



CLAIHR

Canadian Lawyers for International Human Rights
Juristes canadiens pour les droits internationaux de la personne

August 30, 2020

Via Email

To: Dr. Wajid Ahmed
Medical Officer of Health
Windsor Essex Public Health
1005 Ouellette Avenue
Windsor Ontario
M9A 4J8

Re: International Human Rights of Migrant Farm Workers in Windsor-Essex

Dear Dr. Ahmed,

I write on behalf of Canadian Lawyers for International Human Rights (CLAIHR). CLAIHR is a nongovernmental, charitable organization comprised of lawyers, law students, and legal academics, among others, working to promote international human rights within and in connection to Canada.

CLAIHR writes to urge you to take immediate action to protect the human rights of migrant workers within Windsor-Essex to the highest attainable standard of health, safe and adequate housing, just and favourable working conditions and equality, rights that all people including migrant workers are entitled to under international law. In order to do so, CLAIHR urges you to take much more significant steps to prevent the spread of COVID-19 among migrant farmworkers.

Windsor-Essex entered Stage 3 of reopening on August 12, but migrant workers continue to test positive for COVID19 and six of the eleven active workplace outbreaks in the region are occurring on farms. Windsor-Essex was one of the last regions to enter both Stage 2 and Stage 3 of reopening, largely due to the region's inability to contain the virus, especially in the agri-food industry. Rather than acknowledging and remedying the violation of migrant workers' human rights as the source of these continued outbreaks, the Health Unit attempts to isolate these workers from the larger community and continue to use their labour at a low financial cost. As a result, farms continue to prosper at the expense of worker and community health and safety. Nearly half of the 2,393 agri-workers tested in the region have tested positive for COVID-19¹ and two men from Mexico – Bonifacio Eugenio Romero, 31, and Rogelio Munoz Santos, 24 – have died. The Health Unit's response is inadequate and unacceptable. CLAIHR urges you to adopt an approach that addresses the unique vulnerabilities of migrant workers and upholds Canada's international commitment to protect human rights.

CLAIHR's view is that international law requires you to take immediate steps to protect migrant workers from COVID-19. The Ontario Superior Court of Justice recently affirmed this in *Schuyler*

¹ <https://www.wechu.org/chart/confirmed-cases-windsor-and-essex-county-agri-farm-sector>

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Farms v Dr Nesathurai.² Canada is a signatory to the *Universal Declaration of Human Rights* (“UDHR”) and the *International Covenant on Economic, Social and Cultural Rights* (“ICESCR”). Further, the *United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas* (“UNDROP”) forms part of the corpus of international human rights law and norms, which Canadian decision-makers may look to when interpreting statutory obligations. All of these instruments provide for the right to the highest attainable standard of physical and mental health and adequate housing, as well as to just and favourable conditions of work. They also entitle all people to equal protection of the law without discrimination and recognize migrant workers as a systemically vulnerable population. Consistent with the Ontario Superior Court’s instruction, CLAIHR urges you to take immediate steps to protect these rights through stronger public health orders.

The “right of everyone to the enjoyment of the highest attainable standard of physical and mental health” applies regardless of national origin, race, other status, or rural employment.³ It also extends to the determinants of health, including adequate housing and healthy occupational and environmental conditions. Adequate housing must contain the “facilities essential for health” and must be habitable, “in terms of providing the inhabitants with adequate space and protecting them from ... threats to health ... and disease vectors.”⁴

Further, preventing disease in the workplace is a “fundamental aspect of the right to just and favourable conditions of work”, closely related to the right to the highest attainable level of physical and mental health.⁵ In ensuring the right to just and favourable conditions of work, international law requires states to “indicate specific actions required of employers” to prevent disease in the workplace, including in bunkhouses and in agricultural farms. This is particularly so in the context of a global pandemic, where preventive and precautionary workplace measures become core aspects of the right to health.⁶ States are to respect, protect and fulfill the right to health, including regulating industrial hygiene. In particular, the obligation to *protect* requires States to prevent third parties from interfering with the right to health. Canada is obligated under international law **adopt and enforce “preventative measures in respect of occupational ... diseases” and to minimize, as far as reasonably practicable, the causes of workplace health hazards.**⁷ In the context of pandemics, states have duties to adopt strategies of infection disease control.⁸ CLAIHR draws your attention to these legal obligations to urge you to take steps that comply with international law and that protect and affirm migrant workers’ fundamental human rights.

Further, everyone is entitled to the rights and freedoms articulated “without distinction of any kind” on the basis of protected grounds including race and national or social origin and that all are “entitled

² *Schuyler Farms Limited v. Dr. Nesathurai*, 2020 ONSC 4711

³ *International Covenant on Economic, Cultural and Social Rights (ICESCR)* at art.2(2) and 12(1).

⁴ *Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 4 (1991) on The Right to Adequate Housing, E/1992/23* [“General Comment No. 4”] at ¶¶8(b) and 8(d).

⁵ *CESCR, General Comment No. 23 (2016) on The Right to Just and Favourable Conditions of Work, E/C.12/GC/23* [“General Comment No. 23”] at ¶25.

⁶ *General Comment No 23*, at ¶28.

⁷ *CESCR, General Comment No. 14 (2000) on The Right to the Highest Attainable Standard of Health, E/C.12.2000/4* [“General Comment No. 14”] at ¶¶11, 15 and 33.

⁸ *General Comment No. 14*, at ¶16.



without any discrimination to equal protection of the law”.⁹ To that end, international law recognizes that migrant and agricultural workers are systemically vulnerable to increased occupational health and safety risks, social and economic marginalization, and exploitation by employers.¹⁰ For example, *General Comment No 23 on the right to just and favourable conditions of work* states that migrant workers are:

...vulnerable to exploitation, long working hours, unfair wages and dangerous and unhealthy working environments. Such vulnerability is increased by abusive labour practices that give the employer control over the migrant worker’s residence status or that tie migrant workers to a specific employer.¹¹

CLAIHR suggests to you that, as a governmental health authority, international law and Ontario jurisprudence requires that you implement measures that alleviate the vulnerability and health inequities experienced by migrant farmworkers, to protect their right to equality. The Ontario Superior Court has in fact found that Medical Officers of Health must implement measures that conform with Canada’s international legal obligations¹². The Court stated that:

In the public health context, [international law] principles require implementing measures that recognize the vulnerability and health inequities experienced by MFWs so as to eliminate the disproportionate impact of COVID-19 on them. These principles are consistent with the purpose of the Guideline, which obligate[s] the MOH, when making an order under s. 22 of HPPA, to ensure that the quarantining conditions for MFWs did not expose them to more risk than the risk that would be tolerated among the other members of the health unit when they quarantined.¹³

CLAIHR’s suggests that this guidance, while specific to quarantining conditions, applies to all orders made by and MOH, and encourages you to make decisions that comply with this decision and that promote and uphold the rights of migrant workers, including by ensuring that migrant workers’ working conditions are no less favourable than those enjoyed by comparable workers in agriculture.¹⁴

This requires you to take particular account of the unique vulnerabilities faced by migrant workers in Ontario under the Canadian Seasonal Agricultural Worker Program (SAWP). For example, migrant workers have limited employment mobility, which makes them reliant on a single employer for shelter, food, and access to phone and internet. As a result, workers are often reluctant to raise issues of health and safety for fear of termination, deportation, or other reprisal. These fears are well-founded as migrant workers are excluded from many protections afforded under the *Employment Standards Act* and *Occupational Health and Safety Act*.

Migrant farmworkers also face unique risks of infection as a result of their international travel and congregate housing. Migrant workers continue to report that they are unable to safely socially distance in their workplaces and employer-provided housing and are not being provided with proper protective

⁹ *Universal Declaration of Human Rights (UDHR)* at art. 2 and 7; *ICESR* at art. 2 ¶2.

¹⁰ *General Comment No. 23*.

¹¹ *General Comment No. 23* at ¶ 47(e).

¹² *Schuyler Farms* at para 96.

¹³ *Schuyler Farms* at para 95.

¹⁴ *Schuyler Farms* at para 95.



equipment or disinfectant. There are further reports of workers enduring hunger and food safety violations, and being overcharged for employer-sourced groceries. These conditions require you to issue strong orders to protect the health of migrant workers, who face particularly significant barriers to advocating for their own health and safety.

The province of Ontario's recently-introduced "***COVID-19 Quick Reference Public Health Guidance on Testing and Clearance***" further endangers and exploits migrant workers for the short-term profitability of farms. This guidance allows asymptomatic workers who test positive for COVID19 to continue working, despite it being well-established that those who are asymptomatic can infect others and are likely to develop symptoms themselves. Under this system, migrant workers, entirely dependent on their employer for basic necessities and afraid they will be punished for being symptomatic, are incentivized to hide their symptoms, furthering spreading the virus and greatly increasing the risk of worker illness and fatality. This both exposes uninfected workers to infection and prevents sick workers from seeking treatment that they require. No other sector routinely allows asymptomatic workers to return to work having tested positive for COVID19, further highlighting the inequality of migrant workers. This guidance is clearly in contravention of the numerous international human rights principles articulated in this letter and in the Ontario Court's decision, and CLAIHR urges you not to follow it.

It is clear that migrant workers face significant health inequities and are disproportionately vulnerable to contracting COVID 19, requiring public agencies to take particular steps to protect their health and consequently, their rights to equality, the highest attainable standard of health, just and favourable working conditions, and housing under international law.

CLAIHR urges you to take immediate action to protect these rights in compliance with international and domestic law. Specifically, CLAIHR urges you to do the following:

1. Take immediate steps to ensure enforcement of all public health orders, including your order of June 12, 2020. This includes holding employers who fail to provide safe living conditions and nutritious meals accountable under your statutory powers. CLAIHR has been advised of ongoing failures to comply with the June 12 order throughout the region. These breaches require immediate, effective, and ongoing investigation and enforcement;
2. Take immediate steps to improve the safety of quarantine conditions to ensure that workers are able to properly and effectively physically distance. This requires reducing the number of farmworkers in each bunkhouse and maintaining the highest standards of cleanliness within the bunkhouse;
3. In particular, follow the lead of the Haldimand-Norfolk Medical Officer of Health and order that no more than three workers may quarantine together in one bunkhouse during their mandatory 14-day quarantine period;
4. Decline to follow the Ontario government's "COVID-19 Quick Reference Public Health Guidance on Testing and Clearance" where doing so will allow COVID-positive workers to continue working, thereby encouraging non-disclosure of symptoms and exposing other workers to risk of infection;



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5. Respond to the demands made by migrant workers and migrant worker organizations, such as Justicia for Migrant Workers, who have issued demands in response to the material conditions facing migrant workers in Ontario.

Finally, CLAIHR emphasizes that the true cause of these outbreaks is the lack of rights migrant workers hold under Canada's Seasonal Agricultural Worker Program, which denies farmworkers permanent status in Canada and makes their status in Canada dependent on a particular employer. The real answer to this health crisis is to implement immediate status for all migrant workers. In the absence of such a step, it is incumbent on this government and Ontario's public health systems to undertake significant, proactive measures to protect the health and safety of these essential workers.

Yours Sincerely,

James Yap, President

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