

File Nos. 2009-2556; 2010-0852; 2010-0862;
2010-0856; 2010-0858; 2010-0206

OFFICE OF THE UMPIRE

BETWEEN:

EMPLOYMENT INSURANCE COMMISSION

Appellant

-and-

GENARO CRUZ DE JESUS

Respondent

AND BETWEEN:

EMPLOYMENT INSURANCE COMMISSION

Appellant

-and-

AINSWORTH PUGH

Respondent

AND BETWEEN:

EMPLOYMENT INSURANCE COMMISSION

Appellant

-and-

BRANDFORD RUSSELL

Respondent

AND BETWEEN:

BURNETT CLARKE

Appellant

-and-

EMPLOYMENT INSURANCE COMMISSION

Respondent

FACTUM OF THE CLAIMANTS: CRUZ DE JESUS, PUGH, RUSSELL and CLARKE

Distinguishing features of agricultural workers are their political impotence, their lack of resources to associate without state protection and their vulnerability to reprisal by their employers; as noted by Sharpe J., agricultural workers are “poorly paid, face difficult working conditions, have low levels of skill and education, low status and limited employment mobility.”

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

PART ONE: OVERVIEW

1. Migrant workers in the Seasonal Agricultural Workers Program (“SAWP”) are amongst the most vulnerable workers in Canada. While many seasonal agricultural workers return to Canada over the course of years and decades, they do not enjoy the same legal protections as other workers and are not eligible for regular Employment Insurance (“EI”) benefits because they are required to leave the country each year at the conclusion of their contracts.
2. In 2002, the Agricultural Workers Alliance (“AWA”), an organization providing assistance to seasonal agricultural workers, learned that SAWP workers qualify for parental benefits through the Employment Insurance program. The first successful SAWP Board of Referees cases initiated through the AWA were in 2004/2005. Unlike regular EI benefits, it is not necessary for a recipient to be living in Canada to receive parental benefits, because workers on parental leave are not required to be available for work in Canada. Although Service Canada is aware of the significant difficulty that SAWP workers have in learning about and accessing parental benefits, apart from a communication to foreign country representatives in 2008, Service Canada has taken no steps to inform SAWP workers of their entitlement.
3. Since then, amongst its other work, the AWA has been attempting to outreach to SAWP workers to inform them of their rights to parental benefits. However, SAWP workers face many barriers to learning of their eligibility and applying for parental benefits, including: language, illiteracy, social isolation, misinformation, long work hours, fear of retribution and lack of representation. Due to these barriers, in most cases workers do not learn of their right to apply for parental benefits until after they were required to apply. Thus, when they submit their applications, they must request that their applications be antedated.

4. Further, in May 2009 the AWA learned from Service Canada that antedates could be requested back to 1990. Until this communication occurred, AWA representatives believed that antedates prior to 2000 were not possible. As a result of this new information, they began to assist workers to apply for children born prior to 2000.

5. There are approximately 100 appeals to be heard together in respect of denied antedate applications by SAWP workers. The vast majority of these claimants were successful on appeal to the Board of Referees. Four cases have been selected as “illustrative” cases, in order to assist this Honourable Court in the efficient hearing of such a large number of similar cases. The claimants, Cruz De Jesus, Pugh, Russell and Clarke are generally representative of three categories of claimants:

- a. Category One: First-time claims for children born after 2000, as illustrated by Genaro Cruz De Jesus.
- b. Category Two: Claims for children born prior to 2000, as illustrated by Ainsworth Pugh and Brandford Russell.
- c. Category Three: Subsequent claims for children born after 2000, as illustrated by Burnett Clarke.

6. Antedate applications for EI benefits must be granted where a claimant has established that they had a good reason for the delay. EI benefits serve an important public interest purpose of EI benefits by alleviating the poverty associated with unemployment. In light of this purpose, a flexible approach to antedating is required. A flexible approach is particularly justified in respect of the parental benefit, as the concerns of prejudice to the system in backdating regular EI benefits are simply not present.

7. In the majority of the SAWP worker cases, the claimants simply did not know, and could not have known, that they were entitled to the benefit. Ignorance of the law can satisfy the requirement of “good cause” where the claimant can show that they “did what a reasonable person in their situation would have done to satisfy themselves as to their rights and obligations under the Act”. The analysis is one that takes into account the particular circumstances of the claimant before the court. Indeed, a narrow and punitive approach to the “reasonable person test”

would have the effect of deepening the discrimination that migrant workers already experience in respect of access to EI benefits and further marginalize them as a group.

8. The circumstances of Canadian citizens, who reside year-round in Canada and are entitled to the full spectrum of social benefits and worker rights, simply have no bearing on the social conditions faced by migrant workers who live, as recognized by the Ontario Superior Court, at the “outer margins of Canadian society.” Rather, it would be reasonable for a person in the circumstances of SAWP workers to have no knowledge of their entitlement to parental benefits unless they were specifically advised of such, and to require assistance in order to be able to apply once their eligibility was brought to their attention. Until these two conditions were in place, a good faith reason for the delay in applying existed.

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

PART TWO: FACTUAL OVERVIEW

9. The Supreme Court has recognized that, as a group, migrant farm workers are amongst the most vulnerable and marginalized workers in Canada. They are “politically impotent”, vulnerable to reprisal by employers, poorly paid, face difficult working conditions, have low levels of skill and education, low status and limited employment mobility.

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

10. Justice Abella, speaking in dissent in *Fraser (2)*, described SAWP workers as “the most vulnerable of workers” who work in “relentlessly arduous working conditions.” She quoted with approval from Professor David M. Beatty’s 1987 article in which he observed that agricultural workers are “among the most economically exploited and politically neutralized individuals in our society”;

Because they are heavily drawn from a migrant and immigrant population, these workers face even more serious obstacles to effective participation in the political process ... Denying agricultural workers the benefits of [collective bargaining] means that the legal processes which enable much of the rest of our workforce to be involved in decision-making at the workplace in a realistic way are unavailable to the farm workers. Thus a group of workers who are already among the least powerful are given even less opportunity than the rest of us to participate in the formulation and application of the rules governing their working conditions.

D. Beatty (1987), *Putting the Charter to Work: Designing a Constitutional Labour Code*. (Kingston: McGill-Queen's University Press) at p. 89.

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

11. As is elaborated below, the intense vulnerability and social isolation of SAWP workers arises from a combination of the structure of SAWP itself, statutory and practical exclusions from labour relations regimes and social benefit entitlements and the harsh realities of the workplace and identities of migrant farm workers.

A. Structural vulnerabilities built into the Seasonal Agricultural Workers Program

12. The SAWP is a long-standing temporary worker program that provides access to the Canadian labour market to workers who could not do so otherwise. However, the very structure of the program ensures that SAWP workers are in a less advantageous position as compared to other workers.

13. Through a set of administrative agreements between the Canadian government and participating countries, Citizenship and Immigration Canada issues temporary work permits to selected migrant workers. In these cases, the participating countries are Mexico and Jamaica. The duration of the work permits varies from a minimum of six weeks to a maximum of eight months, and workers are required to leave Canada by the expiration of their authorized term. SAWP workers are prohibited from working for any employer besides the one provided for on their work permit.

Fraser v. Canada (Fraser 1), 2005 CanLII 47783 (Ont. C.A.) at para. 2.

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

14. Acceptance into SAWP is discretionary. Workers in participating countries apply and are selected by the Canadian government, and employers are entitled to request specific employees. For returning employees, selection takes place in part on the basis of evaluations completed by employers from the previous year.

Fraser v. Canada (Fraser 1), 2005 CanLII 47783 (Ont. C.A.) at para. 3.

15. Following a brief trial period, employers may dismiss SAWP workers for “non-compliance, refusal to work, or any other sufficient reason.” Once dismissed, SAWP workers are automatically deported. Depending on the circumstances, repatriation is either at the cost of the employer, the worker, the source government, or some combination thereof.

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

16. Migrant workers are not permitted to circulate freely in the labour market, let alone in the agricultural sector. These restrictions on worker mobility grant employers tremendous power over migrant workers. There is no formal appeal process in cases of involuntary repatriation and employers can dispose of workers at will. Employers have repatriated workers for reasons that include falling ill, questioning wages, refusing unsafe work, and complaining about radio noise and humidity emanating from a greenhouse into the worker’s adjacent accommodation.

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

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

K. Preibisch (May 2007), “Patterns of Social Exclusion and Inclusion of Migrant Workers in Rural Canada” (prepared for the North-South Institute; http://www.nsi-ins.ca/english/pdf/Exclusion_Inclusion_Migrant.pdf) at p. 11.

17. As the Ontario Superior Court has noted, this program structure ensures that SAWP workers are in a position of “dependence” and “subordination”.

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

B. Ineligibility for regular Employment Insurance benefits

18. Regular EI benefits are available for workers who are unemployed, have completed the prescribed hours of work and who are available for and able to work but cannot find a job. Subject to a few narrow exceptions, in order to qualify for the regular EI benefits, the claimant must be residing in Canada.

Employment Insurance Act, SC 1996, c 23, ss. 7, 18.

19. The structure of the SAWP program ensures that while SAWP workers pay into the EI program, they will never be eligible for regular EI benefits. SAWP workers are necessarily

physically present in Canada only for the temporary period during which they are employed. Moreover, even if a SAWP worker were to remain in Canada after the termination of employment, the worker would be prohibited by the terms of his or her work permit from accepting work from a different employer. The worker would not, therefore, be considered “capable and available for work”.

Employment Insurance Act, SC 1996, c 23, s. 37(b).

20. In the result, SAWP participants are statutorily required to pay EI premiums without the possibility of ever receiving regular benefits.

Fraser v. Canada (Fraser 1), 2005 CanLII 47783 (Ont. C.A.) at para. 7.

C. Exclusion from other social benefits and worker protections

21. The statutory labour relations scheme in Ontario has systematically excluded SAWP workers from many other social benefits and worker protections that are generally available to other workers:

22. Exemptions from Employment Standards: The *Employment Standards Act* establishes the minimum rights guaranteed to all workers in Ontario. However, this Act provides explicit exemptions for workers in the agricultural sector in respect of legal minimum standards relating to maximum hours of work, daily and weekly rest periods, statutory holidays and overtime pay.

O. Reg 285/01, ss. 2(2), 24-27.

23. Lack of access to public health care: In Ontario, residents with temporary work permits cannot access health care until they have resided in the province for at least three months. Thus, for a significant portion of their contract in Canada, SAWP workers cannot access public healthcare, although they make contributions through tax deductions on each pay cheque. Even after the three month wait period has passed, in practice, many SAWP workers who are sick or injured are quickly deported to their home countries and never have the opportunity to access the health care program.

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

M. Pysklywec et. al. (2011), "Doctors within borders: meeting the health care needs of migrant farm workers in Canada", *Canadian Medical Association Journal* 183: 1039-1042; published ahead of print April 18, 2011, doi: 10.1503/cmaj.091404 at p. 4.

K. Preibisch, et. al. (2011), "Temporary migration, chronic effects: The health of international migrant workers in Canada", *Canadian Medical Association Journal* 183: 1033-1038, published ahead of print April 18, 2011, doi:10.1503/cmaj.090736 at p. 1.

J. Henneby & K. Preibisch (2010), "A Model for Managed Migration? Re-examining best practices in Canada's Seasonal Agricultural Worker Program" *International Migration* DOI: 10.1111/j.1468-2435.2009.00598.x at p. 11.

24. Historically denied the right to unionize: Since the inception of the SAWP, agricultural workers in Ontario have been excluded from the protection of the labour relations legislation governing nearly all other workers in the province. When most Ontario workers were first given statutory protections to unionize and collectively bargain in 1943 under the *Collective Bargaining Act, 1943*, S.O. 1943, c. 4, agricultural workers were excluded. Apart from a brief one year period between 1994 and 1995, SAWP workers have been excluded from the *Labour Relations Act, 1948*, S.O. 1948, c. 51.

Labour Relations Act, 1995, S.O. 1995, c 1, Sch A, ss. 3(b.1-c).

Agricultural Labour Relations Act, 1994, S.O. 1994, ss. 3(1-4).

Labour Relations and Employment Statute Law Amendment Act, 1995, S.O. 1995, c. 1.

25. The United Food and Commercial Workers (UFCW) commenced a legal challenge to this exclusion. In *Dunmore*, the Supreme Court held that the exclusion of agricultural workers from the *Labour Relations Act* violated their right to freedom of association as guaranteed by s. 2(d) of the *Charter*. The Court ordered the Ontario government to enact legislation to provide agricultural workers with the protection necessary for them to meaningfully exercise their right to form unions.

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

26. Ontario sought to comply with this direction with the enactment of the *Agricultural Employees Protection Act, 2002* ("AEPA"), which granted agricultural workers the rights to form and join an employees' association, to participate in its activities, to assemble, to make representations to their employers through their association on their terms and conditions of employment, and the right to be protected against interference, coercion and discrimination in the exercise of their rights. This legislation came into force on June 17, 2003.

Agricultural Labour Relations Act, 1994, S.O. 1994, s. 1(2).

27. However, as discussed in the next section, the *AEPA* has significant limitations in the protections it offers SAWP workers as compared to other workers.

28. Denied legislative protections for collective bargaining: In response to *Dunmore*, described above, the Ontario government enacted the *AEPA*. Unlike the *Labour Relations Act*, the *AEPA* does not impose any obligation on employers to bargain with worker representatives, nor does it include mechanisms to resolve bargaining impasses or disputes regarding the interpretation or administration of collective agreements. All employers must do is listen and/or read submissions from worker representatives. They have no other positive obligation to negotiate collective agreements in respect of their workers.

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

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

29. The constitutionality of these omissions was challenged, on the grounds that the right to association requires statutory protection for collective bargaining. In a lengthy judgment, with four different sets of reasons (including one dissent), the Supreme Court of Canada recently upheld the constitutionality of the *AEPA*, concluding that the right to associate does not include a right to legal protections for collective bargaining.

Ontario (Attorney General) v. Fraser (Fraser 2), 2011 SCC 20.

30. As a result, unlike agricultural workers in every other province with the exception of Alberta, Ontario's agricultural workers do not share the same collective bargaining rights as other employees.

Ontario (Attorney General) v. Fraser (Fraser 2), 2011 SCC 20 at para. 364.

31. While the Supreme Court of Canada in *B.C. Health Services* held that collective bargaining "emerges as the most significant collective activity through which freedom of association is expressed in the labour context" it is not a right enjoyed by migrant workers. There have been no successfully negotiated agreements since the *AEPA* was adopted in 2002. Notably, in November 2010, the International Labour Organization ("ILO"), the United Nations'

organization responsible for overseeing international labour standards, held that the “absence of any machinery for the promotion of collective bargaining of agricultural workers constitutes an impediment to one of the principal objectives of the guarantee of freedom of association” and asked Canada to take the necessary measures to ensure that Ontario puts in place procedures for the promotion of collective bargaining in the agricultural sector.

Ontario (Attorney General) v. Fraser (Fraser 2), 2011 SCC 20 at para. 334.

Agricultural Employees Protection Act, 2002, S.O. 2002, c. 16, s. 18.

Labour Relations Act, 1995, S.O. 1995, c 1, Sch A, ss. 3(b.1-c).

Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia, 2007 SCC 27 at para. 66.

International Labour Office (November 2010), 358th *Report of the Committee on Freedom of Association: Case 2704 (Canada)*, (Governing Body, 309th Session, Geneva), p. 86.

32. Excluded from health and safety protections: The *Occupational Health and Safety Act* provides statutory protections for Ontario workers, including the right to a safe workplace and the right to refuse unsafe work. In June 2006, the Ontario government extended the Act to farming operations with paid workers. Until that date, farm workers were exempt from most of the protections of the Act. Despite this step forward, it remains the case that workers on smaller farms are excluded from the protections of the Act.

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

O. Reg 414/05, “Farming Operations”.

33. No mandatory inquest in the case of migrant worker deaths: Between 1996 and 2004, there were 17 deaths of SAWP workers in Ontario. Despite this alarming number, migrant worker deaths are not the subject of an independent investigation, unlike the deaths of workers in other similar industries.

34. The coronial system in Ontario investigates accidental and unexpected deaths with a view to identifying those deaths that could have been prevented, and making recommendations for policy changes in order to prevent similar deaths in the future. The *Coroners Act* provides that for certain deaths, it is in the public interest to conduct a public inquest, for example in the context of fatalities in industries with high accidental death rates.

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

35. However, deaths in agricultural workplaces are not the subject of mandatory inquests, despite the fact that this industry is one of the top three in terms of fatal accident rates. This omission is the subject of a human rights application before the Human Rights Tribunal of Ontario, commenced following the death of a SAWP worker in 2002. A pre-hearing motion determined that there were sufficient grounds for the discrimination application to continue:

Ned Peart, was a migrant farm worker from Jamaica who was employed under the auspices of the Commonwealth Seasonal Agricultural Workers Program (“CSWAP”). Approximately 15,000 workers come to Ontario under the CSAWP annually; half from Mexico and half from the Caribbean. The vast majority of migrant farm workers are members of racialized communities, and none are Canadian. A total of 17 migrant farm workers have died at work in Ontario between 1996 to 2004 and no coroner’s inquests have been held into those deaths. According to the International Labour Organization, the fatal accident rate is highest in agriculture, mining and construction. Of the three highest accident rates, only agriculture is not subject to a mandatory inquest. The Application asserts that the failure to require a mandatory inquest into the deaths of agricultural workers working under the CSAWP program therefore has a discriminatory impact on non-citizens and racialized persons. ... I am not satisfied that it is plain and obvious that it cannot succeed as being unrelated to a prohibited ground under the Code.

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

36. Canada is not a signatory to International Convention protecting migrant worker rights: Concern by the international community to end abuses of migrant workers has led to the creation of a number of international human rights instruments. However, Canada has not ratified any of the international instruments regarding temporary migrants. For example, Canada has not ratified the two ILO conventions approved by the United Nations that pertain to the rights of migrant workers: the *Migration for Employment Convention (Revised)* (1949) and *Migrant Workers (Supplement Provisions) Conventions* (1975). Similarly, Canada has not ratified the 1990 “International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families”, which offers significant protections for migrant workers.

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

37. In sum, SAWP workers in Canada live and work in a context in which they have fewer rights than other workers and thus have a limited sense of entitlement.

D. Other factors contributing to SAWP worker vulnerability

38. Over and above the systematic exclusion of Ontario's seasonal agricultural workers from many of the protections provided to other workers, there are numerous other factors specific to their workplaces that isolate them from the larger Canadian community and which create barriers to accessing services.

39. The following factors, identified by the Ontario Superior Court in *Fraser (1)*, led the Court to reflect that SAWP workers are "surely amongst the most marginalized of non-citizens":

They are extremely vulnerable: they are poor, earn minimum wages, live and work in isolated rural communities on the property of their employers, lack transportation, work exceedingly long hours, have no citizenship rights in Canada, have narrowly defined rights to enter and remain in Canada for only a brief period, and can be repatriated within 24 hours without right of appeal. In addition, many do not speak English and are further isolated both linguistically and socially.

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

See also: K. Preibisch (May 2007), "Patterns of Social Exclusion and Inclusion of Migrant Workers in Rural Canada" (prepared for the North-South Institute; http://www.nsi-ins.ca/english/pdf/Exclusion_Inclusion_Migrant.pdf) at p. 12.

40. The work itself is physically demanding and the hours are long. Some migrants do not enjoy a day off, especially during the harvest, and by the time they finish their shifts they have little time or energy to do more than cook before bed.

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

41. Employers can exercise considerable control over workers' movements and social life through the imposition of farm rules that bar workers from leaving the grower's property or restrict the entry of visitors. Some employers have actively encouraged their workers to limit their social commitments in their off hours, so as to inhibit social networks developing among

their workers. Workers rely heavily on their employers to provide them with a telephone, help fill out forms, take them to town, or do their banking.

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

42. Assistance from their Consulates has been found to be of questionable quality, with a bias on the part of Consular officials in favour of employers in order to maintain their country's position in the program. In any event, Liaison Officers are based in urban offices that are themselves under-resourced and, at a practical level, inaccessible to most SAWP workers.

J. Henneby & K. Preibisch (2010), "A Model for Managed Migration? Re-examining best practices in Canada's Seasonal Agricultural Worker Program" *International Migration* DOI: 10.1111/j.1468-2435.2009.00598.x at p. 17, 19.

North-South Institute (2006), *Migrant Workers in Canada: A review of the Canadian Seasonal Agricultural Workers Program* at p. 12.

43. SAWP workers do not have the right to access programs and services available to permanent status immigrants. For example, agricultural workers do not have access to English language training.

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

44. While a number of Civil Society Organizations ("CSOs") have attempted to provide assistance to SAWP workers, including the Agricultural Workers Alliance, their impact is necessarily limited. Direct contacts between CSOs and migrant agricultural workers represent only a small fraction of the tens of thousands of temporary foreign workers coming to Canada each year. Most of the groups are operating with extremely limited funding and, with few exceptions, are supported entirely by volunteers. Moreover, employers and Consular Representatives have warned SAWP workers against involvement with CSOs such as the Migrant Resource Centres.

K. Preibisch (May 2007), "Patterns of Social Exclusion and Inclusion of Migrant Workers in Rural Canada" (prepared for the North-South Institute; http://www.nsi-ins.ca/english/pdf/Exclusion_Inclusion_Migrant.pdf) at p. 35.

E. Background on the commencement of SAWP worker parental benefit claims

45. Since 2002, with the assistance of the United Food and Commercial Workers (UFCW), a limited number of SAWP workers began filing claims for maternity and parental leave benefits. Prior to July or August 2002, the UFCW mistakenly informed SAWP workers that no benefits whatsoever were receivable in exchange for their EI premiums. The first year that any SAWP worker received EI benefits of any kind was in 2002.

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

46. However, even during this period the UFCW continued to labour under the misapprehension that antedate applications for parental benefits could not be made prior to 2000.

47. Also in 2002, the UFCW established its first Migrant Worker Support Centre in Leamington, Ontario. In 2003 and 2004, the UFCW opened four more Support Centres in Bradford, Simcoe, and Virgil, Ontario and St. Remi, Quebec. The Centres do not all provide the same types of services. Rather, the services depend upon the needs of the area in which the Centre is found and the skills of the staff and/or volunteers.

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

Transcript of Proceedings before the Board of Referees (March 16, 2010), RE Brandford Russell (09-0395; 09-0396); Ainsworth Pugh (09-400; 09-0401); Renaldo Rodriguez Lopez (09-0402) and Pedro Cruz Lopez (09-0394) at p. 15, 21-22.

48. The Centres are only open during the growing season, typically between May and October. The Virgil Centre, which assisted all of the “illustrative claimants”, opened for the first time in 2004. It operated five to six days a week. Sundays were the busiest day, as this was a day on which many of the workers had some free time. The Centre had between two and three people available on Sundays, mainly volunteers, and amongst other things provided assistance in filing antedate applications for parental benefits.

Transcript of Proceedings before the Board of Referees (March 16, 2010), RE Brandford Russell (09-0395; 09-0396); Ainsworth Pugh (09-400; 09-0401); Renaldo Rodriguez Lopez (09-0402) and Pedro Cruz Lopez (09-0394) at p. 11, 14, 16.

Russell Appeal Docket: (Exhibit 11) Email from Stan Raper (November 30, 2009).

49. The Centre was not always able to see all workers who attended their drop-in on any given day. At the material time, there was only one worker who worked primarily with the Jamaican workers.

Transcript of Proceedings before the Board of Referees (March 16, 2010), RE Brandford Russell (09-0395; 09-0396); Ainsworth Pugh (09-400; 09-0401); Renaldo Rodriguez Lopez (09-0402) and Pedro Cruz Lopez (09-0394) at pp. 11, 14, 16.

50. The Centre experienced many challenges to providing information and services. Stan Raper, a UFCW representative who was heavily involved in the establishment of the Centres, stated as follows in an email dated November 30, 2009:

Virgil did not even open until 2004 and our ability to hold workshops in more rural areas is almost impossible. We also talk about the fact that workers and employers have been contributing to an Employment program for years with knowledge of the program and if they became aware they were told they did not qualify because they were not residence [sic] of Canada. This is in fact true for the primary benefit. It was not until 2004-05 season that we were able to secure the first ruling on Parental Benefit applications for Seasonal Agricultural Workers and it has been difficult to change the culture and understanding around the Employment Insurance Program in Canada.

... We did not implement an 800 series # until this summer and workers just got the new cards with the information on it in the last few months. Most workers cannot get access to a phone on or near the farm let alone a computer.

Russell Appeal Docket: (Exhibit 11) Email from Stan Raper dated November 30, 2009.

51. In September 2008, Service Canada informed representatives of the governments participating in the Offshore Seasonal Agricultural Program that migrant workers were both eligible for maternity and/or parental benefits and that eligibility dated back as far as 1990. Until this point, Service Canada had not publicized the availability of such benefits nor made any efforts to directly advise migrant workers or their employers, although Service Canada must have known that lack of knowledge of eligibility was a significant issue. Jean Smith, a SAWP employer and representative of claimants Mervyn Parris and Glendon Sanchez writes:

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

2008, Mr. Parris' employers would have provided him with that same information.

Schedule C: Written representations of Jean Smith, dated August 14, 2010 at pp. 2-3 and May 6, 2011 (SIN Nos. 915 439 491; 914 587 910).

52. The AWA did not become aware until May 20, 2009 of this new information about the right to make antedate applications for children born as early as 1990. The AWA in Virgil began to publicize this option in its centre in Virgil in and around this time.

Transcript of Proceedings before the Board of Referees (March 16, 2010), RE Brandford Russell (09-0395; 09-0396); Ainsworth Pugh (09-400; 09-0401); Renaldo Rodriguez Lopez (09-0402) and Pedro Cruz Lopez (09-0394) at pp. 4-5, 18-20, 36.

Russell Appeal Docket: (Exhibit 12) Email correspondence between Ingrid Zea of the AWA and Donna Rothwell of Service Canada (May 20, 2009).

53. Initially, the Commission granted many antedate applications from migrant workers. This changed in 2009 when many such applications were denied. The over 100 Umpire Appeals that are being heard consecutively with these "illustrative cases" all date from this time period. There are no Umpire level cases involving migrant worker antedate claims made prior to 2009.

54. The vast majority of the Referees granted the claimant appeals and approved the antedated parental benefit applications.

F. The Illustrative Cases

55. In order to assist in the efficient presentation of the over 100 migrant worker-related appeals to be heard, the claims have been organized into three distinct categories reflecting three distinct fact patterns. Claimants who best illustrate the fact patterns from each category have been selected as "illustrative cases."

i. Category One: First-time claimants for children born after 2000: Cruz De Jesus

56. Category One includes appeals arising from first-time applications. All of the appeals in this category are in respect of children who were born after 2000.¹

57. The delay in Category One cases typically arises from the multitude of barriers and vulnerabilities faced by SAWP workers, and detailed above: social isolation, lack of transportation, language barriers and/or illiteracy, lack of representation, fear of retribution, misinformation, lack of access to telephones and/or computers, lack of access to information.

58. The details of Mr. Cruz De Jesus' appeal are as follows:

Name: Genaro Cruz De Jesus

Date of Birth of Child: September 22, 2008

Date of eligibility for parental benefit: November 23, 2008

Date became aware of eligibility: June 2009

Effective date of application: June 28, 2009

Length of Antedate: 7 months

Appeal by: Commission

Cruz De Jesus Appeal Docket (09-0206): (Exhibit 1) Presentation of the appeal of the BOR; (Exhibit 2) Application for Employment Insurance Benefits; (Exhibit 4) Application to antedate claim for benefit.

59. During the material period, Mr. De Cruz Jesus worked for Frank Eborall & Sons in the Niagara region. He earned wages of \$8.75 per hour during the 2008 season. On average he worked six days a week for 48 hours.

Cruz De Jesus Appeal Docket (09-0206): (Exhibit 1) Presentation of the appeal of the BOR; (Exhibit 2) Application for Employment Insurance Benefits.

60. On his application to antedate his parental benefits claims, Mr. Cruz De Jesus stated as follows:

¹ Until May 20, 2009, the AWA believed that applications could not be made for children born prior to 2000. In light of this misunderstanding, first-time applicants for children born prior to 2000 are addressed separately as Category Two.

I am a Mexican migrant farm worker and I have been coming to work seasonally in Canada for 24 years now. I do not remember my first and last day worked for most of those years since my employer did not give my ROEs. However, until recently, June 2009, no one had ever told me that I have a right to apply for parental benefits. Now that I know about it, I would like to apply for my baby born in 2008. That is why I requested for my 2008 ROE and I got it. The employer issues ROE, only upon request. This is my first time applying for EI benefits.

Moreover, I do not speak neither English nor French and require someone fluent in both English and Spanish to assist me in filing out the application. Also I never got EI benefits information from any government agency in Spanish which is the only language I understand.

Due to my language barrier I do not understand the deductions terminology. So I know that my employer takes money from my biweekly payment. But I do not know where that money goes to.

For the above reasons, I did not apply on time.

Cruz De Jesus Appeal Docket (09-0206): (Exhibit 5) Application to antedate claim for benefit.

See also (Exhibit 7-4): Niagara North Community Legal Assistance Intake Sheet.

61. The application to antedate was denied and Mr. Cruz De Jesus appealed to the Board of Referees. The “Notice of Appeal” states as follows:

I am a seasonal migrant worker as such I am only in Canada during the harvest period. I do not write or read English and need assistance in completing [parental benefit] forms. I acted as a reasonable person would in view of the above facts. I completed my forms as soon as I could receive assistance. I am deducted for this benefit and am entitled to it.

Cruz De Jesus Appeal Docket (09-0206): (Exhibit 7-1) Application to antedate claim for benefit.

62. The Board of Referees heard Mr. Cruz De Jesus’ appeal on November 9, 2009. The hearing did not take place during the growing season and thus Mr. Cruz De Jesus was not able to be present for the hearing itself. The Board made the following findings of fact:

The Board finds as fact that the claimant was severely hindered from finding out and understanding his rights and obligations regarding parental benefits because:

- 1) He is unable to read, write, or comprehend English.
- 2) He feared losing his employment.

3) He did not have the time to access the information due to his heavy work schedule.

4) His employer did not readily issue an ROE unless requested and did not explain the deductions taken from their [sic] paycheck.

The Board finds fact [sic] that the claimant was unaware that he could apply for parental benefits more than once.

The Board finds as fact that migrant workers are in the most part isolated from the community. They have very long work schedules and are only able to go to the closest farming town for few hours [sic] each week to get their bare living essentials.

The Board finds as fact that the claimant did what a reasonable person in his situation would have done given the exceptional circumstances surrounding migrant farm workers in Southern Ontario. These workers, including the claimant, were not able to apprise themselves as to their rights and responsibilities regarding EI benefits; being so isolated as to have no access to government agencies that would apprise them of their entitlements.

The Board is cognizant of the fact that ignorance of the law generally is not good cause for a delay in filing EI benefits. However, in considering the totality of the circumstances in this case finds that a delay of 19 [sic] months in applying for parental benefits is reasonable, and that the claimant showed good cause for the delay throughout the entire period.

Cruz De Jesus Appeal Docket (09-0206): (Exhibit 9-4 to 9-5) BOR Reasons for Decision.

63. The Board unanimously granted the appeal and approved the antedate application.

ii. **Category Two: Claims for children born prior to 2000: Brandford Russell and Ainsworth Pugh**

64. Category Two appeals arise from parental benefit claims pre-dating 2000. As indicated above, the significance of this date is that it was not until May 20, 2009 that the AWA was aware that applications for antedate could be made as far back as 1990.

65. In addition to the general barriers that all migrant workers would face, lack of knowledge and misinformation about the right to apply is a key barrier for members of this group.

66. Brandford Russell and Ainsworth Pugh each submitted applications for two children born prior to 2000. Mr. Russell's two applications were each submitted at the same time as were Mr.

Pugh's. They are each proceeding as illustrative cases because they were heard together and the Board of Referees findings of fact and reasons for allowing the appeals are identical.

67. The details of Mr. Russell's appeals are as follows:

Russell – application for First Child (09-0395)

Name: Brandford Russell

Date of Birth of Child: June 4, 1992²

Date of Eligibility for parental benefit: October 11, 1992

Date became aware of eligibility: August 19, 2009

Effective date of Application: August 23, 2009

Length of Antedate: 16 years, 10 months

Appellant: Commission

Russell Appeal Docket (09-0395): (Exhibit 1) Presentation of the appeal of the BOR; (Exhibit 2) Application for Employment Insurance Benefits; (Exhibit 4) Application to antedate claim for benefit; (Exhibit 5) Birth Registration Form.

Russell – application for Second Child (09-0396)

Name: Brandford Russell

Date of Birth of Child: September 19, 1994

Date of Eligibility for parental benefit: September 25, 1994

Date became aware of eligibility: August 19, 2009

Effective date of Application: August 23, 2009

Length of Antedate: 14 years, 11 months

Appellant: Commission

Russell Appeal Docket (09-0396): (Exhibit 1) Presentation of the appeal of the BOR; (Exhibit 2) Application for Employment Insurance Benefits; (Exhibit 4) Application to antedate claim for benefit; (Exhibit 5) Birth Registration Form.

68. Mr. Russell is a Jamaican national. During the material period he worked at the Falk Family Farms in the Niagara region. He earned wages of \$6.00 per hour during the 1992 season

² Note that the application for Maternity and/or Parental Benefits identified the date of birth as September 19, 1994, but this was corrected on the record to June 4, 1992 (see p. 15 of the Transcript of Proceedings).

and \$6.70 per hour during the 1994 season. On average he worked seven days a week for 70 hours. His Record of Employment for both the 1992 and 1994 seasons were completed on June 3, 2009.

Russell Appeal Docket (09-0395): (Exhibit 1) Presentation of the appeal of the BOR; (Exhibit 2) Application for Employment Insurance Benefits; (Exhibit 3) Record of Employment.

Russell Appeal Docket (09-0396): (Exhibit 1) Presentation of the appeal of the BOR; (Exhibit 2) Application for Employment Insurance Benefits; (Exhibit 3) Record of Employment.

69. On his application to antedate his 1992 parental benefits claim, Mr. Russell stated as follows:³

I am a Jamaican migrant farmworker and I have been coming to work seasonally for several years now. Until recently in the month of August 19, 2009 I heard about parental benefit from a co-worker. I would like to apply for my baby born in 1992. Thank you for your understanding.

Russell Appeal Docket (09-0395): (Exhibit 4) Application to antedate claim for benefit.

Russell Appeal Docket (09-0396): (Exhibit 4) Application to antedate claim for benefit.

70. The application to antedate was denied and Mr. Russell appealed to the Board of Referees. The “Notice of Appeal” states as follows:

I am a seasonal migrant worker. I was not aware of my right to apply for parental benefits. I was unable to understand any of the written material I was given and I needed assistance to complete an application. When I learned of my rights, I acted as a reasonable person would given my specific fact situation. I work very long hours. I have no transportation. I could not ask my employer for help or my consulate.

Russell Appeal Docket (09-0395): (Exhibit 9-1) Application to antedate claim for benefit.

Russell Appeal Docket (09-0396): (Exhibit 9-1) Application to antedate claim for benefit.

71. The details of Mr. Pugh’s appeals are as follows:

³ The reasons provided for requesting an antedate for the 1994 application were the same.

Pugh – application for first child (09-0400)**Name:** Ainsworth Pugh**Date of Birth of Child:** October 18, 1991**Date of eligibility for parental benefit:** November 17, 1991**Date became aware of eligibility:** September 2009**Effective date of Application:** September 13, 2009**Length of Antedate:** 17 years, 9 months**Appellant:** Commission

Pugh Appeal Docket (09-0400): (Exhibit 1) Presentation of the appeal of the BOR; (Exhibit 2) Application for Employment Insurance Benefits; (Exhibit 4) Application to antedate claim for benefit; (Exhibit 6) Birth Registration Form.

Pugh – application for second child (09-0401)**Name:** Ainsworth Pugh**Date of Birth of Child:** September 18, 1996**Date of eligibility for parental benefit:** November 17, 1996**Date became aware of eligibility:** September 2009**Effective date of Application:** September 13, 2009**Length of Antedate:** 12 years, 9 months**Appellant:** Commission

Pugh Appeal Docket (09-0401): (Exhibit 1) Presentation of the appeal of the BOR; (Exhibit 2) Application for Employment Insurance Benefits; (Exhibit 4) Application to antedate claim for benefit; (Exhibit 6) Birth Registration Form.

72. Mr. Pugh is a Jamaican national. During the material period he worked for Thomas Kocsis in the Niagara region. He earned wages of \$5.40 per hour during the 1991 season and \$6.85 per hour during the 1996 season. On average he worked six days a week for 48 hours. His employer was not able to provide any Record of Employment as he did not retain any records from that period.

Pugh Appeal Docket (09-0400): (Exhibit 1) Presentation of the appeal of the BOR; (Exhibit 2) Application for Employment Insurance Benefits; (Exhibit 3) Letter from Thomas Kocsis (July 27, 2009).

Pugh Appeal Docket (09-401): (Exhibit 1) Presentation of the appeal of the BOR; (Exhibit 2) Application for Employment Insurance Benefits; (Exhibit 3) Letter from Thomas Kocsis (July 27, 2009).

73. On his application to antedate his parental benefits claims, Mr. Pugh stated as follows:

I am applying late for the following reasons:

Nobody had ever told me that I was entitled to apply for parental benefits back to 1990s. I was told this September, 2009 that the EI is allowing applications since 1990. Just since May 2009. So that is why. Once I found out about it I asked for help to AWA. Due to my language limitations.

Pugh Appeal Docket (09-0400): (Exhibit 4) Application to antedate claim for benefit.

Pugh Appeal Docket (09-0401): (Exhibit 4) Application to antedate claim for benefit.

74. The application to antedate was denied and Mr. Pugh appealed to the Board of Referees.

The “Notice of Appeal” states as follows:⁴

This person is a seasonal migrant worker. He is sent home directly after his contract ends. He needed assistance to complete the forms as English is his first language but unable to read documents. Due to long working hours, no knowledge of assistance, this person acted as a reasonable person would to protect good cause for delay.

Pugh Appeal Docket (09-0400): (Exhibit 8-1) Application to antedate claim for benefit.

Pugh Appeal Docket (09-0401): (Exhibit 8-1) Application to antedate claim for benefit.

75. The Board of Referees heard Mr. Russell’s and Mr. Pugh’s appeals on March 16, 2010. The hearing did not take place during the growing season and thus neither Mr. Russell nor Mr. Pugh were able to be present for the hearing itself. The majority of the Board made the following findings of fact in all of their appeals:

The Board finds as a fact that the claimant was hindered from finding out and understanding his rights and obligations regarding Parental Benefits available through Employment Insurance because:

- He was unable to read, write or comprehend English at a level that he could comprehend the intricacies of the EI system.
- He does not have the opportunity to access information regarding benefits through his own government.
- He was never given any explanation for the deductions taken from his pay cheque, including E.I. premiums.

⁴ The reasons stated on the Notice of Appeal for the 1994 claim were identical.

The Board finds that migrant workers are isolated in the most part from Canadian society. When they arrive in Canada for their work-term, they have very long work schedules and are only able to go to the closest small farming town to get their bare living essentials and send funds to their families back home in Jamaica. There is no interaction with the community in general and the workers only socialize when time permits with each other. They have little or no contact with their employer.

Virgil, Ontario does not have community services such as an E.I. Office with translation service or a central information services offices that could help them with their questions or give them information about our social service system. This is further exacerbated by the fact that they would not even know what questions to ask because their experience is from a country where such systems do not exist. It was only when the Agricultural Workers Alliance Support Centre was opened in 2005 that these workers were able to communicate in their mother tongue (Spanish) with an advocate who would act on their behalf. However, evidence has been given that farmers would threaten their workers with repatriation if they tried to file applications for social benefits such as WSIB, E.I. benefits.

The Board finds as fact that these workers were unaware of any programs, such as EI, that may be available to them. They were not able to satisfy themselves as to their rights and obligations concerning the Employment Insurance system when they did not even know it existed, given their isolation from this country's social network while working here and the absence of these social programs in their native country. In this case the claimant was not given a copy of the Human Resources document, "Rights and Responsibilities – Employment Insurance and You: A Shared Responsibility", the four page document issued to claimants when filing for benefits.

The Board finds as a fact that the claimant did what a reasonable person in his or her situation would have done, given the exceptional circumstances surrounding the migrant farm workers. In this case the claimant applied for benefits as soon as he became aware that he was eligible for parental benefits.

Russell Appeal Docket (09-0395): (Exhibit 13) BOR Reasons for Decision at pp. 13-6 to 13-8.

Russell Appeal Docket (09-0396): (Exhibit 13) BOR Reasons for Decision at pp. 13-6 to 13-7.

Pugh Appeal Docket (09-0400): (Exhibit 14) BOR Reasons for Decision at pp. 14-6 to 14-8.

Pugh Appeal Docket (09-0401): (Exhibit 15) BOR Reasons for Decision at pp. 15-6 to 15-7.

76. The majority of the Referees granted the appeals and approved the antedate applications.

iii. **Category Three: Subsequent claims for children born after 2000: Burnett Clarke**

77. Claimants in Category Three are migrant workers who applied for parental benefits previously for other children and then subsequently requested antedated benefits for different children. The reasons provided for subsequent antedate applications reflect misinformation provided to migrant workers about their eligibility.

78. The illustrative claimant in this category is Burnett Clarke. The details of his appeal are as follows:

Name: Burnett Clarke

Date of Birth of Child: September 12, 2008

Date of eligibility for parental benefit: September 7, 2008

Date became aware of eligibility: Not on record

Effective date of Application: June 27, 2010

Length of Antedate: 1 year, 9 months

Appellant: Claimant

Clarke Appeal Docket (10-0206): (Exhibit 1) Presentation of the appeal of the BOR; (Exhibit 2) Application for Employment Insurance Benefits; (Exhibit 4) Application to antedate claim for benefit; (Exhibit 6) Birth Registration Form.

79. Mr. Clarke is a Jamaican national. During the material period he worked for Riccardelli Orchards in the Niagara region. He earned wages of \$8.75 per hour during the 2008 season. On average he worked seven days a week for 70 hours. His Canadian contract of employment was over at the time of his child's birth. His Record of Employment for the 2008 season was completed on May 29, 2010.

Clarke Appeal Docket (10-0206): (Exhibit 1) Presentation of the appeal of the BOR; (Exhibit 2) Application for Employment Insurance Benefits; (Exhibit 5) Record of Employment.

80. In July 2008, Mr. Burnett submitted an antedate application for a child born in August 2007. The antedate was granted and he received 26 weeks of benefits effective September 2, 2007.

Clarke Appeal Docket (10-0206): (Exhibit 7) Letter from Commission to Burnett Clarke (August 14, 2008); (Exhibit 10-1) Commission representations to the BOR.

81. On his application to antedate his parental benefits claims, Mr. Clarke stated as follows:

I'm a Jamaican migrant farm worker who have [sic] been coming to work in Canada for seasonally 9 years under the SAW program. However, I apply in 2007 and did get my money. However when I apply for 2008 baby Liaison inform me that there was no more money. However, it was untrue. So that why I am applying now. [sic].

Clarke Appeal Docket (10-0206): (Exhibit 4) Application to antedate claim for benefit.

82. The application to antedate was denied and Mr. Clarke appealed to the Board of Referees. The "Notice of Appeal" states as follows:

1) Although I have had EI deductions from my wages throughout my employment, I have not had the opportunity to access the benefits applied for;

2) The agricultural nature of my working long hours (up to 10 or 12 hours a day) and usually six and seven days of the week;

3) I am in Canada only six months of the year, then I am sent home, so I cannot reasonably keep track of any developments or meet timelines with my application during my absence;

4) Because of my work schedule, I have limited time to spend on my application and documentation;

5) The migrant worker centre nearest me operates seasonally and has limited hours. It is generally not available to me for assistance, or to use its facilities to complete the documentation, because its hours do not coincide with my time off work;

6) I have language and literacy barriers and am unfamiliar with the application forms and process;

7) I lack transportation to get from my farm workplace to either the migrant worker centre, or to library or postal facilities to assist me with completion of the documentation.

Clarke Appeal Docket (10-0206): (Exhibit 9-3) Application to antedate claim for benefit.

83. The Board of Referees heard Mr. Clarke's appeal on September 22, 2010. The hearing did not take place during the growing season and thus Mr. Clarke was not able to be present for the hearing itself. The Board made the following findings of fact:

When the claimant filed his claim on June 19, 2010 for a child born on September 12, 2008, he was or should have been aware of his rights and obligations for EI parental entitlements and antedating of claims sine he had previously availed himself of the opportunity to claim parental benefits in 2007...

Evidence shows that despite his knowledge about the EI parental benefits entitlements in 2007 he delayed filing his second claim for nearly two years. The claimant should have filed his second claim at the same time or immediately thereafter as a reasonable person under the same or similar circumstances would have done. One can reasonably presume that the claimant did not think it important enough to enquire about filing a second entitlement in a timely fashion. His conduct, therefore, could be attributed only to indifference or lack of concern.

...

In his appeal, the claimant cites his work schedule, lack of transportation, literacy barriers and limited hours migrant centre is open [sic] as the reasons for the delay. But these very factors were present when he made his first claim in 2007 and were not then an impediment in obtaining parental benefits for his child born in 2007.

The Board finds as a fact that the claimant was or should have been aware of his rights and obligations as of 2007 and has, therefore, since then, failed to show good cause throughout the 2 year period of delay in filing his second claim for benefits in 2009 pursuant to section 10(4) of the Act.

Clarke Appeal Docket (10-0206): (Exhibit 11-4 to 11-5) BOR Reasons for Decision.

84. The Board of Referees' decision makes no reference to Mr. Clarke's explanation for the delay; namely that he was misinformed by the Jamaican Liaison Officer, who told him that he could not apply for his second child.

PART THREE: ISSUES

85. The issue to be determined in each of the illustrative cases is whether the claimants have established that they had good cause for delay in applying for parental benefits.

PART FOUR: LAW AND ARGUMENT

A. Standard of Review

86. The Claimant and the Commission have the right to appeal as of right to an Umpire from a decision of a board of referees. Pursuant to s. 115(2) of the *Employment Insurance Act*, the permitted grounds of appeal are:

s. 115(2) The only grounds of appeal are that

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

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

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

Employment Insurance Act, SC 1996, c 23, s. 115.

87. An appeal of an Employment Insurance matter to an Umpire is not a hearing *de novo*; the Umpire reviews the decision of the Referees and determines whether, based on the information which was before them, the Referees committed an error. The role of the Umpire is not to substitute their opinion for that of the Referees in the absence of a legal or factual error.

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

88. The legal issue in these appeals is whether there was “good cause for delay” in commencing parental benefit claims. This is a question of mixed fact and law. While the meaning of “good cause” is a matter of law, its application to the circumstances of a case is within the expertise of the Referees, which a reviewing Court should not lightly invade.

Canada v. Albrecht (1985), A-172-85 (Fed. C.A.) at p. 3.

Rettie v. Employment and Immigration Commission (1996), CUB 35066 at p. 2.

89. Indeed, deference is appropriate where legal and factual issues are intertwined and where a tribunal is interpreting its own statute. In these circumstances, Tribunals are afforded a “margin of appreciation” within the range of acceptable and rational solutions.

90. The legislation governing employment insurance is complex, and the Tribunal has developed a unique expertise. Such knowledge assists in ensuring that its approach to statutory interpretation is harmonious with the purposes of the program. Thus, where the Referees have fallen within “a range of possible, acceptable outcomes which are defensible in respect of the facts and the law”, appeals from the Board of Referees ought not to be granted.

Dunsmuir v. New Brunswick, [2008] 1 S.C.R. 190 at paras. 47, 53-54.

Celgene Corp. v. Canada (Attorney General), 2011 SCC 1 at para. 34.

B. Principles of statutory interpretation and the purpose of parental benefits

91. It is well-established that the *Employment Insurance Act* is “remedial legislation” and should be interpreted in a liberal and purposive manner in order to ensure that the program attains its goal of providing support to people who have lost employment. The words of the *Employment Insurance Act* are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of the Legislature. Any ambiguity should be resolved in the claimant’s favour.

Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27 at para. 21.

Abrahams v. Attorney General of Canada, 1983 CanLII 17 (SCC) at p. 10.

92. As the Supreme Court has stated: “the federal unemployment insurance power must be interpreted generously. Its objectives are to remedy the poverty caused by unemployment and maintain the ties between unemployed persons and the labour market.” While the first EI legislation excluded all seasonal employment in agriculture, forest, fishing and hunting, there is now no question regarding the public plan’s support in relation to these economic activities which are vital to the Canadian economy.

Confederations des syndicats nationaux v. Canada (Attorney General), 2008 SCC 68 at para. 31.

Reference re Employment Insurance Act (Can.), ss. 22 and 23, 2005 SCC 56 at paras. 47, 60.

Abrahams v. Attorney General of Canada, 1983 CanLII 17 (SCC) at p. 10.

93. Parental benefits are an integral part of Canada’s employment insurance scheme. Pursuant to s. 23(1) of the *Employment Standards Act*, parental benefits are payable to eligible claimants in order to allow them to care for one or more new-born children. Benefits are payable until the claimant returns to work, but for a maximum of 35 weeks during the 52 weeks following the child’s birth.⁵

Employment Insurance Act, S.C. 1996, c. 23, ss. 23(1) – 23(2).

⁵ There are a number of circumstances that can increase or decrease this 52 week entitlement, none of which are relevant to the cases before this Honourable Court.

94. Unlike regular benefits, claimants receiving parental benefits are not obligated to establish that they are available for work, as the purpose of the benefit is to allow parents to care for their children. As a result, claimants who are outside of Canada are eligible to receive parental benefits.

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

95. As noted above, the purpose of regular EI benefits is to alleviate the poverty associated with unemployment. This is also the purpose for the inclusion of parental benefits within the EI regime. However, in addition, parental benefits reflect a public policy commitment to protect the important reproductive function shared by both parents as well as the protection of equality rights:

I therefore conclude that parental benefits, like maternity benefits, are in pith and substance a mechanism for providing replacement income when an interruption of employment occurs as a result of the birth or arrival of a child.

...

I see no reason why parental benefits should be characterized differently from maternity benefits. In both cases, the benefits relate to the function of the reproduction of society... All parents have equal obligations....The inclusion of this type of benefits in the unemployment insurance plan is an extension of the plan that is made necessary by the equality rights that are also an integral part of our Constitution.

Reference re Employment Insurance Act (Can.), ss. 22 and 23, 2005 SCC 56 at paras. 73-75.

96. Thus, parental benefits serve an important social purpose to not only ensure that young families are not mired in poverty, but also embody a salutary commitment to equality rights.

C. Antedating, parental benefits, and the meaning of “good cause”

97. Although there is no statutory “limitation period” within which a claim for EI benefits must be made, the *Act* contemplates that claims will be initiated immediately upon eligibility. In the case of parental benefits, a parent becomes eligible in the first week of unemployment following the birth of their child. However, a parent only becomes qualified for EI benefits in the week that they actually apply, even if they were eligible at an earlier date.

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

98. However, it is not uncommon for unemployed parents to submit a claim for benefits late and the *Act* explicitly provides that claims can be backdated. Pursuant to s. 10(4) of the *Act*, a claimant wishing to antedate their benefit claim to any period prior to the date they submit an application must establish that there was good cause for the delay:

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

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

99. A large number of antedate requests involve short delays only, and most of these requests are accepted. Indeed, the Commission has an administrative policy to permit all antedate requests up to four calendar weeks. This policy implicitly recognizes that it is reasonable to expect that the typical claimant will require up to a month in order to take the necessary steps to apply for benefits.

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

100. For antedate requests greater than four weeks, a claimant must establish that they meet the test set out in the legislation; that is: “there was good cause for the delay throughout the period beginning on the earlier day and ending on the day when the initial claim was made.” In other words, there must be good cause for the delay up to and including the day before the initial claim was made.

101. In light of the important social function that EI benefits play, the antedating provisions were included in the EI regime in order to ensure that unemployed persons who would otherwise be entitled were not denied benefits on mere “technical grounds”. As noted by this Honourable Court in *Bouchard*, nothing would be gained by denying benefits to people who would otherwise be entitled on the mere grounds that they have not filed at the right time. As with the *Act* generally, the “good cause” provisions must be interpreted liberally and with any ambiguity resolved in the claimant’s favour.

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

102. There is considerable jurisprudence concerning antedating. The following principles in respect of “good cause for delay” can be distilled from the statute and jurisprudence:

- a. The language in the statute is mandatory. That is, where good cause is established the antedate must be granted. Antedating is not discretionary.
- b. Good cause must be shown to have existed throughout the whole period of the delay. It is not necessary to account for every single day but it must be readily concluded that there was good cause without any break for the whole period.
- c. Good cause does not “rust.” That is, where good cause is established, such good cause endures naturally and legally until it is displaced. There is no time limit following which good cause can no longer be established.
- d. The reason for the delay need not be the same throughout the period. There may be a succession of reasons provided each is considered to be good cause.
- e. The cumulative effect of reasons provided for delay must be considered.
- f. Good cause for delay is not a “rigidly closed concept”, but rather more flexible and circumstantial.
- g. Barring exceptional circumstances, a claimant is expected to take reasonably prompt steps to understand their obligations under the *Act*. However, a strict application of the antedate provisions could impose on claimants financial losses that are not justified by administrative efficiency. The object of the antedate provisions is to ensure flexibility.

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

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

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

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

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

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

103. The principles favouring flexibility and attention to the individual circumstances of each claimant are even stronger in the case of special benefits, such as parental benefits. Claimants for special benefits are not required to prove that they are available for work during the period of eligibility and, unlike recipients of regular benefits, they are not required to submit reports every two weeks. As such, the potential for prejudice to the Commission is simply not as significant a concern in the case of special benefits.

Spurrell v. Employment and Immigration Commission (1991), CUB 19242 at p. 2.

Johnston v. Employment and Immigration Commission (1966), CUB 14019 at p. 2-3.

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

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

D. Ignorance of the Law: The Reasonable Person Test and Migrant Workers

105. One of the most commonly litigated antedate issues arises in circumstances in which a claimant’s delay in applying for benefits arose because they were not aware of their entitlement. Indeed, as the Federal Court of Appeal noted in *Albrecht*, leaving aside possible cases of “indifference” or “lack of concern”, “ignorance of the law is necessarily involved in the failure of a claimant to exercise his rights in due time.” Ignorance of the law is a key element of the migrant worker appeals before this Honourable Court.

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

106. The leading case on the interpretation of “ignorance of the law” and “good cause for delay” is the Federal Court of Appeal’s judgment in *Albrecht*.

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

107. *Albrecht* established that ignorance of the law can satisfy the requirement of “good cause” where the claimant can show that they “did what a reasonable person in his situation would have done to satisfy himself as to his rights and obligations under the Act”:

In my view, when a claimant has failed to file his claim in a timely way and his ignorance of the law is ultimately the reason for his failure, he ought to be able to satisfy the requirement of having “good cause”, when he is able to show that he did what a reasonable person in his situation would have done to satisfy himself as to his rights and obligations under the Act. This means that each case must be judged on its own facts and to this extent no clear and easily applicable principle exists; a partially subjective appreciation of the circumstances is involved which excludes the possibility of any exclusively objective test. I think, however, that this is what Parliament had in mind and, in my opinion, this is what justice requires [emphasis added].

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

See also: *Bouchard v. Canada* (1989) CUB 17192 at p. 3.

108. Thus, in assessing whether there was “good cause for delay”, the relevant point of view is that of the reasonable person. A “reasonable person” is one who is “dispassionate and fully apprised of the circumstances, possessed of similar attributes to, and under similar circumstances as, the claimant.”

Law v. Canada (Minister of Employment and Immigration), 1999 CanLII 675 (S.C.C.) at para 60.

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

I am aware of the controversy that exists regarding the biases implicit in some applications of the “reasonable person” standard. It is essential to stress that the appropriate perspective is not solely that of a “reasonable person” – a perspective which could, through misapplication, serve as a vehicle for the imposition of community prejudices. The appropriate perspective is subjective-objective. Equality analysis under the *Charter* is concerned with the perspective of a person in circumstances similar to those of the claimant, who is informed of and rationally takes into account the various contextual factors which determine whether an impugned law infringes human dignity, as that concept is understood for the purpose of s. 15(1) [emphasis added].

Law v. Canada (Minister of Employment and Immigration), [1999] 1 SCR 497 at para. 61.

110. When faced with claims that may extend or develop the common law, Canadian courts are guided by the values found in the *Charter*, including the principles of equality, liberty and security of the person. A “rights-based” approach to the development of the common law allows for the consideration of the vulnerabilities of historically disadvantaged groups and the establishment of remedies that serve both the individual and the public interest. Equality principles require that a court closely examine pre-existing historical disadvantage, vulnerability, stereotyping or prejudice experienced by the individual or group.

Hill v. Scientology of Toronto, 1995 CanLII 59 (S.C.C.) at paras. 91-92.

RWDSU Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd., 2002 SCC 8 (CanLII) at paras. 17-22.

111. Equality principles are not only an important element of the reasonable person test, but are at the very foundation of the creation of the parental benefit itself. Thus, equality principles must guide this Honourable Court in its approach to the reasonable person test and the circumstances faced by migrant workers.

112. There can be no question that SAWP workers are in a position of historical disadvantage. Appellate Courts have consistently described SAWP workers using language such as: “vulnerable”; “among the least powerful”; “political impotence”; and, “surely amongst the most marginalized of non-citizens.”

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

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

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

113. Indeed, in respect of the very social benefit in issue, the EI benefit, SAWP workers already experience a significant disadvantage in respect of access. As has been noted above, despite paying premiums with every paycheck, SAWP workers are ineligible for regular benefits because they are required to leave the country immediately upon the conclusion of their contract of employment. The Ontario Superior Court has held that, as a result, the eligibility provisions in the Act have a “disproportionate impact on [SAWP workers] as non-citizens and as persons from particular national origins.”

Fraser v. Canada (Fraser 1), 2005 CanLII 47783 at para. 72.

114. Further, in light of their exclusion from other protective legislation related to employment standards, labour relations regimes and other social benefits, agricultural workers possess what the Supreme Court has characterized as a “limited sense of entitlement”.

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

115. A narrow and punitive approach to the “reasonable person test” would have the effect of deepening the discrimination that migrant workers already experience in respect of access to EI benefits and further marginalize them as a group. This is utterly inconsistent with the purpose of the benefit.

116. Much of the caselaw on the “reasonable person” and “good cause for delay” cannot be applied uncritically to the circumstances faced by migrant workers in the SAWP. Virtually all of the caselaw to date involves Canadian citizens and permanent residents of Canada, and for the most part arises for claimants who have access to regular EI benefits. Yet even for such claimants, this Honourable Court has found that it was reasonable for a recent immigrant to err in their understanding of Canadian law.

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

117. Moreover, special benefits are not of such a nature that one would expect there to be broadly based knowledge of their availability. For example in *Johnston*, this Honourable Court held that it was reasonable for a Real Estate agent to delay applying for sickness benefits in circumstances in which she had no experience with EI and had not been apprised of the existence of the benefit. Furthermore, there was no conceivable prejudice to the EI regime in paying the delayed special benefits claim.

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

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

Court, at the “outer margins of Canadian society.” Indeed, Justice Ducharme gave a strong warning to this effect:

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

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

119. A series of Umpire decisions have been released within the past several months, arising from SAWP worker antedated parental benefit applications. In every case, the Honourable Umpires who heard the appeals held that the migrant workers in the cases before them had not established good cause for delay. Notably, none of claimants in these appeals were represented by counsel. While the cases were decided by different Umpires, several common threads run through the decisions. The Honourable Umpires held that:

- The claimants had the capacity to find employment in Canada, travel to Canada and return to their home countries. The implication is that these same workers should therefore have had the capacity to apply for parental benefits without assistance.
- Lack of knowledge of EI benefits can only justify a short delay.
- The claimants should have taken steps to inform themselves of what they were paying for through their employment insurance premiums.

Employment Insurance Commission v. F.L. (1) (2010), CUB 75951.

Employment Insurance Commission v. F.L. (2) (2010), CUB 75952.

Employment Insurance Commission v. F.L. (3) (2010), CUB 75953.

Employment Insurance Commission v. H.W. (2011), CUB 76321.

Employment Insurance Commission v. K.X. (2011), CUB 76322.

Employment Insurance Commission v. P.C. (2011), CUB 76709.

Employment Insurance Commission v. F.T. (2011), CUB 76710.

Employment Insurance Commission v. E.V. (2011), CUB 76711.

Employment Insurance Commission v. D.K. (2011), CUB 76712.

120. With the greatest of respect to the decision makers in these cases, the jurisprudence reviewed above supports the following responses:

- The capacity to participate in the SAWP program administered by their home countries is not determinative of the claimants' knowledge or capacity in respect of a Canadian social benefit program.
- As noted above, a "good reason for delay" does not "rust", and thus the length of time of the delay is not determinative.
- Migrant workers are not eligible for regular EI premiums, and thus any inquiries about "what they were paying for through their employment insurance premiums" would not necessarily have confirmed their eligibility for the parental benefits in question in these appeals.
- Moreover, the reasoning in the migrant worker appeals to date appears to be based on the faulty premise that Justice Ducharme warned against: that migrant workers operate in a perfect marketplace of information and ideas.
- The contextualized, objective-subjective "reasonable person" analysis, guided by equality principles, is absent from these decisions.

121. Rather, in assessing the reasonableness of a claimant's delay, this Honourable Court must consider the position of the claimant and their relationship to the Canadian system. A "reasonable person" for the purpose of these cases is one who:

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

- p. Lacks reliable and unbiased assistance from Liaison officers.
- q. Faces barriers to access AWA Centres, which are themselves under-resourced.
- r. Is not provided with a Record of Employment at the conclusion of their contract. This is significant because the Record of Employment form includes a warning that claims for EI should be made immediately. Employees who do not receive this form do not receive this warning (see *Canada v. Tuck* (2003), CUB 59482; *Canada v. Koo* (2006), CUB 65711)
- s. Is completely disenfranchised from the Canadian political system.
- t. Has no experience with a similar benefit in their home countries.

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

In this case the applicant provides two reasons for the delay in filing the Application: that he was threatened by the personal respondent that he would be repatriated if he took action against the termination of his employment, and that as a migrant farm worker he was socially and politically excluded and therefore had difficulties exercising legal protections against discrimination. In his submissions, the applicant explains that as a migrant farm worker from St. Lucia he has no secure immigration status. The applicant asserts that employers of migrant farm workers are empowered to make unilateral decisions to terminate a worker’s employment and repatriate them to their countries of origin. He states that it was only when he received assistance from a friend and migrant rights activist that he was able to develop the courage and confidence to report the incident.

Based on the applicant’s submissions alone, it is not plain and obvious to me that the delay in filing the Application was not incurred in good faith. Therefore, the Tribunal will continue to process this application.

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

123. In light of their virtual exclusion from the social benefits and protections offered to other workers, SAWP workers have a limited sense of entitlement. It would be reasonable for a person in such circumstances to have no knowledge of their entitlement to parental benefits unless they were specifically advised of such, and to require assistance in order to be able to apply once their

eligibility was brought to their attention. Until these two conditions are in place, a good faith reason for the delay in applying exists.

124. To hold migrant workers to the same standards as other Canadian workers, to ignore their vulnerabilities based on a fictional “marketplace of information”, represents a significant windfall for the Canadian government who collects SAWP worker EI premiums, offers them no services, structures a program that they cannot access for the most part and then refuses to pay out the few benefits to which they are entitled.

E. Application to the illustrative cases

i. Category One: First-time claimants for children born after 2000: De Cruz Jesus

125. Mr. De Cruz Jesus is a Spanish-speaking migrant worker from Mexico. He was unable to understand the deduction terminology on his paystubs. He never received information concerning EI benefits in a language that he could understand and did not receive Records of Employment at the conclusion of his contracts. He faced all of the barriers and hardships that characterize SAWP workers that are described above. The cumulative impact of these barriers is significant.

126. Mr. De Cruz Jesus first learned that he could apply for parental benefits in June 2009. He applied immediately, on June 28, 2009, with the assistance provided by a Spanish-speaking person at the AWA. The antedate in this case is only seven months.

127. It is submitted that the Referees committed no errors of fact or law in granting Mr. De Cruz Jesus’ appeal. Rather, the Referees applied the “reasonable person” test as required, taking into consideration the cumulative impact of Mr. De Cruz Jesus’ circumstances and the extremely vulnerable position of migrant workers.

128. It is respectfully requested that this appeal be denied and Mr. De Cruz Jesus’ parental benefits claim be paid forthwith.

ii. Category Two: Claims for children born prior to 2000: Brandford Russell and Ainsworth Pugh

129. Mr. Russell and Mr. Pugh are both Jamaican migrant workers. They each required assistance in order to complete the necessary forms and could not independently understand any written material provided to them. They each worked long hours and lacked transportation to centres where they could obtain assistance. Neither men were given Records of Employment at the conclusion of their contracts. They faced all of the barriers and hardships that characterize SAWP workers that are described above.

130. It was not until August 19, 2009 that Mr. Russell first learned from a co-worker that he could apply for parental benefits for his children born in 1992 and 1994. He applied a mere four days later, with assistance provided by the AWA. The antedates in these cases are respectively 16 years, 10 months and 14 years, 11 months.

131. It was not until September 2009 that Mr. Pugh first learned that he could apply for benefits for his children born in 1991 and 1996. He submitted his application immediately on September 13, 2009, with assistance from the AWA. The antedates in these cases are respectively 17 years, 9 months and 12 years, 9 months.

132. Both Mr. Russell and Mr. Pugh learned of their eligibility at a time when the AWA in Virgil was attempting to communicate widely that antedate applications could be made for children born as early as 1990. The AWA itself was not aware of this fact until May 2009, nor is it the legal responsibility of this under-resourced organization to inform migrant workers of their legal rights. Rather, this is an obligation that ought to be placed upon Service Canada. Had Mr. Russell or Mr. Pugh sought information from the AWA prior to May 2009, they would have been erroneously told that they could not apply.

133. Misinformation about the process or entitlement can be good cause for delay. Where misinformation is found to be good cause for delay, such good cause “endures naturally and legally” until it is displaced by correct information.

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

134. It is submitted that the Referees committed no errors of fact or law in granting these appeals. Rather, the Referees applied the “reasonable person” test as required, taking into consideration Mr. Pugh’s and Mr. Russell’s cumulative circumstances and the extremely vulnerable position of migrant workers.

135. It is respectfully requested that these appeals be denied and that the parental benefit claims of Mr. Pugh and Mr. Russell be paid forthwith.

iii. Category Three: Subsequent claims for children born after 2000: Burnett Clarke

136. Mr. Clarke is a Jamaican worker. He faced all of the barriers and hardships that characterize SAWP workers described above.

137. Mr. Clarke was aware of the parental benefit by July 2008, when he submitted an application for a child born in August 2007. However, when his second child was born in September 2008, he was erroneously told by the Jamaican Liaison that there was no more money available. When he learned of the error, he filed an application on June 27, 2010. The antedate in this case is 1 year, 9 months.

138. There are numerous cases that have held that a claimant will be seen to have established “good cause” for delay, where failure to apply for benefits sooner is the direct result of erroneous information from third parties. The misrepresentations must have been made by a person upon whom the claimant could reasonably be expected to rely. A reasonable person who made enquiries of an individual he or she has every reason to expect to be knowledgeable in the field would not consider it necessary to seek information directly from the Commission.

Kay v. Employment and Immigration Commission (1997) CUB 36384A at p. 3.

Graham v. Canada (1999), CUB 42404A at p. 3.

Halverson v. Canada (2002), CUB 54334 at p. 3.

Langille v. Canada (2004), CUB 60830 at p. 2.

139. The Referees denied Mr. Clarke's appeal on the basis that, since he knew about the benefit in 2008, his failure to apply for the second child immediately reflected his indifference or lack of concern and therefore acted unreasonably. In reaching this conclusion, the Referees made two distinct legal errors.

140. First, in denying Mr. Clarke's appeal, the Referees make no reference at all to his explanation for the delay in claiming for his second child. It was an error of law to fail to consider this evidence. It was entirely reasonable for Mr. Clarke to rely upon information that he received from the Jamaican Liaison.

141. Second, the "reasonable person" standard applied by the Referees does not acknowledge the incredible difficulty that migrant workers have in obtaining accurate information and assistance. It is submitted that the Referees erred in law by applying a "reasonable person" standard that failed to consider the circumstances of the claimant.

142. These two errors, individually and cumulatively, constitute "palpable and overriding errors."

143. It is therefore respectfully requested that Mr. Clarke's appeal be granted and that the parental benefits claim be paid forthwith.

PART FIVE: ORDER SOUGHT

144. It is therefore respectfully requested that the antedate applications made by each of the claimants be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

September 19, 2011

Jackie Esmonde

Income Security Advocacy Centre
425 Adelaide Street, 5th Floor
Toronto, Ontario
M5V 3C1

Jackie Esmonde & Cindy Wilkey

Tel: 416-597-5820
Fax: 416-597-5821

Niagara North Community Legal Assistance
8 Church Street
P. O. Box 1266
St. Catharines, Ontario
L2R7A7

Jennifer Pothier

Tel: 905-682-6635
Fax: 905-682-3411

Co-Counsel for the claimants De Cruz Jesus,
Pugh, Russell and Clarke