

# LAW OF MIGRANT WORK

BY: ALANA BUJEYA

## SCHUYLER FARMS LIMITED V DR. NESATHURAI



Image from The Hamilton Spectator.<sup>1</sup>

It is not a ***privilege, but a right***, to be able to be safe, clean and healthy.

The Canadian government made drastic but necessary regulations in reaction to the pandemic to protect Canadian workers. However, some of the most vulnerable members of society still lack a strong voice, and few mechanisms through which to be heard – particularly migrant workers.

The Health Services Appeal and Review Board, (“the Board”), recently allowed a grower to contest a portion of an order that limited the number of migrant workers allowed in a bunkhouse, where they normally reside for work. The order was put in place to allow workers to safely self-isolate in a low enough number as recommended by medical guidelines. The Board’s decision catered more favourably to the grower’s economic loss argument rather than the safety of the workers.

The Ontario Superior Court of Justice Divisional Court (“the Divisional Court”) enforced the above policies meant to protect workers and overturned the Board’s decision. However, it is telling how it took an appeal to the Divisional Court for migrant worker safety to be prioritized.

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<sup>1</sup> JP Antonacci, “[Dispute between Norfolk farmers and public health unit threatens food security](https://tinyurl.com/y3rx5py)”, *The Hamilton Spectator* (15 May 2020), online:<<https://tinyurl.com/y3rx5py>>.

## SCHUYLER FARMS LIMITED V DR. NESATHURAI

**Overview: Schuyler Farms Limited v Dr. Nesathurai**

Schuyler Farms, a Norfolk County grower that employs over 220 migrant workers, challenged part of an order issued by Dr. Shanker Nesathurai, Medical Officer of Health for the Haldimand-Norfolk Health Unit, the order required that upon arrival in Canada migrant workers were required to self-isolate for fourteen days.<sup>2</sup> Further provided was a “Self-Isolation Plan Checklist” that imposed a maximum of three individuals per bunkhouse shelter.<sup>3</sup>

Schuyler Farms argued that farmers were experiencing delays in workers being able to come to Canada.<sup>4</sup> The three-person limitation prevented employers from hiring more workers, which Schuyler Farms claimed would “significantly reduce their planting and harvesting plans and this has had a devastating impact on the operations of the farms in HNC and jeopardized food security.”<sup>5</sup> The Board found the limitation to be arbitrary and struck it out.<sup>6</sup> The Divisional Court considering four separate issues on the appeal overturned the decision of the Board and restored the restriction limiting the number of workers per bunkhouse.<sup>7</sup>

**What is at Stake?**

Schuyler Farms primary driving cause is ensuring their farm is operational and making a profit. *The Grower*, a local publication, estimated that Schuyler Farms would lose \$864,000 gross this year due to the loss of harvesting acres of asparagus.<sup>8</sup> The article reported that the region’s crops were valued at \$519 million in the 2016 census.<sup>9</sup> For growers, “labour productivity” is an increasing concern and “cheap labour” can provide the advantage necessary to compete in the market.<sup>10</sup>

At stake for the migrant workers is their health. Although all employment relationships are subject to power imbalances a migrant worker is in a particularly vulnerable and unequal position. The fact that the Board favoured Schuyler Farms’ argument over worker’s safety demonstrates how worker’s vulnerability is further exacerbated by the pandemic. Constructed is a dichotomy of who is deserving of protection.

The Divisional Court highlighted some of the vulnerabilities that migrant workers face including being tied to their employer, the inability to advocate for themselves and the increasing control employers have over workers, including the “paternalistic relationship” fashioned by having their living quarters on the employer’s property.<sup>11</sup>

**SPEAK UP**

If there was a concern for workers’ safety, the restriction would have remained in place to prevent the heightened risk of contracting the virus. The Divisional Court emphasized this stating:

**“Allowing larger numbers to isolate together exposes MFWs to a level of risk not tolerated for others in the community, thereby increasing the vulnerability of an already vulnerable group.”<sup>12</sup>**

Migrant workers are not always afforded access to legal avenues including “access to legal rights to unionize” and often “work in non-unionized sectors.”<sup>13</sup> In this instance it took allies in positions of power to speak up on behalf of migrant worker voices. Dr. Nesathurai initiated the order and took a stand by appealing the Board’s decision. But it is about time that workers are able to tell their own stories. More recently CTV News highlighted the deplorable living conditions that the workers are subjected to and their inability to protect themselves from the virus. Workers are forced to live in close quarters, and lack access to basic facilities, such as toiletries.<sup>14</sup>

Migrant workers status dictates how they are treated and sometimes exploited, by employers, the Canadian government and the justice system. Many individuals return for numerous seasons and to refer to their status as temporary is wrong. Fay Faraday, a labour and human rights lawyer, referred to it as “cycling of vulnerable migrant workers.”<sup>15</sup> By ensuring their status remains as non-citizens the workers cannot enforce their rights.<sup>16</sup>

Workers are not a commodity. And although the Board failed them it is promising that the Divisional Court treated them equitably with the right to be safe in their employment.

<sup>2</sup> *Schuyler Farms Limited v Dr. Nesathurai*, 2020 ONSC 4711 at paras 14, 18 [*Schuyler Farms - ONSC*].

<sup>3</sup> *Ibid* at para 20, *Schuyler Farms - ONSC*.

<sup>4</sup> *Schuyler Farms Limited v Nesathurai*, 2020 CanLII 41811 (ON HSARB) at para 41 [*Schuyler Farms Limited*].

<sup>5</sup> *Ibid*, *Schuyler Farms Limited*.

<sup>6</sup> *Supra* note 2 at para 2, *Schuyler Farms - ONSC*.

<sup>7</sup> *Ibid* at para 117, *Schuyler Farms - ONSC*.

<sup>8</sup> Karen Davidson, “Norfolk County Retains Legal Counsel”, *The Grower* (11 May 2020), online: < <https://tinyurl.com/yy9eb9uu> > [Norfolk County Retains Legal Counsel].

<sup>9</sup> *Ibid*, Norfolk County Retains Legal Counsel.

<sup>10</sup> Leigh Binford, *Tomorrow We’re All Going to the Harvest: Temporary Foreign Worker Programs and Neoliberal Political Economy* (Austin: University of Texas Press, 2013) at 95 [Binford].

<sup>11</sup> *Supra* note 2 at para 87, *Schuyler Farms - ONSC*.

<sup>12</sup> *Ibid* at para 88, *Schuyler Farms - ONSC*.

<sup>13</sup> Fay Faraday, “Made in Canada: How the Law Constructs Migrant Workers’ Insecurity” (2012) Metcalf Foundation at 5 [Faraday].

<sup>14</sup> *W5: Fields of Wrath*, News Video (CTV News, 2020), online: < <https://tinyurl.com/yxu68tcj> >.

<sup>15</sup> *Supra* note 13 at 100, Faraday.

<sup>16</sup> *Ibid*, Faraday.

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