no employees in 2010. In a sole proprietorship<sup>38</sup> operation, the agricultural operator or operators<sup>39</sup> may provide all the labour required themselves,

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<sup>34</sup> *Ibid.* at 35.

<sup>35</sup> *Ibid.* and David Fairey, Christina Hanson, Glenn MacInnes, Arlene Tigar McLaren, Gerardo Otero, Kerry Preibisch, Mark Thompson, *Cultivating Farmworker Rights: Ending the Exploitation of Immigrant and Migrant Farmworkers in BC* (An Economic Security Project Report, Canadian Centre for Policy Alternatives, Ottawa, 2008).

<sup>36</sup> Human Resources and Skills Development Canada, "Temporary Foreign Worker Program". Online at: <[http://www.hrsdc.gc.ca/eng/workplaceskills/foreign\\_workers/lowskill.shtml](http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/lowskill.shtml)>. See also Judy Fudge and Fiona MacPhail, "Temporary Foreign Worker Programs in Canada: Low-Skilled Workers as an Extreme Form of Flexible Labour" (2010) 31 *Comparative Labour Law & Policy Journal* 5.

<sup>37</sup> The four year maximum term came into effect with respect to lower skill level occupations (NOC B, C and D) April 1, 2011. This limit does not apply to managerial or professional workers in the TFWP. See Citizenship and Immigration Canada, "Information for Foreign Workers in Canada on the Temporary Foreign Worker Program Regulatory Changes" online at: <<http://www.cic.gc.ca/english/work/tfw.asp>> and *Immigration and Refugee Protection Regulations*, *supra* note 27.

<sup>38</sup> In 2011, 10,603 agricultural operations in BC were sole proprietorships. This was 54% of all agricultural operations.

<sup>39</sup> In the 2011 Census of Agriculture, up to three agricultural operators may be listed in relation to a single agricultural operation. The Census of Agriculture defines "agricultural operator" as the person or persons responsible for the management decisions on an agricultural operation. The operator may be the owner, a tenant on the land or a hired manager.

without being counted as “employees”. Some of these agricultural operations may also use custom work,<sup>40</sup> in which a service such as hay baling is provided by a contractor using the contractor’s own equipment and expertise. Agricultural operations may also rely on contract workers provided by a farm labour contractor. Workers employed by farm labour contractors are not employed directly by agricultural operations, and therefore, are not included in the count of employees in the Census of Agriculture. These workers can be tracked indirectly through operating expenses information in the Census of Agriculture. Throughout BC, 6,739 agricultural operations spent over 11 million dollars on contract work, custom work and hired trucking in 2010, accounting for 4% of total operating expenses in the province.<sup>41</sup>

A farm labour contractor is defined in the *BC Employment Standards Act* as “an employer whose employees work, for or under the control or direction of another person, in connection with the planting, cultivating or harvesting of an agricultural product.”<sup>42</sup> The agricultural operation contracts with the farm labour contractor. In return, the farm labour contractor recruits, transports to the field and pays the workers. Farm labour contractors must register with the Employment Standards Branch of the BC Ministry of Labour, pass a licencing exam, and initially post a bond equal to eighty times the minimum wage rate per worker.<sup>43</sup> The purpose of the bond is to provide wage security for workers. The amount of this bond reduces according to the number of years the farm labour contractor has operated without having been found to have violated a core employment standards requirement.

According to the provincial licensing registry,<sup>44</sup> 93 farm labour contractors were licensed and bonded to provide a total of 6,807 employees in 2012. The number of employees that farm labour contractors are bonded to provide has increased since 2009,

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<sup>40</sup> Custom work is work done on an agricultural operation, using the labour and equipment of another under a non-employment contract relationship. Common examples include custom combining, seed cleaning, grain drying, crop spraying and hired trucking. Custom work is not specifically addressed in this chapter. The 2011 Census of Agriculture Questionnaire specifically notes that custom work and contract workers are excluded from the count of employees. *Supra* note 12.

<sup>41</sup> Note that not all expenses in this category would be paid to farm labour contractors.

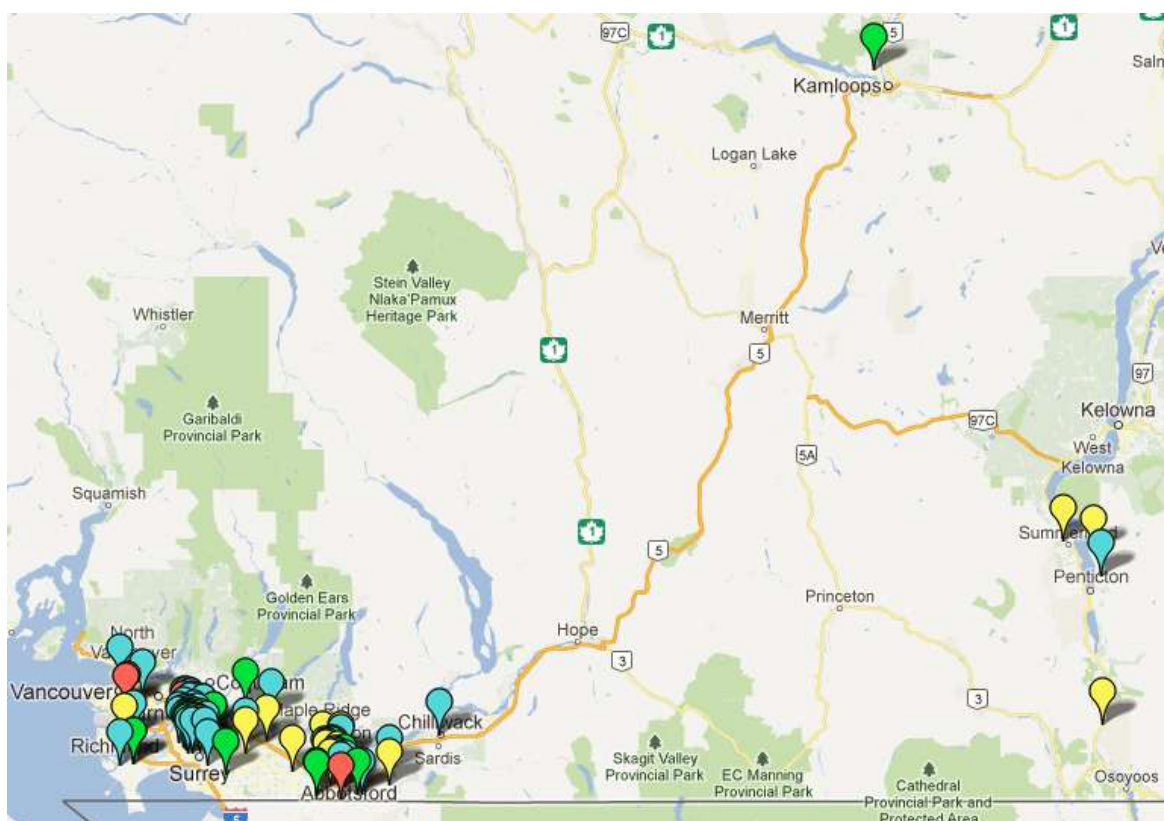
<sup>42</sup> *Employment Standards Act*, R.S.BC 1996, c. 113, s.1.

<sup>43</sup> *Employment Standards Act*, *ibid.* at ss. 13,17,28,58, 15, 18. Currently, this equals \$820 per worker.

<sup>44</sup> British Columbia, Ministry of Labour, Citizen's Services and Open Government, “Licensed Farm Labour Contractors in British Columbia” online at <<http://www.labour.gov.bc.ca/esb/agriculture/flclist.htm>>. This information is current to current to June 13, 2012.

when 95 farm labour contractors were bonded for 6,098 employees.<sup>45</sup> Usually, farm labour contractors provide labour for nursery, greenhouse, berry and field vegetable operations. A small number of contractors provide labour exclusively for the poultry industry. In the Kelowna area, four labour contractors are licensed to provide workers for grapes and other fruits. As illustrated in Figure 3.5, below, the overwhelming majority of these farm labour contractors were located in the Lower Mainland region of BC. In this map, each marker represents the registered business address of a farm labour contractor. The yellow marker indicates a contractor bonded to provide 20 or fewer employees; the blue marker a contractor with 21-99 employees; the green marker a contractor with 100-249 employees; and the red marker a contractor with 250 or more employees.

**Figure 3.5 Map of Licensed Farm Labour Contractors in BC**



Map data ©2012 Google. Farm Labour Contractor data compiled by author from British Columbia, Ministry of Labour, Citizen's Services and Open Government, "Licensed Farm Labour Contractors in British Columbia" online at <<http://www.labour.gov.bc.ca/esb/agriculture/flclist.htm>>. This information is current to current to June 13, 2012.

<sup>45</sup> Otero and Preibish, *supra* note 33.

Eighty-eight farm labour contractors are located in the Lower Mainland region. Six large farm labour contractors are bonded to provide between 200 and 400 workers each. The majority of the agricultural operation labour contractors are located in the Abbotsford and Surrey areas and most are bonded to provide fewer than 100 workers. Many of these appear to be family-owned corporations located in residential areas. Large multi-national temporary employment agencies, such as Labour Ready, Adecco or Manpower, do not appear to be registered to provide labourers in BC's primary agricultural sector, although numbered companies or other named companies could have connections to these larger multi-national corporations.

Since the 1960s, the majority of agricultural workers employed by farm labour contractors in the Lower Mainland and Fraser Valley region of BC have been Punjabi-speaking and often first-generation immigrations from India.<sup>46</sup> According to a study carried out in 2007-08, over half of the workers employed by farm labour contractors are women, more than three-quarters have lived in Canada more than ten years, and over half have been seasonal agricultural workers for more than ten years.<sup>47</sup> Many have limited or no English skills and low levels of formal schooling. Approximately 21% did not finish elementary school.<sup>48</sup> Low pay and dangerous working and transportation conditions for workers employed by farm labour contractors are persistent problems.<sup>49</sup> Most farm labour contractors are also Punjabi speaking, and it has been observed that the shared community and religious ties between farm labour contractors and their employees make it more difficult for workers to complain.<sup>50</sup> Further, the need to meet hours requirements to qualify for employment insurance benefits during the off-season provides an incentive for workers to work long hours. Workers employed by farm labour contractors averaged 9 hours per weekday and 5 hours per weekend day in peak seasons.<sup>51</sup> Despite performing work on many agricultural operations throughout a growing season, workers employed

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<sup>46</sup> Otero and Preibish, *ibid.* at 10, 33.

<sup>47</sup> *Ibid.* at 21.

<sup>48</sup> *Ibid.*

<sup>49</sup> See for example Nancy MacDonald, "Nightmare in the Fraser Valley" *Maclean's* 120:24 (25 June 2007) 22; Worksafe BC, Agriculture Statistics (2007-2010), online at <<http://www2.worksafebc.com/Portals/Agriculture/Statistics.asp>>.

<sup>50</sup> Otero and Preibish, *supra* note 33.

<sup>51</sup> *Ibid.* at 37.

by farm labour contractors remain dependent on a single employer for their connections to the agricultural jobs and for daily transportation to and from the worksite.<sup>52</sup> These factors, combined with few other employment options, poor English skills and low education, create structural barriers for contract employees to refuse unsafe work and otherwise raise complaints in relation to their employment.

The presence and use of farm labour contractors is not unique to BC, and is a prominent feature of agricultural labour in several locations, including California, Florida, the United Kingdom and South Africa.<sup>53</sup> More research is needed into the particularities of the development and persistence of farm labour contractors in BC.<sup>54</sup>

In BC agricultural workers are not entitled to overtime pay or statutory holidays.<sup>55</sup> The only legislated limitation on hours of work is that workers are not to work excessive hours that create a health and safety risk. The minimum wage for all workers, including agricultural workers in BC who are not paid by piecework, has increased from \$8.75 per hour as of May 1, 2011 to \$10.25 per hour as of May 1, 2012.<sup>56</sup> For hand harvesters paid by piece-rate, or in other words by the volume of berries or fruits they pick, the minimum piece-rates have not been increased since May 1, 2011.<sup>57</sup> Rates vary by commodity. For example, a worker must be paid at least 39.6 cents for each pound of blueberries picked. Under optimal picking conditions, a skilled hand harvester may exceed the hourly

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<sup>52</sup> *Ibid.* at 43.

<sup>53</sup> See for example, Dawn Thilmany and Steven C. Blank, “FLCs: An Analysis of Labor Management Transfers among California Agricultural Producers” (1996) 12:1 *Agribusiness* 37, Ben Rogaly, “Intensification of Workplace Regimes in British Horticulture: The Role of Migrant Workers” (2008) 14 *Population, Space and Place* 497, Stephanie Barrientos, “Strategies for Promoting Decent Contract Labour: Experiences from South African and UK Agriculture” in David Larson, David Hulme, Imran Matin, Karen Moore (eds.), *What Works for the Poorest? Poverty Reduction Programmes for the World's Extreme Poor*, (Rugby, Warwickshire : Practical Action Publishing, 2010) 209.

<sup>54</sup> Very little has been written on the history of farm labour in BC, and historic role and development of farm labour contractors. In respect of the Pacific Northwest more generally, and particularly Aboriginal workers from the coastal regions of British Columbia acting as farm labour contractors in the hop industry in Washington in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries, see: Paige Raibmon, “The Practice of Everyday Colonialism: Indigenous Women at Work in the Hop Fields and Tourist Industry of Puget Sound” (2006) 3:3 *Labor: Studies in Working-Class History of the Americas* 23.

<sup>55</sup> *Employment Standards Act*, *supra* note 42, ss. 31-43, *Employment Standards Regulation*, B.C.Reg. 396/95, s.34.1.

<sup>56</sup> Minimum wage in British Columbia was \$8.75 per hour as of May 1, 2011, increased to \$9.50 on November 1, 2011 and is scheduled to increase to \$10.25 per hour on May 1, 2012: British Columbia Ministry of Labour, Citizens’ Services and Open Government, “Minimum Wage Factsheet” online at: <<http://www.labour.gov.bc.ca/esb/facshts/min-wage.htm>> .

<sup>57</sup> David Fairey, “Farm Workers Deserve Fair Pay” *Burnaby Now* (27 April 2012) online: <<http://www.burnabynow.com/business/Farm+workers+deserve+fair/6528196/story.html>>.

minimum wage rates. Employers are not required by the *Employment Standards Act* to guarantee the hourly minimum wage rate to workers paid by piece-rate, and therefore, in some conditions, hand-harvesters earn less than the hourly minimum wage.<sup>58</sup>

### **Regional Nature of Agriculture and Agricultural Employment**

Agricultural production and, correspondingly, agricultural employment are not distributed equally throughout BC. Because of the mountainous nature of the province, and the extreme climates and high transportation costs caused by this topography, much of the province is unsuited to commercial agricultural production. Agriculture is primarily concentrated in the Lower Mainland region, encompassing and surrounding the city of Vancouver. The next most important region is the Thompson-Okanagan region, in the central south portion of the province, followed by the Vancouver Island and Coast region. This section provides a brief overview of the type of commodities produced, the economic size of the agricultural sector in each region, and labour needs in each of these three regions.

The Lower Mainland has the greatest numbers of individual agricultural operations, greatest share of gross agricultural operation receipts, most hired employees, and on average the most profitable agricultural operations of any region in BC.<sup>59</sup> The region produces over two-thirds of the total provincial production of dairy, berries, vegetables, poultry, eggs, pork, mushrooms, greenhouse vegetables, flowers and nursery products.<sup>60</sup> A number of factors contribute to the region's dominance, including favourable weather and soil, a long growing season, local demand for agricultural products, access to export markets in the United States, and well developed transportation infrastructure.<sup>61</sup>

Most of the money that comes into BC's primary agriculture sector flows into the Lower Mainland. Gross farm receipts in the Lower Mainland in 2010 totalled almost two billion dollars.<sup>62</sup> This was 65% of the total gross agricultural operation receipts for the province. Figure 3.6 shows the total gross receipts, represented by the black columns, and the total operating expenses, represented by the red columns, for each agricultural region

<sup>58</sup> The government of British Columbia's report on the piece-rate system may be found online at: <[http://www.gov.bc.ca/citz/down/piece\\_rate\\_study.pdf](http://www.gov.bc.ca/citz/down/piece_rate_study.pdf)>. For a critical evaluation of the study's research methodology, see Fairey, "Fair Pay", *supra* note 57.

<sup>59</sup> See appendix A.

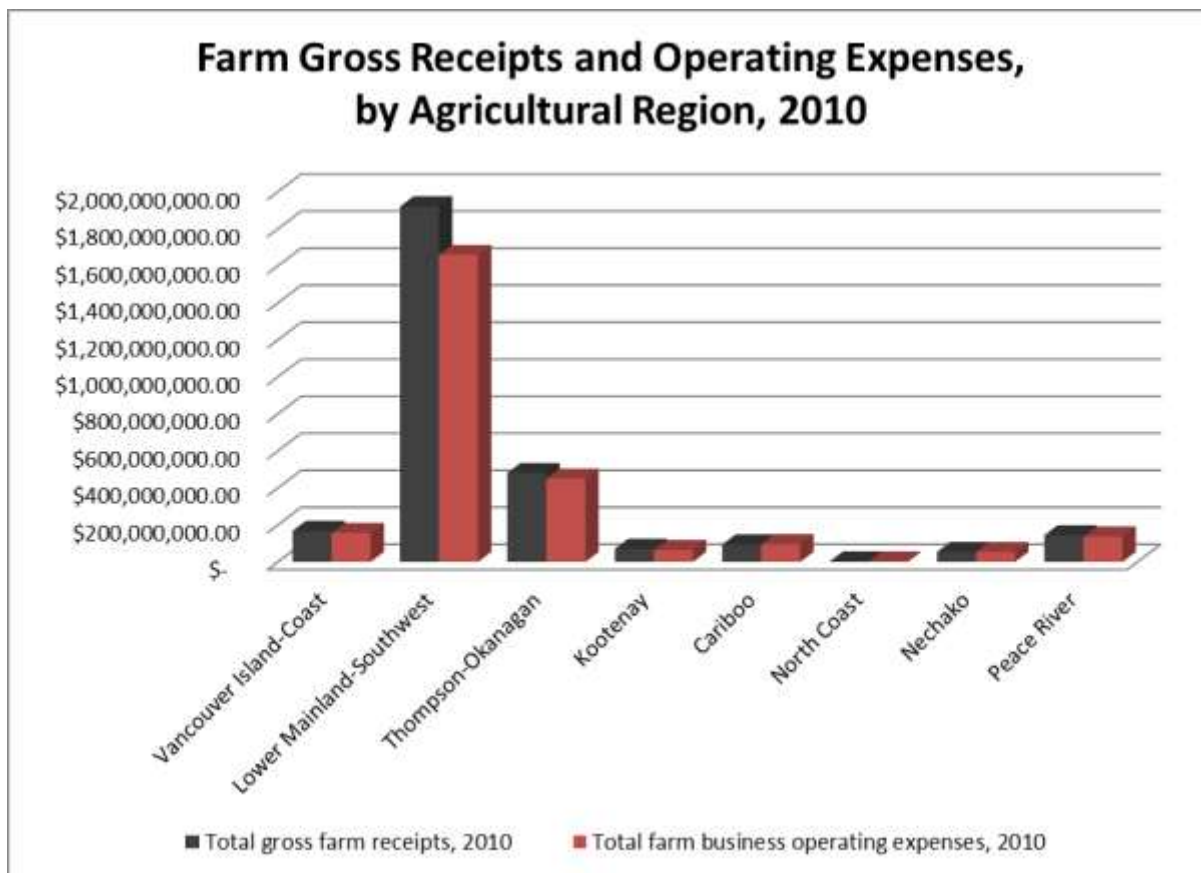
<sup>60</sup> McGillivray, *supra* note 7 at 222.

<sup>61</sup> *Ibid.*

<sup>62</sup> Actual figure is \$1,920,747,557.00

in the province. The Lower Mainland region also had the best regional ratio of operating expenses for gross receipts in the province at .86.<sup>63</sup>

**Figure 3. 6 Receipts and Expenses by Agricultural Region in BC**



Data from: Statistics Canada, *2011 Census of Agriculture, Farm and Farm Operator Data*, catalogue no. 95-640-XWE

The Lower Mainland also contains the vast majority of BC's economically large agricultural operations. 75% of BC's agricultural operations grossing over \$1 million are in the Lower Mainland.<sup>64</sup> 13% of the agricultural operations in BC with gross receipts over \$1 million are located in the Thompson – Okanagan region. Vancouver Island and the gulf islands contain 6% of the operations taking in over \$1 million in the province.

In 2010, Lower Mainland agricultural operations reported employing 9,108 year-round and 14,956 seasonal or temporary employees, together making up 53% of all employees

<sup>63</sup> This does not reflect the average of the ratios on each agricultural operation in the region. Instead, it reflects the ratio of total operating expenses for the region to total receipts.

<sup>64</sup> *Farm and farm operator data*, supra note 5.

hired by agricultural producers in the province. These employees performed 66% of the total number of weeks worked by producers' direct employees. These numbers do not include the labour time of agricultural workers employed by farm labour contractors, who, as illustrated above in Figure 3.5, are located almost exclusively in the Lower Mainland. When the labour of these workers is taken into account, the Lower Mainland clearly dominates agricultural employment. The next largest employee-hiring region in 2010 was the Thompson – Okanagan region, where 27% of the workers hired by agricultural producers were located, followed by Vancouver Island (9%), the Cariboo (5%) and Kootenay (4%) regions.

The hired agricultural workforce in the Lower Mainland is mostly seasonal and temporary. This being said, there is a greater proportion of the workforce engaged in full-year work in this region compared with all the other agricultural regions in BC. Full-year employees made up 38% of employees hired directly by agricultural producers in the Lower Mainland, or 9,108 employees. In terms of the volume of working time, full-year employees were reported as providing 63% of the total paid weeks of work in the region.

Agriculture in the Lower Mainland is not primarily a family business in which employees are also relatives. Of the 2,566 Lower Mainland agricultural operations that hired employees directly in 2010, 647 (25%) hired exclusively family members. The rest of the agricultural operations with employees hired only non-family members or a combination of family and non-family members. Three-quarters of the dollars spent on salaries and wages were paid to employees who were not family relatives. In the current data available through the Census of Agriculture, whether some of these family employees were also owners or operators of the agricultural business cannot be calculated.

As discussed in the previous section, the numbers of employees listed above include migrant workers employed through the SAWP and TFWP.<sup>65</sup> The numbers do not, however, include workers provided through farm labour contractors. The use of contract labour is most prevalent in the Lower Mainland, with as many as 6,807 contract workers in peak season. Including these contract workers, the total number of positions for

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<sup>65</sup> Information as to the numbers of migrant workers in each agricultural region is not publically available, according to the author's correspondence with the Consulate of Mexico in Vancouver.

agriculture workers in the Lower Mainland could be as high as 30,871, with the majority of these positions being seasonal and temporary.

The Census of Agriculture data released in May 2012 did not include information about the number of employees hired by each individual agricultural operation. However, even looking at the data at a region level, more employees per farm were hired in the Lower Mainland region than other regions. On average, there were over 9 employees per agricultural operation. The next closest average was in the Thompson – Okanagan region, with an average of just over 6 employees per operation. This would suggest that not only are there more agricultural operation that hire employees in the Lower Mainland region, but that many of these operations are large employers.

Economically speaking, the next most important agricultural-producing region in BC is the Thompson-Okanagan region, as illustrated in Figure 3.6, above. In terms of climate, the Thompson-Okanagan region generally experiences low levels of precipitation, and relatively hot summers and cold winters.<sup>66</sup> One-third of agricultural operations in this area are produce fruits and tree nuts, mostly in the Okanagan valley. North from the Okanagan, in the southern interior plateau cattle, other livestock, and related forage crops are most common.<sup>67</sup> Approximately 27% of the paid agricultural employees in BC were employed in the Thompson – Okanagan region in 2010. 1,904 agricultural operations, representing 35% of the all agricultural operations in the region, reported hiring employees. Wages and salaries represent 24% of the total operating expenses incurred by all operations in the region. Similar to the Lower Mainland region, approximately three-quarters of all wages and salaries paid by agricultural operations were paid to non-family members. 1,797 operations (33% of total) reported using contract labour, custom work or hired trucking, incurring expenses totalling \$17,986,428.

The majority (85%) of the agricultural operations in the Thompson-Okanagan region that hired employees (1,613), hired employees on a seasonal or temporary basis. 32% (625) of operations hired full-year employees.<sup>68</sup> Of the total 12,217 direct employees hired in the region, 10,245 were seasonal or temporary, and 1,972 were full-year

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<sup>66</sup> McGillivray, *supra* note 7 at 15.

<sup>67</sup> *Ibid.* at 17.

<sup>68</sup> Some farms hired both full-year and seasonal employees, and therefore, the percentages total more than 100%.

employees. A large percentage – 65% – of the weeks of paid work was done by seasonal or temporary employees.

The Vancouver Island and Coast region has a fairly mixed agriculture sector, including horse stables, beef cattle, mixed livestock operations, chicken eggs, sheep, dairy, bees, other poultry, goats and hogs, greenhouses and nurseries, fruits and nuts. Approximately 27% of the agricultural operations (805) on Vancouver Island reported hiring employees. A total of 4,097 employees were reported in the Vancouver Island and Coast Region. Agricultural operations on Vancouver Island, the Gulf Islands and the Coast spent total of \$38,299,592 on wages and salaries, and \$5,937,925 on custom work, contract work and hired trucking in 2010, for a total of \$44,237,517.00. This was the third largest amount spent on labour (whether hired directly or through a contractor) of all the agricultural regions in BC, after the Lower Mainland and Thompson-Okanagan. In the Vancouver Island and Coast region, labour represented 28% of all operating expenses. Two-thirds of hired employees in the Vancouver Island and Coast region were seasonal or temporary employees. 2,999 were seasonal or temporary hires and 1,098 were full-year employees. In terms of the proportion of working time provided, 64% of the weeks of paid employment in 2010 were worked by full-year employees. The majority – 69% – of wages and salaries in the region were paid to non-family employees. 32% of agricultural operations used contract workers, custom work or hired trucking, either in conjunction with or instead of employees hired directly by the agricultural operation.<sup>69</sup>

Taken together, the Lower Mainland, Thompson-Okanagan and Vancouver Island regions account for 89% of all direct employees and 88% of gross farm receipts for the province. Only 11% of all agricultural employees are located in the remaining northern three-quarters of the province and the mountainous south-east corner. In these regions, livestock and related hay and forage crop production predominate. Although the majority of agricultural employment in BC is seasonal, full-year employment, more common to livestock operations, constitutes the bulk of hired agricultural work in some regions. Outside of the Lower Mainland, Thompson-Okanagan and Vancouver Island regions,

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<sup>69</sup> From the data released in the 2011 Census of Agriculture by Statistics Canada as of May 2012, one cannot calculate the extent to which there is an overlap in the 27% of farms that hire employees directly and the 32% of farms that obtain labour through labour contractors, trucking services and other custom work.

individual agricultural operations tend to be low-grossing, and only 43 individual agricultural operations outside of these three regions grossed over \$1 million in 2010.

A more detailed region-by-region look at agricultural production and employment in each agricultural region in BC can be found at Appendix A to this thesis.

### **Conclusions**

A minority of agricultural operations in BC hire employees, and those that do tend to be economically larger and are more likely to be viable and even quite profitable enterprises. As the data in this chapter demonstrates, the vision of the “family farm” does not reflect the reality of the agricultural operations which hire employees in BC today. The majority of the hired agricultural workforce is made up of employees who are not managers, owner-operators or family members of owner-operators. Within this group of employees, employment in BC takes several forms. First, the majority of the workforce is resident workers. Of these, resident agricultural workers may be employed directly by agricultural operations or employed through an intermediary farm labour contractor. Second, a significant minority of workers are migrant workers who enter Canada under one of two programs, the SAWP or the Temporary Foreign Worker Program. While the SAWP remains dominant, the use of the less regulated Temporary Foreign Worker Program is increasing. The differences in the form of employment create real distinctions in the support networks and lives of agricultural workers, but there is a shared experience of precarious employment. Low pay, seasonal and temporary work, physical and dangerous working conditions and long hours are common for most agricultural employees.

British Columbia’s geography structures the location of agricultural production and employment. The Lower Mainland region, and to a lesser extent, the Okanagan and Vancouver Island regions are the areas of primary agricultural production in BC. The Lower Mainland stands alone in its economic dominance of the agricultural sector and also in the use of farm labour contractors. As is evident from the discussion in the next chapter, the organizing patterns of the United Food and Commercial Workers union follow the patterns of agricultural employment. For unions to become established and maintain collective bargaining relationships, especially in the face of employer resistance, the complexity of current labour relations law and policy requires the assistance of union

organizers and negotiators. Because agricultural employment is concentrated in the Lower Mainland, unions can more easily make experienced persons from the Vancouver area available to workers for organizing and for maintaining collective bargaining relationships in a sustainable way. Two of the UFCW-funded Agriculture Workers Alliance (“AWA”) centres are located in the Lower Mainland region. The third AWA centre is located in the Okanagan. Given the geographic structure of agriculture in BC, it is perhaps not surprising that all three of the agricultural operations involved in the union organizing campaigns described in the next chapter are located in the Lower Mainland region of BC.

## Chapter 4

# Organizing Agricultural Workers under the *Labour Relations Code of British Columbia*

### Introduction

In this chapter, I document how the legal processes set up by the *Labour Relations Code*<sup>1</sup> have operated in connection with groups of agricultural workers who sought to unionize in the context of an ongoing campaign to unionize agricultural workers in British Columbia. In 2008, UFCW Local 1518 made several applications to the BC Labour Relations Board to become the certified bargaining agent for three groups of agricultural workers. The union's certification applications were challenged by the employers involved, but the union became the officially recognized bargaining agent for the three groups of workers and it achieved collective agreements with the employers. By the spring of 2012, however, one group of workers had voted to discontinue representation by the union, and the other two groups of employees, the union, employers and the Mexican government were involved in ongoing disputes about continued union representation and whether the employees were exposed to coercion or intimidation prohibited by the *Labour Relations Code*. This chapter focuses the extent to which the legal processes in BC's labour relations regime have fostered or inhibited the ability of agricultural workers to exercise their freedom of association.

United Food and Commercial Workers' efforts to organize agricultural workers in BC is only the second sustained and targeted campaign to unionize workers in the agricultural sector since their inclusion in the provincial labour relations legislation in 1975. The first campaign was undertaken by the Canadian Farmworkers Union (CFU) in the early 1980s. In the eighteen months after the CFU's founding convention in April 1980, the CFU obtained six certifications, two collective agreements, and set in motion a process that would result in the 1983 British Columbia Human Rights Commission report on farmworkers and domestic workers.<sup>2</sup> Following changes to labour legislation which

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<sup>1</sup> R.S.B.C. 1996, c. 244.

<sup>2</sup> E. M. Colbert, *The Canadian Farmworkers' Union* (Geneva: International Labour Organisation, 1988), Murray Bush and Canadian Farmworkers' Union, *A History of the Canadian Farmworkers Union* (Surrey, B.C.: Canadian Farmworkers' Union, 1995), "1,200 of 13,00 workers signed up: B.C. farm union faces long, tough battle" *The Globe and Mail* (6 October 1981) P3; Human Rights Commission of British Columbia, "*What this Country did to us, it did to itself*": *A Report of the B.C. Human Rights Commission on the Farmworkers & Domestic Workers* (February 1983), reprinted in *Racial discrimination, B.C.*

made the union more vulnerable to decertification applications, bargaining rights were lost. The introduction of mandatory secret ballot votes for all certification applications in 1984, a series of de-certifications, activist burn-out, and the discontinuance of Canadian Labour Congress funding for the CFU all contributed to the CFU no longer actively organizing to unionize workers by the early 1990s.<sup>3</sup> Today, the Canadian Farmworkers Union continues to advocate for improved working conditions and safety of agricultural workers by appointing board members to represent the interests of agricultural workers to the British Columbia Farm and Ranch Safety and Health Association.<sup>4</sup> Thus, the UFCW is the lone union organizing agricultural workers in BC, and, as part of a large and well established national and North American union, it is better equipped with the resources necessary for a sustained social and legal campaign.

This chapter describing and analysing the UFCW Local 1518's unionization campaign is organized into six sections. Following this first introductory section, the second section contains an overview of the key processes set up by the *Labour Relations Code*, which are the certification, collective bargaining, unfair labour practice and decertification processes. This general explanation of *Code* processes provides a background for the third section of the chapter, which contains a description of how these processes operated in relation to UFCW Local 1518's efforts to organize and unionize migrant and resident agricultural workers in BC from 2008 to 2012. The fourth section focuses on a collective agreement achieved between the union and an agricultural employer and analyses what was achieved through collective bargaining. The fifth section analyses the concept of jurisdiction as a way of understanding the legal difficulties encountered when migrant workers and their advocates claim rights within a provincial legal labour relations regime. The sixth and final section of this chapter draws out some of the benefits and challenges for unionization in BC's agricultural sector.

### **Overview of BC *Labour Relations Code***

Broadly speaking, the BC *Labour Relations Code* follows the general mechanisms,

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*farmworkers, and suggested reform of laws affecting farmworkers* (Abbotsford: Farmworkers Legal Services Project, Matsqui Abbotsford Community Services, 1984).

<sup>3</sup> *Ibid.*

<sup>4</sup> Interview of Charan Gill by author (23 April 2012). CFU Secretary Treasurer Charan Gill also sits on the Board of Directors of the Canadian Agricultural Safety Association, a national non-profit organization that promotes safety for agriculture operators and workers: *ibid.*

structures and processes common to labour legislation in much of the United States and Canada. Specific provisions and the practices that develop under the legislation differ in each jurisdiction, and the regulation of labour relations in BC contains several distinctive elements. In this section, I will sketch a brief overview of key processes and procedures of the BC *Code* and Labour Relations Board.<sup>5</sup> This overview provides the background information on the Board's processes necessary to understand the detailed description of UFCW Local 1518's campaign to unionize groups of agricultural workers in BC, which follows in the next section.

The *Labour Relations Code* is administered by the British Columbia Labour Relations Board. The Board is made up of a chair, vice-chairs and part-time members representing employers and employees, all appointed by the provincial Cabinet for fixed terms.<sup>6</sup> Cabinet appoints the Board chair for an initial term of between 3 and 5 years, which may be renewed. Vice-chairs and members of the Board are appointed for an initial term of 2 to 4 years and may also be extended for additional terms.<sup>7</sup> The chair, vice-chairs and members are assisted by officers who investigate and report to the Board on a number of matters. Panels, which hear and decide applications, complaints and other disputes relating to the *Code*, are made up variously of a single chair or vice-chair sitting alone, chair and two vice-chairs sitting together, or the chairperson or vice-chair sitting with employer- and employee-representative members.<sup>8</sup> In BC, most matters are heard by a "panel" of the chair or a vice-chair sitting alone, in order to have matters heard in a timely way and to assist with scheduling. With the exception of the reconsideration panels, all of the hearings described in the next section were heard by a single vice-chair.

The Board determines its own practice and procedure, so long as the parties have some ability to present evidence and make submissions.<sup>9</sup> A formal oral hearing is not required

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<sup>5</sup> This overview does not deal with all the procedures and obligations under the *Code*, but focuses on those rights, obligations and procedures that are important to understanding the legal aspects of the interactions between UFCW Local 1518 and certain agricultural employers in BC since 2007. In particular, this overview does not discuss common employer, successorship, councils of unions and employers, renewal and renegotiation of collective agreements, required joint consultation and adjustment plans and requirements and procedures for strikes, lockouts and picketing. The summary does not capture all of the details in the *Code*, in an attempt to make this discussion reasonably accessible and brief.

<sup>6</sup> *Code*, *supra* note 1 at s.115.

<sup>7</sup> British Columbia Labour Relations Board, "About Us" online: <[www.lrb.bc.ca/aboutus/](http://www.lrb.bc.ca/aboutus/)>.

<sup>8</sup> *Code*, *supra* note 1 at s.117.

<sup>9</sup> *Code*, *ibid.* at ss. 125, 126, 140.

in all cases and decisions are sometimes made based on written material. The Board can reject applications or complaints it deems to be without merit at any time.<sup>10</sup> The Board can require witnesses to testify under oath, compel the productions of documents necessary to investigate matters at issue, appoint an investigating officer to prepare a report, and visit workplaces.

In addition to hearing applications and complaints, the Board may also reconsider one of its own panel's decisions.<sup>11</sup> If a party believes that the original decision was made following an unfair or unjust procedure, was inconsistent with the Board's policies, or was made without the benefit of important evidence that has since become available, that party can apply for leave to have the original decision reconsidered.<sup>12</sup> Reconsideration is not an automatic right. Anyone seeking reconsideration must convince the reconsideration panel that there is a serious question as to the correctness of the original decision.<sup>13</sup> Reconsideration is rarely granted, in part because of the need to provide quick and final resolutions to labour relations disputes.

In its administration and implementation of the *Labour Relations Code*, the Board has the duty to encourage collective bargaining and cooperation between employers and unions in "resolving workplace issues, adapting to changes in the economy, developing workforce skills and developing a workforce and a workplace that promotes productivity".<sup>14</sup> The Board also has the duty to promote the settlement of disputes in a way that minimizes the effect of labour disputes on third parties, protects the public interest and encourages mediation of disputes.<sup>15</sup>

The BC *Labour Relations Code* recognizes a number of rights and duties for employees, unions and employers. The *Code* recognizes the freedom of employees to be members of trade unions and participate in trade union activities, and a right of employers to be members of employers' organizations.<sup>16</sup> The *Code* also explicitly

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<sup>10</sup> *Code, ibid.* at s.133.

<sup>11</sup> The process of reconsideration of the Board's own decision is not unique to British Columbia. Reconsideration is a general practice of labour relations boards across Canada.

<sup>12</sup> *Re Brinco Coal Mining Corporation*, BCLRB No. B74/93. Section 141 of the *Code, supra* note 1, provides the authority for the Board to change or cancel a previous decision of a panel of the Board and to send the matter back to the original panel to be re-decided.

<sup>13</sup> *Re Brinco, ibid.*

<sup>14</sup> *Code, supra* note 1 at s.2.

<sup>15</sup> *Code, ibid.*

<sup>16</sup> *Code, ibid.* at s.4.

recognizes a “right to communicate” for all persons (which includes employers and trade unions) except where the communication amounts to coercion or intimidation. This provision allows employers to express some opinions about unionization to their employees.

The *Labour Relations Code* protects the rights of employees, unions and employers by defining and prohibiting unfair labour practices. The *Code* generally prohibits anyone from coercing or intimidating others into joining or rejecting a trade union.<sup>17</sup> Employers are prohibited from limiting an employee’s rights under the *Code* through the employment contract.<sup>18</sup> Employers are prohibited from firing, threatening or imposing negative consequences on an employee because of her or his union activity.<sup>19</sup> Employers are also prohibited from being involved in the formation or selection of a trade union.<sup>20</sup> There are also specific prohibitions for unions. In addition to the prohibition against coercion or intimidation, unions and union organizers are prohibited from trying to talk with employees about unionization at the workplace during working hours without the employer’s permission.<sup>21</sup>

If a union, employee or employer believes one of these unfair labour practices or another violation of the *Code* has taken place, a written complaint can be filed with the Board. In response, an officer may be appointed to investigate and attempt to settle the issue informally or there may be a more formal oral hearing in front of a panel of the Board. To remedy an unfair labour practice or other violation of the *Code*, the Board has the power to order that the violation stop, to reinstate employees, to require payment of lost wages, to prevent changes to terms and conditions of employment, or to order otherwise that the loss created by the violation of the *Code* be rectified.<sup>22</sup>

An application to the Board for a certification order is usually marks the beginning of collective bargaining relationships established and supervised under the *Labour Relations*

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<sup>17</sup> *Code, ibid.* at s.4, 9.

<sup>18</sup> *Code, ibid.* at s.6(c).

<sup>19</sup> *Code, ibid.* at s.6.

<sup>20</sup> *Code, ibid.* at s.6.

<sup>21</sup> *Code, ibid.* at s.7(1).

<sup>22</sup> *Code, ibid.* at s.14.

*Code*. Certification is the statutory mechanism that replaces recognition strikes<sup>23</sup> by setting up a process by which the Board ensures a majority of employees wish to be represented by a specific union and then orders the employer to recognize and bargain collectively with that union. A trade union begins by gathering written evidence that employees wish to join and be represented by the union. This written evidence is in the form of membership or support cards, which must be individually signed by the employee and dated. In order to protect employees against possible reprisals or discrimination for having supported the union's application, information about who signed cards or even how many employees signed cards must be kept strictly confidential and cannot be disclosed by anyone without consent of the Board.<sup>24</sup> Support card information remains confidential regardless of whether or not the union obtains a certification order.

Once the union has gathered support evidence, the union files a certification application with the Board. As a threshold, the union must file written evidence at least 45% of the group of employees that the union seeks to represent support the union's application.<sup>25</sup> In its certification application, the union also proposes a bargaining unit description. The bargaining unit description defines the specific group of employees the union intends to represent. When the Board receives a union's certification application, the Board must evaluate whether the proposed unit is an appropriate unit for collective bargaining.<sup>26</sup> The Board has a preference for units that include all non-management employees. In spite of this preference, the union's proposed bargaining unit does not need to be the most appropriate unit, but simply an appropriate bargaining unit. In determining whether the employees within the proposed unit are capable of bargaining together for mutual benefit, the BC Board usually considers four factors: (1) the similarity in skills, interests, duties, and working conditions of employees in the unit; (2) the physical and administrative structure of the employer; (3) whether the employees in the unit are functionally integrated with employees outside the unit; and (4) whether the employees in

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<sup>23</sup> A recognition strike is workers' collective withdrawal of services or other strike activity to pressure an employer to recognize and bargain with a union or workers association and to achieve a first collective agreement. See *Code, ibid.* at s.32.

<sup>24</sup> *Code, ibid.* at s.124 and British Columbia, *Labour Relations Board Rules* at r.24(4).

<sup>25</sup> *Code, ibid.* at s.18.

<sup>26</sup> An overview of Board's considerations in determining whether a bargaining unit is appropriate can be found in *Island Medical Laboratories Ltd.*, BCLRB No. B308/93.

the unit are geographically separated from employees outside the unit. The Board has said that these factors are not to be used as a checklist, but in most cases guide the exercise of the Board's discretion.<sup>27</sup>

Upon receiving the union's certification application, the Board informs the employer that an application has been made and requires the employer to post a notice informing all employees of the application. Upon receipt of the application, a date is set for a hearing of any objections to the certification application or the proposed bargaining unit. An industrial relations officer is tasked with the initial investigation of the information in the certification application and makes a list of all employees in the bargaining unit. A secret ballot vote of all employees in the unit is normally held within 10 days.<sup>28</sup> Often, there are disagreements about which employees are entitled to cast ballots. When such disagreements occur, the employee votes, the ballot is sealed in an envelope, and the ballot box is sealed until it is determined whether the person was entitled to vote. If the proposed bargaining unit is appropriate for collective bargaining and if the majority of employees who participate in the election vote in favour of the union, the Board will issue a certification order.

A certification order is a beginning rather than an endpoint. As a result of the certification order, the employer has a legal obligation to bargain with the union and is prohibited from making individual agreements with employees. Once the certification order is in place, the *Code* imposes a duty on both unions and employers to bargain collectively in good faith and to make reasonable efforts to arrive at a collective agreement.<sup>29</sup>

In addition to imposing an obligation on employers and unions to bargain in good faith, the *Code* provides for certain bargaining procedures. After a certification order has been made, and there is no collective agreement in place, either the union or the employer can give written notice to require the other party to start bargaining within 10 days.<sup>30</sup> After this is done, the employer cannot unilaterally change rates of pay or other terms of

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<sup>27</sup> *Island Medical Laboratories Ltd.*, *ibid.* at 31-32. Note that the considerations in determining an appropriate bargaining unit outlined here apply to an application for certification where none of the employees of the employer were previously represented by a trade union. Applications to change an existing bargaining unit or to add a second bargaining unit often require additional considerations not outlined here.

<sup>28</sup> *Code*, *supra* note 1 at s.24.

<sup>29</sup> *Code*, *ibid.* at s.11.

<sup>30</sup> *Code*, *ibid.* at s.45, 47.

employment for four months unless a collective agreement is reached or the Board authorizes the change. Both parties have an obligation to work toward the goal of agreeing on a collective agreement.

The BC *Code* has special provisions that only apply during the process of negotiating a first collective agreement. When the parties have bargained and the union has obtained a mandate for a strike from its members, the employer or the union can request a mediator to assist the parties in negotiating the first collective agreement.<sup>31</sup> If no agreement is reached with the assistance of a mediator, the mediator prepares a report recommending the terms of a first contract, or recommending a process for negotiations to continue, or both. If the parties reject the mediator's recommendations, a vice-chair will direct further mediation, or require interest arbitration to have the terms of a first collective agreement imposed, or allow the parties to strike or lockout.<sup>32</sup>

An application to revoke a certification order, also called a decertification application, can be made any time after 10 months following the date of the original certification order.<sup>33</sup> The certification order can be cancelled or revoked when the majority of workers no longer support the union, when the union stops being a trade union as defined by the *Code*, or when the employer stops employing bargaining unit employees.<sup>34</sup> When 45% or more of the employees in the bargaining unit sign individual cards in support of an application to have the certification order cancelled, the Board holds a representation vote to determine whether the majority of employees still support the union. The vote is to occur within 10 days of the application. The Board has the authority to refuse to hold a vote or to ignore the results of the vote if the Board decides that "because of improper interference by any person a representation vote is unlikely to disclose the true wishes of the employees."<sup>35</sup> When a certification order is cancelled and the bargaining unit is

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<sup>31</sup> *Code, ibid.* at s.55.

<sup>32</sup> None of the collective bargaining relationships described below involved strikes or lockouts. However, strike activity in the primary agriculture sector may trigger an extension of the standard required 72 hour notice period before a strike or lockout can begin in the province. The BC *Code* allows the Board, on its own motion or the application of either the employer or union, to extend the mandatory 72 hours' notice of a strike or a lockout to some longer period, in order to protect "perishable property", defined in the Code as property that is imminently subject to spoilage. *Code, ibid.* at s.56, 60, 61.

<sup>33</sup> *Code, ibid.* at s. 33. The Board also has the ability to order a period in which decertification applications will not be considered.

<sup>34</sup> *Code, ibid.* at s.33.

<sup>35</sup> *Code, ibid.* at s.33(6).

decertified, the union is no longer recognized as the exclusive bargaining authority on behalf of a group of employees, and the employer is no longer obligated to bargain with the union or follow the collective agreement.<sup>36</sup>

As unionization and collective bargaining processes supervised by the Labour Relations Board unfold, the status quo remains in place. This means that when certification applications are challenged, employees who have taken steps to join a union and begin collective bargaining may face months or years of working for an employer who refuses to recognize or bargain with the employees' union, while legal processes unfold in front of the Labour Board. For seasonal workers, and especially for migrant workers who must leave the country after each work season, the delays inherent in contentious Labour Relations Board processes undermine the set of employee rights protected by the *Labour Code*. As illustrated in the previous chapter, BC's agricultural sector has a high proportion of seasonal workers and a significant number of migrant workers, making issues of delay and maintaining a non-unionized status quo during early Board processes significant barriers in a campaign to unionize agricultural workers.

The processes described above were put in motion when the employees of three agricultural operations in BC chose to be represented by UFCW Local 1518. In the next section, I describe the details of how these processes structured the formation of legalized collective bargaining relationships.

### **UFCW Local 1518's Campaign to Organize Agricultural Workers**

Unionization attempts by the employees of Sidhu & Sons Nursery, Greenway Farms and Floralia Plant Growers came to light in the summer of 2008 and progressed concurrently on separate but similar and sometimes intersecting paths. The cases reveal the junctures at which the seasonal nature of the work, the linkage of a worker's employment and legal right to remain in Canada, and issues related to state sovereignty create novel and unusual problems when provincial labour legislation is applied to "low-skill" transnational migrant workers.

Unionization campaigns are not without risks, especially for migrant agricultural workers. Despite the risks, there are many reasons why migrant workers participate in attempts to unionize under the *Code*. For example, when asked about the priorities of

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<sup>36</sup> *Code, ibid.* at s.33(8).

migrant agricultural workers who wanted to form a union, Lucy Luna, the coordinator of the Abbotsford Agricultural Workers Alliance said:

It was dignity. The opportunity to defend themselves in the case that they are laid off or fired without an explanation. They [migrant agricultural workers] want to be able to have a voice and tell their side of the story. Because with a traditional contract like [the Seasonal Agricultural Worker Program or] SAWP from Mexico, they have no say and they can be sent home without any explanation, with or without the help of the Mexican government. So boy, to be able to tell their story: ‘this is my point of view, I’ve been fired without just cause.’ They don’t have that. They don’t have that because there is no voice for them in these [SAWP] contracts. So for the union to provide the voice, it is very important and that’s still one of the things that they still feel. They are afraid to search for union representation, but they still claim the same thing: we want a voice, we want to be able to put our case forward and explain our side, we want dignity, we want respect, we want the right to be recalled. Those are the most important things [for migrant agricultural workers] still today.<sup>37</sup>

Ms. Luna’s comments come from over five years’ experience assisting and advocating for agricultural workers in the Lower Mainland region of BC. She has been the coordinator of the Abbotsford Agricultural Workers Alliance (“AWA”) centre since it opened in May 2007. The AWA centre is a non-profit organization funded by the United Food and Commercial Workers, the union behind the campaign to unionize agricultural workers in BC and elsewhere in Canada. AWA centres provide language support, information about farm worker conditions and entitlements, and assistance with filing income tax and claiming workers’ compensation, parental leave and other benefits. As an AWA centre coordinator, Ms. Luna is in regular contact with migrant workers. She tells them about their rights as employees in British Columbia, including the right to form a union. She also has been a witness and participant in many hearings related to attempts to unionize workers at three agricultural operations in the Lower Mainland region of BC.

Ms. Luna’s comments reflect many aspects of her experience organizing and advocating for agricultural workers in BC. According to her, workers fear repercussions if they formally seek out union representation. Workers have such fears despite the provisions of the *Labour Relations Code* of British Columbia which guarantee that workers, including agricultural workers, can join a union and participate in collective

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<sup>37</sup> Interview of Lucy Luna by author (25 April 2012). This interview occurred in English. Ms. Luna’s primary language is Spanish.

bargaining processes without fear of reprisals. As explained above, the *Code* prohibits anyone from intimidating or coercing a worker in her or his exercise of that freedom, but as the narrative below will show, the *Code* and Labour Relations Board have not been able to provide protection from intimidation or coercion.

Since UFCW Local 1518 filed certification applications in relation to three groups of agricultural workers, the union reports that workers have increased levels of fear.<sup>38</sup> United Food and Commercial Workers Local 1518 representative Glenn Toombs articulated the mis-match between the protections and processes set up by the *Labour Relations Code* and the realities of organizing migrant agricultural workers:

It's been a real challenge I guess as far as traditional organizing goes. Even though our *Labour Relations Code* is not the best in Canada, working within it gets us through on new organizing. The fundamental thing you can assure the targeted individuals is that you can provide them dignity and respect in the workplace, the right to be heard without fear of reprisal and no repercussions for talking to us. The opposite happens with the farm workers.<sup>39</sup>

In the following pages, I trace the path of certification, employer challenges and resistance, collective bargaining and decertification applications in relation to employees of Sidhu & Sons Nursery, Greenway Farms, and Floralia Plant Growers. The narrative follows the events in relation to each bargaining unit in turn, and as a result, the next section divides into three sub-sections, beginning with Sidhu & Sons Nursery.

#### **Sidhu & Sons Nursery Ltd.**

Sidhu & Sons Nursery is a wholesale potted plant nursery and blueberry farm. In 2008, it was made up of a total of 372.5 acres<sup>40</sup> spread over six locations near Mission, BC, located within the Lower Mainland region where, as described in the previous chapter, the majority of BC's agricultural production is located.<sup>41</sup> In July 2008, Sidhu & Sons Nursery claimed it employed 134 general farm labourers. Of these workers, sixty-one were residents of Canada, mostly Indo-Canadians and who spoke Punjabi as their

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<sup>38</sup> Interviews with Lucy Luna, *ibid.*, interview of Glenn Toombs by author (25 April 2012), and interview of Raul Gatica by author (March 5, 2012).

<sup>39</sup> Interview of Glenn Toombs, *ibid.*

<sup>40</sup> An acre is 4840 square yards or approximately 4047 square metres. This is slightly smaller than a Canadian football field without the end zones. Roughly one square mile (a section of land) contains 640 acres.

<sup>41</sup> *Re Sidhu & Sons Nursery Ltd.*, [2008] B.C.L.R.B.D. No. 159 (QL), 158 C.L.R.B.R. (2d) 259 at para.9 [Sidhu original certification decision]. See also the website of Sidhu & Sons Nursery, online at <www.sidhunursury.com>.

primary language.<sup>42</sup> The remaining seventy-three were migrant workers under the Seasonal Agricultural Workers Program. The SAWP workers from St. Vincent spoke English as their primary language, whereas the SAWP workers from Mexico spoke Spanish as their primary language.<sup>43</sup> Forty of the 73 migrant workers had worked for Sidhu & Sons Nursery for two years or more.<sup>44</sup> In 2008, the SAWP workers arrived in two groups, the first in January and the second in February.

On July 7, 2008, UFCW Local 1518 applied to be certified as the bargaining agent representing all employees, except office and sales staff, employed by Sidhu & Sons Nursery. A Board officer prepared a report to determine how many employees were in the proposed bargaining unit and eligible to cast a ballot in the union representation vote. The officer determined 132 migrant and resident employees worked for Sidhu & Sons Nursery at the time the first certification application was made.<sup>45</sup>

The union disagreed with the officer's determination of the number of employees employed by Sidhu & Sons Nursery.<sup>46</sup> The union believed a number of the persons identified as resident employees were contract workers and not direct employees.<sup>47</sup> A hearing into the matter was held July 15, 2008. Vice-Chair Lisa Southern ordered a payroll audit to confirm who the number of employees.

The vote was held July 17, 2008. Again, the union contested whether all the voters were actually employees of Sidhu & Sons Nursery and entitled to vote. The ballots were sealed until the dispute could be resolved. Following a Board-mediated agreement, 127 of 129 votes were counted on July 25, 2008. Forty-nine workers voted in favour of union representation and seventy-eight voted against.<sup>48</sup> Accordingly, no certification order was issued.

On the same day that the vote results were counted, the union filed a second certification application. In this second certification application, the union proposed a

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<sup>42</sup> *Sidhu* original certification decision, *ibid.* at paras. 11, 20.

<sup>43</sup> *Sidhu* original certification decision, *ibid.*

<sup>44</sup> *Sidhu* original certification decision, *ibid.* at para.18.

<sup>45</sup> *Re Sidhu & Sons Nursery Ltd.*, [2008] B.C.L.R.B.D. No. 116 (QL), 157 C.L.R.B.R. (2d) 157 at para.5 [*Sidhu* time bar decision].

<sup>46</sup> Interview with Glenn Toombs, *supra* note 38.

<sup>47</sup> Interview with Glenn Toombs, *ibid.* The circumstances of workers employed by farm labour contractors are explained in the previous chapter.

<sup>48</sup> *Sidhu* time bar decision, *supra* note 45 at para.5.

bargaining unit made up of only the SAWP workers. Sidhu & Sons Nursery applied to have the second application dismissed and to bar the union from applying again in the next six months.<sup>49</sup> In BC, this time bar is discretionary and has rarely been granted.<sup>50</sup> Vice-chair Michael Adam<sup>51</sup> rejected the time-bar application and allowed the union's SAWP-only certification application to go forward to a hearing on the issue of whether the proposed bargaining unit was appropriate.<sup>52</sup> A vote was held to preserve the wishes of the employees pending the outcome of the hearing.

Vice-chair Adam also heard the union's SAWP-only certification application and dismissed it in a decision dated October 14, 2008.<sup>53</sup> The issue before the vice-chair was whether a unit comprised of only SAWP workers was appropriate for collective bargaining. Sidhu & Sons Nursery claimed that, rather than defining a reasonable bargaining unit, the application defined a unit based only on the level of support for the union and did not define a stable collective bargaining structure.<sup>54</sup> The employer argued all non-management employees were in one general classification of "farm labourer" and an appropriate bargaining unit must include everyone in the classification. The Labour Board's determination of whether a bargaining unit is appropriate requires consideration of potentially competing objectives of facilitating access to collective bargaining and ensuring the collective bargaining structures that result are viable.<sup>55</sup> The Board determines whether the workers in the proposed unit share common bargaining interests and whether a rational line can be drawn between workers within the unit and workers excluded from the unit. The vice-chair wrote, in part, as follows:

I have concluded that there are some identifiable differences between the SAWP employees and the domestic farm workers in terms of their respective interests arising from their employment status; their unique terms and conditions of employment;

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<sup>49</sup> This application was made pursuant to s. 30 of the *Code*, *supra* note 1.

<sup>50</sup> *Sidhu* time bar decision, *supra* note 45 at para.13.

<sup>51</sup> Michael Adam served as Vice-Chair from May 2007 to March 2012. Before his appointment as Vice-Chair, he studied labour relations and acted as counsel on labour and employment issues for municipal governments and employers in the forestry sector. See British Columbia, *Resume of Order-in-Council*, vol.37, No.3, Order-in-Council 65, effective May 25, 2010 and British Columbia Labour Relations Board, *2008 Annual Report*, at 10, online at <<http://www.lrb.bc.ca/reports/ANNUAL%20REPORT%202008.pdf>>.

<sup>52</sup> *Sidhu* time bar decision, *supra* note 45.

<sup>53</sup> *Sidhu* original certification decision, *supra* note 41.

<sup>54</sup> *Sidhu* original certification decision, *ibid.*, at para.23.

<sup>55</sup> *Sidhu* original certification decision, *ibid.*, at para.24. See also the list of factors to be considered in determining an initial bargaining unit, described above.

cultural, linguistic and social differences; and the different administrative structures required to manage the SAWP. On the other hand, given the manner with which this Employer has organized its operations, and most significantly the way agricultural work is performed on a day-to-day basis, I find that these differences are dramatically outweighed by the common skills, duties and physical working conditions applicable to all of the Employer's farm workers, and the fact that no geographical distinctions can be drawn between the proposed unit and the domestic farm workers.

[...]

In this case, all of the farm workers—domestic and foreign alike—perform the same job duties (namely, potting, pruning, weeding, irrigation, cutting, spraying, fertilizing and grafting, and blueberry picking) at all of the various locations where the Employer operates. Groups of farm workers are not distinguishable from one another on the basis of job content, job duties, or geography. The Employer has organized its affairs in a manner that creates one, singular classification of farm workers, and utilizes its entire farm worker complement in a uniform manner across all of its operations.<sup>56</sup>

In other words, the vice-chair recognized that SAWP employees had different terms and conditions of employment by virtue of the SAWP, but decided that this was not significant in determining what group of employees ought to bargain together in relation to the terms and conditions of their employment. The Seasonal Agricultural Worker Program determines the employees' maximum duration of employment, minimum wage rate, certain hours of work, rest periods and meal breaks, accommodations and costs of accommodations, and transportation to and from Canada, among other things. The SAWP required the employer administer the SAWP workers' employment differently from resident workers. The similarity between the SAWP workers and resident workers was in the type of tasks they did at work.

The vice-chair decided that all employees who perform the same tasks must bargain in a single bargaining unit, regardless of whether their working conditions and bargaining priorities are bound to differ widely. Even if this bargaining unit requirement defeated attempts of the SAWP workers to gain access to collective bargaining, all employees must bargain together. A SAWP-worker-only bargaining unit was not an appropriate unit. Therefore, vice-chair dismissed the union's application to be certified in relation to only the SAWP workers.

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<sup>56</sup> *Sidhu* original certification decision, *ibid.* at para.73.

UFCW Local 1518 applied for reconsideration of vice-chair Adam's original decision, arguing that his decision ignored the Board's duty to facilitate access to collective bargaining and denied access to collective bargaining to a marginalized and traditionally difficult to organize group.<sup>57</sup> Counsel for Sidhu & Sons Nursery responded that the original decision was consistent with the Board's principles, including the principle that the employer has no obligation to reorganize its operations to facilitate collective bargaining.<sup>58</sup>

On March 26, 2009, a reconsideration panel made up of chair Brent Mullin<sup>59</sup> and vice-chairs Allison Matacheskie<sup>60</sup> and Ken Saunders<sup>61</sup> overturned the original decision.<sup>62</sup> They said the original decision paid too much attention to whether the workers did the same job tasks and not enough attention to whether the workers inside and outside the proposed unit had shared job-related interests. Collective bargaining through a union generally addresses primarily the terms and conditions of employment. Certainly, collective agreements often touch on work assignment issues, scheduling, overtime, promotion and other issues, but few private sector employers relinquish substantial degrees of control over the assignment of work through the collective bargaining process.<sup>63</sup> In most cases, employees performing similar tasks will also have similar terms and conditions of employment. Where workers under the SAWP work alongside resident workers, however, terms and conditions of employment will differ even though all workers perform similar tasks. Therefore, the reconsideration panel decided similarity of tasks

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<sup>57</sup> *Re Sidhu & Sons Nursery Ltd.*, [2009] B.C.L.R.B.D. No. 63 (QL), 176 C.L.R.B.R. (2d) 84 at para.42 [*Sidhu* Reconsideration decision].

<sup>58</sup> *Sidhu* Reconsideration decision, *ibid.* at para.61.

<sup>59</sup> Brent Mullin was appointed Chair of the Labour Relations Board in 2002. Before becoming Chair, he practiced labour, employment and human rights law in Vancouver with the firm now known as Fasken Martineau, an international business law and litigation firm. He also served as a Vice-Chair from 1992 to 1998. His current term expires January 31, 2015. See BCLRB 2008 Annual Report, *supra* note 51 at page 9 and British Columbia Labour Relations Board, "About Us", online at <[www.lrb.bc.ca/aboutus/](http://www.lrb.bc.ca/aboutus/)>.

<sup>60</sup> Allison Matacheskie was appointed as a Vice-Chair in 2004. Before her appointment, she acted as a criminal prosecutor and represented unions with a number of Vancouver-based firms. Since February 2010, she has been the Registrar of the Labour Relations Board. Her current term ends August 31, 2013. See BCLRB 2008 Annual Report, *supra* note 51 at 11 and British Columbia Labour Relations Board, "About Us", online at <[www.lrb.bc.ca/aboutus/](http://www.lrb.bc.ca/aboutus/)>.

<sup>61</sup> Ken Saunders has served as a Vice-Chair since 2000. His current term is scheduled to expire in 2014. Before his appointment to the Board, Mr. Saunders acted as in-house counsel to public service employers' organizations. See BCLRB 2008 Annual Report, *supra* note 51 at 11.

<sup>62</sup> *Sidhu* Reconsideration decision, *supra* note 57.

<sup>63</sup> *Sidhu* Reconsideration decision, *ibid.* at para.87.

ought not to have the same significance in the Sidhu & Sons Nursery workplace as it may in others where SAWP workers are not present. In determining whether a bargaining unit made up of only part of a classification is appropriate, the reconsideration panel stated that more attention must be paid to the “unique, if not unprecedented” situation of SAWP workers and their distinctive terms and conditions of employment, not shared by the resident employees.<sup>64</sup> The reconsideration panel sent the issue of the appropriateness of a SAWP-only bargaining unit back to vice-chair Adam for a new decision in light of the comments of the reconsideration panel.

The decision of the reconsideration panel points to the new challenges posed by a transnational migrant “low skill” workforce and to the need to be alert to the policies the *Code* and the Board are mandated to promote. A list of factors developed for a traditional industrial workforce made up of Canadian residents does not necessarily capture the relevant considerations in determining bargaining structures for a workforce of both resident and temporary migrant agricultural workers. A shared job title and similar job assignments may be traditional hallmarks of shared bargaining interests, but are not determinative in a workforce containing a subgroup of workers whose legal right to remain in Canada is peculiarly tied to their employment status.

In the post-reconsideration certification hearing, the vice-chair heard additional evidence and arguments. The union again presented the same arguments it made in the original certification application hearing. The union argued that the SAWP workers in effect existed in their own classification differentiated by the working conditions dictated by the SAWP contract,<sup>65</sup> and in the alternative, that the Board has a duty to ease barriers to collective bargaining and certify less than optimal bargaining unit made up of only a part of a job classification because of the difficulties agricultural workers have traditionally had in forming unions. Perhaps in recognition that the vice-chair had not been convinced by these arguments the first time, the union presented a new alternative argument in the post-reconsideration certification hearing. The union proposed that, if the vice-chair still thought a bargaining unit comprised of only the SAWP workers created certain labour relations problems, the Board could attach conditions to limit the scope of

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<sup>64</sup> *Sidhu* Reconsideration decision, *ibid.* at paras.73,74,78.

<sup>65</sup> *Re Sidhu & Sons Nursery Ltd.*, [2010] B.C.L.R.B.D. No. 26 (QL) at para.21 [*Sidhu* post-reconsideration certification].

collective bargaining in order to avoid these labour relation problems.<sup>66</sup>

The employer presented substantially the same arguments as in the original certification hearing, supported by two intervening employers' organizations, the Western Agricultural Labour Initiative ("WALI") and the British Columbia Agriculture Council ("BCAC").<sup>67</sup> They argued the certification application ought to be dismissed because the SAWP-only bargaining unit was not an appropriate unit. They claimed no rational or defensible division could be made between the SAWP workers and the non-SAWP workers. They argued that because the employer placed all these workers in one classification, an appropriate unit must cover all workers in the classification. Finally, they argued that the SAWP workers are functionally integrated with the non-SAWP workers and, therefore, must all be in the same bargaining unit.

In the post-reconsideration decision,<sup>68</sup> the vice-chair repeated that the SAWP workers and resident workers shared many interests in common. However, vice-chair Adam also accepted that migrant workers formed a distinct group when compared to resident workers, even though they performed the same tasks, at the same locations, subject to the same statutory conditions and minimum employment standards. He recognized the group of SAWP workers as a distinct group for the following reasons: the SAWP imposes a maximum employment term duration of 8 months; SAWP workers are separated from and do not live with their family members during the employment term; temporary separation from family and country of origin gives SAWP workers an incentive to work more intensive hours; SAWP workers have less job mobility and cannot easily change employers, take a second job, or change industries while in Canada; SAWP employees receive subsidized accommodations on the employer's property; SAWP employees do not have independent access to personal transportation; SAWP employees have distinct medical insurance concerns; and SAWP employees have language, cultural and transportation barriers to accessing medical services.<sup>69</sup> The vice-chair also found that the additional evidence presented in the post-reconsideration hearing reinforced the different community of interest shared by the SAWP workers, distinct from the interests of

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<sup>66</sup> *Sidhu* post-reconsideration certification, *ibid.* at paras.24 and following.

<sup>67</sup> *Sidhu* post-reconsideration certification, *ibid.* at para.20.

<sup>68</sup> *Sidhu* post-reconsideration certification, *ibid.*

<sup>69</sup> *Sidhu* post-reconsideration certification, *ibid.* at paras.37-43.

resident workers. This distinct community of interest could support a separate bargaining unit, but the vice-chair again voiced his concern that having the union bargain in relation to only some of the workers would create problems when the employer normally assigned the same type of tasks to all workers. In order to save the employer from perceived harm of bargaining over access to certain job tasks, the vice-chair took the unusual step of imposing conditions limiting the certification order: the union could not bargain terms relating to the distribution of job tasks in the workplace. Representing a SAWP worker-only unit, the union could bargain over housing, rates of pay, benefits, access to medical care, transportation, repatriation, recall and name request, health and safety, discipline and discharge, and other non-work jurisdiction matters.<sup>70</sup> The vice-chair also commented that all employees preferred some job tasks over others, and that non-represented resident employees may eventually be disadvantaged if the union bargained a claim to the more preferred work.<sup>71</sup>

The comments of the vice-chair provide an interesting example of how the definition of a bargaining unit, and especially the limitation of bargaining issues through conditions to a certification order, effectively decides substantive bargaining issues. On the issue of whether the employer's pre-certification ability to assign any worker to any task would preclude a SAWP-only bargaining unit, the vice-chair wrote as follows:

I am satisfied on the evidence before me that the success of the Employer's business depends on maintaining a flexible workforce that can flow to the work that needs to be performed on short notice. The Employer's operation is highly labour dependent. It is seasonal in nature and weather dependent, with constantly shifting priorities and labour requirements. On the evidence before me, I find the Employer's business would be particularly sensitive to the types of labour relations problems that can be expected to arise if the Board were to grant a certification that cuts through the work performed by the Employer's farm workers on the basis of whether that work is performed by SAWP or non-SAWP employees.<sup>72</sup>

The prohibition against bargaining work-jurisdiction matters preserved the employer's ability to continue to treat all workers in the classification as interchangeable and preserved the employer's "flexible" workforce, and determines a potential bargaining

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<sup>70</sup> *Sidhu* post-reconsideration certification, *ibid.* at para.78.

<sup>71</sup> *Sidhu* post-reconsideration certification, *ibid.* at para.64-68.

<sup>72</sup> *Sidhu* post-reconsideration certification, *ibid.* at para.59.

issue in the employer's favour throughout the bargaining relationship. Why then, one might ask, did the union propose attaching conditions to the certification order? In proposing conditions to limit the scope of bargaining required by the certification order, the union strategically offered some middle ground to the decision-maker. The vice-chair plainly stated that, without conditions limiting the scope of collective bargaining, he would have found for a second time that a bargaining unit made up of only the SAWP workers was neither a viable nor an appropriate bargaining unit.<sup>73</sup>

After the vice-chair's reasons were released February 9, 2010, the results of the certification vote held in 2008 were finally tallied and majority support for the union was confirmed. The certification order stating UFCW Local 1518 is the exclusive bargaining agent for "a unit composed of Seasonal Agricultural Workers Program (SAWP) employees employed by Sidhu & Sons Nursery Ltd." is dated March 4, 2010.<sup>74</sup> The order was made over 19 months after the certification application was filed.

Sidhu & Sons Nursery applied for reconsideration of the February 9, 2010 certification decision, claiming that the Board had certified an inappropriate bargaining unit and that the Board did not have jurisdiction to limit or attach conditions to the scope of collective bargaining.<sup>75</sup> Both the WALI and BCAC intervened in support of the employer's position. On April 26, 2010, the reconsideration panel, again comprised of the chair Brent Mullin and vice-chairs Allison Matacheskie and Ken Saunders, rejected the reconsideration application, finding no good arguable case of reviewable error. The certification order stood, at least for a time. The legal struggles continued between UFCW Local 1518 and Sidhu & Sons Nursery, as the union attempted to maintain a relationship with its members and establish a collective bargaining relationship with the employer.

Access to workers living on the employer's property was the next issue brought to the Board's attention. After a union representative entered Sidhu & Sons Nursery's property to pick up some union members in order to take them to a union function, the employer sent a letter to UFCW Local 1518 stating:

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<sup>73</sup> *Sidhu* post-reconsideration certification, *ibid.* at para.74.

<sup>74</sup> British Columbia Labour Relations Board, Certification order between United Food and Commercial Workers Local 1518 and Sidhu & Sons Nursery Ltd, dated March 4, 2010. Obtained from Labour Relations Board and on file with the author.

<sup>75</sup> *Re Sidhu & Sons Nursery Ltd.*, [2010] B.C.L.R.B.D. No. 64 (QL), 174 C.L.R.B.R. (2d) 33.

We are writing to notify the Union that representatives of the Union are not permitted to attend on the Employer's premises including staff housing without the express approval in advance of the Employer. Anyone attending without approval will be treated as trespassing and removed from the property.<sup>76</sup>

In response, the union applied to the Board for an order directing the employer to allow the union to enter the employer's property to conduct union business.<sup>77</sup> Workers who live on the employer's property and who have transportation barriers face particular problems in the collective bargaining process and in their ability to maintain a relationship with the union. This appears to be the first time the Board considered an application for an access order to facilitate union servicing, rather than for organizing purposes.<sup>78</sup>

During the course of the decision, vice-chair Ritu Mahil<sup>79</sup> made several comments revealing the nature of the accommodations and restrictions the employer imposed on SAWP workers living on the employer's property:

The staff housing is shared accommodation comprised of bedrooms, washrooms and kitchen facilities. There are no lounges or meeting rooms within the staff housing. The bedrooms are shared. There are no individual or private living areas. Kitchens are shared amongst the residents of each staff housing unit.

[...]

The Employer's policy is that it does not allow any unauthorized people on its property including in staff housing. This is done to protect employees' privacy and ability to rest and attend to personal matters without disruption. All employees are prohibited from drinking alcoholic beverages and smoking on the Employer's property.<sup>80</sup>

These brief paragraphs provide a glimpse into the life of these migrant workers, all of whom lived on the employer's property. Sidhu & Sons Nursery provided accommodations with little or no possibility of privacy. The accommodations

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<sup>76</sup> *Re Sidhu & Sons Nursery Ltd.*, [2010] B.C.L.R.B.D. No. 153 (QL) at para.6 [*Sidhu* access decision]. The letter was dated July 13, 2010.

<sup>77</sup> See *Code*, *supra* note 1 at s.7.

<sup>78</sup> *Sidhu* access decision, *supra* note 76 at para.22.

<sup>79</sup> Ritu Mahil was appointed as a Vice-Chair in May 2007, after serving as in-house counsel to the BC Health Sciences Association since 2002. In 2010, she was appointed to a second term ending in May 2014. See *BCLRB 2008 Annual Report*, *supra* note 51 at 11 and British Columbia, *Resume of Order-in-Council*, vol.37, No.3, Order-in-Council 66, effective May 25, 2010.

<sup>80</sup> *Sidhu* access decision, *supra* note 76 at paras. 4, 5, 7.

contemplate few activities apart from the bare necessities required to continue to be able to work. The employer's policies further create significant barriers to the migrant workers engaging in normal interaction with others in the wider Canadian community, union-related or otherwise. By setting lifestyle policies governing non-working time spent in the workers' accommodations, the employer exercises much greater control over aspects of life not generally regulated by the employers of most workers in Canada. Because the SAWP requires that the employer provide accommodations at a fixed rental cost,<sup>81</sup> lower than the cost of generally available accommodations, SAWP workers' accommodations effectively form part of their compensation package. To live elsewhere would, in some respects, be equivalent to taking a pay cut.

In response to the union's application for an access order, Sidhu & Sons Nursery argued that the union and workers can organize and conduct affairs off the employer's property at the union's office in Abbotsford, and that any access to workers on the employers' property interferes with workers' ability to recuperate from work and prepare to work again. If access was necessary, the employer argued that it could only be allowed at a specific employer-designated location. The Board rejected both of these arguments as inconsistent with employee privacy and with the *Code* protections against employer interference in union activities.<sup>82</sup> In order to preserve access comparable to employees who live off employer-property, the Board ordered that the employer permit union representatives unsupervised and unrestricted access to knock on housing doors and be admitted to the housing should the employees wish between 6:30 p.m. and 10:00 p.m. on weekdays and at other times if invited by the employees.<sup>83</sup>

By September 2010, when the Board ordered the employer to permit union access to employees on the employer's property, only 30 SAWP workers remained employed by Sidhu & Sons Nursery,<sup>84</sup> down from 73 when the initial certification application was filed in July 2008. By 2011, Sidhu & Sons Nursery employed a mix of resident workers,

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<sup>81</sup> For example, in 2012, an employer could not charge a worker more than \$589.00 for accommodations provided for the entire duration of his stay which could be as long as 8 months. See Human Resources and Skills Development Canada, "Agreement for the Employment in Canada of Seasonal Agricultural Workers from Mexico in British Columbia for the Year 2012", online:  
<[http://www.hrsdc.gc.ca/eng/workplaceskills/foreign\\_workers/contracts-forms/sawpmcb2012.shtml](http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/contracts-forms/sawpmcb2012.shtml)>.

<sup>82</sup> *Sidhu* access decision, *supra* note 76 at para.26.

<sup>83</sup> *Sidhu* access decision, *ibid.* at para.27.

<sup>84</sup> *Sidhu* access decision, *ibid.* at para.3.

SAWP migrant workers, and non-SAWP temporary foreign migrant workers.<sup>85</sup> Despite the decreased numbers within the SAWP-only bargaining unit, the union persisted in its efforts to obtain a first collective agreement.

The union filed an unfair labour practice complaint alleging Sidhu & Sons Nursery was bargaining in bad faith.<sup>86</sup> The Board imposed a first collective agreement between the parties on November 3, 2010. This collective agreement contained a general wage increase, vacation pay increase, paid breaks, seniority and recall rights, and a grievance procedure.<sup>87</sup> This agreement was reached late in the season. The union translated the agreement into Spanish and verbally introduced it when the workers returned the next season.<sup>88</sup>

On April 11, 2011, one or more SAWP workers employed by Sidhu & Sons Nursery filed an application with the BC Labour Relations Board to revoke the certification order.<sup>89</sup> This decertification application was filed fairly early in the growing season and before any grievances had been filed to enforce the newly imposed collective agreement.<sup>90</sup>

UFCW Local 1518 believed the decertification application was the result of pressure and improper interference by the employer, the Mexican government and the Mexican Consulate in Vancouver. On April 19, 2011, the union filed a complaint alleging that an unfair labour practice had occurred, and requested as a remedy that the Board dismiss the decertification application and order the employer and Mexican officials to stop interfering with employees' exercise of rights under the *Code*.<sup>91</sup> The union's application provided details of the interference it believed had taken place. In September 2010, the

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<sup>85</sup> See allegations in Complaint by UFCW Local 1518 against United Mexican States and Consulado General de Mexico en Vancouver and Sidhu & Sons Nursery Ltd., filed with the BC Labour Relations Board and dated April 19, 2011 at para.10. Online at: [http://www.ufcw.ca/index.php?option=com\\_content&view=article&id=2564%3Astop-the-blacklisting-of-migrant-workers&catid=6%3Adirections-newsletter&Itemid=342&lang=en](http://www.ufcw.ca/index.php?option=com_content&view=article&id=2564%3Astop-the-blacklisting-of-migrant-workers&catid=6%3Adirections-newsletter&Itemid=342&lang=en) [UFCW complaint against Mexico and Sidhu & Sons].

<sup>86</sup> UFCW complaint against Mexico and Sidhu & Sons, *ibid*.

<sup>87</sup> United Food and Commercial Workers Canada, "Another UFCW Canada Victory for Migrant Agriculture Workers", (22 November 2010) online: UFCW Canada [http://www.ufcw.ca/index.php?option=com\\_content&view=article&id=2151%3Aanother-ufcw-canada-victory-for-migrant-agriculture-workers&catid=6%3Adirections-newsletter&Itemid=6&lang=en](http://www.ufcw.ca/index.php?option=com_content&view=article&id=2151%3Aanother-ufcw-canada-victory-for-migrant-agriculture-workers&catid=6%3Adirections-newsletter&Itemid=6&lang=en).

<sup>88</sup> Interview with Glenn Toombs, *supra* note 38 and interview with Lucy Luna, *supra* note 37.

<sup>89</sup> UFCW complaint against Mexico and Sidhu & Sons, *supra* note 85.

<sup>90</sup> Interview of Glenn Toombs, *supra* note 38. According to Mr. Toombs, as of April 2012, no grievances have been filed in relation to any of the union's collective agreements covering agricultural workers in B.C.

<sup>91</sup> UFCW complaint against Mexico and Sidhu & Sons, *supra* note 85.

union alleged, a manager used a translator to tell the SAWP employees that if they contacted a union representative in the future, they would be in trouble with the farm. The union also alleged that the government of Mexico had violated the *Code*<sup>92</sup> by prohibiting union-supporting workers from returning to the employer in 2010 because of their support for the union. The allegation against Mexico is somewhat complex and requires some background on certain SAWP mechanisms. The collective agreement imposed in September 2010 required the employer request from the SAWP administrators the return of the previous season's workers, in order of seniority, when the employer made its request for workers through the SAWP. The union's members in Mexico then would receive recall letters informing them that they had been requested by name to work for the employer the next season. Administrators of the SAWP in Mexico keep files on all Mexican workers who work through the SAWP. The union obtained a copy of part of one recalled employee's file. Translated from Spanish, the typed file notation said: "a call is received from the Vancouver's Consulate Office where we are told that this worker would not go to Canada because he is immersed in things of the union, pay attention that he does not go out."<sup>93</sup> Despite having received a recall letter from Sidhu & Sons Nursery, the Mexican government did not allow this employee to return to Sidhu & Sons Nursery. Instead, he was eventually sent to work in Quebec.<sup>94</sup> The union alleged that this sent a clear message that support for the union jeopardized continued employment with the same employer.

Mexico responded to these allegations of improper interference in violation of the BC *Code* by claiming state immunity. The *State Immunity Act*<sup>95</sup> is federal legislation that provides general assurance that a foreign state is immune from the jurisdiction of any court in Canada, unless one of the exceptions set out in the Act applies. Exceptions to state immunity include criminal proceedings and actions relating to a foreign state's "commercial activity" or any action of a foreign state causing damage or loss of property occurring in Canada.

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<sup>92</sup> The union's allegations were that sections 6, 9 and 33 of the *Code*, *supra* note 1, were violated.

<sup>93</sup> UFCW complaint against Mexico and Sidhu & Sons, *supra* note 85.

<sup>94</sup> *Certain Employees, Sidhu & Sons, Floralia, Mexico, Mexican Consulado en Vancouver v. United Food and Commercial Workers International, Local 1518*, [2012] B.C.L.R.B.D. No. 28 (QL), 207 C.L.R.B.R. (2d) 1 at para.4 [*Mexican Government Immunity* decision].

<sup>95</sup> R.S.C. 1985, c.S-18.

In response to Mexico's argument, UFCW Local 1518 argued that Mexico's provision of labourers to Canadian employers through the SAWP was a commercial activity, and therefore, state immunity did not apply. A direct financial benefit, the union argued, was not determinative of whether the activity was commercial, and in any event, Mexico received an indirect financial benefit through the money made by Mexican workers.<sup>96</sup> The Mexican government countered that the SAWP was not commercial activity because the state receives no fee for supplying labour. It described the SAWP as a "temporary immigration agreement".<sup>97</sup> Vice-chair Wilkins accepted this argument and relied on the absence of a fee paid to Mexico as the primary reason why the SAWP was not commercial activity. In the vice-chair's view, Mexico negotiated and administers the SAWP agreement including the basic contract of employment, but the commercial activity exists between the Canadian employer and the Mexican migrant workers.<sup>98</sup>

The union also argued that state immunity did not apply to Mexico because the actions of Mexico caused damage to the union's property in Canada. The property the union argued had been damaged was the union's bargaining rights recognized and protected by the certification order. Mexico responded that property must refer to tangible real or personal property. Again, the vice-chair agreed with Mexico's position, commenting that the international understanding of property is in a physical sense, and does not describe statutory rights, such as a certification order.<sup>99</sup> Vice-Chair Bruce Wilkins<sup>100</sup> decided state immunity did apply and dismissed the union's allegations against Mexico and the Mexican Consulate in Vancouver based on state immunity. As a result, the union's applications against Mexico were dismissed. The Board could neither require Mexico to participate nor order remedies against Mexico.

The decision on state immunity did not, however, have the effect of dismissing all of the union's unfair labour practice complaint. The Board accepted the union's argument that the Board may hear evidence relating to actions taking place outside of the

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<sup>96</sup> *Mexican Government Immunity* decision, *supra* note 94 at para.13.

<sup>97</sup> *Mexican Government Immunity* decision, *ibid.* at para.25.

<sup>98</sup> *Mexican Government Immunity* decision, *ibid.* at para.36.

<sup>99</sup> *Mexican Government Immunity* decision, *ibid.* at para.41.

<sup>100</sup> Bruce Wilkins became a Vice Chair in May 2007, after working in prosecutions and as in-house counsel for the BC Health Sciences Association. He is appointed to a term expiring May 25, 2014. See BCLRB 2008 Annual Report, *supra* note 51 at 12 and British Columbia Labour Relations Board Website, "About Us", online at <[www.lrb.bc.ca/aboutus/](http://www.lrb.bc.ca/aboutus/)>.

jurisdiction of BC to determine whether an unfair labour practice or other violation of the *Code* occurred within the jurisdiction of BC. The Board commented:

While it is my finding that Mexico enjoys state immunity in this matter, facts arising with respect to the actions of Mexico are relevant and important to provide the background and context in which the Board may fully exercise its remedial powers, if it is appropriate to do so, once the evidence in this matter is heard and considered. I am of the view that the Board can and should take into account facts which take place in other jurisdictions in exercising its remedial authority within the province of British Columbia.<sup>101</sup>

Jurisdictional issues are not unique to migrant workers. The same issue arises with multi-national corporate employers who make statements related to unionization, or close stores in which employees have recently unionized in other jurisdictions, and in so doing, send a strong message to employees everywhere. The extent to which the Board can respond to the inter-jurisdictional challenge inherent in the employment of transnational migrant workers and in the operations of multi-national corporate employers has yet to be seen.

A hearing into the decertification application proceeded in the late winter and early spring of 2012.<sup>102</sup> At the same time, the union applied to the British Columbia Superior Court for a review of the Labour Relations Board's decision to dismiss the allegations against Mexico, and the Mexican government applied to the British Columbia Superior Court for a stay, to prevent the BC Labour Relations Board from making any rulings in relation to the Mexican government's conduct. As of the end of August 2012, the court had not yet ruled on either application.

### **Greenway Farms**

Greenway Farms grows field vegetables and packages and markets vegetables near Surrey, BC. Greenway Farms is also in the Lower Mainland region of the province. On July 28, 2008, a few weeks after the union filed the certification applications relating to Sidhu & Sons Nursery, UFCW Local 1518 applied to be certified as the bargaining

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<sup>101</sup> *Mexican Government Immunity* decision, *supra* note 94 at para.47.

<sup>102</sup> United Food and Commercial Workers, "BC hearings start into Blacklisting of Mexican migrant workers", (21 February 2012) online: <[http://www.ufcw.ca/index.php?option=com\\_content&view=article&id=2668%3Ae-news-vol5-issue-9&catid=76%3Ae-news-2012&Itemid=347&lang=en](http://www.ufcw.ca/index.php?option=com_content&view=article&id=2668%3Ae-news-vol5-issue-9&catid=76%3Ae-news-2012&Itemid=347&lang=en)>.

representative for employees of Greenway Farms.<sup>103</sup> At the time of the union's application, Greenway Farms employed approximately forty workers, the majority of whom were migrant workers from Mexico under the SAWP.<sup>104</sup>

The union's application proposed two possible bargaining units. The primary proposal was a bargaining unit including all SAWP employees employed by Greenway Farms, and the alternative bargaining unit proposal was for all employees of Greenway Farms, except office workers and supervisors.<sup>105</sup> A representation vote was held and a majority of the employees at Greenway Farms voted to be represented by UFCW Local 1518. On August 7, 2008, the Board issued a certification order covering all employees except office workers and supervisor. This means that under the certification order, the union would represent all employees regardless of whether they were Canadian resident workers or hired through the SAWP or another temporary foreign worker program.

After the Board issued the certification order, Greenway Farms, supported by the Western Agricultural Labour Initiative and British Columbia Agricultural Council, applied to have the certification order cancelled, claiming that the provincial *Labour Relations Code* could not apply to foreign national workers.<sup>106</sup> The employer and the employer-representative organizations claimed that the SAWP memorandum of agreement and federal immigration legislation were federal "laws" that completely covered labour relations and the contract of employment for migrant workers. They argued that the Mexican or Caribbean government agent under the SAWP entirely fulfils the negotiating-agent role of a union. A national government, the employer argued, has more power and ability to represent workers compared with a trade union.<sup>107</sup> As a

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<sup>103</sup> Notice of the British Columbia Labour Relations Board, Re Application for Certification, Greenway Farms Ltd and United Food and Commercial Workers International Union, Local 1518, Case No 58245/08R, dated July 28, 2008. ["Notice of Greenway Certification Application"] Obtained from the Labour Relations Board and on file with the author.

<sup>104</sup> United Food and Commercial Workers Canada, "Seasonal Farm Workers in B.C. go Union with UFCW Canada", (8 August 2008) online: <[www.ufcw.ca](http://www.ufcw.ca)>; interview with Glenn Toombs, *supra* note 38; interview with Lucy Luna, *supra* note 37.

<sup>105</sup> Notice of Greenway Certification Application, *supra* note 103. See also Tom Sandborn, "Setback for Historic Effort to Unionize Guest Farm Workers", *The Tyee* (29 June 2009) <<http://thetyee.ca/News/2009/06/29/FarmUnionSetback/>>.

<sup>106</sup> See *Re Greenway Farms*, [2009] B.C.L.R.B.D. No. 135 (QL), 170 C.L.R.B.R. (2d) 208. For another commentary on this case, see Robert Russo, "Case Comment: Temporarily Unchained: The Drive to Unionize Foreign Seasonal Agricultural Workers in Canada -- A Comment on Greenway Farms and UFCW" (2011) 169 *BC Studies* 131.

<sup>107</sup> *Greenway Farms*, *supra* note 106 at paras. 55, 71.

consequence, the employer, WALI and BCAC claimed the federal law was either paramount to the provincial labour law or the doctrine of interjurisdictional immunity applied. Either way, they argued the provincial *Labour Relations Code* could not apply to migrant workers in BC.

The union's submissions were that SAWP is not a federal law but a federal program, and as a program, it cannot be a federal law that is inconsistent with a provincial law. Therefore, neither the doctrine of interjurisdictional immunity nor the doctrine of paramountcy applied. Moreover, the terms of the SAWP memorandum of understanding and employment contract anticipate that provincial employment standards will apply to the workers while they are working in Canada. Under the terms of the program, the SAWP workers are to receive treatment equal to Canadian workers performing the same work in accordance with Canadian laws. Finally, the union argued that the government agent role is different from and compatible with the role of a union.

Greenway Farms' challenge to the certification order raised a constitutional question. Therefore, the Attorneys General of Canada and BC were notified and invited to give submissions. Both Attorneys General supported the union's position that provincial labour legislation applied to SAWP workers. The Attorney General of Canada relied on submissions it prepared for the Quebec labour relations commission, where the same constitutional jurisdiction question was raised in 2007.<sup>108</sup> The BC Labour Relations Board came to the same conclusion as the Quebec labour relations commission that provincial labour relations legislation applied. Vice-chair Ken Saunders concluded that the SAWP memoranda of understanding are not "laws" for the purposes of the doctrine of paramountcy, and therefore, there is no federal law capable of displacing the jurisdiction of the provincial government.

Incidentally, the Board's conclusions in the Greenway Farms case resolved an important collective bargaining issue. The vice-chair rejected the idea that the terms of the SAWP contract regarding wage rate or other terms of employment cannot be altered by collective bargaining.<sup>109</sup> The contract of employment imposed through the SAWP reads "The PARTIES agree that no term or condition of this agreement shall be

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<sup>108</sup> *Greenway Farms, ibid.* at para.75. The Quebec case is *Travailleurs et travailleuses unis de l'alimentation et du commerce, section locale 501 c. La Legumier Y.C. inc.*, 2007 QCCRT 467.

<sup>109</sup> *Greenway Farms*, supra note 106 at paras. 115, 123-4.

superseded, suspended, modified or otherwise amended, in any way, without the express written permission of the competent Canadian and Mexican authorities, as well as the EMPLOYER and his WORKER.”<sup>110</sup> Although this provision could be used to argue that the terms and conditions covered by the SAWP contract, including wages and hours of work, are off limits as collective bargaining topics, the vice-chair interpreted the “no alternation of terms” provision of the SAWP employment contract to mean that employees could not be compelled to accept lesser terms and the SAWP provisions function to set mandatory minimums rather than fixed conditions.<sup>111</sup> In coming to this conclusion, vice-chair Saunders wrote: “The SAWP was intended to alleviate a labour shortage, not to guarantee the agricultural employees will be able to cultivate and harvest their crops regardless of their employee’s statutory rights.”<sup>112</sup>

Despite winning the battle on the constitutional question and confirming that provincial labour legislation applied, the union lost the war for the Greenway Farms bargaining unit. Even before the Board released its decision confirming the Board’s jurisdiction to make the certification order on June 29, 2009, certain employees of Greenway farms had already filed an application to revoke the certification order on June 22, 2009.<sup>113</sup> A vote was held and the majority of employees voted to no longer be represented by the union. The certification order was cancelled on June 28, 2009.<sup>114</sup>

What factors led to this decertification just under a year after the initial certification order was made? Despite the employer’s constitutional challenge to the validity of the certification order, the union had pursued negotiations and a collective agreement had been reached.<sup>115</sup> According to the union, however, the composition of the workforce

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<sup>110</sup> See Human Resource and Skills Development Canada, Agreement for the Employment in Canada of Seasonal Agricultural Workers from Mexico (2011) at XI.5.

<sup>111</sup> *Greenway Farms*, *supra* note 106 at paras.118, 130.

<sup>112</sup> *Greenway Farms*, *ibid.* at para.140.

<sup>113</sup> Notice from the British Columbia Labour Relations Board of an application to revoke a certification order, Re Certain Employee, Greenway Farms and United Food and Commercial Workers International Union, Local 1518, Case No 59510/09R, dated June 24, 2009. Obtained from the Labour Relations Board and on file with the author.

<sup>114</sup> British Columbia Labour Relations Board, Cancellation of a Certification Order dated August 7, 2008, between UFCW Local 1518 and Greenway Farms (28 July 2009). Obtained from the BC Labour Relations Board and on file with the author.

<sup>115</sup> Interview of Glenn Toombs, *supra* note 38. According to Mr. Toombs, this agreement was based in part on an agreement from Manitoba, and also included a provision requiring the employer pay employees for transportation time between fields and modest wage increases.

changed significantly in between 2008 and 2009.<sup>116</sup> In 2008, the majority of workers were SAWP workers from Mexico, with a few Canadian resident field workers. In the 2009 growing season, the majority of workers were Canadian residents, primarily Indo-Canadians. Fewer than one-third of the workers were SAWP workers from Mexico.<sup>117</sup> In 2009, the union attempted to identify and reach out to this new contingent of workers through a Punjabi-speaking union representative.<sup>118</sup> In part, the union explained the decertification application by pointing to the significant change in the workforce composition and the difficulty of connecting with the contingent of new workers in the short time period before the decertification application was made. The predominantly seasonal nature of agricultural employment in BC, as described in the previous chapter, creates many challenges in maintaining stable collective bargaining relationships. The Coordinator of the Agricultural Workers Alliance centre who had regular contact with some SAWP workers from Greenway Farms observed that in 2010, the season after the Greenway Farms bargaining unit was decertified, the workforce appears to have returned to a majority of SAWP workers and a small number of Canadian resident workers.<sup>119</sup> Although greater numbers of SAWP workers were hired by Greenway Farms in 2010, the union claims that the workers who voted in favour of the 2008 certification have not returned.<sup>120</sup>

In the course of my research, I was unable to confirm with Greenway Farms whether the proportion of SAWP workers hired by the employer changed in the 2009 season.<sup>121</sup> Neither was I able to confirm with the employer if SAWP workers again made up the majority of the workforce in 2010 and following years, as the union claims. In terms of the effect of such a change to the workforce, however, the perception is perhaps just as important as the reality for its impact on the union's current and future organizing

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<sup>116</sup> Representatives from Greenway Farms declined my interview requests, and I have been unable to verify the employer's perspective on whether the composition of the 2009 workforce changed and the reasons for same.

<sup>117</sup> See also Tom Sandborn, "More Legal Twists to Migrant Workers' Unionizing Attempt" *The Tyee* (3 July 2009) online at <thetyee.ca>; Tom Sandborn, "Setback for Historic Effort to Unionize Guest Farm Workers", *supra* note 105.

<sup>118</sup> Interview with Glenn Toombs, *supra* note 38.

<sup>119</sup> Interview with Lucy Luna, *supra* note 37.

<sup>120</sup> Interview with Lucy Luna, *supra* note 37 and interview with Glenn Toombs, *supra* note 38.

<sup>121</sup> My request for an interview with Greenway Farms was declined. Representatives from Sidhu & Sons Nursery and Floralia Plant Growers also declined my interview requests.

campaigns. If migrant agricultural workers are under the impression that workers who voted in favour of union certification were not recalled to work with the employer in the seasons that followed, the perception of reprisals for union activity is a significant and continuing deterrent to support for future unionization campaigns.

As was the case with the employees at Greenway Farms, the perception of reprisals for union activity played a key role in UFCW Local 1518's efforts to unionize and bargain collectively on behalf of employees of Floralia Plant Growers. It is to this organizing campaign I turn next.

#### **Floralia Plant Growers Ltd.**

Floralia Plant Growers produces vegetables, including broccoli, beans and zucchini, on 433 acres spread over ten locations in the Abbotsford area of the Fraser Valley, also located in the Lower Mainland region of BC.<sup>122</sup> As of early September 2008, the employer had thirty employees. Of these thirty, twenty-nine were SAWP employees from Mexico and one was local.<sup>123</sup> Sixteen of the twenty-nine SAWP workers had worked for Floralia Plant Growers for more than one season.<sup>124</sup> Floralia has employed migrant workers through the SAWP since 2005.

UFCW Local 1518 applied to be the certified bargaining representative of the employees of Floralia Plant Growers on September 4, 2008. After the certification application was filed, but before the representation vote was held, fourteen employees - roughly half the workforce - were laid off and sent back to Mexico.<sup>125</sup> The union filed an unfair labour practice complaint with the Labour Relations Board, alleging that the lay-off decision was made directly after the employer became aware of the certification application and was a form of punishment for union activity. Floralia took the position that the decision to lay-off workers was made before it was aware of the organizing drive and was motivated only by crop failure.

A few days later, the union filed a second unfair labour practice complaint in relation to statements made by a manager to workers on the day of the vote. The employer had asked its lawyer draft a statement, which was professionally translated into Spanish,

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<sup>122</sup> See *Re Floralia Plant Growers Ltd.*, [2008] B.C.L.R.B.D. No. 157 (QL) generally, especially at paras. 6-7.

<sup>123</sup> *Floralia*, *ibid.* at para.12.

<sup>124</sup> *Floralia*, *ibid.* at para.12.

<sup>125</sup> *Floralia*, *ibid.* at para.62.

outlining the employer's views about unionization. This statement was distributed to the workers who had not been laid off. On the day of the vote, a manager, along with a Spanish-speaking friend, held a meeting with the workers in which he read out parts of the statement and told them that the vote would be that day, that the vote was confidential and that the workers "could be the group that could be re-elected for next season".

The hearing of the union's unfair labour practice complaints lasted eight days. Some of the union's witnesses, who had been repatriated to Mexico, testified in Spanish by telephone from Mexico and their evidence was translated by a Board-supplied interpreter.<sup>126</sup> Vice-chair Beverley Burns<sup>127</sup> decided that the employer's statements on the day of the vote were not a violation of the *Code*, which states that expressing one's views on any matter, including the representation of employees by a trade union, is not contrary to the *Code* so long as the person does not use intimidation or coercion.<sup>128</sup> The vice-chair also decided that the employer had laid off and repatriated the employees because of lack of work caused by weather-related crop failure. All witnesses agreed that the 2008 growing season had been terrible for the employer. The vice-chair determined that the certification application and anti-union animus played no part in the employer's decision. The vice-chair heard conflicting evidence from witnesses for the employer and the union. In the end, the vice-chair appears to have resolved some of the evidentiary discrepancies by concluding that the managers and workers, both speaking in their second languages, did not always understand one another.<sup>129</sup>

The vice-chair's attention to the challenges of multiple languages and the potential for misunderstanding highlights the problem of an analysis of unfair labour practice allegations that focuses on intentions of the employer rather than on effects on the workers. In her analysis of the union's allegations that the lay-off amounted to an unfair labour practice, much attention was paid to the timing of the decision and whether it was made before or after the employer was aware of the certification decision. Little attention

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<sup>126</sup> *Floralia, ibid.* at para.3.

<sup>127</sup> Vice-Chair Beverley J. Burns was first appointed to the Labour Relations Board in May 2007. Before that, she had practiced law in various capacities for almost 20 years, including as an in-house counsel to the Canadian Union of Public Employees, in-house counsel to Woolworth Canada Inc., Executive Assistant to the Deputy-Minister of Labour-Management Services in Ontario, and Director of Labour Relations for WorkSafeBC. BCLRB 2008 *Annual Report, supra* note 51 at page 10.

<sup>128</sup> See *Code, supra* note 1, s. 8.

<sup>129</sup> *Floralia, supra* note 122 at para.77.

appears to have been paid to what the workers believed to be the reasons behind the lay-off and the effect the news of the lay-off had on the remaining workers' perception of their freedom to join and support a trade union. The focus on the employer's intentions is ill-suited to the Board's remedial powers. The Board does not punish an offender for an intentional wrong, but instead orders remedies to protect the rights and freedoms recognized by the *Code*.

After dismissing the union's unfair labour practice complaints on October 8, 2008, the Board ordered the ballots in the certification representation vote be counted.<sup>130</sup> The following day, the employer applied for a stay of the counting of the ballots. The Board Registrar dismissed the application and the vote was counted October 10, 2008.<sup>131</sup> When the votes were counted, despite the actions the union believed to be an improper attempt to influence the workers' decision to join the union, a majority of voters had voted in support of union representation.

Floralia then applied to the Board for a declaration that the provincial *Code* did not apply to temporary foreign workers, and requested that the certification order not be issued until the Board had decided the jurisdictional issue raised by Greenway Farms and the intervening employers' associations, discussed above. Vice-chair Beverley Burns first questioned whether she had the authority to delay issuing a certification order,<sup>132</sup> but without deciding that issue, she dismissed Floralia's application because of the employer's delay in raising its objection. The Western Agricultural Labour Initiative and the British Columbia Agricultural Council had initially applied to intervene in the Floralia certification hearing, but later withdrew and proceeded only in the Greenway case. Floralia had notice of the jurisdiction issue long before the vote was counted, but had failed to raise it.

The certification order was issued October 20, 2008. Like the Greenway Farms certification order, the Floralia certification order applied to all employees, except office staff and supervisors. The bargaining unit therefore included resident workers and SAWP or other migrant workers. With the certification order in place, collective bargaining

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<sup>130</sup> *Floralia, ibid.* and *Re Floralia Plant Growers Ltd.*, [2008] B.C.L.R.B.D. No. 165 at para.5 [*Floralia* stay application].

<sup>131</sup> *Floralia* stay application, *ibid.* at para.7.

<sup>132</sup> *Floralia* stay application, *ibid.* at para.27.

began. The parties sought the mediation assistance of the Labour Relations Board. With vice-chair Mahil acting as mediator, Floralia and UFCW Local 1518 reached a collective agreement September 21, 2009.<sup>133</sup> The agreement was to last from September 22, 2009 to September 22, 2012. The provisions of this collective agreement are analysed in some detail in the next section of this chapter.

After the agreement was signed, the employer, employees and union appear to have lived under this agreement for the complete growing season in 2010. The union had the collective agreement translated into Spanish and met with the workers to explain it to them. According to the union, no formal grievances were filed. Representatives of the union say that this was because the workers were under surveillance and afraid to come forward.<sup>134</sup> As described in the previous chapter, SAWP employees are likely to be more vulnerable to pressure from employers because of their dependence on their employers for not only their continuing employment, but also housing and legal status to remain in Canada. Even with the collective agreement in place, the union reports that many employees pretended not to know the union representatives when the employer was around because of fear of repatriation or fear that the employer would employ fewer SAWP workers the next season. These fears perhaps were justified. From when the certification application was filed in September 2008 to April 2011, the number of workers arriving through SAWP decreased from twenty-nine to six.

Certain employees of Floralia filed a decertification application on April 14, 2011, just three days after certain employees of Sidhu & Sons filed their decertification application. UFCW Local 1518 raised objections to the decertification application, citing interference from the state of Mexico and its Consulate in Vancouver.<sup>135</sup> The union's pleadings make the following specific allegations of interference:

13. In 2010, [a long-time SAWP employee of Floralia] went to the offices of the Ministry of Labour in Tlaxacala in Mexico.

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<sup>133</sup> United Food and Commercial Workers Canada, "Historic Victory for Migrant Farm Workers" (23 September 2009) online: <[www.ufcw.ca](http://www.ufcw.ca)>.

<sup>134</sup> Interview of Glenn Toombs, *supra* note 38 and interview of Lucy Luna, *supra* note 37.

<sup>135</sup> See Complaint by UFCW Local 1518 against United Mexican States and Consulado General de Mexico en Vancouver and Floralia Plant Growers Limited., filed with the BC Labour Relations Board and dated April 28, 2011. Online at: [http://www.ufcw.ca/index.php?option=com\\_content&view=article&id=2564%3Astop-the-blacklisting-of-migrant-workers&catid=6%3Adirections-newsletter&Itemid=342&lang=en](http://www.ufcw.ca/index.php?option=com_content&view=article&id=2564%3Astop-the-blacklisting-of-migrant-workers&catid=6%3Adirections-newsletter&Itemid=342&lang=en) ["Complaint against Mexico and Floralia"].

14. Staff at the Ministry of Labour, using its resources to access information on the internet and translate that information into Spanish, researched the process for decertification in British Columbia.

15. The Ministry of Labour presented this information to [the employee] and told him to implement the process upon his return to Canada.

[...]

17. [The employee] did return to Canada to work for Floralia in 2011 and, as instructed, he did initiate a decertification campaign.

18. On April 14, 2011, certain employees of Floralia, led by [the employee], applied to the Board to be decertified. A vote has been held and the counting of those ballots has been sealed pending the adjudication of this amended complaint.<sup>136</sup>

These are extraordinary allegations of interference. The state of Mexico and its Vancouver consulate have sought and obtained state immunity in relation to these allegations. Therefore, Mexico is not a party to the Board hearing to determine the union's allegations whether "improper interference by any person" has rendered the decertification representation vote "unlikely to disclose the true wishes of the employees".<sup>137</sup>

The union has requested reconsideration of the Board's decision granting Mexico state immunity. At the same time, the government of Mexico has filed a stay application with the British Columbia Superior Court, to prevent the Board from making any findings in relation to Mexico's alleged actions. As of the end of August 2012, no decision had been rendered in relation to the union's reconsideration application, the unfair labour practice against Floralia, or Mexico's stay application. The Board also had not made any decision on the decertification application, which linked to the union's unfair labour practice allegations. The union had alleged that the events in late 2010 and early 2011 created a situation in which a representation vote on the decertification application would be unlikely to disclose the true wishes of the workers in the bargaining unit.

### **Analysis of a Collective Agreement**

As described in the narrative above, the union achieved a first collective agreement

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<sup>136</sup> Complaint against Mexico and Floralia, *ibid.*

<sup>137</sup> *Code, supra* note 1, s.33(6)(b).

with each of the three agricultural employers. In one case,<sup>138</sup> the collective agreement was reached through direct negotiations with the employer. In the other two cases, the collective agreement was imposed by the Board under the first collective agreement provisions of the *Code*. These three agreements are not identical, but share some common features. The agreements provide a measure of job security for migrant workers through the Seasonal Agricultural Worker Program, provide for seniority rights, set out grievance arbitration procedures, and guarantee union access to the workplace. Hours of work are not limited and there is no requirement to pay overtime rates. The collective agreements do provide for wage increases in each of the three years of the agreement and other monetary improvements for workers. The collective agreements also provide for the deduction of union dues. In this section, I discuss the details of the collective agreements that UFCW Local 1518 was able to achieve for its agricultural worker members, in order to gain insight into the concrete improvements in working conditions and terms of employment that agricultural workers have been able to achieve through collective bargaining. In this discussion, I make specific reference to the collective agreement between UFCW Local 1518 and Floralia Plant Growers, imposed by the Board in September 2009.

The Floralia-UFCW collective agreement provides for many basic rights commonly found in collective agreements, but also has specific provisions to deal with the SAWP requirements.<sup>139</sup> For example, the union recognition article, which confirms that the employer recognizes the union as the exclusive bargaining agent for all employees, defines “employee” as a person in the bargaining unit including “foreign workers”, which is in turn defined as a worker hired through the SAWP.<sup>140</sup> The agreement requires that, if Floralia wanted to use another foreign worker program to hire migrant workers, it must meet with the union and negotiate changes.<sup>141</sup> The collective agreement specifically states that the employer retains absolute discretion over the number of SAWP workers the

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<sup>138</sup> *Greenway Farms*, *supra* note 106.

<sup>139</sup> This discussion of the collective agreement between Floralia and UFCW Local 1518 does not cover all the provisions of the agreement. Instead, I highlight those provisions that address the more distinctive features of agricultural and migrant worker workforces.

<sup>140</sup> Collective Agreement between Floralia Plant Growers Ltd. and United Food and Commercial Workers International Union, Local 1518, expiry date September 22, 2012, at articles 1 and 4 [“UFCW-Floralia Agreement”].

<sup>141</sup> UFCW-Floralia Agreement, *ibid.* at article 4.

employer requires.<sup>142</sup> However, in this provision, the union ensured that the union and employees will be part of the decision-making process if the foreign worker immigration program was changed, and that the interests of current employees who may not be able to return to the workplace under a foreign worker program other than the SAWP can be taken into account.

The collective agreement also provides for seniority rights, which accumulate by hours worked from one season to the next. Seniority rights govern hiring, layoff and recall. An employee who has worked more hours will be laid off later and recalled sooner compared with an employee who has worked fewer hours. The seniority system provides employers and unions with a predictable method of making important decisions and can prevent the perception that decisions are made based on favouritism or to punish union activity or for other improper motivations. Seniority rights in the collective agreement contain an important exception to maintain compliance with the SAWP: workers with Canadian residency or citizenship must be hired, retained, and recalled in preference to the SAWP workers, regardless of seniority. The agreement maintains consistency with the SAWP requirements, and in so doing, unavoidably retains the second class status of the migrant worker.

The Floralia-UFCW collective agreement contains provisions governing discipline, dismissal and grievance arbitration, as required by the BC *Labour Relations Code*.<sup>143</sup> The agreement ensures employees have the option of being accompanied by a steward or union representative during serious discipline and provides for policy and individual grievance arbitration.<sup>144</sup> Here again, the agreement contains special provisions for SAWP workers. Without a collective agreement, a SAWP worker is repatriated immediately following the termination of his or her employment. Under the collective agreement, if a migrant worker is terminated and the union grieves the termination, the agreement contemplates that the worker will stay in Canada and, unless physical violence or threats are involved, stay on the employer's property until an arbitration of the termination

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<sup>142</sup> UFCW-Floralia Agreement, *ibid.* at article 4. Of course, before any SAWP worker can be hired, the employer must first obtain a Labour Market Opinion from Human Resource and Skills Development Canada confirming that there are not enough Canadian citizens or residents available to perform the work. This process is described in chapter 3.

<sup>143</sup> *Code, supra* note 1, s.84.

<sup>144</sup> UFCW-Floralia Agreement, *supra* note 140 at articles 12, 13, 14.

grievance is heard and decided.<sup>145</sup> The agreement sets out an expedited procedure that would, if the timelines are adhered to, render a decision on the grievance of the termination of the employment of a SAWP worker within 21 days from the date of termination. Access to arbitration processes that allow an employee, through the union, to challenge an employer's decision to fire a migrant worker was identified as a significant priority for migrant workers, as Ms. Luna's comments reproduced at the start of this section demonstrate.

Similar to many collective agreements, employees under the Floralia-UFCW collective agreement must pass a probationary period.<sup>146</sup> During the probationary period, the employer has the discretion to discipline or discharge the probationary employee and the employee has no recourse to the grievance and arbitration processes set out in the collective agreement. The probationary period is a five-month period following the first day of work. Considering the maximum of eight month employment season for the SAWP workers, this is a lengthy probationary period. The probationary period would appear to give the employer a more than adequate opportunity to evaluate an employee's work performance without having to justify that evaluation through arbitration processes. The probationary period is served once and does not need to be re-served each season.

The collective agreement guarantees a degree of union access to workers and to the workplace.<sup>147</sup> Through this provision, the parties would appear to avoid the need to seek an access order from the Labour Relations Board, as occurred with Sidhu & Sons Nursery, described above. The collective agreement guarantees the union access to the workers and workplace at one location, and access on permission of management at other locations of the agricultural operation. The limitations to the access address concerns for

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<sup>145</sup> UFCW-Floralia Agreement, *ibid.* at article 14. The relevant portion of the agreement reads: "14.02(a) Where a foreign worker is terminated, and subject to repatriation, then a grievance application for expedited arbitration shall be processed forthwith by the union or Employer notwithstanding the steps contained in this section within twenty- four (24) hours of that decision after the union is notified. An Arbitrator must be available and willing to convene a hearing within five (5) days of the request for appointment under The British Columbia Labour Relations Code. In such circumstances, the hearing must be completed within ten (10) days of the first day of hearing, and the Arbitrator shall issue an award within five (5) days of the completion of the hearing. 14.02(b) Unless it is alleged that a Foreign Worker has been discharged for causing physical harm to any person or uttering threats or physical violence against any person, such worker shall be allowed to continue to reside on the premises of the Employer until the final disposition of his/her grievance in accordance with the provisions in Article 14.02 (a) above on the condition that the employee continue to observe all the rules of the residence."

<sup>146</sup> UFCW-Floralia Agreement, *ibid.* at article 5.

<sup>147</sup> UFCW-Floralia Agreement, *ibid.* at article 9.

safety, non-disruption of working time to the extent possible, privacy in union communications, and prevention of damage to crops.

The collective agreement does not provide for overtime pay, nor does it set out maximum hours of work.<sup>148</sup> The minimum hours of work set out in the collective agreement is 40 hours per week, except when weather, market or crop conditions make farm work unfeasible.<sup>149</sup> The workers individually can agree to work more than eight hours per day and more than 40 hours per week. The agreement limits the ability of the employer to require workers to work part-time hours and maximizes workers' ability to work the most hours possible. An employee is entitled to one day off per week, but can waive this and choose to work seven days per week. There is no provision requiring payment of overtime.

In BC, agricultural employees are excluded from overtime pay and maximum hours of work set out in employment standards legislation.<sup>150</sup> This exclusion from the employment standards protections generally available to most hourly-wage workers in the province is reinforced in the collective agreement. UFCW Local 1518 representative Glenn Toombs explained why the union pushed to keep maximum hour and overtime pay requirements out of the agreement. He said:

The employers tried to get us to take overtime which we didn't do, and it seems bad except that overtime would be used against the union. Migrant workers want to work 70-80 hours a week or more if they can. There are no restrictions and no overtime is what the government has negotiated in the SAWP agreement. And if we were to put in overtime even at 60 hours, people would lose 10 and 20 hours a week, because the employer would say, I can't work you anymore than this, it's the union's fault. And they would have decertified us that way. So I had to really bite my tongue by taking that off the table.<sup>151</sup>

As described in the previous chapter, both resident and migrant agricultural employees often are subject to structural pressures to work long hours. Migrant workers work seasonally and, under the SAWP, they can work a maximum of eight months in Canada.

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<sup>148</sup> UFCW-Floralia Agreement, *ibid.* at article 10.

<sup>149</sup> UFCW-Floralia Agreement, *ibid.* at article 10.

<sup>150</sup> *Employment Standards Regulation*, B.C. Reg. 395/95, s. 34.1 excludes "farm workers" from the hours of work, overtime and statutory holidays provisions in Parts 4 and 5 of the *Employment Standards Act*, R.S.B.C. 1996, c. 113. Farm workers are subject to the limitation that an employer not require employees to work excessive hours that are harmful to the worker's health and safety.

<sup>151</sup> Interview with Glenn Toombs, *supra* note 38.

For most migrant workers, their family has remained in the sending country, and therefore there is less need to balance family commitments with work time commitments. Accommodations are often isolated with limited recreational options. For many agricultural operations, the hours of work are weather dependent. Rain or other conditions may prevent work for several days, to be made up when the weather improves. Instead of working the same number of hours for more pay, the union believed that the inclusion of overtime hours would result in a reduction of the overall number of hours worked by employees, contrary to the wishes of its members.

The Floralia-UFCW agreement provided for a wage schedule that benefits both resident and SAWP workers, and ensured parity of wages between the two groups. Approximately 90% of workers in the unit were SAWP workers at the time the collective agreement was signed.<sup>152</sup> At the time the agreement was signed, resident workers were paid minimum wage, which was approximately one dollar per hour less than the wage required under SAWP.<sup>153</sup> Under the collective agreement, all employees were to receive the wage rate set by the SAWP, plus ten cents per hour after March 2010, and additional ten cents per hour after March 2011 (total of 20 cents over the SAWP wage rate), and a further additional 12 cents per hour after March 2012 (total of 32 cents over the SAWP wage rate). Also, if the employer paid by piecework, the hourly rate became a guaranteed minimum.

The collective agreement also specifies that transportation time between work locations during the work day is to be included as time worked. The union said that this was a priority for the workers.<sup>154</sup> This suggests unrepresented workers are not necessarily paid for all time that they are at the employer's disposal. What counts as paid working time is a key part of the compensation calculation. This is especially so where the farm operation land is spread over several locations, as is the case at Floralia Plant Growers and many agricultural operations in the Fraser Valley.

In addition to these wage gains, vacation pay was increased to 4% of gross annual wage for employees with fewer than three years' service, and to 6% after three years. Employees are entitled to two paid 15 minute breaks, and one unpaid 30 minute meal

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<sup>152</sup> "Historic Victory", *supra* note 133.

<sup>153</sup> *Ibid.*

<sup>154</sup> Interview of Glenn Toombs, *supra* note 38.

break during an eight-hour shift.<sup>155</sup> The union representative involved in negotiating this collective agreement commented that the union did not go “overboard” on the monetary gains it pushed for in the collective agreement because the union did not want the agreement to fail.<sup>156</sup>

The collective agreement also makes provisions for mandatory union membership and requires the employer to deduct union dues from workers’ pay and remit the dues to the union.<sup>157</sup> A representative of the British Columbia Agricultural Council was recently reported as characterizing unions and the union-funded AWA centres as a cash-grab for union dues:

‘Their goal is to get [workers] away from the consulate, to be their representative and charge them dues,’ Rhonda Driediger, chair of the BCAC says of the UFCW, over the phone from her family's berry farm near Langley.

‘They don’t exist for nothing. Somebody has to pay the bills and the salaries and everything else, and the only way that’s done is through union dues.’<sup>158</sup>

The British Columbia Agricultural Council representative is candid in her opposition to union organization in the agriculture sector and takes the view that the primary agriculture industry is able to protect workers against unscrupulous employers, making unions unnecessary in her opinion.<sup>159</sup> However, the BCAC position on dues is not consistent with what has occurred in the union’s organizing campaign over the past five years. Although the collective agreement makes a provision for payment of union dues, it appears that United Food and Commercial Workers Local 1518 has not yet collected any dues from agricultural workers. The union took the position that it would not collect any dues until one year after ratification of the collective agreement.<sup>160</sup> At that point, the employees would have had the benefit of increased wage rate and inclusion of travel time in hours of work for a full year. A rough estimate would put the monetary gains in the first year of the contract above \$170 per season for a full time employee. In the second

<sup>155</sup> “Historic Victory”, *supra* note 133.

<sup>156</sup> Interview with Glenn Toombs, *supra* note 38.

<sup>157</sup> UFCW-Floralia Agreement, *supra* note 140 at article 3.06. These provisions are permitted but not required by the *Code*, *supra* note 1, ss.15, 16.

<sup>158</sup> Justin Langille, “Creating Centres for Migrants Universes” *The Tyee* (16 February 2012) <<http://thetyee.ca/News/2012/02/16/Migrant-Centres/>>.

<sup>159</sup> *Ibid.*

<sup>160</sup> Interview of Glenn Toombs, *supra* note 38.

year of the contract, when dues would begin to be paid, workers would earn approximately \$350 more than they would have under the SAWP contract. The union dues were to be fixed at a maximum of five dollars per week.<sup>161</sup> For an eight month full-time work season, this would result in union dues of \$160. The dues are outweighed by the wage rate increase and other monetary gains under the collective agreement. Simply looking at dues and the monetary gains in the collective agreement ignores the other benefits in the contract. It also ignores the union's commitment, through the Agricultural Workers Alliance centres, to provide a variety of services and assistance to agricultural workers free of charge since the first BC AWA centre opened in 2007. Viewed in this context, it is difficult to characterize the union's campaign to organize agricultural workers as a cash-grab.

The collective agreement between Floralia and UFCW Local 1518 would appear to have achieved some real gains for workers, not the least of which is a process to protect against the potential for arbitrary employer repatriation decisions. As with any first collective agreement, there is room for gains for workers through future negotiations. The modest wage increases and union access provisions demonstrate how workable solutions and compromises can be found between unions and agricultural employers. The agreement also demonstrates how some key priorities for most unionized employees, such as overtime pay and limits on hours of work, needed to be adjusted to the situation and priorities of migrant agricultural workers.

After five years of organizing agricultural employees, just two collective agreements exist in BC. The implementation and continued existence of these agreements are under the shadow of unresolved decertification applications. In the next section, therefore, I look more closely at the jurisdictional challenges of organizing migrant agricultural workers.

### **Migrant workers and the concept of jurisdiction**

The legal processes engaged in unionizing migrant agricultural workers in BC reveal a complex confluence of difficulties. Migrant workers and their advocates are well aware that moving across territorial boundaries complicates enforcing and protecting workers'

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<sup>161</sup> Interview with Glenn Toombs, *ibid.*

rights.<sup>162</sup> It is not simply migrant worker status or lack of secure citizenship status at the root of the difficulties. Instead, insecure citizenship status is inter-related with a long history of precarious employment in BC's agriculture sector, and exclusion and exceptionalist attitudes to legal protections for agricultural workers, as explained in chapters 2 and 3 of this thesis. Beyond the insecurity created by the linkage of a migrant worker's legal right to be in Canada with continued employment with a particular agricultural employer, the narrative of the United Food and Commercial Workers' campaign to unionize agricultural workers in BC exposes a mis-match between the events and agents who control aspects of agricultural migrant workers' circumstances and legal jurisdiction over those events and agents.

The question of whether the BC Labour Relations Board ought to hear evidence relating the actions of the Mexican consulate in Vancouver and Ministry of Labour and Social Security in Mexico puts the concept of jurisdiction in the foreground. The concept of legal jurisdiction is complex and does not reduce to a simple question of the territorial boundaries of BC. Instead, jurisdiction deals with where the event, conduct and persons to be regulated by the law are located, who has the power to control or set standards of conduct, what logic or rationality governs the situation, and who is regulated by the laws.<sup>163</sup> Seen in this way, jurisdiction determines the types of questions that can be asked and answered through the legal process. For example, labour relations law is concerned with, and constitutes some of the participants in its processes as "employees" rather than citizens of Mexico, Canada, Guatemala or elsewhere. This constituting and defining who is governed is how jurisdictional issues operate on an often hidden level to frame and control situations. Jurisdiction, then, is always of central importance to how a situation or problem is dealt with through legal processes.

In the context of a labour relations board, jurisdiction can be conceptualized in several ways. Inside the legal system, jurisdiction is often conceptualized in terms of the delegation of power and authority to the labour relations board from the legislative assembly, rather than in terms of physical territorial boundaries. Jurisdiction is a question

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<sup>162</sup> See Judy Fudge, "Global Care Chains, Employment Agencies, and the Conundrum of Jurisdiction: Decent Work for Domestic Workers in Canada" (2011) 23 *Canadian Journal of Women and the Law* 235 at 249.

<sup>163</sup> Mariana Valverde, "Jurisdiction and Scale: Legal 'Technicalities' as Resources for Theory" (2009) 18 *Social & Legal Studies* 139 at 143.

of the subject matter over which the government, through statute, has given the Board the authority. As an adjudicative body, the Board's jurisdiction can also be divided into adjudication jurisdiction and enforcement jurisdiction. Adjudication jurisdiction is judgment on the facts, rights and obligations, and enforcement jurisdiction refers to the ability to order production of documents, damages, penalties.<sup>164</sup>

At an international level, one of the mechanisms for defining and enforcing jurisdictional boundaries is state immunity, a modern vestige of the idea that the King can do no wrong.<sup>165</sup> State immunity stops the exercise of governmental power of one state (Mexico) from being adjudicated under the legal system of another state (Canada).<sup>166</sup> A successful plea of state immunity often leaves a domestic litigant without legal recourse. Reasons for preserving the concept of state immunity despite the cost extracted from private litigants include the recognition of the equality of sovereignty of states and the difficulty of enforcing judgments against foreign states.<sup>167</sup> Conceptually, state immunity is immunity from legal proceedings and not an exemption from the law.<sup>168</sup> Theoretically, at least, the individual disputes involving a foreign state that are not determined through legal processes could be resolved through diplomatic negotiation.<sup>169</sup> Indeed, Mexico has made just such an argument in its application to the British Columbia Supreme Court for a stay of proceedings of the Labour Relations Board. The Union has alleged that improper interference has affected the employees of Sidhu & Sons Nursery and rendered the vote unlikely to reveal the true wishes of the employees. Some of this improper interference is related to the conduct of Mexican officials, both in Mexico and in BC. No findings of fault or that Mexico violated the *Code* can be made, but the Board can evaluate the situation, including the conduct of Mexico, and its effect on the migrant agricultural workers employed by Sidhu & Sons. Mexico has argued that these issues ought to be resolved through diplomatic negotiations between Mexico and Canada.

State immunity is premised on a Westphalian conception of the state, in which a centralized state government sets and enforces rules to control the persons, property and

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<sup>164</sup> Hazel Fox, *The Law of State Immunity* (Oxford: Oxford University Press, 2002) at 21.

<sup>165</sup> Ernest K. Bankas, *The State Immunity Controversy in International Law: Private Suits Against Sovereign States in Domestic Courts* (Berlin: Springer, 2005) at 318.

<sup>166</sup> Fox, *supra* note 164 at 11.

<sup>167</sup> *Ibid.* at 28.

<sup>168</sup> *Ibid.* at 19.

<sup>169</sup> *Ibid.* at 36-7.

events in a defined territory.<sup>170</sup> To the extent this conception of the state is being transformed, state immunity law is also changing. The circumstances in which a state can claim immunity to a legal claim brought against the state in the court of another state have shifted with the changing role of state governments in the international economy, the increasing international economic integration, and other changes caught under the rubric of globalization. Historically, state immunity was an absolute bar to any claim in the domestic court of another state. As the twentieth century progressed, this was seen as an unfair shield for commercial traders operating under the umbrella of the state, and unfairly denying remedies individuals when they dealt with foreign states in a commercial capacity or when the sovereignty of the foreign state was not challenged by the foreign domestic legal proceeding.<sup>171</sup> Forms of restricted state immunity developed in the mid-twentieth century and, in Canada, were codified in the 1982 *State Immunity Act*.<sup>172</sup> State immunity can be understood as a concrete site where globalization processes are contested and documented.

As of the end of August 2012, Mexico's plea of state immunity has prevented the Labour Relations Board of British Columbia from hearing the union's allegations of an unfair labour practice committed by Mexico. The Board could not compel Mexican officials to act in any particular way in Mexico or in BC, and could not assign fault or find that Mexico had violated the *Code*. State immunity has not, however, prevented the Board from hearing evidence related to events in Mexico and actions by officials of the Mexican Ministry of Labour and Social Security in Mexico and the actions of officials in the Mexican Consulate in Vancouver. Nevertheless, the focus of the hearing has shifted from an allegation that would find fault against Mexico to an investigation into the effects on employees while they are in BC. The Board's hearing and adjudication of evidence of these events is for the purpose of determining whether the interference of any person had affected the true wishes of employees from being captured by a Board-administered vote

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<sup>170</sup> Rick Lawson, "The Concept of Jurisdiction and Extraterritorial Acts of State" in Gerard Kreijen (ed.), *State, Sovereignty, and International Governance* (Oxford: Oxford University Press, 2002) 281 at 281.

<sup>171</sup> See *Re Canada Labour Code*, [1992] 2 S.C.R. 50 at para.24.

<sup>172</sup> *Supra* note 95. Pursuant to the *State Immunity Act*, state immunity does not apply to criminal proceedings and civil proceedings related to commercial activity of the foreign state, allegation that the foreign state caused the death, personal injury, property damage or support for terrorism.

on the decertification question. The evidence has been heard, but as of the end of August 2012, the Board has not yet rendered a decision.

Mexico has applied to the British Columbia Supreme Court for a review of the Board's decision to hear evidence related to the conduct of Mexican officials, both in Mexico and in Vancouver, and applied for a stay to prevent the Board from ever issuing a decision that makes any findings of fact related to Mexico. As of the end of August 2012, the British Columbia Supreme Court has also not released a decision.

From the perspective of a state immunity plea, the question is whether Mexico ought to be held responsible in BC for its conduct in Mexico and in Canada when that conduct has effects on employees and on legal processes in BC. This framing of the question, however, takes us away from the BC *Labour Relations Code*, the rights parties have under that legislation and the duties of those who administer it. By framing the issue in terms of the responsibility of the Mexican government, an important aspect of a protective labour relations legal regime is left out. The question ought to be whether the presence of the certain officials of the government of Mexico creates a labour-law-free zone for workers employed by Canadian employers in Canada and represented by a trade union in Canada.

The jurisdiction of labour relations legislation operates to define and constitute parties in functional workplace terms of the employer, employee, and trade union. In this forum, migrant workers become visible as workers, whereas they may be excluded from legal regimes that operate in terms of citizenship. The position put forward by the government of Mexico would render invisible to the Board any international context or action, and in so doing, in a sense also render much of the experience of migrant workers invisible.

Agricultural migrant workers are entitled to the same rights under the *Labour Code* and those administering the *Labour Code* have the same duties to these employees as the rights and duties that apply to employees in traditionally unionized industries and sectors. The BC Labour Relations Board has the duty to encourage the practices and procedures of collective bargaining, and to recognize the rights of every employee to join a trade union and participate in its activities.<sup>173</sup> When dealing with the international migration of temporary workers, the concept of state immunity ought not to function as blinders on the

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<sup>173</sup> *Code, supra* note 1 at ss.2, 4.

vision of the labour relations board, blocking out all events outside of the province and all international actors within the province.

Ideas of jurisdiction, governance and territorial boundaries are complicating features for enforcing the rights of migrant workers, and particularly migrant workers in agriculture, in light of the precarious employment relations inherent in the sector, as explained in chapter 3. The jurisdiction of a labour relations board, however, also maintains a focus on agricultural and migrant workers' status as employees, rather than on the differences of citizenship status. By focusing on whether the situation of the migrant workers as a whole respects their rights as employees under the *Labour Relations Code*, rather than on intentions and fault of international actors, a limited range of remedies from the British Columbia Labour Relations Board may be available to migrant workers. Although still unresolved, the decertification proceedings between certain employees of Sidhu & Sons and UFCW Local 1518 illustrate both the limitation of provincial labour boards to order remedies for wrongs beyond provincial borders and the possibility of applying a contextual approach that constitutes subjects as employees and workers, rather than as temporary migrants and foreigners, beyond the reach of Canadian legal processes. This contextual approach, with a focus on migrant workers first and foremost as workers and employees, is required to protect and fulfil the rights and duties of the *Code*.

### **Reflections on five years of organizing agricultural workers in BC**

The United Food and Commercial Workers International Union Local 1518's campaign to unionize agricultural workers in BC is continuing. In relation to two of the workplaces described above, litigation, particularly involving the effect of actions of the Mexican government, is ongoing and may very well be subject to a number of appeals. The UFCW Local 1518 and the Agricultural Workers Alliance centres in BC continue to assist agricultural workers in their exercise of many employment-related rights. Although unfinished, the story to this point does reveal much about the potential and pitfalls of union organizing under the BC *Labour Relations Code*.

The union's formal campaign to organize three workplaces has had effects beyond those three workplaces. AWA coordinator Lucy Luna perceives that the threat of unionization has sparked real improvements in working conditions on agricultural

operations that have been organized and also in the unorganized agricultural operations in the surrounding area. She gave the following example:

One thing that workers from the first farm we organized told us was that all the neighbouring employers were cleaning their water wells [after the union filed a certification order. ... The workers complained to the union that some workers were washing their feet and] the water was dripping on the container where the Mexican workers were drinking. So [the union] showed that to the employer. The employer cleaned up that mess, and then cleaned the water well and everything. So all the employers around Surrey and here in Abbotsford started doing the same on their farms. [...] Somehow, the voice goes around and then [...] conditions improve. We get cleaner water. They don't yell at us all. [...] It is a hidden benefit for the workers.<sup>174</sup>

Union activity in the sector can provide an extra motivation for employers to ensure that the conditions at their own farm and neighbouring farms are acceptable to the workers and do not give the workers a reason to seek out assistance from the AWA or UFCW Local 1518.

There is also the benefit of participating in a formal legal process and having one's story heard and recognized. For some migrant agricultural workers, isolated from the mainstream population by language, the workplace location and accommodations, the union's campaign has given the workers a voice and helped migrant workers feel like they are noticed by the wider community in Canada. After a worker was returned to Mexico during one of the union's organizing campaigns, Ms. Luna spoke with him and apologized to him for not being able to get him reinstated to his position. She reported his reaction as follows:

And he said, don't apologize to me Doña Lucy. The union has done for us what no Mexican worker thought about to be able to do a year ago. We sat at the labour board face to face with the employers and before that [...] people in Canada didn't know that Mexican workers were collecting their vegetables. Now people know, and we sat at the labour board at least to negotiate something with the employers, thanks to the union. Otherwise, it would never have happened. So he said don't apologize. And to this day, that same worker still stands on the same opinion and he hasn't been able to come back to Canada since 2008, and I think that's a very powerful testimony from somebody who was actually on the organizing campaign and was hurt by the campaign. Well, not the campaign but these issues. He hasn't been able to return to Canada. If he doesn't return this

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<sup>174</sup> Interview with Lucy Luna, *supra* note 37.

year, he will be out of the [SAWP] program, and he hasn't changed his mind. No, he says, don't think like that, now people know that we are here, thanks to the union.<sup>175</sup>

The unionization campaign has, in its own way, provided a forum for at least a few migrant agricultural workers to be recognized as agents and claim their voice in the country in which they work but do not have formal citizenship rights.

UFCW Local 1518's campaign to organize agricultural workers also has had serious challenges. The union identified that overcoming migrant workers' perceptions of unions and unionization formed in their country of origin was a significant difficulty at the start of the union's efforts. Glenn Toombs reported that, when UFCW Local 1518 first started trying to organize migrant agricultural workers in BC, the union met opposition based on the workers' perception that all unions operated in the corrupt manner of certain syndicates in Mexico. UFCW Local 1518 worked to demonstrate the transparency and accountability of Canadian unions and reports having been reasonably successful in overcoming this hurdle.<sup>176</sup>

Locating and connecting with agricultural workers who reside on the employer's property is a significant challenge. It appears the Agricultural Worker Alliance centre is fairly successful in attracting migrant workers, especially from Mexico and Guatemala, and also from the Caribbean. The centre provides targeted services and information tailored to where migrant workers start from, often with an in-depth knowledge of conditions in the workers' countries of origin. Since the union's applications for certification in 2008, however, the union reports that fewer migrant workers will speak with representatives of the union in grocery stores or other public places that union representatives used to be able to meet and introduce themselves to workers. Union representatives lay responsibility for the change in the receptiveness of workers at the door of the Mexican Consulate in Vancouver and the labour ministry of the Mexican government.

A major difficulty in ongoing efforts to organize is that, since their experiences with Greenway Farms, Sidhu & Sons Nursery, and Floralia Plant Growers, organizers cannot adequately reassure workers that after union activity becomes apparent within an

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<sup>175</sup> Interview with Lucy Luna, *ibid.*

<sup>176</sup> Interview with Glenn Toombs, *supra* note 38, interview with Raul Gatica, *supra* note 38.

agricultural operation, the migrant workers will not be sent home early by the employer or be prevented from returning to the same employer or from returning to Canada at all by the Mexican government.<sup>177</sup> One AWA coordinator said that he has many workers who tell him that they support the union, but do not want to risk a certification application at this time.<sup>178</sup>

A news reporter for the BC internet publication *The Tyee* supports the union's impression that workers connect union activity with being fired, repatriated and not allowed to return to Canada the next season. He reports having been told by SAWP workers that the "during their recruitment Mexican State Employment Service employees told them to avoid Canadian unions."<sup>179</sup> He further reports that the migrant agricultural workers he spoke to, on condition of anonymity, said that they were treated well by their employers, and even if they were not, they would not risk their continued employment through the SAWP program by joining a union.<sup>180</sup>

Union representative Glenn Toombs provided a stark account of the challenge posed. "The organizing aspect," he said, "was taking off. I could see it actually heading somewhere." In the summer of 2008, when the three certification applications were filed in a matter of months, the organizing campaign had momentum indeed. But events over the next four years, as recounted above, have taken their toll. Mr. Toombs continued: "I think personally the legislation has to be changed before organizing is going to be successful. I don't know that approaching these people, signing them into the union and having them repatriated has done any good for the union or the labour movement. [...] All the union is doing is implementing the rights that the government says [the workers] have."<sup>181</sup> The *Labour Code* recognizes a set of employee rights to work together on job-related issues, but for migrant agricultural workers, does not appear to contain adequate mechanisms to protect the exercise of those rights.

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<sup>177</sup> Interview with Lucy Luna, *supra* note 37.

<sup>178</sup> Interview with Raul Gatica, *supra* note 38.

<sup>179</sup> Justine Langille, "Guest Workers Weigh Risks when Unions Approach" *The Tyee* (15 February 2012) online: <<http://thetyee.ca/News/2012/02/15/Guest-Workers-And-Unions/index1.html>>.

<sup>180</sup> *Ibid.* and "Creating Centres", *supra* note 158.

<sup>181</sup> Interview with Glenn Toombs, *supra* note 38.

## **Chapter 5 Conclusion**

This thesis explored some of the opportunities and challenges of organizing agricultural workers in a province where these workers are included in the general provincial labour legislation. I have examined how and to what extent the law protects the ability of agricultural workers (including migrant agricultural workers) to form and maintain trade unions and to participate in collective bargaining. In particular, the thesis traces and documents labour relations legislation and processes as they relate to the agricultural sector in British Columbia and UFCW Local 1518's ongoing campaign to unionize agricultural workers. The focus in this study on the law and processes surrounding labour relations stems, in large part, from the fact that inclusion in modern provincial labour relations legislation has been treated by unions and by courts in Canada as a threshold requirement for unionizing agricultural workers. This legalized framing of union organization means that much can be learned about unions and their organizing campaigns by paying close attention to the operation of labour relations legislation in particular sectors.

For agricultural workers, access to the generally-applicable labour relations law cannot be assumed. As documented in chapter 2, extending labour relations legislation to agricultural workers in BC was mostly a question of political will, tempered against an idea that agriculture is different and that agricultural employers are either unable or ought not be required to negotiate with their employees. The formal inclusion in labour relations legislation achieved in 1975 in BC does not automatically equal the realization of union representation and collective bargaining throughout the agricultural sector. Collective bargaining under labour relations legislation is available only when certain administrative steps are taken and technical hurdles overcome. Only after the preconditions are met does legalized collective bargaining become the forum for contestation and the working out of the particular problems and relations between employers and employees in the agricultural sector.

In chapter 3, characteristics of BC's agricultural sector were explored. The data regarding agricultural production and employment dispels some common preconceptions about agricultural production and agricultural work. In BC, most productive and

profitable agricultural operations are not on large tracts of land in rural locations remote from urban populations. Instead, the largest share of profitable agricultural production and agricultural employment occurs in the Lower Mainland region, surrounding the city of Vancouver, in the most densely populated region of the province, followed by the Okanagan region and, to a lesser degree, Vancouver Island. The data presented in chapter 3 encompasses a large diversity of agricultural operations, from very small agricultural operations that are not viable independent economic entities to the large operations grossing several million dollars annually. Only 17%<sup>1</sup> of agricultural operations in BC grossed over \$100,000 in 2010, and only one-third of agricultural operations hired employees. And yet, BC has the third-highest number of agricultural employees among Canadian provinces.

Modern agricultural employment in BC is not primarily a situation of a farmer hiring one or two family members as employees, who are envisioned as eventually taking over the operation as an owner. Instead, and especially in greenhouse, field vegetable, fruit and berry production, agricultural operations hire many seasonal and temporary employees. Contemporary agricultural employment in BC is structured in many ways. In the managed migration model of the Seasonal Agricultural Worker Program, the governments of Canada and the worker-sending country (Mexico or a Caribbean country) and employer representatives negotiate a base employment contract, that forms minimum rights and obligations on top of which a union can bargain improvements. In the less-structured Low Skill Temporary Foreign Worker Program, the employer may deal directly with the migrant worker, who may work in Canada several years, but never have an opportunity to apply for permanent residence or citizenship in Canada. Agricultural producers may employ employees directly. However, especially in the Fraser Valley, agricultural employers may also contract with farm labour contractors, and obtain a crew of workers without a direct employment relationship. Despite the diversity of forms of employment, many agricultural workers are paid minimum or below the hourly minimum wage rate, work long hours without overtime, and are exposed to considerable health and safety risks.

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<sup>1</sup> 3,441 of 19,759 agricultural operations. See Figure 3.2, above.

Against this background, then, the UFCW campaign to unionize agricultural employees in BC can be understood as an attempt to unionize precarious employees in a sector in which few unions have tried to organize in the past, and in which unionization has been unstable and difficult to sustain over the years.<sup>2</sup> In chapter 4, I provided a detailed narrative of how BC's *Labour Relations Code* has operated during an ongoing unionization campaign. The presence of significant numbers of migrant workers in agriculture and the nature of the provincial agricultural sector itself has given rise to novel practices and responses to new situations that require re-examination of how to administer labour relations legislation in relation to a seasonal, mixed migrant and resident, and precarious workforce. The challenges of applying the general labour relations law of BC to migrant agricultural workers has resulted in innovations in the definition of an appropriate bargaining unit, in the scope of union access to the workplace, in the inter-relation between foreign state officials acting both in BC and outside of Canada and the rights and protections of the *Code*. This last challenge continues to play out in the labour board and courts of BC, and may be an important indicator of the extent to which current provincial labour relations regimes are capable of enabling and supporting unionization of precarious and migrant workers in the agriculture sector.

In 1937, BC's Minister of Labour wrote that "Every sensible person will admit the justice of the claim of men to organize themselves for the purpose of discussing their problems with their employers and negotiating terms of employment."<sup>3</sup> This idea has echoed throughout the years, and finds expression today in collective bargaining conceptualized as an exercise of democracy in the workplace, industrial self-government and enhancing human dignity, equality and the rule of law in the workplace.<sup>4</sup> However, just like in the labour relations legislation enacted in 1937, today's labour relations legislation continues to preserve individual employment relations and non-unionized

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<sup>2</sup> As alluded to briefly at the end of chapter 2 and beginning of chapter 4, the Canadian Farmworkers Union is one of the only other modern trade unions in Canada that has tried in a comprehensive way to organize in the agricultural sector in British Columbia.

<sup>3</sup> Memorandum from George Pearson to Duff Pattullo, dated September 10, 1937 (British Columbia Archives, Pattullo Papers, GR 1222, Box 142, File 142-7). Also quoted in chapter 3, *supra* at note 11 and accompanying text.

<sup>4</sup> See for example *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391, 2007 SCC 27 at para.82.

workplaces as the status quo. When this non-unionized status quo is combined with the apparently limited reach of regulatory protection from reprisals and negative repercussions for migrant workers when they choose to unionize, the justice of the claim of agricultural workers to organize themselves for the purpose of discussing their problems with their employers is not adequately actualized for agricultural workers through the legislative regime.

The BC *Labour Relations Code* creates a framework for union organizing and collective bargaining. In the face of a resistant employer and the prohibitions on legal strike activity outside of this framework, the *Code* is the primary path to collective bargaining for agricultural workers in BC. The *Code* guarantees that “every employee is free to be a member of a trade union and to participate in its lawful activities.”<sup>5</sup> Because the *Code* defines parties in terms of employer, employee, union, etc., rather than in terms of citizen, permanent resident or non-citizen, the legalized labour relations regime provides a forum in which, at least formally, temporary migrant non-citizen workers have rights and can make claims. Indeed, certain of the procedural decisions of the Labour Relations Board documented in chapter 4 arguably facilitated migrant workers’ access to the protections of the *Code*. These include the provision of a Board-paid translator, and the ability of migrant workers to testify by telephone from outside of Canada. This study of the operation of the labour relations legal regime over a five year period in BC demonstrates that, in this framework, at least some migrant workers could choose to bargain collectively and collective agreements could be achieved, albeit perhaps for a limited duration.

There remain more substantive hurdles to full realization of the protections in the *Code* and free access to membership in a trade union and participation in collective bargaining, especially for precarious workers and migrant workers. Significantly, delay and an interlinked focus on intentions of employers and others rather than on the effects on workers, and on a punitive rather than restorative approach to remedies, combined to fail to provide the guarantees of the *Code* to employees who perceive that they have been or will be punished for joining a trade union. As UFCW Local 1518’s efforts to unionize agricultural workers proceeded through labour relations board processes, union

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<sup>5</sup> R.S.B.C. 1996, c. 244 at s.4.

organizers and advocates for migrant agricultural workers reported a shift in worker receptiveness when remedies under the *Code* were delayed beyond one season and migrant workers returned to their countries of origin, and when the labour relations board did not react or provide remedies to workers who perceived that they were targeted or repatriated because of union activity. These problems are not unique to migrant workers, or even to precarious workers, but the uncertainty of migrant workers' status in the country and the linkage of employment and legal status in the country increases the importance of a migrant worker's employment with a particular employer, and thus, increases the impact of reprisals or perceived reprisals for migrant workers' union activity. If the *Labour Code* is to protect precarious workers' ability to bargain collectively, then the effects on the workers, rather than the stated intentions of employers or others, must remain the focus of any inquiry into whether the provisions of the *Code* have done their job to protect an employee's freedom to associate.

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## Appendix A Regional Profile of BC's Agricultural Sector

This Appendix provides supplemental detail to the profile of BC's agricultural sector provided in chapter 3 of this thesis. The characteristics of agricultural production in the Lower Mainland, Thompson-Okanagan, Vancouver Island and Coast, Cariboo, Kootenay, Peace River, Nechako and North Coast regions are described in detail.

Unless otherwise cited, all data in this Appendix is taken from Statistics Canada's 2011 Census of Agriculture.<sup>1</sup>

**Figure A. 1 Map of Lower Mainland**



Source: Statistics Canada, *2011 Census of Agriculture*

### Lower Mainland Region

The Lower Mainland region encompasses the mouth of the Fraser River and the city of Vancouver. It extends westward to Hope and Yale, North to Pemberton, and eastward to Sechelt and Jervis Inlet. It is the most populous and most densely populated region of BC. With a population of 2,657,711, the Lower Mainland is home to 60% of the people BC.<sup>2</sup> It is also the region of most intensive agricultural production in the province.

The Lower Mainland has 5,793 of BC's 19,759 agricultural operations, or 29% of the agricultural operations in the province. These agricultural operations are found in the Greater Vancouver area (2,821) and the lower Fraser Valley surrounding and to the west of Abbotsford (2,743). Insignificant numbers of agricultural operations are located in the Sunshine Coast (89) and Squamish-Lillooet (140) areas.

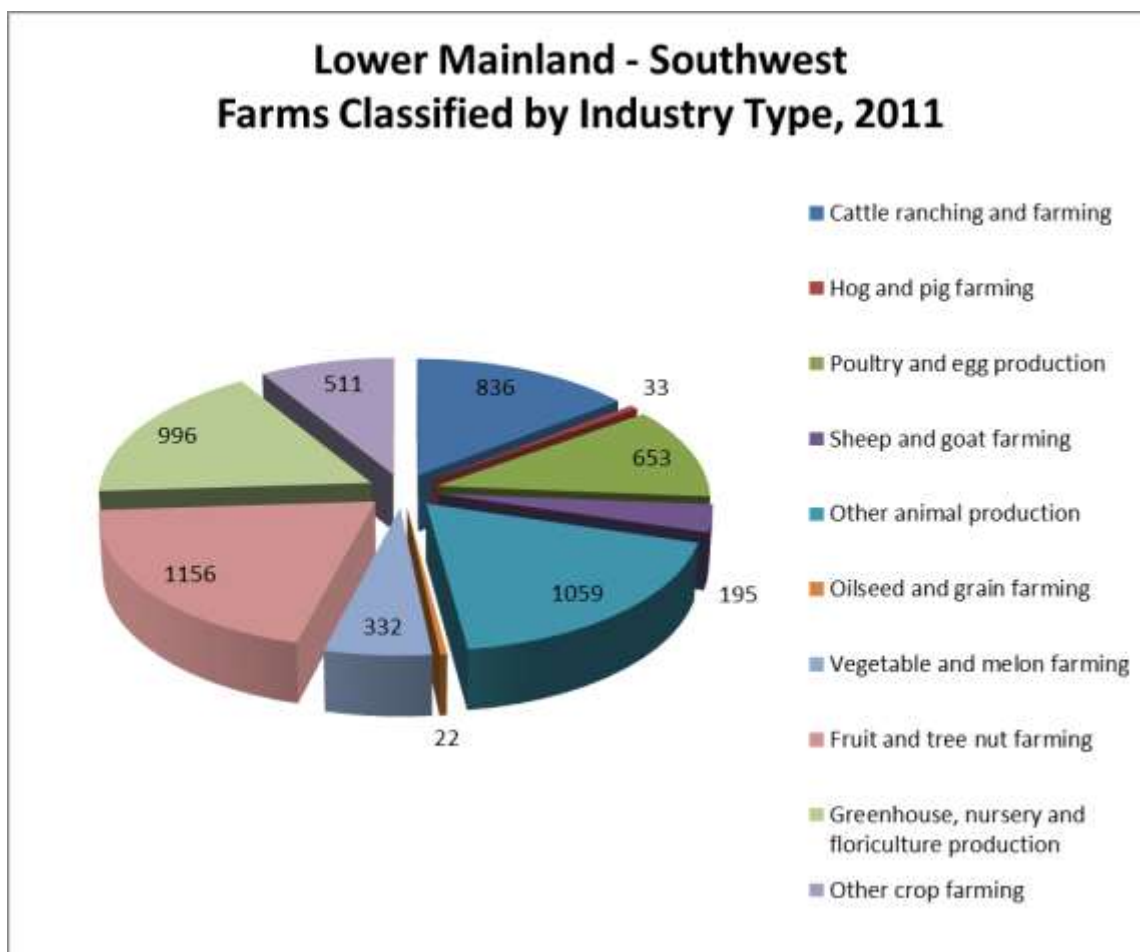
The Lower Mainland is home to a diversity of types of agricultural operations. Figure A.2 shows the number of agricultural operations of each general type. Fruit and tree

<sup>1</sup> Statistics Canada, *2011 Census of Agriculture, Farm and Farm Operator Data*, catalogue no. 95-640-XWE, online: <[www.statcan.gc.ca](http://www.statcan.gc.ca)>.

<sup>2</sup> Statistics Canada, *2011 Population Census* (Ottawa: Statistics Canada, 2012).

agricultural operations make up 20% of the agricultural operations in the Lower Mainland. The “other animal” category accounts for a further 18%. Nurseries, greenhouses and floriculture are the primary activity of 17% of operations. There are also significant numbers of cattle, poultry and egg and vegetable producing operations.

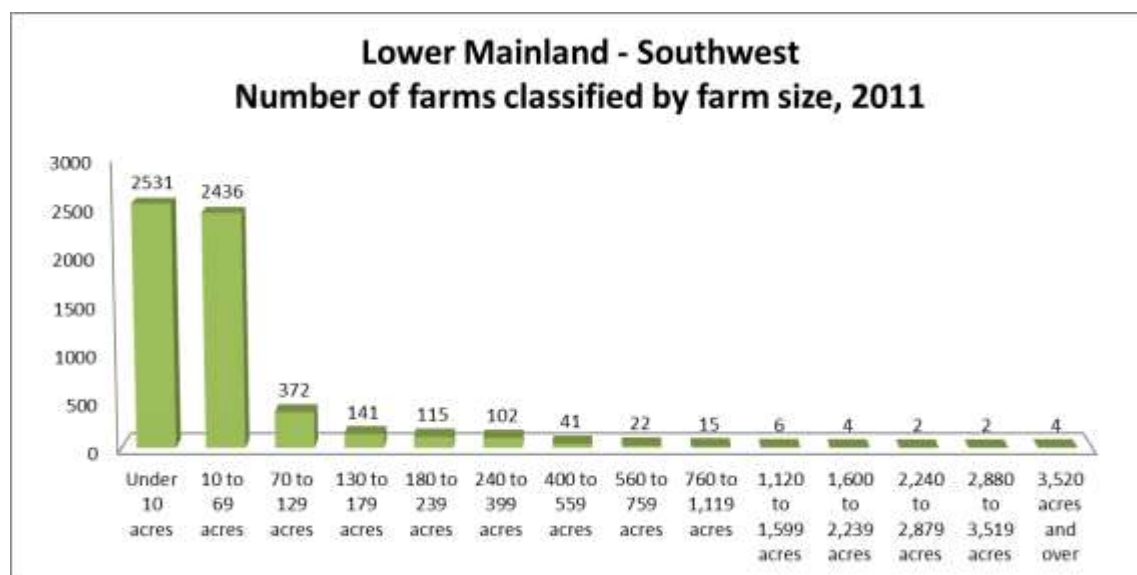
**Figure A. 2 Agricultural Operations by Type in Lower Mainland**



Data from: Statistics Canada, *2011 Census of Agriculture, Farm and Farm Operator Data*, catalogue no. 95-640-XWE

The Lower Mainland has predominantly small agricultural operations by land area, as is illustrated by Figure A.3, below. 44% of agricultural operations in the region are under 10 acres, and a further 42% are between 10 and 69 acres.

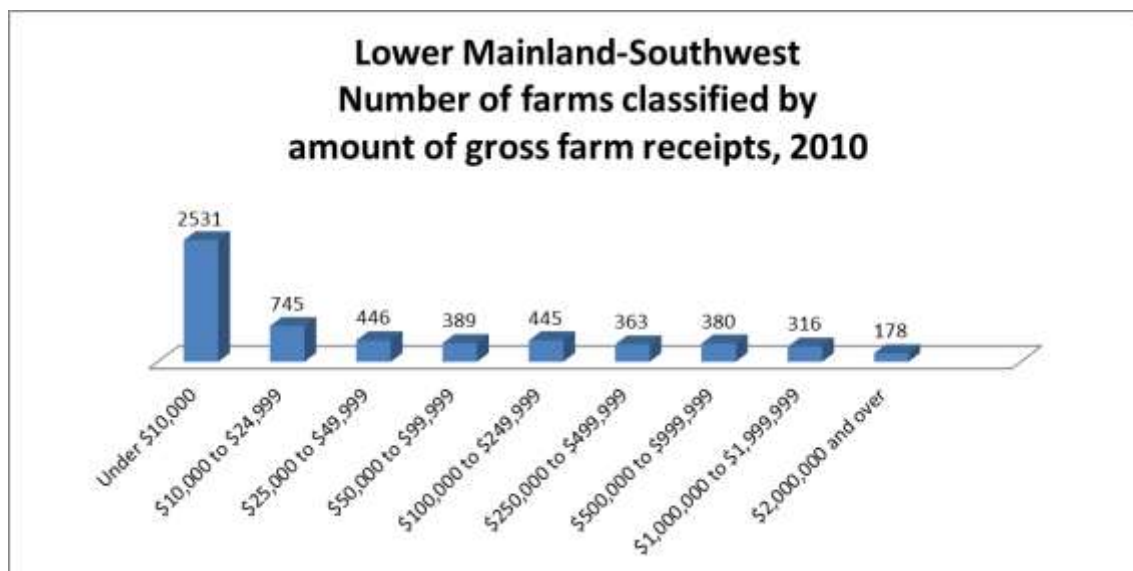
**Figure A. 3 Agricultural Operations by Landmass in Lower Mainland**



Data from: Statistics Canada, *2011 Census of Agriculture, Farm and Farm Operator Data*, catalogue no. 95-640-XWE

Land area is just one way of measuring the size of an agricultural operation. Given the diversity of commodities produced and acreage requirements in the province, the amount of money taken in by an agricultural operation gives a better indication of an operation's size and economic importance. Agricultural operations with gross agricultural operation receipts under \$10,000 represent a significant proportion of the agricultural operations in Lower Mainland, as illustrated in Figure A.4, below. In the Lower Mainland, the 2,531 operations with gross receipts under \$10,000 represent 44% of operations in the region. Comprising only 9% of the agricultural operations in the Lower Mainland region, 494 agricultural operations had gross receipts over \$1 million. 75% of BC's agricultural operations grossing over \$1 million are in the Lower Mainland. A comparison of the agricultural operation land area size found in Figure A.3 above and classification of agricultural operations by gross receipts in Figure A.4 below makes clear that, in BC, a large land mass is not necessarily required for large gross earnings.

**Figure A. 4 Agricultural Operations by Revenue Class in Lower Mainland**



Data from: Statistics Canada, *2011 Census of Agriculture, Farm and Farm Operator Data*, catalogue no. 95-640-XWE

Gross farm receipts in the Lower Mainland in 2010 totalled almost two billion dollars.<sup>3</sup> This was 65% of the total gross agricultural operation receipts for the province. The Lower Mainland region also had the best regional ratio of operating expenses for gross receipts in the province at .86.<sup>4</sup>

Wages and salaries in the amount of \$363,633,640 and contract work and hired trucking in the amount of \$76,149,050 together comprised 28% of total operating expenses incurred by agricultural operations in the Lower Mainland in 2010. 44% of the agricultural operations in this region hired employees and 37% used contract workers or hired trucking. The 24,064 employees hired directly by agricultural operations in the Lower Mainland represent 53% of all employees hired by agricultural producers in BC in 2010.

The hired agricultural workforce in the Lower Mainland is mostly seasonal and temporary. This being said, there is a greater proportion of the workforce engaged in full-year work in this region compared with all the other agricultural regions in BC. Full-year employees made up 38% of employees hired directly by agricultural producers in the

<sup>3</sup> Actual figure is \$1,920,747,557.00

<sup>4</sup> This does not reflect the average of the ratios on each agricultural operation in the region. Instead, it reflects the ratio of total operating expenses for the region to total receipts.

Lower Mainland, or 9,108 employees. In terms of the volume of working time, full-year employees were reported as providing 63% of the total paid weeks of work in the region.

Agriculture in the Lower Mainland is not primarily a family business in which employees are also relatives. Of the 2,566 Lower Mainland agricultural operations that hired employees directly in 2010, 647 (25%) hired exclusively family members. The rest of the agricultural operations with employees hired only non-family members or a combination of family and non-family members. Three-quarters of the dollars spent on salaries and wages were paid to employees who were not family relatives. In the current data available through the Census of Agriculture, whether some of these family employees were also owners or operators of the agricultural business cannot be calculated.

The numbers of employees listed above include migrant workers employed through the SAWP and TFWP.<sup>5</sup> The numbers do not, however, include workers provided through farm labour contractors. The use of contract labour is most prevalent in the Lower Mainland, with as many as 6,807 contract workers in peak season. Including these contract workers, the total number of positions for agriculture workers in the Lower Mainland could be as high as 30,871, with the majority of these positions being seasonal and temporary.

The Census of Agriculture data released in May 2012 did not include information about the number of employees hired by each individual agricultural operation. However, even looking at the data at a region level, more employees per farm were hired in the Lower Mainland region than other regions. On average, there were over 9 employees per agricultural operation. The next closest average was in the Thompson – Okanagan region, with an average of just over 6 employees per operation. This would suggest that not only are there more agricultural operation that hire employees in the Lower Mainland region, but that many of these operations are large employers.

### **Thompson-Okanagan Region**

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<sup>5</sup> Information as to the numbers of migrant workers in each agricultural region is not publically available, according to the author's correspondence with the Consulate of Mexico in Vancouver.

**Figure A. 5 Map of Thompson-Okanagan**



Source: Statistics Canada, *2011 Census of Agriculture*

comprising 12% of the province's population.

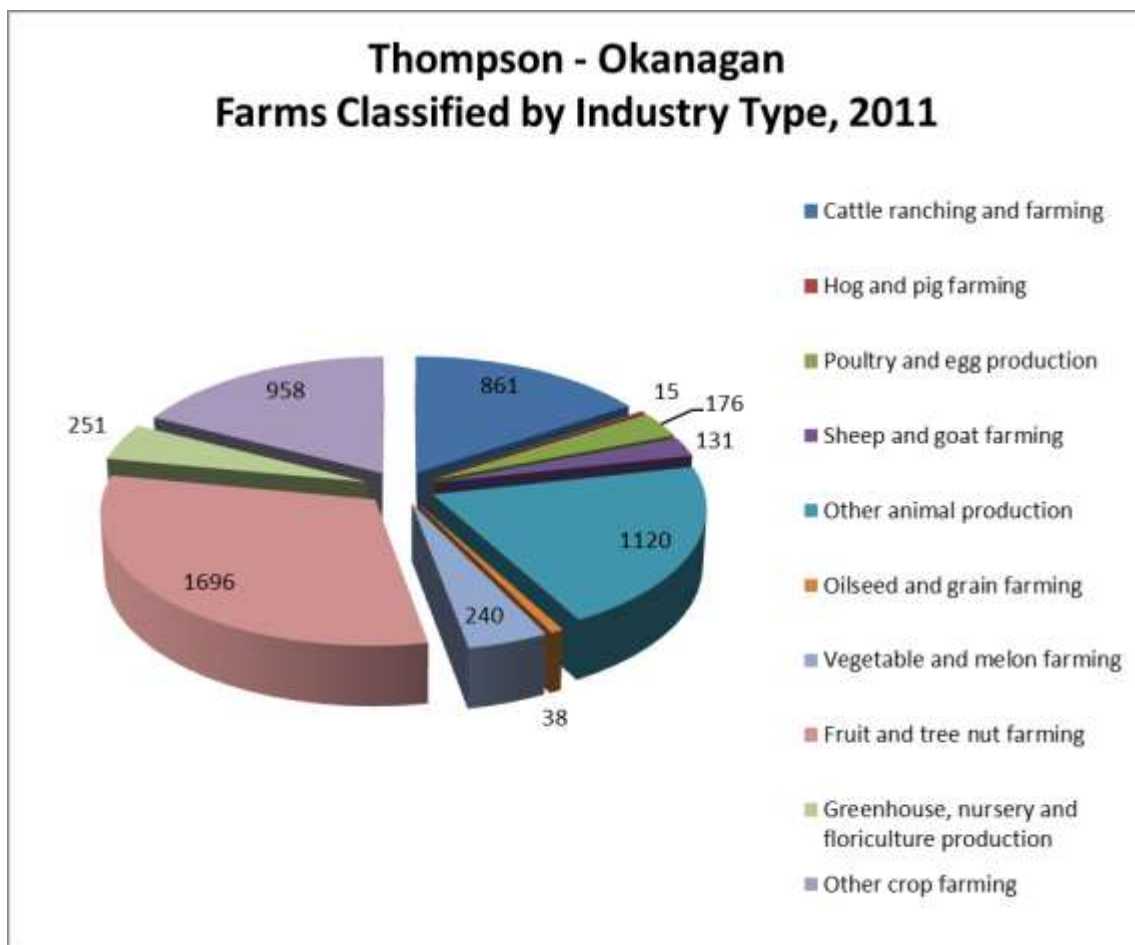
31% of agricultural operations in this area are produce fruits and tree nuts, mostly in the Okanagan, in the southern part of the region. North from the Okanagan is the southern interior plateau, containing the Thompson river valley, where cattle ranching and related agricultural production are most common.<sup>7</sup> Beef production accounts for 15% of agricultural operations. Livestock other than pigs, poultry, sheep and goats accounts for a further 20%. Livestock-related crops such as alfalfa and tame hay are primary crops of another 17% of agricultural operations. Small numbers primarily produce vegetables, greenhouse products, poultry, eggs, pigs or grains. Figure A.6, below, illustrates the relative proportion of the different types of agricultural operations located in the Thompson-Okanagan region.

The Thompson - Okanagan Region is located in the south central part of the province, including both Kamloops and Kelowna, reaching to the Alberta border north-east of Kamloops. The Okanagan valley is found between the Cascade Mountains and Monashee mountains and is characterized by low levels of precipitation, and relatively hot summers and cold winters.<sup>6</sup> Irrigation is necessary for the production of many crops in the region. In 2011, 520,803 people lived in the region,

<sup>6</sup> Brett McGillivray, *Geography of British Columbia: People and Landscapes in Transition* (Vancouver: UBC Press, 2011) at 15.

<sup>7</sup> *Ibid.* at 17.

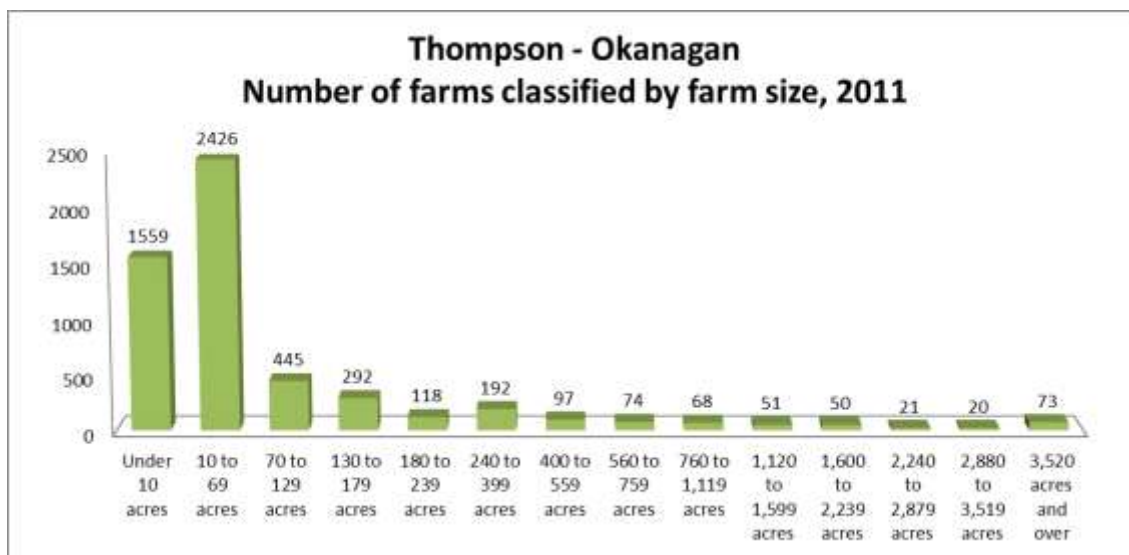
**Figure A. 6 Agricultural Operations by Type in Thompson - Okanagan**



Data from: Statistics Canada, *2011 Census of Agriculture, Farm and Farm Operator Data*, catalogue no. 95-640-XWE

The Thompson – Okanagan had 5,486 agricultural operations, comprising almost 28% of the agricultural operations in BC. 27% of the land in agricultural production in the province is located in the Thompson – Okanagan region.

**Figure A. 7 Agricultural Operations by Landmass in Thompson - Okanagan**

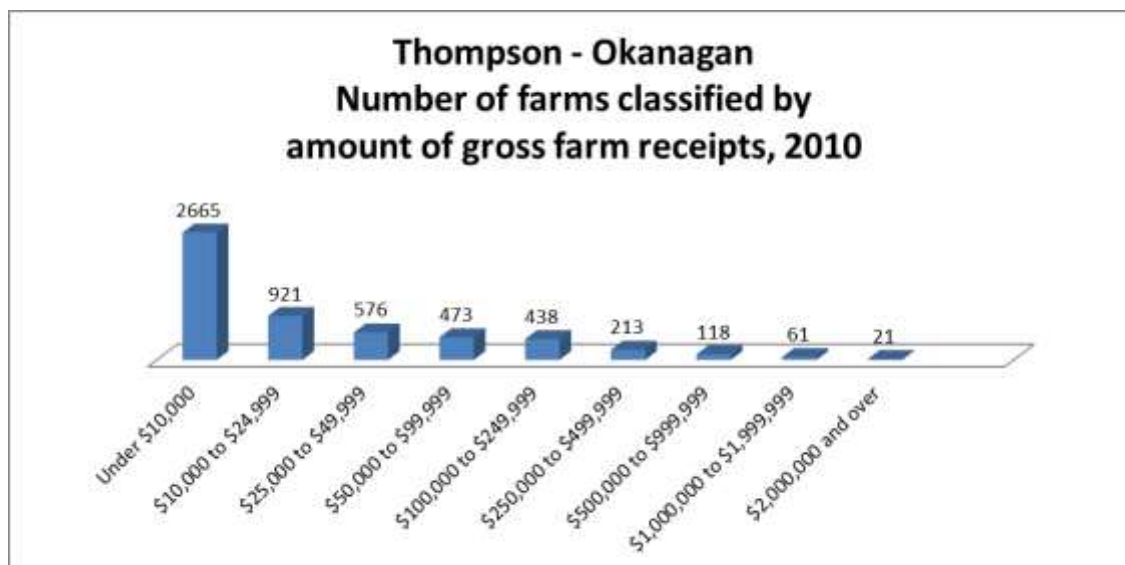


Data from: Statistics Canada, *2011 Census of Agriculture, Farm and Farm Operator Data*, catalogue no. 95-640-XWE

Figure A.7, above, shows the majority of agricultural operations in the Thompson - Okanagan are on a small land base, with 28% of agricultural operations under 10 acres and 44% of agricultural operations from 10 to 69 acres.

Using the measure of gross farm receipts, half the agricultural operations in fell in the smallest category of under \$10,000 per year. The region does, however, have some larger grossing agricultural operations. 13% of the agricultural operations in BC with gross receipts over \$1 million are located in the Thompson – Okanagan region. Figure A.8, below, shows the distribution of operations by revenue class in the region.

**Figure A. 8 Agricultural Operations by Revenue Class in Thompson - Okanagan**



Data from: Statistics Canada, *2011 Census of Agriculture, Farm and Farm Operator Data*, catalogue no. 95-640-XWE

In 2010, the agricultural operations in the Thompson-Okanagan region together took in a total of \$480,694,754 in gross receipts and incurred a total of \$450,597,538 in operating expenses. The ratio of operating expenses to receipts for 2010 was .94, somewhat above the provincial average.

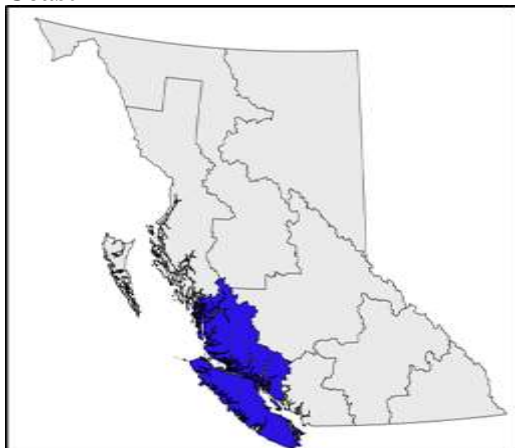
Approximately 27% of the paid agricultural employees in BC were employed in the Thompson – Okanagan region in 2010. 1,904 agricultural operations, representing 35% of the all agricultural operations in the region, reported hiring employees. These agricultural operations spent \$101,260,225 on wages and salaries, representing 24% of the total operating expenses incurred by all operations in the region. Similar to the Lower Mainland region, approximately three-quarters of all wages and salaries paid by agricultural operations were paid to non-family members. 1,797 operations (33% of total) reported using contract labour, custom work or hired trucking, incurring expenses totalling \$17,986,428.

The majority (85%) of the agricultural operations that hired employees (1,613), hired employees on a seasonal or temporary basis. 32% (625) of operations hired full-year

employees.<sup>8</sup> Of the total 12,217 direct employees hired in the region, 10,245 were seasonal or temporary, and 1,972 were full-year employees. A large percentage – 65% – of the weeks of paid work was done by seasonal or temporary employees.

### Vancouver Island and Coast region

**Figure A. 9 Map of Vancouver Island - Coast**



Source: Statistics Canada, *2011 Census of Agriculture*

Vancouver Island and Coast region encompasses Vancouver Island, the gulf islands and central mainland coastal region from Powell River to Bella Bella. This is a mountainous region containing the Insular Mountains on Vancouver Island, and the Coast Mountains range on the mainland.<sup>9</sup> According to the 2011 population census, 759,366 people live in the region, representing 17% of the province's population.<sup>10</sup> Over half of these people live

on the southern tip of Vancouver Island including the city of Victoria and surrounding municipalities. Transportation costs, largely by ferry, make export of goods produced in this region prohibitively expensive. The local markets are often the primary market for agricultural products grown in this region and agricultural operations on Vancouver Island produce about one-quarter of the produce consumed in the region.<sup>11</sup>

The Vancouver Island and Coast region is home to a fairly mixed agriculture sector, as illustrated in Figure A.10, below. The greatest number of agricultural operations on Vancouver Island and the gulf islands are primarily animal-producing. This includes horse stables, beef cattle, mixed livestock operations, chicken for eggs production, sheep, dairy, bees, other poultry, goats and hogs. In 2011, there were 439 greenhouses and nurseries and 373 fruit and tree nut farms in this region.

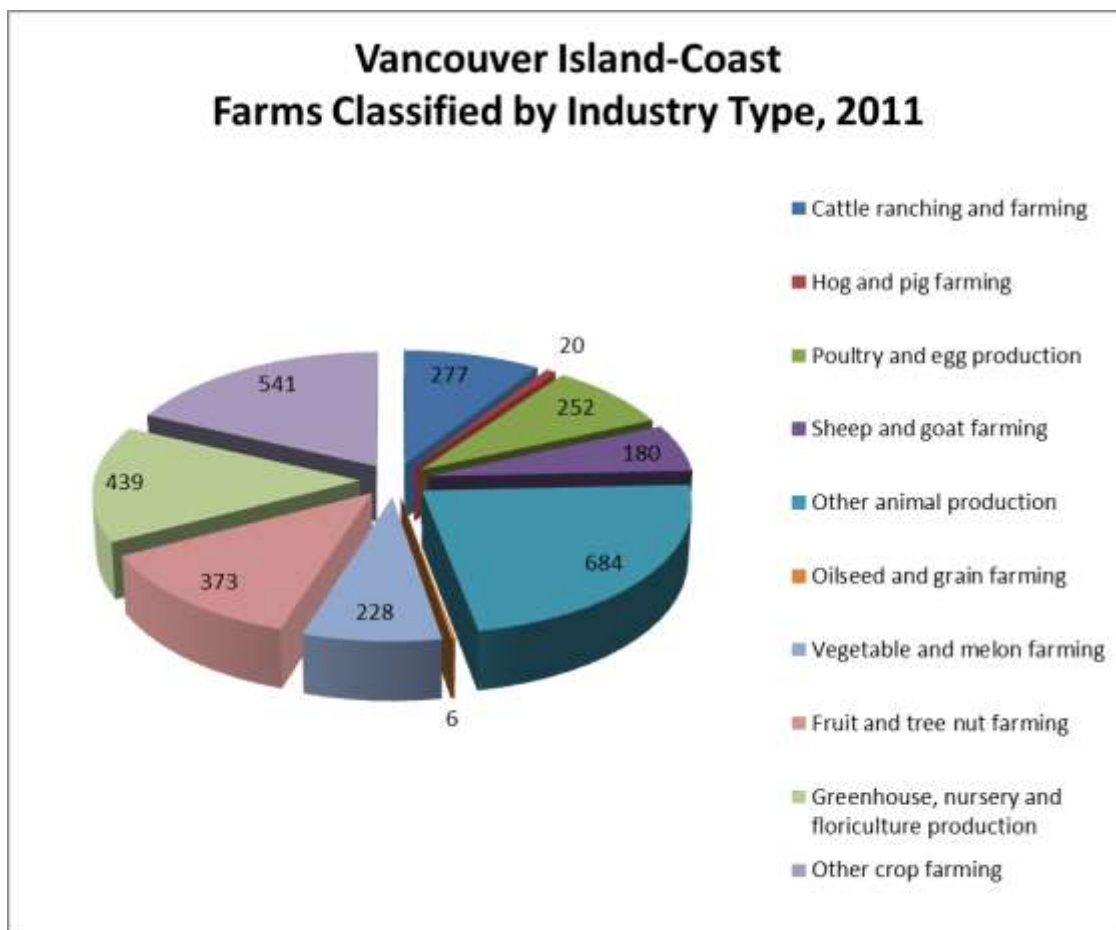
<sup>8</sup> Some farms hired both full-year and seasonal employees, and therefore, the percentages total more than 100%.

<sup>9</sup> McGillivray, *supra* note 6 at 12.

<sup>10</sup> *2011 Census of Population*, *supra* note 2.

<sup>11</sup> McGillivray, *supra* note 6 at 222.

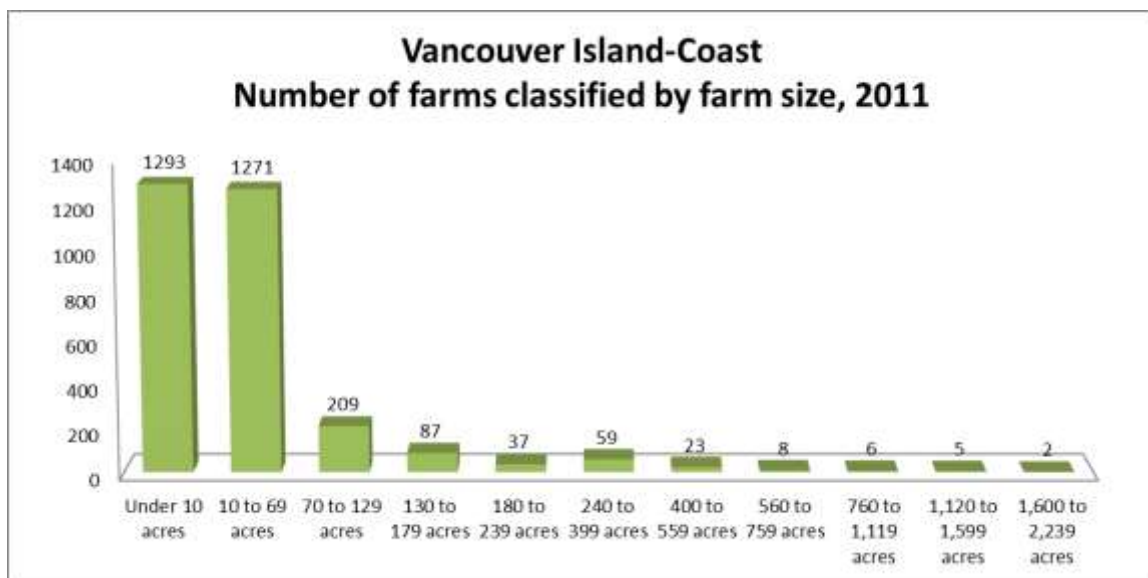
**Figure A. 10 Agricultural Operations by Type in Vancouver Island - Coast**



Data from: Statistics Canada, *2011 Census of Agriculture, Farm and Farm Operator Data*, catalogue no. 95-640-XWE

Three thousand individual agricultural operations are found in the Vancouver Island and Coast region. The vast majority of agricultural operations in this region are in the capital sub-region (1,093), Cowichan valley (685), Nanaimo (478), and the Comox valley (432), all on Vancouver Island. The 3000 agricultural operations in the region account for 15% of agricultural operations in the province. The area of agricultural land in the Vancouver Island and Coast region represents only 2% of the total agricultural land in BC. Not surprisingly then, by landmass, most agricultural operations in this region are quite small. 43% of agricultural operations in this region contain fewer than 10 acres. A further 42% of agricultural operations are between 10 acres and 69 acres. Figure A.11 shows the land size of agricultural operations in the region.

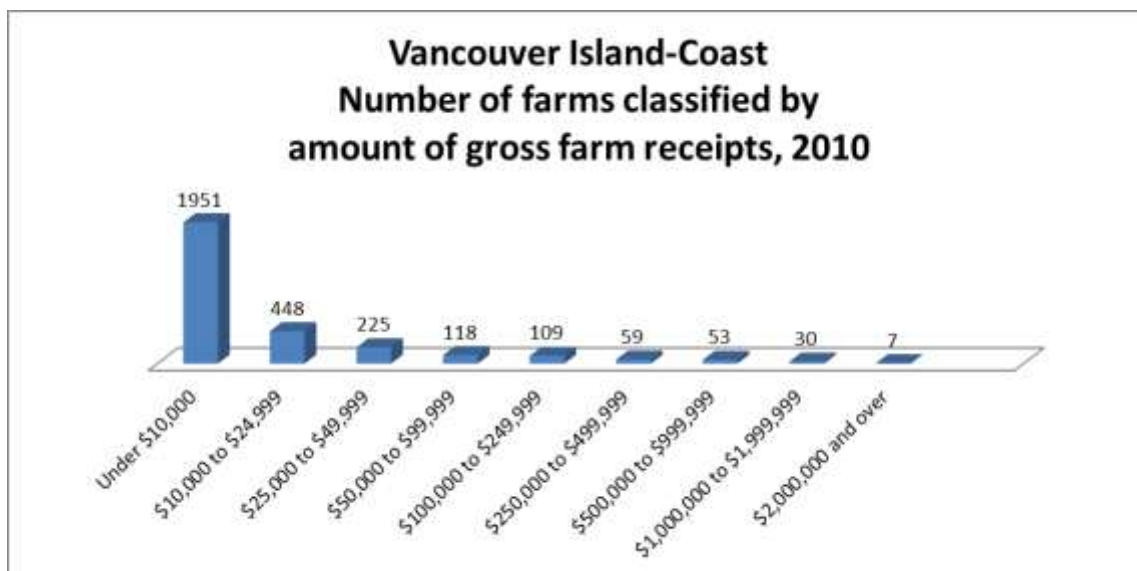
**Figure A. 11 Agricultural Operations by Landmass in Vancouver Island - Coast**



Data from: Statistics Canada, *2011 Census of Agriculture, Farm and Farm Operator Data*, catalogue no. 95-640-XWE

As Figure A.12, below, illustrates, the vast majority of agricultural operations on Vancouver Island and the Coast region are also small in terms of the money they generate. Taken as a whole, gross farm receipts were less than 6% of the total gross receipts for the province. Two-thirds of agricultural operations in the region grossed less than \$10,000. Thirty-seven individual operations had gross receipts of over one million dollars. This represents 6% of the operations taking in over \$1 million in the province.

**Figure A. 12 Agricultural Operations by Revenue Class in Vancouver Island - Coast**



Data from: Statistics Canada, *2011 Census of Agriculture, Farm and Farm Operator Data*, catalogue no. 95-640-XWE

The ratio of operating expenses to gross agricultural operation receipts in this region for 2010 was 0.94, putting this region's average ratio higher than the provincial ratio of .89. Total gross agricultural operation receipts in the region were reported as \$167,549,987. Total operating expenses incurred by all agricultural operations in the region were reported as \$156,844,114.

Approximately 27% of the agricultural operations (805) on Vancouver Island reported hiring employees. A total of 4,097 employees were reported in the Vancouver Island and Coast Region. Agricultural operations on Vancouver Island, the Gulf Islands and the Coast spent total of \$38,299,592 on wages and salaries, and \$5,937,925 on custom work, contract work and hired trucking in 2010, for a total of \$44,237,517.00. This was the third largest amount spent on labour (whether hired directly or through a contractor) of all the agricultural regions in BC, after the Lower Mainland and Thompson-Okanagan. In the Vancouver Island and Coast region, labour represented 28% of all operating expenses.

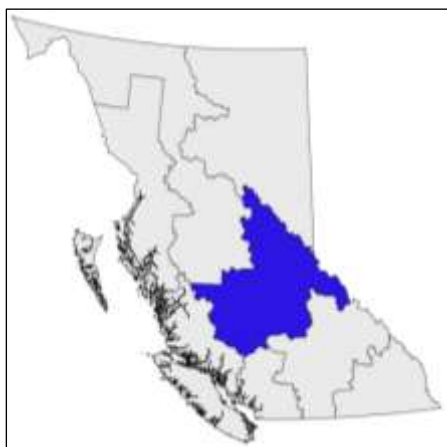
Two-thirds of hired employees in the Vancouver Island and Coast region were seasonal or temporary employees. 2,999 were seasonal or temporary hires and 1,098 were

full-year employees. In terms of the proportion of working time provided, 64% of the weeks of paid employment in 2010 were worked by full-year employees.

Only 6% of agricultural operations in the region hired exclusively family members. 21% of agricultural operations hired non-family members, either exclusively or in conjunction with family member employees. The majority – 69% – of wages and salaries in the region were paid to non-family employees. 32% of agricultural operations used contract workers, custom work or hired trucking, either in conjunction with or instead of employees hired directly by the agricultural operation.<sup>12</sup>

### Cariboo Region

**Figure A. 13 Map of Cariboo**



Source: Statistics Canada, *2011 Census of Agriculture*

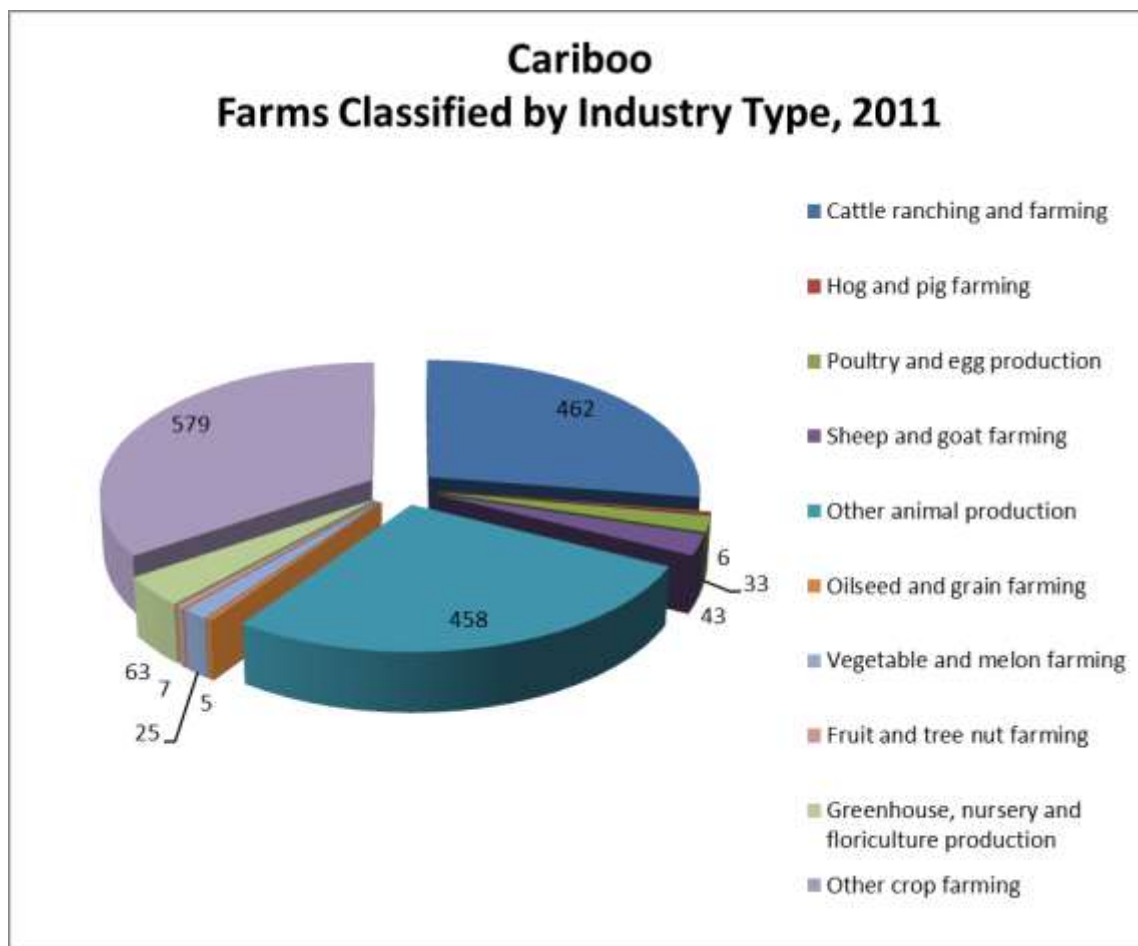
The Cariboo region encompasses a large area in the central interior of BC. In this region is found the source of the Fraser River, the Cariboo Mountains, part of the Rocky Mountain range and a large semi-arid plateau of ranch land. Prince George is the largest urban centre followed by Williams Lake and Quesnel. The region is sparsely populated, with 154,271 residents or approximately 3.5% of BC's population.<sup>13</sup>

As is clear from figure A.14, below, the Cariboo region is characterized primarily by livestock operations and crops which support the livestock industry. Cattle, horses and other mixed livestock operations make up fully 55% of agricultural operations in the Cariboo region. Hay or other non-grain crops are the primary product of another 34%. Taken together, the greenhouse, vegetable and fruit and nut production so important in the southern agricultural regions in BC make up less than 6% of the total agricultural operations in the Cariboo region.

<sup>12</sup> From the data released in the 2011 Census of Agriculture by Statistics Canada as of May 2012, one cannot calculate the extent to which there is an overlap in the 27% of farms that hire employees directly and the 32% of farms that obtain labour through labour contractors, trucking services and other custom work.

<sup>13</sup> Statistics Canada, *2011 Population Census*, *supra* note 2.

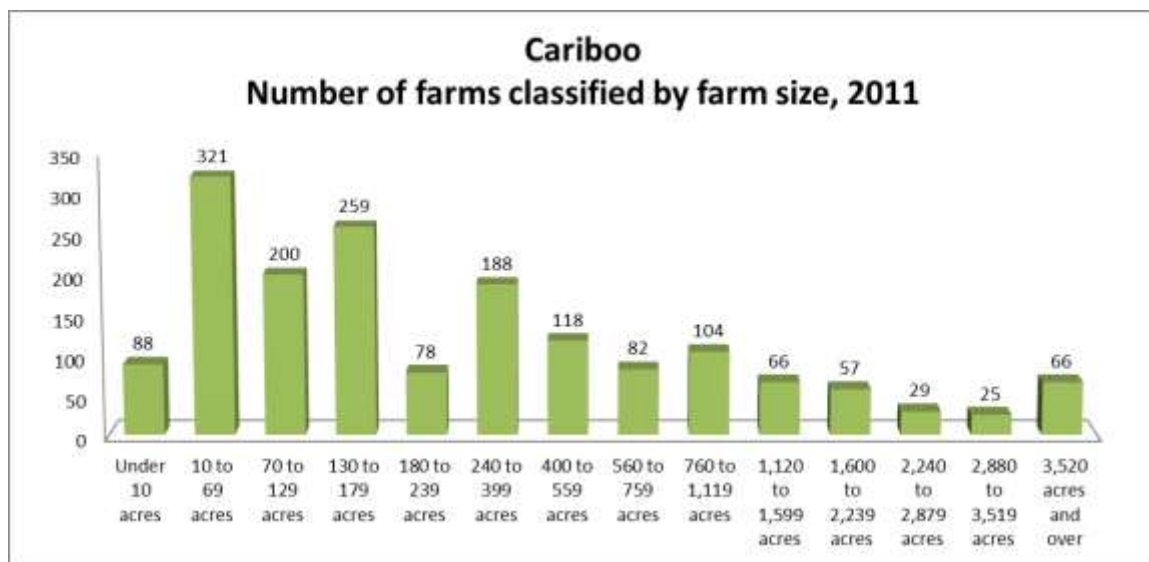
Figure A. 14 Agricultural Operations by Type in Cariboo



Data from: Statistics Canada, *2011 Census of Agriculture, Farm and Farm Operator Data*, catalogue no. 95-640-XWE

A total of 1,681 agricultural operations were in the Cariboo region in 2010. This represents approximately 9% of BC's agricultural operations, and 19% of the total landmass in BC used by agricultural operations. By landmass, this is the third largest area in agricultural production in the province, behind the Peace River region and the Thompson-Okanagan region. This region has a diversity of agricultural operation sizes. Only 24% of agricultural operations are under 69 acres, and 10% of agricultural operations are 16,000 acres or more.

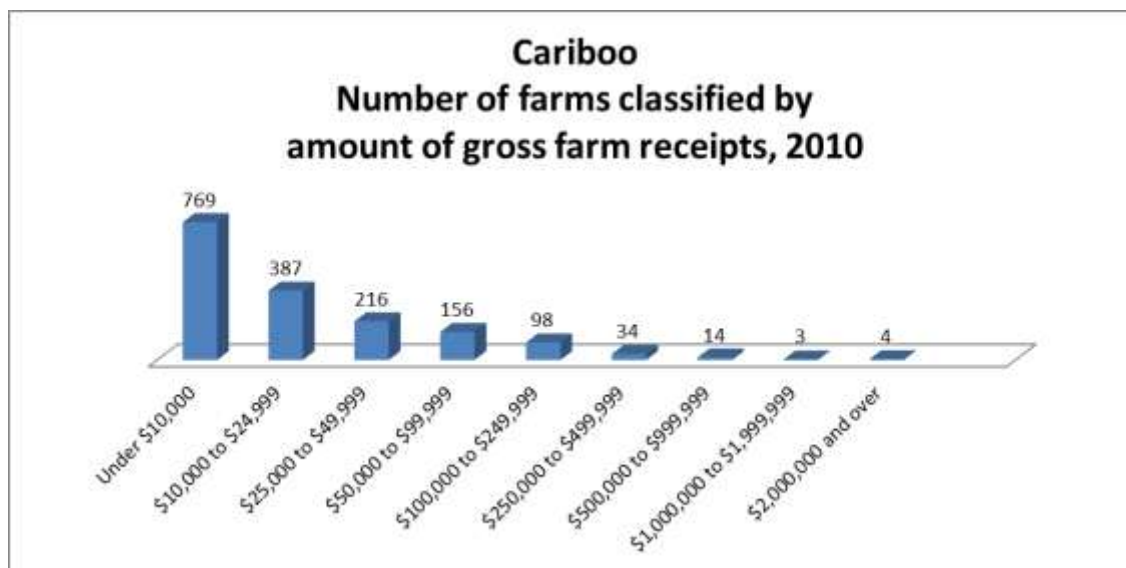
**Figure A. 15 Agricultural Operations by Landmass in Cariboo**



Data from: Statistics Canada, *2011 Census of Agriculture, Farm and Farm Operator Data*, catalogue no. 95-640-XWE

In terms of gross receipts, most agricultural operations in the Cariboo region are small, as shown in Figure A.16. 46% of firms had gross receipts under \$10,000 in 2010, and a further 23% with receipt from \$10,000 to \$24,999. Seven operations had receipts over \$1 million.

**Figure A. 16 Agricultural Operations by Revenue Class in Cariboo**



Data from: Statistics Canada, *2011 Census of Agriculture, Farm and Farm Operator Data*, catalogue no. 95-640-XWE

In 2010, the total operating expenses of \$95,825,916 incurred by agricultural operations in the Cariboo region exceeded gross receipts of \$94,320,938, resulting in an expenses to receipts ratio of 1.02. Expenses for wages and salaries made up 20% of total expenses. The cost of custom work, contract labour and hired trucking made up 2% of the total expenses for the region.

351 agricultural operations, or 20% in the region, reported hiring employees in 2010. 1,799 employees were hired and paid a total of \$19,235,848 in wages and salaries. 83% of wages and salaries were paid to non-family members. The majority of employees (79%) were seasonal or temporary employees. However, the overall number of weeks of work performed by seasonal or temporary workers was less than the number of weeks performed by full-year employees. In 2010, a total of 12,181 weeks of work were done by 1,428 temporary or seasonal workers on Cariboo region agricultural operations. 13,025 weeks of work were done by 371 year-round employees.

### **Kootenay Region**

**Figure A. 17 Map of Kootenay**

Source: Statistics Canada, *2011 Census of Agriculture*

The Kootenay region is in the eastern corner of British Columbia. The region contains four north-south mountain ranges – the Monashees, Selkirks, Purcells and Rockies – as well as the lower Thompson River system. Pockets of agricultural production exist along river valleys. Three percent of BC’s population, or 146,264 people live in the Kootenay Region.<sup>14</sup> In addition to the mountainous terrain, high transportation costs and low local demand

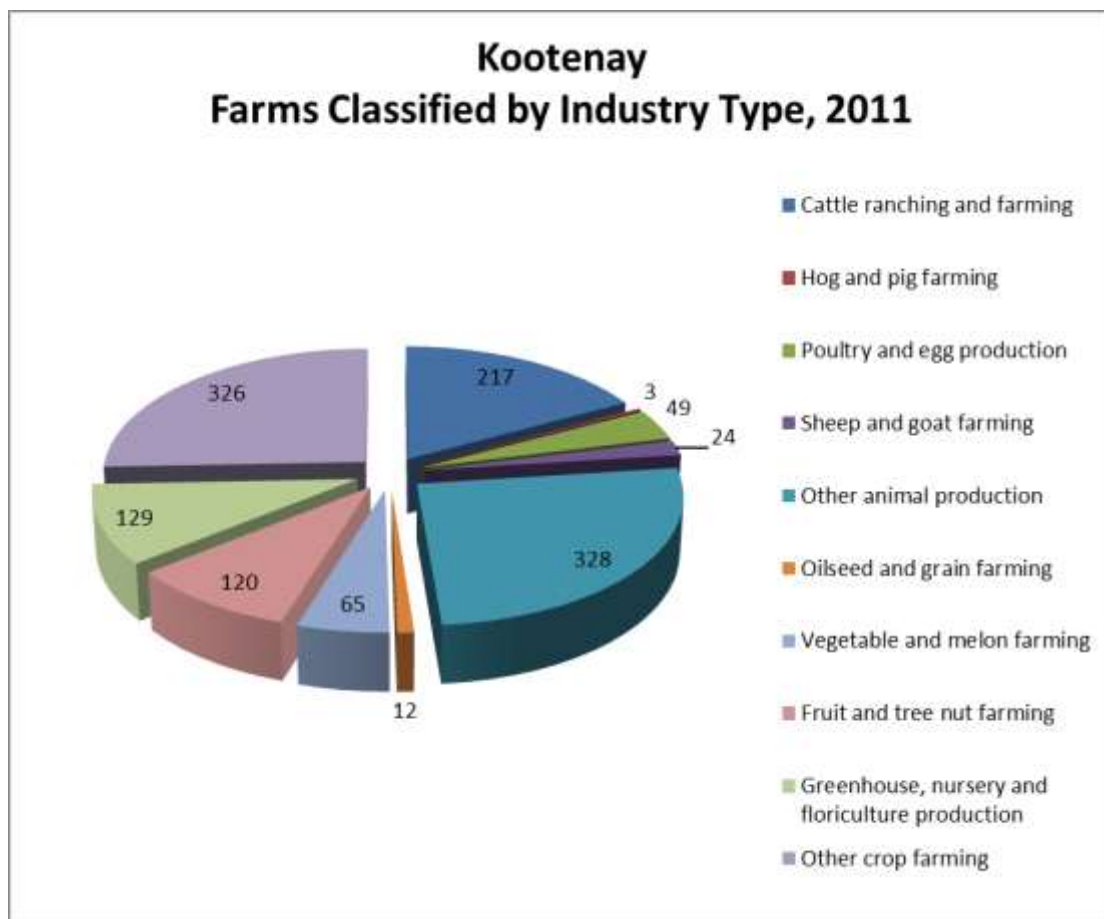
because of the sparse population are considerable challenges to agricultural production in this area.<sup>15</sup>

Agricultural production in the Kootenay region is heavily weighted towards livestock operations. Cattle ranching accounts for 17% of agricultural operations in the region. Other livestock, predominantly horses, make up a further 25%. In the Kootenay region, hay makes up most of the “other crop” category that accounts for a further 26% of the agricultural operations. Greenhouses and fruit production make up 10% and 9% of the remaining agricultural operations, respectively. Figure A.18 illustrates the relative proportions and numbers of the different types of agricultural operations in the region.

<sup>14</sup> Statistics Canada, *2011 Population Census*, *supra* note 2.

<sup>15</sup> McGillivray, *supra* note 6 at 223.

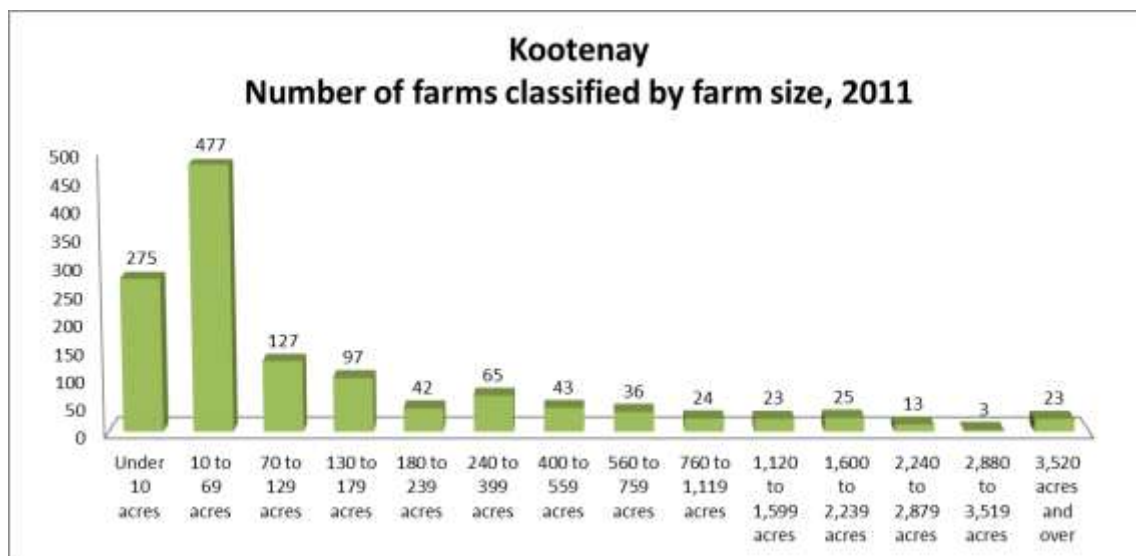
Figure A. 18 Agricultural Operations by Type in Kootenay



Data from: Statistics Canada, *2011 Census of Agriculture, Farm and Farm Operator Data*, catalogue no. 95-640-XWE

1,273 of British Columbia's 19,759 agricultural operations (6%) are found in the Kootenay Region. These agricultural operations account for almost 6% of the agricultural operation land area in the province. As Figure A.19, below, shows, agricultural operations in the region are on a relatively small land base, with 59% of agricultural operations under 69 acres.

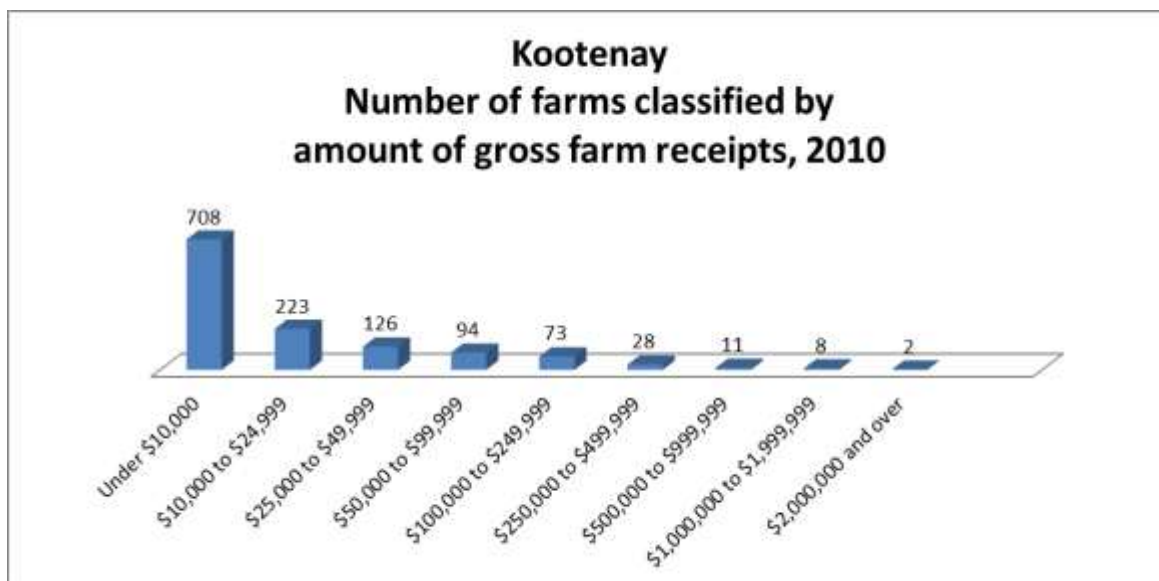
**Figure A. 19 Agricultural Operations by Landmass in Kootenay**



Data from: Statistics Canada, *2011 Census of Agriculture, Farm and Farm Operator Data*, catalogue no. 95-640-XWE

In terms of economic size, the majority of operations are also small. 56% of the agricultural operations in this region grossed under \$10,000 in 2010. Ten operations grossed over \$1 million, representing less than 2% of BC's agricultural operations grossing over \$1 million.

**Figure A. 20 Agricultural Operations by Revenue Class in Kootenay**



Data from: Statistics Canada, *2011 Census of Agriculture, Farm and Farm Operator Data*, catalogue no. 95-640-XWE

In 2010, the aggregated gross agricultural operation receipts was \$71,099,592 and total operating expense were \$64,321,076, resulting in a regional expenses to receipts ratio of .90. This is only slightly above the provincial average of .89. On a sub-regional level, the total operating expenses exceeded total receipts in the East Kootenay region. The Central Kootenay and Boundary sub-regions had better expenses to receipts ratios.

311 Kootenay agricultural operations (24%) reported hiring a total of 1,910 employees. This represents approximately 4% of the total number of employees in BC. Seasonal or temporary employees, totalling 1,659 employees, made up 86% of all employees in the Kootenay region. Agricultural operations reported 251 full-year employees in 2010. 311 Kootenay agricultural operations spent \$15,733,680 on wages and salaries. 319 Kootenay agricultural operations spent \$1,981,426 on contract labour, custom work and hired trucking. Of the money paid for wages and salaries in the region, 78% was paid to non-family members.

### **Peace River Region**

**Figure A. 21 Map of Peace River**

Source: Statistics Canada, *2011 Census of Agriculture*

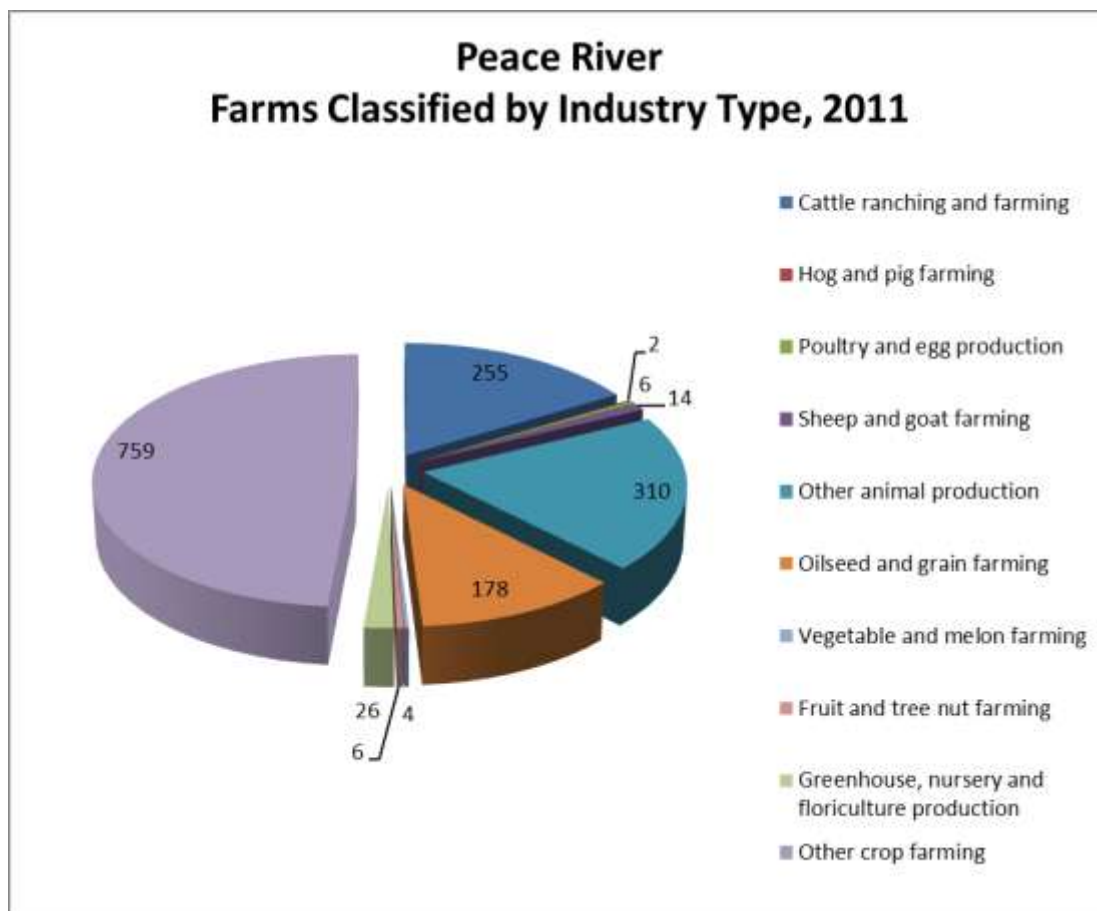
The Peace River region is located in the north eastern portion of the province, extending to the north to the Yukon and Northwest Territories and to the east to Alberta. Fort Nelson, Fort St. John and Dawson Creek are located in this region, as are the rugged and dry northern Rocky mountains. The Peace River region, to the east of the Rockies, is characterized by grasslands and rolling hills. Its northern location equals a shorter growing season.

Approximately 65,660 people live in the region, representing a little more than 1% of the province's population.<sup>16</sup>

The Peace River region differs from agriculture in the rest of the province. Figure A.22, below, illustrates the different the mix of commodities produced. Wheat and oilseed crops are the primary crop of 11% of agricultural operations in the region. These are not significant crops in any other region in BC. In 2011, almost half of the agricultural operations reported hay or other similar crops as the primary crop. Cattle, bison and other livestock apart from hogs, poultry, sheep and goats accounted for 36%. This region contains 87% of the acres growing wheat in the province, 60% of acres in barley, 34% of the rye, 94% of the canola, 94% of dry field peas, 43% of the alfalfa hay and 27% of other tame hay and fodder crops. Only 45 of the 60,525 acres devoted to growing fruits, berries and nuts in BC are found in the Peace River region. This region has less than one per cent of the agricultural operations growing field vegetables in British Columbia. 19 of BC's 1,122 greenhouse operations are located in the Peace River region. These account for less than 0.2% of the greenhouse area found in BC. The Peace River region in 2010 was home to 22% of the beef cattle and over 84% of the bison in the province of British Columbia.

<sup>16</sup> Statistics Canada, *2011 Population Census*, *supra* note 2.

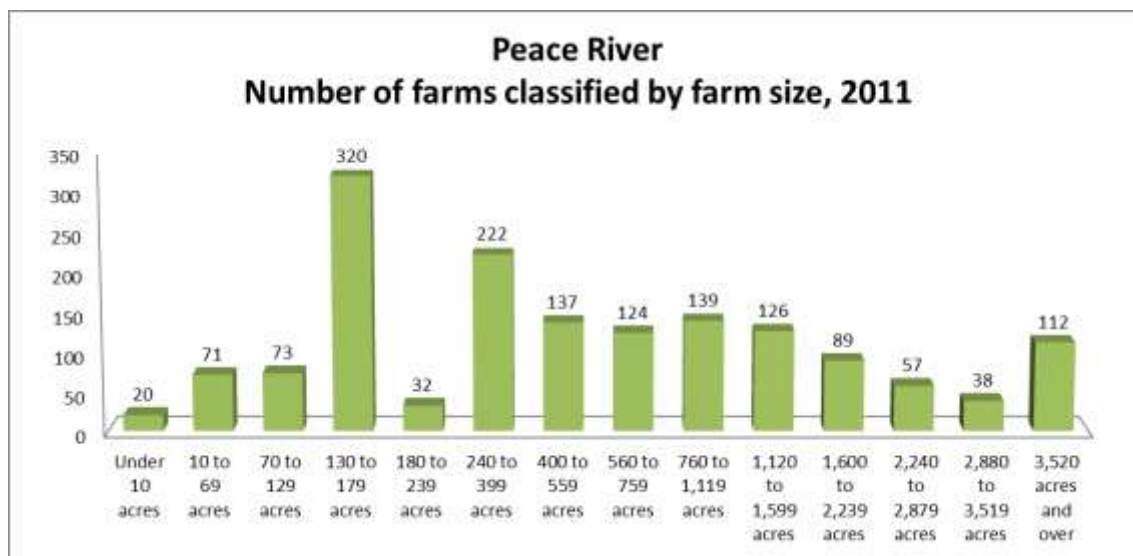
**Figure A. 22 Agricultural Operations by Type in Peace River**



Data from: Statistics Canada, *2011 Census of Agriculture, Farm and Farm Operator Data*, catalogue no. 95-640-XWE

1560 agricultural operations are located in the Peace River region, almost 8% of the agricultural operations in British Columbia. This region contains the most acreage under agricultural production of any single region in the province, with 2,054,843 acres or 32% of BC's agricultural operation landmass. As illustrated in Figure A.23, below, compared to the rest of BC, most agricultural operations tend to be medium to large in terms of landmass, with 19% of agricultural operations over 1,600 acres in size.

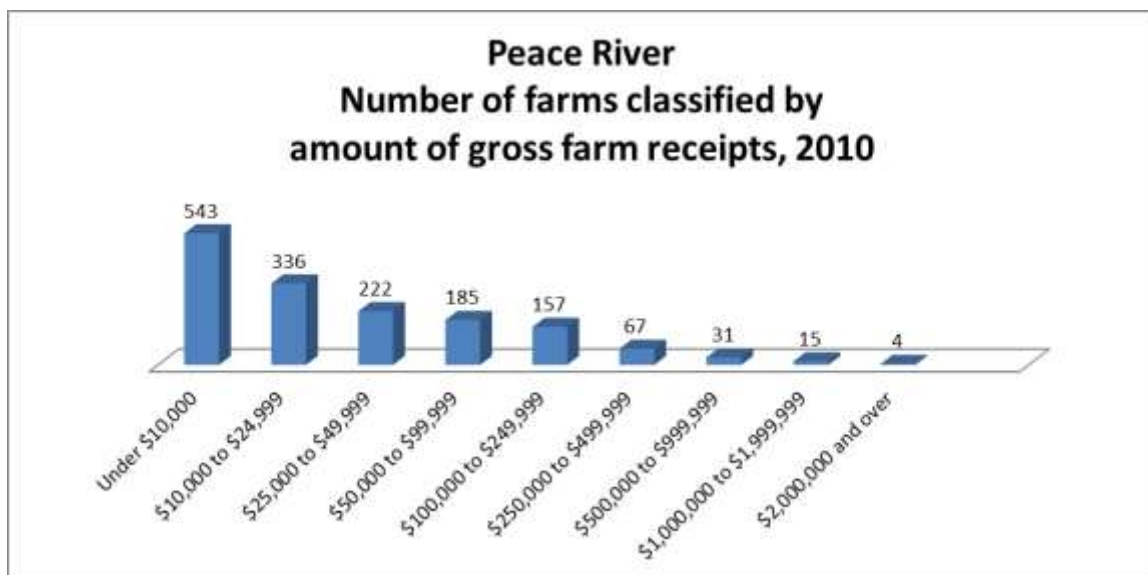
**Figure A. 23 Agricultural Operations by Landmass in Peace River**



Data from: Statistics Canada, *2011 Census of Agriculture, Farm and Farm Operator Data*, catalogue no. 95-640-XWE

The Peace River region also had the smallest proportion of agricultural operations grossing under \$10,000. 35% of these agricultural operations took in less than \$10,000 in gross receipts in 2010. The gross receipts of the individual agricultural operations in the region are represented in Figure A.24. 22%, or 336 operations, had gross receipts between \$10,000 and \$25,000 in 2010. 14%, or 222 agricultural operations, had gross receipts between \$25,000 and 50,000. Approximately 3% of the agricultural operations in BC grossing over \$1 million are located in the Peace River region.

**Figure A. 24 Agricultural Operations by Revenue Class in Peace River**



Data from: Statistics Canada, *2011 Census of Agriculture, Farm and Farm Operator Data*, catalogue no. 95-640-XWE

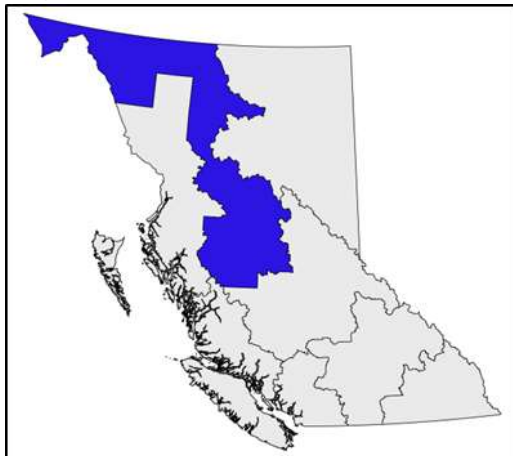
The ratio of expenses to receipts in the Peace River area is .94, somewhat above the provincial average. In 2010, operating expenses totalled \$137,165,740 and gross receipts totalled \$144,940,291. Expenses for wages and salaries accounted for 6% of all operating expenses in the region and expenses for custom work, contract labour and hired trucking accounted for additional 4% of all operating expenses.

Only 20% of agricultural operations (317) in the Peace River area reported hiring employees. A total of 730 employees were reported for the region, making up almost 2% of hired agricultural operation workers in BC. Over half of the employees were seasonal or temporary. Agricultural producers who did hire workers appear to hire a small number of employees, with an average of 2.3 employees per producer. This is the lowest average of all the regions.

### **Nechako Region**

The Nechako region is located between the North Coast and Cariboo regions, extending north to BC's border with Alaska and the Yukon. It has a population of 39,837,

**Figure A. 25 Map of the Nechako Region**



Source: Statistics Canada, *2011 Census of Agriculture*

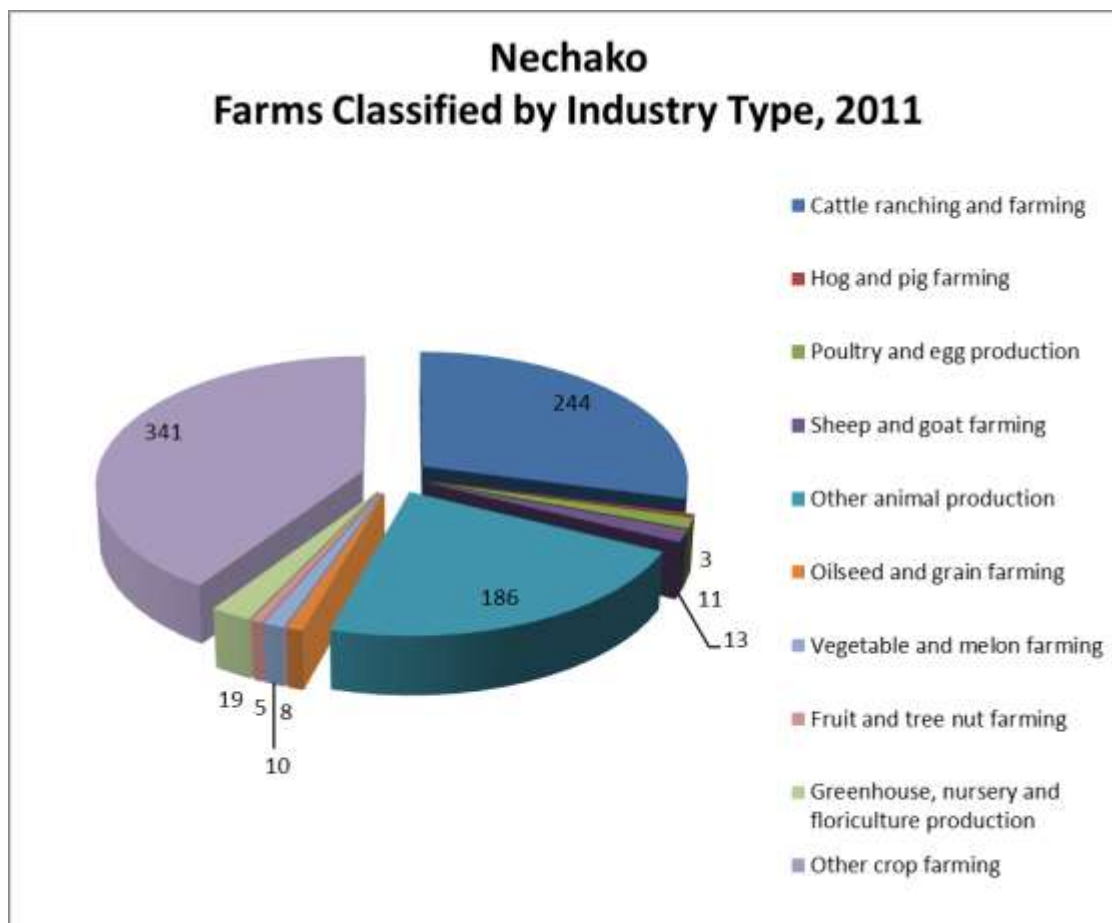
commodity grown on just 4% of agricultural operations in this region. In keeping with other regions in the central and northern parts of the province, livestock operations dominate, as illustrated in Figure A.26, below.

less than 1% of the province's residents.<sup>17</sup> The Nechako region has 840 agricultural operations, located primarily in a plateau area in the southern part of the region, west of Prince George.

Just over half of the agricultural operations in the Nechako region are cattle or other livestock operations. Hay is the primary agricultural product of a further 38% of agricultural operations. Greenhouses, fruits and nuts and vegetables are the primary

<sup>17</sup> Statistics Canada, *2011 Population Census*, *supra* note 2.

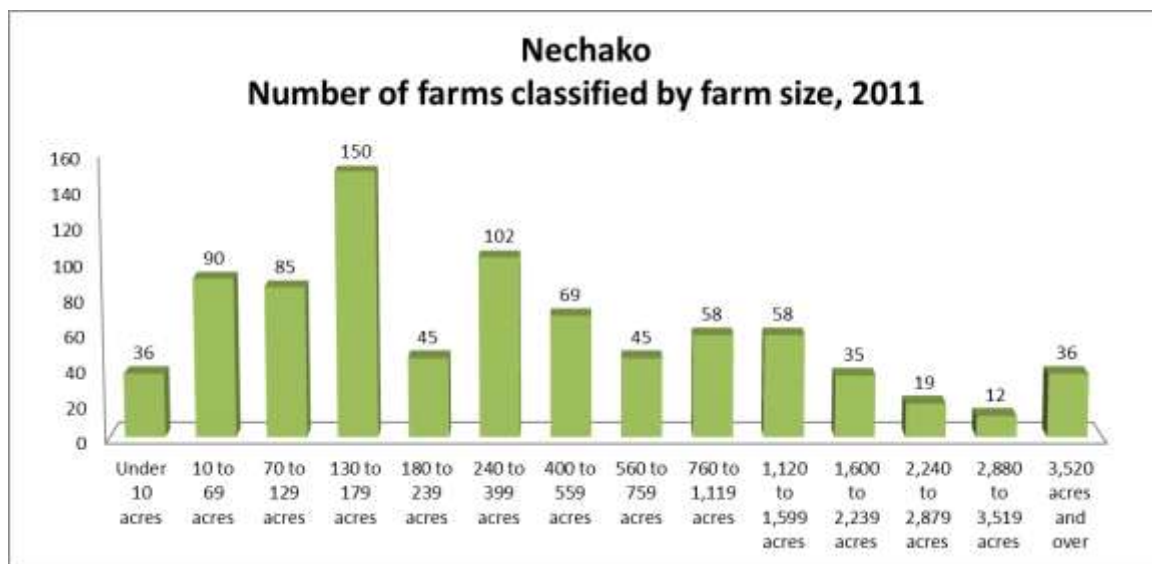
Figure A. 26 Agricultural Operations by Type in Nechako



Data from: Statistics Canada, *2011 Census of Agriculture, Farm and Farm Operator Data*, catalogue no. 95-640-XWE

The agricultural operations in the Nechako region account for 4% of the total number in BC and 9% of the province's total agricultural landmass. The region has the second smallest number of agricultural operations of all the regions in BC. As Figure A.27 shows, there is a diversity of agricultural operation sizes by landmass in this region, with a trend towards medium-sized operations. Agricultural operations under 69 acres, which take up the vast majority of agricultural operations in the Vancouver Island and Lower Mainland regions, comprise 15% of agricultural operations in the area. 12% of agricultural operations are over 1,600 acres.

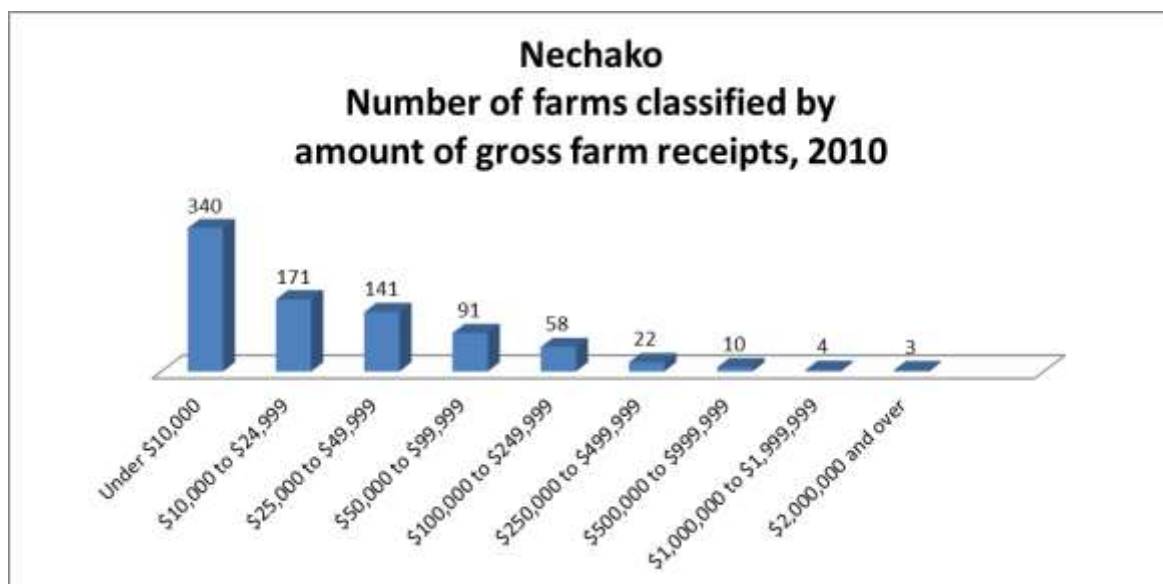
**Figure A. 27 Agricultural Operations by Landmass in Nechako**



Data from: Statistics Canada, *2011 Census of Agriculture, Farm and Farm Operator Data*, catalogue no. 95-640-XWE

In economic terms, agricultural operations are a variety of sizes, as illustrated in Figure A.28. 40% grossed under \$10,000 in 2010. Seven agricultural operations had gross receipts of \$1 million or more.

**Figure A. 28 Agricultural Operations by Revenue Class in Nechako**



Data from: Statistics Canada, *2011 Census of Agriculture, Farm and Farm Operator Data*, catalogue no. 95-640-XWE

Agricultural operations in the Nechako region spent \$54,262,473 in operating expenses in 2010, and took in \$54,186,702 in gross receipts. With an expenses to receipts ratio of 1.00 at the aggregate level, agricultural operations in this region are less profitable than the provincial average.

Custom work, contract labour and hired trucking expenses of \$2,935,556 were 5% of total operating expenses. Salaries and wages of \$5,315,768 were just under 10 % of the total operating expenses for the region. A greater proportion of salaries and wages were paid to family members in this region compared with the rest of BC, with 49% of wages paid to employees related to the operator of the agricultural operation.

The number of agricultural employees in the Nechako region represents approximately 1% of the total number of employees hired directly by agricultural operations in the province. 215 agricultural operations (26% of the agricultural operations in the region) reported hiring employees in 2010. Of these, the majority of agricultural operations (176) hired temporary or seasonal workers. Fewer (73 agricultural operations) hired full-year employees. 466 temporary workers provided 4,266 weeks of work. 165 full year workers provided 6,256 weeks' worth of work.

### North Coast Region

**Figure A. 29 Map of North Coast**

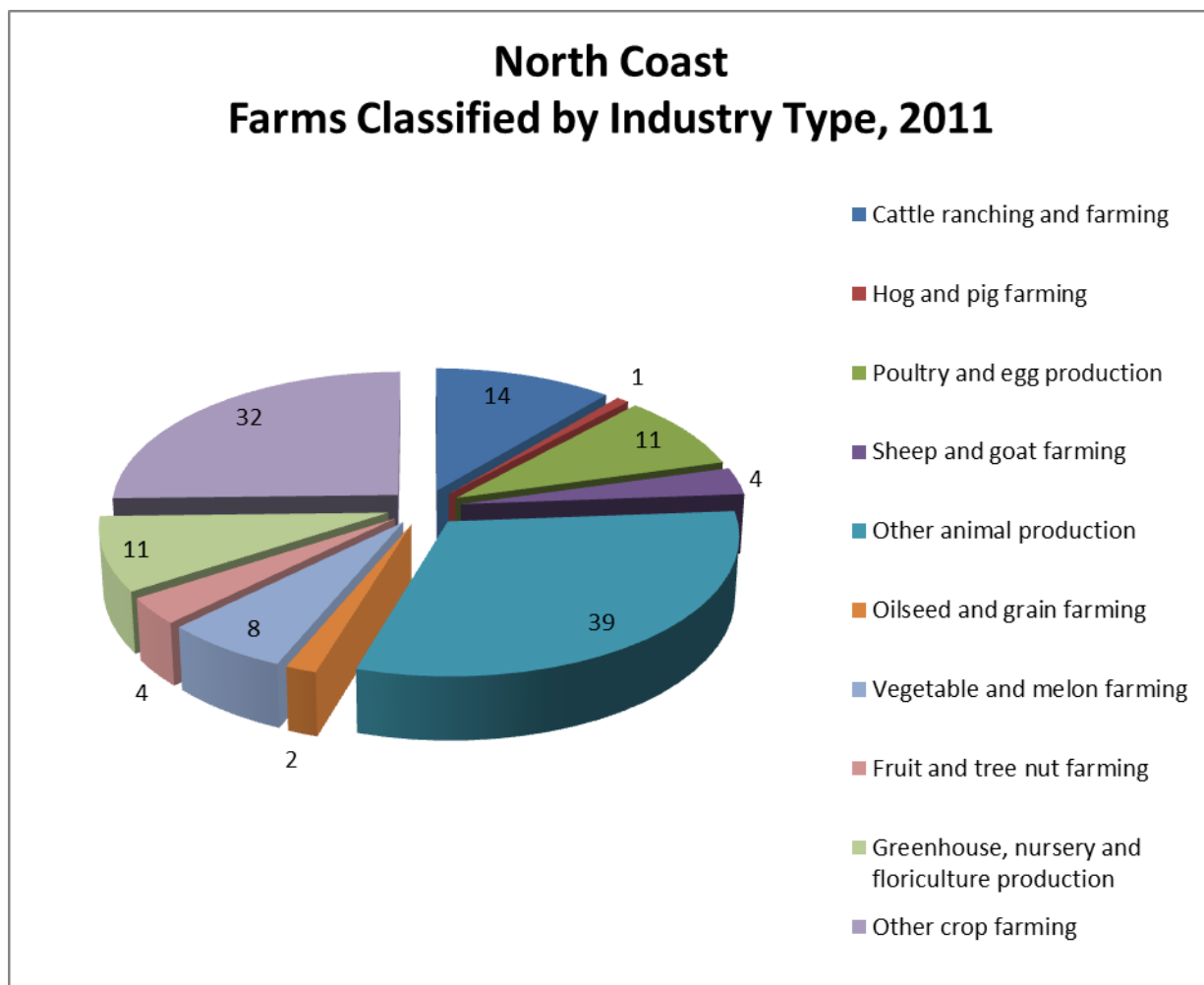


Source: Statistics Canada, *2011 Census of Agriculture*

The North Coast refers to Haida Gwaii and the north-central coastal mainland, including Prince Rupert and the Nisga'a Territory. The Coast mountains run through the region. It is sparsely populated, with 56,145 residents, just over 1% of the total provincial population. The North Coast is not a significant agricultural area.

Figure A.30 below shows the numbers of agricultural operations of each type for this region. Similar to the other regions in the northern portion of the province, cattle and other livestock production and accompanying hay crops predominate in agricultural operations on the North Coast.

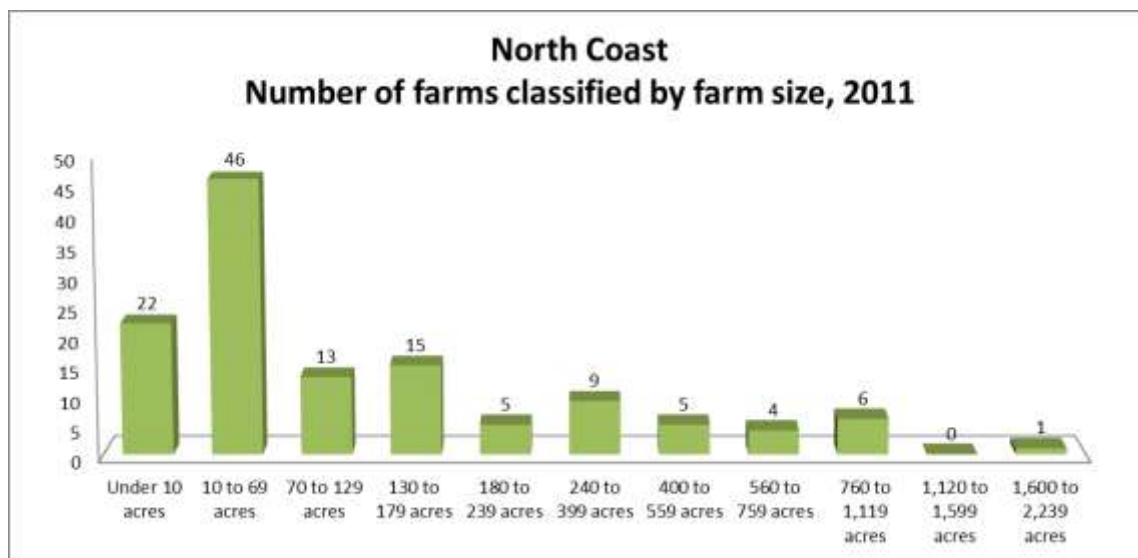
**Figure A. 30 Agricultural Operations by Type in North Coast**



Data from: Statistics Canada, *2011 Census of Agriculture, Farm and Farm Operator Data*, catalogue no. 95-640-XWE

The 2011 Census reported a total of 126 agricultural operations in this area, making up less than 1% of the agricultural operations in the province. Only a very small amount of the province's agricultural land is in the North Coast region. In 2011, 20,852 acres in agricultural use were in the region, making up 0.3% of the total agricultural area in the province. Figure A.31, below, shows the number of agricultural operations in the North Coast region categorized by landmass. Over half (54%) of the agricultural operations were in under 69 acres, and only one agricultural operation was over 1,600 acres.

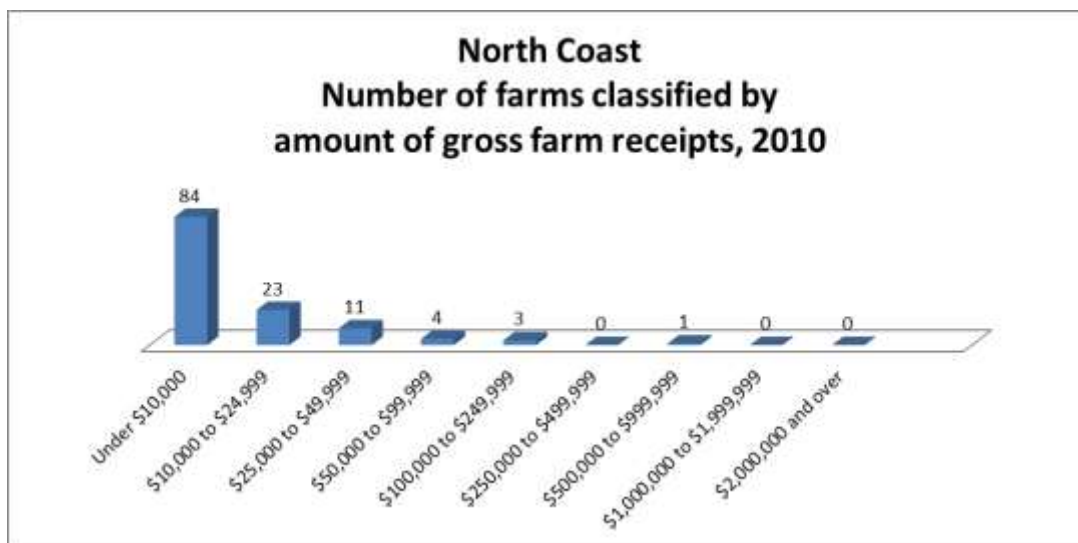
**Figure A. 31 Agricultural Operations by Landmass in North Coast**



Data from: Statistics Canada, *2011 Census of Agriculture, Farm and Farm Operator Data*, catalogue no. 95-640-XWE

With 67% of the agricultural operations in the North Coast grossing less than \$10,000, and no operations grossing over \$1 million, the economic size of agricultural operations in the area can only be characterized as small. Figure A.32, below, shows the relative proportion and absolute numbers of agricultural operations by gross agricultural operation receipts.

**Figure A. 32 Agricultural Operations by Revenue Class in North Coast**



Data from: Statistics Canada, *2011 Census of Agriculture, Farm and Farm Operator Data*, catalogue no. 95-640-XWE

With an expenses to receipts ratio of 1.27, the North Coast is on an aggregate level the least profitable agricultural region in the province. In 2010, agricultural operations in the region incurred \$2,996,889 in operating expenses, and took in \$2,366,235 in gross receipts.

Only 18% of agricultural operations in the North Coast reported hiring employees. A total of 23 agricultural operations hired 57 employees (seasonal or full year), who together earned \$440,183. Less than one percent (0.4%) of the agricultural employees in BC are located in the North Coast region.