

# Conference on: Temporary Migrant Workers



## Labour Rights and Organizing Strategies

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In Canada, and around the world, temporary migrant workers are increasingly being used for seasonal and permanent jobs. Their rights and legal protection, however, are highly circumscribed, their employment is insecure, and abuse of the temporary foreign worker programs by employers and some governments is widespread. Their rights, moreover, to a healthy, safe workplace are non-existent or greatly inferior to Canadian norms.

This two-day conference will be of interest to all those working on the issue of temporary foreign workers, especially union and community organizers already engaged in or needing to find out more about these programs.

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<https://www.sfu.ca/temporary-migrant-workers.html>

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**Conference on Temporary Migrant Workers**  
**Table of Contents**

**1. Migrant Agricultural Workers and Labour Relations in Quebec**

Claude Melancon and Guillaume Genier, Melançon Marceau Grenier Sciortino, s.e.n.c.

**2. The Call for a Temporary Foreign Worker National Advocacy Coalition**

Lynne Fernandez, Errol Black Chair in Labour Issues, Canadian Centre for Policy Alternatives, Manitoba

**3. The Temporary Foreign Workers Program From an Albertan Perspective**

Yessy Byl, Northern Alberta Educator in Human Rights Education for the Alberta Civil Liberties Research Center

**4. Bringing Up BC: The Negative Impacts of the Temporary Foreign Workers Program on Vulnerable Workers and Proposals for Regional Action**

Kaity Cooper, Lawyer for the Hospital Employees' Union, and Jodie Gauthier, Lawyer who practices in the areas of labour, human rights, disability and workers' compensation law

**5. Temporary Migrant Workers: Workers Rights to Organize: Strategies and Perspectives from the US Experience**

Arthur Read, General Counsel, Friends of Farmworkers, Inc.

**6. Embodying and Experiencing Labour Apartheid**

Adriana Paz Ramirez, Justicia for Migrant Workers

**7. Health Issues Under Canada-Sponsored Migrant Worker Indentureship**

Patricia O'Hagan, Dean, Health Sciences, University of Hawaii, and  
Leo McGrady, Lawyer at McGrady and Company

**8. Seeking International Human Rights Law Protection for Temporary Foreign Workers in Canada**

Mia Reimers has worked at the Centre of Constitutional Studies at the University of Alberta and McGrady & Company in Vancouver

**Papers available after conference**

**Migrants: Strategic Organizing of Ultra – Precarious Workers**

Naveen P. Mehta, Lawyer, Director, Human Rights, Equity and Diversity, United Food & Commercial Workers Canada

**Caregivers and Labour Rights in BC: Barriers to Decent Work**

Natalie Drolet, West Coast Domestic Workers Association

## MIGRANT AGRICULTURAL WORKERS AND LABOUR RELATIONS IN QUEBEC

by Claude G. Melançon and Guillaume Grenier  
Melançon Marceau Grenier Sciortino, s.e.n.c.

*Note: the authors wish to acknowledge the inestimable contribution of Ms. Patricia Perez (1955-2007) to the cause of migrant agricultural workers in Quebec. Ms. Perez was forced to flee from Mexico in 1996 after armed agents in plainclothes ordered her to leave the country because of her work for social justice. Upon her arrival in Montreal, she quickly became acquainted with the harsh difficulties that migrant agricultural workers face. She provided assistance to them and denounced the discriminatory treatment they experienced. The United Food and Commercial Workers (UFCW) hired Ms. Perez to lead a support center for migrant workers in St-Rémi, enabling her to get in close contact with the migrant workers who worked nearby. For years, she fought tirelessly for the rights of these workers and gave them courage.*

*The authors also wish to salute the generous and unwavering support of the UFCW to the fight for the rights of migrant agricultural workers. Their contribution has been essential to establishing crucial support initiatives and sustaining long and hard-fought campaigns.*

Migrant agricultural workers employed in Quebec suffer from a particularly high degree of vulnerability which stems both from their status as migrants and their belonging to the category of agricultural workers — a category of workers that has historically been deprived of the legal protections afforded to other workers under Quebec law.

The first section of this essay will examine some of the structural constraints of the programs under which a high number of migrant workers come to work in Quebec. It goes without saying however that other factors of vulnerability affect the experience of migrant agricultural workers, such as factors related to agricultural work *per se* (namely the very demanding and sometimes dangerous nature of the work) and factors related to the socio-economic and cultural characteristics of migrant agricultural workers (debt incurred to work abroad, economic dependency of the family, language and cultural barriers, etc.)

The second section of this essay will address the matter of labour relations as it pertains to agricultural workers. It will look at the attempts to organize agricultural workers in Canada and Quebec, examine the exclusions and restrictions which this category of workers has faced, summarize the legal challenges that have been launched in relation to these exclusions and restrictions, and describe the responses of the governments to the tribunals.

Finally, the essay will examine some avenues for the future that might help to redress the power imbalance agricultural workers — and particularly agricultural migrant workers — still experience today. Reference will be made to recent experiences of labour standards reform in Quebec and to the parallel labour relations regimes that exist in this province.

### **A) The constraints imposed on migrant agricultural workers under the temporary foreign workers programs**

#### ***The Seasonal Agricultural Worker Program and the Low-Skill Program (now Low-wage)***

A high proportion (75%) of the migrant workers who come to work in the agricultural sector in Quebec have been hired pursuant to the Seasonal Agricultural Worker Program (the “SAWP”)<sup>1</sup>. This program, which first took the form of bilateral agreements between Canada and a number of foreign countries (mostly Mexico, but also countries of the Caribbean) during the 1960’s and was then formalized into a general program in 1974, was designed to alleviate scarcity of labour in some agricultural sectors. Some critics of the SAWP argue that the agricultural sector in Quebec (or elsewhere in Canada) does not suffer so much a “labour shortage” as it has difficulty finding Canadians willing to work under the (low) conditions offered. It is argued that the SAWP — and the Low-Skills (or now Low-Wage) Temporary Foreign Worker (TFW) program in general — allows employers to address the labour “shortage” by a mechanism that drives down wages and conditions.

Under the SAWP, an association of agricultural producers tasked with the administration of the program known as FERME<sup>2</sup> communicates to the foreign authorities the labour needs of producers and the foreign government handles the selection of the workers.

#### ***The tie between the temporary resident visa and an single employer work permit***

One of the major constraints imposed upon migrant workers such as the Mexican workers coming to Quebec is that their temporary resident visa is tied to an employer-specific work permit. If a worker’s employment ends for one reason or

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<sup>1</sup> In 2003, a “Low-Skill Pilot” program was set up by the Canadian government and now provides another means of hiring temporary foreign workers in the agricultural and other sectors (the name was later changed to “Occupations requiring lower levels of formal training”). According to a report from the Quebec Commission des droits de la personne et de la jeunesse, one of the factors explaining the establishment of this program is said to be the numerous attempts at unionizing Mexican agricultural workers through the SAWP (Commission des droits de la personne et de la jeunesse, *La discrimination systémique à l’égard des travailleuses et travailleurs migrants*, December 2011).

<sup>2</sup> Fondation des entreprises en recrutement de main-d’œuvre agricole étrangère.

another, he or she technically loses his or her right to stay in Canada. To remain in the country, workers must undergo a complicated and time-consuming process. First, they must seek a new employer. Once they find one, they must wait for a new work permit to be issued, a process that can take weeks or even months. The change in employer must not only be approved by the Canadian government, but also by the foreign government representative as well as by the new *and* former employers.

It is thus readily apparent that changing employers is a difficult — and risky — proposition for migrant workers. Complaining about ones' working conditions or seeking other employment opportunities is a hazardous gamble, as losing one's job entails the possibility of deportation. In such a context, workers tend to keep their complaints to themselves and remain with the same employer despite their grievances. They are also deprived of any leverage to negotiate better working conditions.

### ***The necessity of living on the employer's premises***

Another important constraint imposed on migrant workers is the obligation — legal or *de facto* — to live on the employer's premises. For example, workers who come under the Live-in Caregiver Program (the "LCP") are subject to an actual obligation to live with their employer. Agricultural workers who come under the SAWP are not subject to such an obligation but the employers are obliged to provide free accommodation to the workers they hire. In practice, given the remote location of most farm businesses, migrant agricultural workers are essentially condemned to live on the employer's premises.

The problems created by this situation are numerous and important. For one, it is difficult for these workers to enjoy much privacy and to be free from the employer's constant supervision. Attempts by workers to discuss their work conditions or to organize are hindered by the constant presence of the employer, who may impose retaliatory measures. The line between work and free time becomes tenuous and employers may come to rely on the extension of the workers' normal working day as a normal thing. It is not surprising then that workers have reported unwarranted intrusions by the employer in the workers' living quarters, searches of the workers' personal possessions in their absence and even cases of assault.

The fact that the workers' shelter and food are directly tied to their employer significantly restrains their freedom. It hinders their capacity to exercise their rights and to complain about poor working conditions.

The workers are also isolated from the outer world. Thus, the employer can strictly control (or prohibit) the possibility for third parties to come and provide help or information. Furthermore, there have been reports of cases where employers have prohibited workers from leaving the farm, barring them access not only to the local community and church but more importantly to outside help.

### ***The threat of repatriation***

A third constraint faced by migrant agricultural workers is the threat of repatriation in case of termination. To be accepted in the SAWP or TFW (Low-Wage) program, workers must sign the standard employment contract. It must be emphasized that this employment contract is established by the Canadian and foreign authorities charged with the administration of SAWP or unilaterally by the Canadian government and the employers' representatives for the TFW-LW program. Workers are thus not in a position to negotiate anything.

Under these standard employment contracts, employers have the right to dismiss a worker for "non-compliance, refusal to work, or any other sufficient reason." In case of dismissal, the employer informs the foreign authorities, who will usually repatriate the worker in a hurry. In most cases, workers must assume the price of their ticket back home.

Neither SAWP or TFW-LW provide any mechanism to appeal a dismissal/repatriation decision. Workers thus face the threat of abusive repatriation and may be forced to leave the country without having received the wages or benefits they are due and before having had the time to launch any complaint under local laws.

A recent arbitration award which dealt with the repatriation of a migrant agricultural worker<sup>3</sup> provides a beacon of hope but also starkly illustrates the limits of the legal regime's capacity, as it currently stands, to protect the rights of migrant workers. In this case, the grievors were workers from Guatemala who worked for a Quebec employer involved in the production of tomatoes. A union was certified to represent all the workers and a collective agreement was in force (note that the next section discusses the difficulties involved in certifying unions in the agricultural sector).

The story begins with the case of an injured worker whom the employer refused to take to the hospital. One of the grievors had taken the initiative of organizing a "mini-strike" to force the employer to drive the injured worker to the hospital. All the employees except two participated in the collective action. Later, the employer dismissed the grievors upon hearing allegations that they had threatened the two workers who had not participated in the "mini-strike". The workers were then quickly repatriated to Guatemala.

The arbitrator concludes that the evidence adduced by the employer cannot sustain its decision to dismiss the grievors. The arbitrator considers that the probative value of the declarations accusing the grievors, tendered through representatives of the employers, is low, that the employer failed to carry any form of investigation

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<sup>3</sup> *Travailleurs et travailleuses unis de l'alimentation et du commerce, section locale 501 (TUAC-FTQ) et Savoura*, 2014 CanLII 76230 (QC SAT).

into the alleged facts, and that the circumstances around the alleged facts are obscure or unknown. The arbitrator thus concludes that the employer did not have sufficient cause to dismiss the grievors.

One interesting aspect of this award is that the arbitrator went beyond this analysis and also considered the union's argument that the grievors' suffered from discrimination on the basis of their ethnic or national origin and language, in contravention with the Quebec *Charter of human rights and freedoms*<sup>4</sup>. After having noted the grievors' situation of vulnerability, the arbitrator concluded that the process to which the grievors were subjected was intimately tied to their status as foreign workers. The declarations which formed the basis of the decision to dismiss them was in part based on stereotypes about the violence of Guatemalans; repatriation was carried in utmost urgency, without any assessment of alternative means; the workers were not told why they were expelled or dismissed; the workers were provided with no opportunity to seek help, in particular from their union; they were deprived of the benefits of their collective agreement, in particular the provisions regarding the imposition of disciplinary measures; the language barrier was abusively used by the employer to justify not communicating with the grievors. The arbitrator thus concludes that the grievors were discriminated upon on the basis of their ethnic or national origin and on the basis of their language and refused the employer's defence that repatriation was the act of a third party, the Guatemala consulate.

It is with respect to remedies that the situation becomes more complicated. The arbitrator found she could not compel the employer to reinstate the grievors. She notes that the grievors' employment is subject to their having a valid temporary work visa and that that maximum duration of their stay in Canada was 11 months. She further states that there is no evidence that the employer would have called the grievors back to work had they not been dismissed. The arbitrator thus leaves the parties to agree on compensatory remedies and reserves her jurisdiction on that aspect.

To further complicate matters, in February 2015, Savoura (the employer) placed itself under the protection of the *Companies' Creditors Arrangement Act*<sup>5</sup> and was later bought by another entity. As of this writing, the grievors still have not been compensated for their dismissal and subsequent repatriation.

### ***The lack of guarantee of returning the next season***

A fourth constraint associated with agricultural work is that migrant agricultural workers have no guarantee whatsoever of returning to work in the next season. Although employers have a recurring need for migrant labour, migrant workers must reapply every year in the program. Under SAWP, preference is given to those

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<sup>4</sup> CQLR, c. C-12.

<sup>5</sup> RSC 1985, c. C—36.

workers who have been expressly requested by an employer. Because of their economic dependency on the work they do abroad, migrant workers seek to be “named back” by the employer they previously worked for. The need to be named back compels workers not to complain about poor working conditions.

### ***The lack of access to permanent residence***

The fifth constraint is a major one and relates to the status of migrant agricultural workers under immigration law. Unlike other categories of migrant workers, workers coming to Canada under SAWP or TFW-LW are not admissible to become permanent residents in Canada. Their stay in Canada is limited to eight months under SAWP and 12 months under TFW-LW, upon which they must return to their home country.

This barrier to having a permanent status in Canada does not exist for other foreign temporary workers — especially in the case of skilled workers, who are favoured by the immigration system. Migrant agricultural workers are also treated differently from workers coming through the Live-in Caregiver Program, as the latter can apply for permanent residence in Canada after having completed either 3 900 hours (of which only 390 hours can be overtime) or 24 months of work.

This means these people will forever be in a situation of dependency and will never have any political voice. They are literally disposable at will.

### ***The competition between countries of origin and resulting conflicts of interest***

The role of foreign countries in the bilateral agreements underlying migrant work represents another matter of concern. One aspect of this problem is the competition between foreign countries for placement in the SAWP or to have its workers preferred generally. It must be emphasized that substantial remittances flow from the work of migrant workers abroad to the economy of their home countries. One country might thus be willing to accept substandard working or living conditions on a particular farm to gain the spot that was once occupied by another country. In fact, as part of the elaboration of SAWP, government memos have been circulated which stated that including Mexico in the program would provide farmers with leverage to counter pressures from Caribbean governments to improve wages and working conditions of their nationals.

Foreign countries, which must in theory provide support and ensure the protection of migrant workers through their consulate, are thus placed in a significant conflict of interest due to the structure of the SAWP and its reliance on bilateral agreements. But the inability of foreign countries’ consulate to adequately protect their nationals also extends to the TFW-LW, as seen in the Savoura case. In this context, consulates are reluctant to make demands to farm producers and allocate few resources to support workers who contact them for help. As an example, the Mexican consulate does not take direct calls from workers; they must leave a message and wait for the



consulate to call their farm office. It is readily apparent that such a system ensures little to no confidentiality and makes the potential interventions of the consulate subservient to the will of the farmer.

Shifts in the country of origin of migrant agricultural workers have been observed over the years. From a majority of Caribbean workers in the 1980s to a majority of Mexican workers, there is now another shift toward workers coming from Central American countries, and in particular Guatemala and Honduras. Some have argued that this shift can be explained by a search for more docile workers by farmers. It is argued that as workers become more entrenched in their jobs, they begin to demand better working conditions. Farmers then look at other sources of workers.

### ***The absence of worker representation***

Another constraint stems from the fact that, as mentioned above, there is no worker representation in the negotiation of the employment contracts that govern the work of migrant workers under SAWP, nor is there any in the negotiation of the bilateral agreements underlying SAWP as a general matter. The same is true under the other programs.

The intervening parties in SAWP are the Canadian department of Employment and Social Development (formerly the department of Human Resources and Skills Development) and representatives of the agricultural industry, who are represented in Quebec by the FERME organization, as well as representatives of the foreign countries, who negotiate the bilateral agreements with the Canadian government. The employment contracts are negotiated by representatives of the Canadian and foreign governments and FERME.

At no point are worker representatives involved in the negotiation of the employment contracts or SAWP's modalities. This lack of worker voice is echoed in the absence of any mechanism of appeal to resolve disputes and the lack of any mechanism through which workers representation would be achieved.

On the other hand, significant power is conferred to the employers (and to their representative organization FERME, in Quebec). The administration of the program has essentially been privatized and handed off to FERME, despite the fact that significant matters of public order — questions of employment and immigration policy, no less — are at issue. FERME is thus in charge of the oversight of the program (for example, inspecting the accommodation for workers), which raises issues of conflict of interest since the organization is composed solely of representatives of the employers.

### ***The barriers limiting access to social programs and protections***

A final category of constraints that migrant agricultural workers face concerns their admissibility and access to social programs and protections. In theory, migrant

agricultural workers are supposed to enjoy most of the benefits and legal protections that other workers enjoy in Quebec (they do not, however, have the right to legal aid, to the Quebec parental insurance plan and to social assistance [welfare]). In practice, however, their access to those benefits and protections are significantly hampered for a variety of reasons.

Like all other workers performing insurable employment, migrant agricultural workers contribute to the Employment Insurance program. However, migrant workers are essentially barred from obtaining employment insurance benefits during the period of seasonal unemployment associated with agricultural work. Because they cannot stay in Canada when their employment ceases and since they no longer have a valid work permit at that point, migrant workers are denied benefits under *Employment Insurance Act*<sup>6</sup>.

As for Medicare, temporary workers must wait three months before being covered in Quebec (the “délai de carence”). However, a special exemption has been negotiated for workers coming through SAWP: they can immediately benefit from Medicare as soon as they register once they arrive. In practice however, their actual access to health services is significantly constrained.

One of these constraints is the illegal retention by certain employers of official documents of the workers — Medicare card, passport, etc. In this situation, the worker depends on the employer to access medical services and is forced to alert his employer to his or her illness or injury, which might entail more dramatic problems if the employer decides to cut off the employment relationship, with the ultimate threat of repatriation, as described above.

Migrant workers also often depend on the employer to access health services because they have no other means of transportation to a medical service or do not know where they are located. This was precisely the problem which constituted the backdrop in the *Travailleurs et travailleuses unis de l'alimentation et du commerce, section locale 501 (TUAC-FTQ)* and *Savoura*<sup>7</sup> arbitration case described above. Migrant workers can also be reluctant to take the sick days they are entitled to under the Quebec labour standards legislation<sup>8</sup> in fear they might not be called back in the following season.

Access to workers' compensation is similarly difficult. While migrant workers do have access to workers' compensation like any other worker, claiming benefits proves difficult. They must first go past their basic disinclination not to alert the

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<sup>6</sup> *Employment Insurance Act*, SC 1996, c. 23. Section 37(b) of the *Act* stipulates that persons who are “not in Canada” cannot claim benefits. Section 18(1)a) of the *Act* stipulates that claimants must be “available for work”.

<sup>7</sup> 2014 CanLII 76230 (QC SAT).

<sup>8</sup> *An Act Respecting Labour Standards*, CQLR, c. N-1.1, s. 79.1.

employer to their injury. As the employers' contributions to the CSST<sup>9</sup> rise with worker claims, employers might be especially wary of workers filing claims and decide not to call them back in subsequent seasons. Furthermore, it is difficult for a migrant worker to see through the sometimes complicated and lengthy process necessary to handle a claim — especially if the work permit has expired and the worker is forced to exit Canada (unless he or she manages to get a temporary visa from the Minister of Immigration on humanitarian and compassionate grounds).

Historically, labour standards legislation did not extend to agricultural workers. Their general exclusion from the *Act Respecting Labour Standards* was only removed in 1991; the provisions of the *Act* on the minimum wage only became applicable to them in 2003<sup>10</sup>. Even today, agricultural workers remain excluded from the application of the *Act's* provision on the number of hours of the regular workweek<sup>11</sup>, which means that they are not entitled to overtime rates. As for the way in which the labour relations regime treats agricultural workers, we refer you to the next section of this text, which examines specifically this issue.

Furthermore, the same kind of difficulties applies when migrant workers seek to use complaint mechanisms to address employment or labour rights violations. Knowing their rights, using the proper procedure, having the time to go through the process, not wanting to be identified as a “problem” employee are all significant barriers. For example, in a case where a worker from Guatemala had filed a complaint alleging that he had been dismissed because he exercised a right under the labour standards legislation, the Commission des relations du travail (Labour Board) decided that the worker could not be exempted from the obligation to testify in person and refused to proceed by way of videoconference<sup>12</sup>.

In summary, the structural constraints of the SAWP described above place migrant agricultural workers in a precarious situation, makes them dependent on their employer, renders them vulnerable to situations of exploitation and leaves little possibility for them to voice their concerns and exert a degree of control on their work and life environment in the host country.

## **B) The exclusion of agricultural workers from the general labour relations regime**

### ***Certification and organization campaigns***

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<sup>9</sup> Commission de la santé et de la sécurité du travail: the governmental organization tasked with administering workers' compensation in Quebec.

<sup>10</sup> Workers assigned to non-mechanized operations relating to the picking of raspberries or strawberries are still excluded from the provisions of the *Act* on minimum wage (*Regulation Respecting Labour Standards*, CQLR c N-1.1, r 3, s. 4.1).

<sup>11</sup> *An Act Respecting Labour Standards*, s. 54(7).

<sup>12</sup> *Chamale Santizo v. Potager Riendeau inc.*, 2009 QCCRT 438.

As explained in the previous section, the considerable isolation that migrant agricultural workers face during their stay in the host country makes it difficult for them to improve their working conditions or to simply seek redress for the violations of their basic rights.

Over the years, organizations have attempted to provide assistance to migrant agricultural workers in their dealings with employers or with the administrative apparatus in Quebec and Canada. The United Farm Workers of America and the United Food and Commercial Workers unions embarked on campaigns of unionization in Canada. They had limited success, however, as the province of Ontario, where the majority of SAWP workers were, completely excluded agricultural workers from its labour relations regime<sup>13</sup>. They also lobbied the Canadian government to be able to represent the workers in the discussions revolving around SAWP, but to no avail.

In parallel, organizations not specifically orientated toward unionization were also established to provide assistance to agricultural migrant workers. In Quebec, the *Travailleurs unis de l'alimentation et du commerce* (TUAC) (Quebec branch of UFCW), in addition to the unionization campaigns they supported, invested considerable resources in this endeavour. They formed and financed the *Alliance des travailleurs agricoles*, an organization that set up support centres for agricultural workers in several localities. In 2004, the TUAC also formed and financed the *Centre d'appui aux travailleurs agricoles migrants*, an organization that provided migrant agricultural workers with information about their rights, helped them access social programs and helped them with administrative proceedings. Other groups not associated with the TUAC such as the *Coalition d'aide aux travailleurs et travailleuses agricoles* (CATTA) also organized on behalf of migrant agricultural workers.

### ***The Dunmore judgment***

In 2001, the Supreme Court of Canada released an important decision in the case *Dunmore v. Ontario (Attorney General)*<sup>14</sup> in which it began to take a more expansive view of the constitutional freedom of association (guaranteed by section 2d) of the *Canadian Charter of Rights and Freedoms*) than it did in its past jurisprudence. In that case, the Supreme Court of Canada examined the constitutionality of the exclusion of all agricultural workers in the Ontario *Labour Relations Act*<sup>15</sup>. In June 1994, Ontario had enacted legislation that extended the general labour relations regime to agricultural workers. This was short-lived, however, as the exclusion was reinstated the following year upon the election of a new, Conservative, government.

This last piece of legislation which stripped away the labour relations regime for agricultural workers was challenged in *Dunmore* on the basis that it infringed the

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<sup>13</sup> See below for a more detailed discussion of the exclusion of agricultural workers from the general labour relations regime.

<sup>14</sup> 2011 SCC 94.

<sup>15</sup> *Labour Relations Act*, 1995, S.O. 1995, c. 1.

workers' freedom of association (protected by s. 2d) of the *Charter*) and right to equality (protected by s. 15 of the *Charter*). The majority of the Court found that, but for the brief period covered by the previous legislation, there had never been an agricultural workers' union in Ontario and agricultural workers had suffered repeated attacks in their efforts to unionize. The Court found that the inability of agricultural workers to organize could be linked to state action. It thus concluded that agricultural workers in Ontario were substantially incapable of exercising their fundamental freedom to organize without access to the *Labour Relations Act's* regime.

The Court further found that the violation of the workers' freedom of association was not a reasonable limit demonstrably justified in a free and democratic society per the analysis required by section 1 of the *Charter*. It accepted that the protection of the family farm, as advanced by the attorney general, was a justification pressing enough and that there was a rational connection between the law and this objective. However, it found that the wholesale exclusion of agricultural workers from Ontario's labour relations regime did not minimally impair their right to freedom of association. It did not consider whether the exclusion violated the workers' right to equality.

The Court thus struck down the law that excluded agricultural workers from the labour relations regime. Although this had the effect of giving agricultural workers access to the whole *Labour Relations Act* regime, the Supreme Court expressly said that the legislature was not compelled to provide the workers with such a specific and complete regime. The Court stated that in order to comply with its constitutional obligations, the legislature had to provide a statutory framework that allowed for the meaningful exercise of the freedom to organize. The legislature remained free to adopt another regime for agricultural workers — and possibly a more limited regime — should it wish to do so and which indeed it did in 2002 by adopting the *Agricultural Employees Protection Act, 2002*<sup>16</sup>, which is discussed in further detail below.

### ***Union certification in Quebec***

The TUAC had managed in the early 2000's to certify a few unions, mostly in the animal production sector and in the greenhouse industry, where operations usually are not confined to a single season, as is the case in the horticultural sector.

Unlike in Ontario (and Alberta), agricultural workers in Quebec were no longer completely barred from organizing under the labour relations regime since the major reform of the Quebec *Labour Code* in 1964. However, this was subject to a very restrictive limit: section 21, paragraph 5 of the *Code* stipulated that only farms that employed three or more persons "ordinarily and continuously" could be the object of a petition to certify a union.

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<sup>16</sup> S.O. 2002, c. 16 (the "AEPA").

This restriction was interpreted by the Labour Board as a requirement that three or more employees work on the farm the whole year long and thus precluded certification in a large number, if not the vast majority, of cases at the time<sup>17</sup> — especially in the horticultural sector, where operations usually stop completely outside of the season.

In July 2008, TUAC filed to unionize the workers of Ferme L & L, a farm that produces cabbage and cauliflower as well as garden vegetable plants. Despite the fact the union had the requisite majority, it was not certified because the employer raised the exclusion based on the fact that it did not ordinarily and continuously employ three or more people, which the union acknowledged. The case was thus sent to the Labour Board for adjudication.

Before the Labour Board, the union challenged the constitutionality of the exclusion set out in s. 21, paragraph 5 of the *Labour Code* on the grounds that it violates the workers' freedom of association and right to equality. In April 2010, the Labour Board rendered its decision<sup>18</sup>: it agreed with the union that the restriction infringed the workers' freedom of association (but did not agree that it violated their right to equality), considered that s. 21, paragraph 5 of the *Labour Code* to be inoperative and consequently certified the union.

In a lengthy and well written decision, the Labour Board first reviewed the relevant jurisprudence on freedom of association — in particular the *Dunmore* judgment cited above as well as the seminal 2007 *Health Services* judgment rendered since, in which the Supreme Court of Canada reversed its own jurisprudence dating back to 1987 and affirmed that the freedom of association guaranteed by s. 2d) of the *Charter* entails the constitutional protection of the right to collective bargaining. The Board found that, in the absence of any other applicable regime, the exclusion of agricultural workers from the *Labour Code* regime deprived the workers from any mechanism that would allow them to exert meaningful influence over their working conditions. The Board found that in this particular context, the state had a responsibility with respect to the incapacity of agricultural workers — and in particular migrant agricultural workers — to exercise their freedom to associate. This conclusion was buttressed by the findings of the Board with respect to the particular vulnerability of migrant agricultural workers. In order to provide an evidentiary basis for this finding, the union had adduced an expert opinion by a professor in Social Work demonstrating how the social condition of SAWP agricultural workers influences their relationship with their employer. The employer and the attorney general refused to recognize the witness as an expert, arguing in particular that the professor's advocacy on behalf of migrant workers

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<sup>17</sup> See for example *Travailleurs et travailleuses unis de l'alimentation et du commerce, section locale 501 v. La Légumière Y. C. inc.*, 2007 QCCRT 467.

<sup>18</sup> *Travailleurs et travailleuses unis de l'alimentation et du commerce, section locale 501 v. L'Écuyer*, 2010 QCCRT 191.

showed her bias. The Labour Board dismissed this argument, noting that the professor's participation in community groups was part of her mandate as a professor and that her sympathetic views toward migrant workers could not in any way disqualify her as an expert witness.

The Board concluded that the legislative restriction considerably diminished the workers' ability to associate with a view to promoting work-related interests and that the impossibility for the workers to obtain a certification constituted substantial interference with their freedom of association.

The Labour Board also found that the infringement was not justified as a reasonable limit that can be demonstrably justified in a free and democratic society. It remarked that it could not find any evidence to support the assertion that there was a pressing and substantial objective, but proceeded anyway as if that objective was valid, but then found that there was no rational link between that objective and the restriction of section 21, paragraph 5. The attorney general had produced an expert opinion that essentially underlined the ongoing economic fragility of farm undertakings, but the report did not advance any evidence that could support a finding that unionization would have a negative impact on the farming industry. The Board also found that the restrictive measure did not minimally impair the workers' freedom of association, as the objective of protecting small or family farms could be achieved by much more restrained means. It also noted that because of the structure of farming business today, it is often the case that large farm undertakings, in which a large number of employees are working, would nonetheless come within the ambit of section 21, paragraph 5 because they stop functioning when the farming season is over.

The Labour Board's decision was upheld by the Superior Court in judicial review<sup>19</sup> and the Court exercised its broader powers to issue a general declaration of constitutional invalidity against this restrictive provision (the Labour Board, on its hand, was limited to find it inoperative in the specific context of the certification petition that was before it). However, as has become almost standard procedure in this sort of situation, the Court suspended the declaration of invalidity for a period of 12 months to allow the legislature to determine if it wanted to amend the law. The case was not appealed but yet again, as in the *Dunmore* case, the legislature ultimately *did* change the law.

### ***The legislative responses***

As mentioned above, following the Supreme Court judgment in *Dunmore*, which struck down as unconstitutional the wholesale exclusion of agricultural workers from the Ontario *Labour Relations Act*, the legislature enacted the *Agricultural Employees Protection Act, 2002* (the "AEPA"). This piece of legislation maintained the

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<sup>19</sup> *L'Écuyer v. Côté*, 2013 QCCS 973.

exclusion of agricultural workers from the *Labour Relations Act*, but enacted a separate labour relations regime for farm workers.

The *AEPA* regime is minimal. It grants farm agricultural workers the right 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 these rights.

The *AEPA* also tasked the existing Agriculture, Food and Rural Affairs Appeal Tribunal with hearing disputes about contraventions to the *AEPA*. It must be emphasized that this tribunal has no labour relations expertise and that its mandate was (and still remains essentially) to hear challenges to "orders, directions, decisions, policies or regulation made under the *Farm Products Marketing Act* and the *Milk Act*"<sup>20</sup>.

The employer's obligations under the *AEPA*, besides the prohibition on interference, coercion and discrimination, are "to give an employees' association a reasonable opportunity to make representations respecting the terms and conditions of employment<sup>21</sup>" of the workers it represents and to "listen to the representations if made orally, or read them if made in writing<sup>22</sup>". In the latter case, the employer must provide the employee's association a "written acknowledgment that [it] has read them<sup>23</sup>". Most significantly, the *AEPA* contains no provisions stating that the parties have the obligation to negotiate in good faith.

The *AEPA* was challenged on the grounds that it violated the freedom of association and the right to equality of agricultural workers protected by the *Charter*. The Ontario Superior Court dismissed the application. The Ontario Court of Appeal, in a judgment written by Chief Justice of Ontario and labour law specialist Warren Winkler, allowed the appeal and declared that the *AEPA* substantially impaired the ability of agricultural workers to meaningfully exercise the constitutionally protected right to bargain collectively. The Court of Appeal established three minimum statutory features that were required for agricultural workers to be able to meaningfully exercise their right to collective bargaining: "(1) a statutory duty to bargain in good faith; (2) statutory recognition of the principles of exclusivity and majoritarianism; and (3) a statutory mechanism for resolving bargaining impasses and disputes regarding the interpretation or administration of collective agreements"<sup>24</sup>.

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<sup>20</sup> *Ministry of Agriculture, Food and Rural Affairs Act*, RSO 1990, c M.16, s. 16(1).

<sup>21</sup> *AEPA*, s. 5(1).

<sup>22</sup> *AEPA*, s. 5(6).

<sup>23</sup> *AEPA*, s. 5(7).

<sup>24</sup> *Fraser v. Ontario (Attorney General)*, 2008 ONCA 760, at para. 80.



In a judgment containing four separate opinions, the majority of the Supreme Court (in reasons written by McLachlin C.J. and LeBel J., authors of *Health Services*) allowed the appeal and found the *AEPA* to be constitutional. It must be noted however that only one dissenting justice (Abella J.) would have upheld the Ontario Court of Appeal judgment and found the *AEPA* to be unconstitutional. One other opinion squarely argued for overturning *Health Services* (Rothstein and Charron JJ.) and another advanced a restrictive interpretation of *Health Services* which stated that the duty to negotiate in good faith was a mere *obiter* in *Health Services* and was not to be considered a component of the protection of freedom of association (Deschamps J.).

The majority judgment by McLachlin C.J. and LeBel J. rejects the checklist of items advanced by the Ontario Court of Appeal, noting that it does not comport with *Health Services*' warning that the protection of freedom of association does not require that the legislature set up a uniform model of labour relations.

While acknowledging that the *AEPA* does "not expressly refer to a requirement that the employer consider employee representations in good faith", the majority hastens to add that it does not "rule it out" either. In fact, the majority adds, such a requirement must be included "by implication". Finding that the provisions of the *AEPA* must be interpreted "as imposing a duty on agricultural employers to consider employee representations in good faith", the majority concludes that the *Act* passes constitutional muster.

In Quebec, in March 2014, that is, as the 12-month window given to the legislature in the Superior Court judgment was set to expire, the Parti Québécois government then in power announced that it would not amend the law. This meant that the provision restricting access to the unionization regime would no longer be in force. However, in June 2015, less than two months after the election of a new, Liberal, government, a bill was tabled to amend the *Labour Code*<sup>25</sup>. The bill was very closely modelled on the Ontario *AEPA*, sometimes quoting its provisions verbatim.

The Bill removed the restriction of section 21, paragraph 5 (requiring that there be three or more employees working ordinarily and continuously on a farm)... only to relocate it in a new chapter of the *Labour Code*, which established a special, minimal regime for agricultural workers. As was the case under the old version of the *Code*, farms in which three or more people work ordinarily and continuously are subject to the general labour relations regime. However, for farms that do not meet this requirement — that is, a vast number of farms, especially in the horticultural sector —, workers only have access to a minimal regime that is essentially the same as under the *AEPA*<sup>26</sup>: a right to form and join an employees' association, to participate

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<sup>25</sup> Bill 8, *An Act to amend the Labour Code with respect to certain employees of farming businesses*.

<sup>26</sup> *Labour Code*, CQLR, c. C-27, chapter V.3 ("Special provisions applicable to farming businesses")

in its activities, the right to be protected against interference, coercion and discrimination in the exercise of these rights, the right to file a complaint to a tribunal (in this case the Labour Board) about a violation of the rules of this regime; the obligation for employers to give to the association of employees a reasonable opportunity to make representations about the conditions of employment of its members, to examine and discuss the representations with the association's representatives. In an attempt to minimally comply with the *Fraser* judgment, the legislature added that "Diligence and good faith must govern the parties' conduct at all times" at the end of the provision dealing with the examination and discussion of representations<sup>27</sup>.

These changes introduced by Bill 8 were applauded by employers and justified as a necessary alignment with the Ontario regulatory scheme, decried by unions, and defended by the government as necessary "to protect the most vulnerable farm businesses"<sup>28</sup>. In September 2014, the Commission des droits de la personne published its comments on the Bill<sup>29</sup>. It concluded that by imposing a hard-to-reach condition for agricultural workers to be able to benefit from the labour relations regime available to most other employees, Bill 8 infringed the equality rights afforded by the Quebec *Charter* to a particular category of workers. The Commission stated that Bill 8 infringed their right to the full and equal exercise of their freedom of association and their right to dignity. Despite the Commission's recommendation that the Bill be withdrawn, Bill was sanctioned into law on October 22, 2014<sup>30</sup>.

It would be unfair to depict the constitutional challenges based on freedom of association as efforts deployed completely in vain. The principles recognized in the Supreme Court jurisprudence on freedom of association have a wide range of application and provide a foundation that can be built on as the case law develops. The recent judgments of the Supreme Court in *Mounted Police*<sup>31</sup> — where the Court stated that a meaningful process of collective bargaining must provide employees with a degree of choice and independence sufficient to enable them to determine their collective interests and meaningfully pursue them — and *Saskatchewan*<sup>32</sup> — where the Court again reversed its prior jurisprudence and recognized that freedom of association constitutionally protects the right to strike — are evidence that the Court is willing to continue to develop its freedom of association jurisprudence in a way that enables workers to facilitate their joining forces to collectively pursue workplace goals.

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<sup>27</sup> *Ibid.*, s. 111.30, para. 3.

<sup>28</sup> National Assembly, Hansard, 41<sup>th</sup> Legislature, 1<sup>st</sup> session, Tuesday, September 30, 2014 - Vol. 44 N° 25, comments of Labour Minister Sam Hamad.

<sup>29</sup> Commission des droits de la personne et des droits de la jeunesse, *Commentaires sur le projet de loi n° 8, Loi modifiant le code du travail à l'égard de certains salariés d'exploitations agricoles*, September 2014.

<sup>30</sup> S.Q. 2014, c. 9.

<sup>31</sup> *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1.

<sup>32</sup> *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4.

Still, in the agricultural sector in particular, the legislative responses of the Ontario and Quebec legislatures to the *Dunmore* and *L'Écuyer* judgments starkly illustrate the limits of judicial action as an instrument to advance the fight for better working conditions for agricultural migrant workers, in particular through collective representation and bargaining. They thus reveal a need for other avenues to further these goals.

### **C) Potential avenues for the future**

The *Wagner Act*, which served as a model for the Quebec *Labour Code*, sought among other objectives to end the sometimes violent conflicts that resulted from the presence of “company unions” and made it impossible for workers to engage in meaningful negotiation with the employer through a truly representative association<sup>33</sup>.

The *Wagner Act* model endorsed by the *Labour Code* has shown over time some of its limitations. Chief among those limitations is the fact that it restricts collective bargaining to a site-specific, employer-employee based context. In the recent *Mounted Police* judgment, the Supreme Court emphasized that one of the purposes of freedom of association is to protect “collective activity that enables ‘those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict’”<sup>34</sup>. The “atomization” of collective bargaining that the *Wagner Act* model enforces<sup>35</sup> significantly restricts the capacity of workers to join together “to meet on more equal terms the power and strength of” employers that the Court writes about in *Mounted Police*.

In *Mounted Police*, the Court writes:

“[58] This then is a fundamental purpose of s. 2(d) — to protect the individual from “state-enforced isolation in the pursuit of his or her ends”: *Alberta Reference*, at p. 365. The guarantee functions to protect individuals against more powerful entities. By banding together in the pursuit of common goals, individuals are able to prevent more powerful entities from thwarting their legitimate goals and desires. In this way, the guarantee of freedom of association empowers vulnerable groups and helps them work to right imbalances in society. It protects marginalized groups and makes possible a more equal society.”

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<sup>33</sup> Laurence Léa Fontaine and Cécile Liénart, *75<sup>e</sup> anniversaire du Wagner Act: Où en sont les rapports collectifs du travail au Québec?* (Cowansville : Éditions Yvon Blais, 2013), 4.

<sup>34</sup> *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, para. 54.

<sup>35</sup> *Supra* note 33, 5.

One would be hard-pressed to conclude that the *Wagner Act* model has allowed for these lofty goals to be reached (or even pursued) for certain categories of workers. As we have seen, in the case of agricultural migrant workers in Quebec, the general labour relations regime is not even accessible to a vast number of them.

Clearly, then, other avenues must be explored to “right imbalances” in the workplace. One possible way to achieve better working conditions for migrant agricultural workers is to enforce them through legislation setting out minimal conditions. Of course, the obvious caveat associated with such an approach is that it requires a government that is amenable to legislate in such a manner. There is one example in recent Quebec history in which a campaign was successfully waged to improve the working conditions of non-unionized workers through legislative action with respect to minimal standards of work.

In the early 2000s, community organization Au bas de l'échelle (ABE) waged such a campaign to reform the *Act Respecting Labour Standards (ALS)*<sup>36</sup>. After an extensive process of consultation (including with trade unions) and documentation, ABE produced a report calling for a major reform of the *ALS*<sup>37</sup>. The report was sent to a thousand organizations and all members of the legislative assembly.

Several of the demands tracked the concerns of “non-standard” and non-unionized workers. By seizing a favourable political opportunity — that is, a government that was open to the idea of reforming the *Act* — and by building a broad social consensus, ABE managed to have several of their demands move forward through the political process and ultimately succeeded in enshrining a number of them in the amended law.

Among other things, the 2002 reform of the *ALS* featured: a reduction from three to two years of the period of uninterrupted service required to be able to challenge an unjust dismissal<sup>38</sup>; the introduction of the right to a workplace free from psychological harassment<sup>39</sup>; the introduction of several holidays to facilitate work-life balance (right to leave work for reasons of sickness or accident extended from 17 to 26 weeks per year<sup>40</sup>; right to 10 days per year to fulfil obligations relating to the care, health or education of the employee's child<sup>41</sup>; right to 12 weeks of leave in case of serious illness or accident of a family member<sup>42</sup>; ); the extension of the law's

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<sup>36</sup> For an account of this campaign, see: Esther Paquet and Carole Henry, « La représentation collective des travailleuses et des travailleurs non syndiqués: le rôle d'Au bas de l'échelle » in *75<sup>e</sup> anniversaire du Wagner Act: Où en sont les rapports collectifs du travail au Québec?* (Cowansville : Éditions Yvon Blais, 2013), 37.

<sup>37</sup> Esther Paquet, *Une réforme en profondeur : c'est l'heure !*, Au bas de l'échelle, 2000.

<sup>38</sup> *An Act Respecting Labour Standards*, CQLR, c. N-1.1, s. 124.

<sup>39</sup> *Ibid.*, s. 81.19.

<sup>40</sup> *Ibid.*, s. 79.1.

<sup>41</sup> *Ibid.*, s. 79.7.

<sup>42</sup> *Ibid.*, s. 79.8.

scope of application to domestic workers, caregivers and agricultural workers (in the latter case, the application of the minimum wage provisions to their work); the right to refuse to do overtime work after a certain threshold (more than four hours after regular daily working hours or more than 14 working hours per 24 hour period, whichever period is the shortest or, for an employee whose daily working hours are flexible or non-continuous, more than 12 working hours per 24 hour period)<sup>43</sup>.

On the collective bargaining front, inroads have been few and far between. Progress has been hindered by statutory bars (the wholesale exclusion in Ontario) or restrictions (requirement of three or more workers ordinarily or continuously employed) preventing agricultural workers from accessing the general labour relations regime, by the general inadequacies of the *Wagner Act* outlined above, or because of the barebones nature of the special labour relations regime for agricultural workers introduced in Ontario (the *AEPA*) and Quebec (chapter V.3 of the *Labour Code*), which has not allowed for meaningful negotiations resulting in binding agreements on working conditions.

With respect to agricultural workers — and in particular agricultural migrant workers —, the labour relations regime currently in place do not allow for an equalization of power in line with what the Supreme Court alludes to in the *Mounted Police* and *Saskatchewan* judgments. In order to get closer to a more level playing field, it appears that one of the few plausible solutions would be to put in place a regime based on sectorial, regional or even provincial negotiation. Of course, the same caveat as in the case of labour standards reform would unavoidably apply with respect to labour relations reform in the agricultural sector. To be successful, any campaign along these lines would need to mount a broad consensus, implicate unions, community organizations and the civil society in general, and try to seize the most politically favourable circumstances possible. On this last front, the fact that migrant workers are unable to vote is a particularly glaring weakness.

One factor that could work in favour of the implantation of such a model in the agricultural sector in Quebec is that agricultural *production* is already regulated along sectorial, territorial and provincial lines.

Under the *Farm Producers Act*, producers may join a union of their choice and those unions may regroup in a federation. These unions and federations can be either specialized — meaning they are only composed of members engaged in the same form of production — or not. However, the entity to which are conferred special powers under the *Act* is the certified association, which takes the form of a confederation of unions and federations. The Régie des marchés agricoles et alimentaires du Québec is tasked with verifying that the association that seeks certification represents a majority of the producers; it may conduct this

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<sup>43</sup> *Ibid.*, s. 59.0.1.

investigation in such manner as it considers appropriate<sup>44</sup>. Certification of an association confers it a monopoly of representation of all producers with public authorities<sup>45</sup>.

Regulation of farm production and marketing is carried out under another Act<sup>46</sup>. It uses the mechanism of the “joint plan” to impose on all producers of a given sector the same conditions. Under this Act, at least 10 producers may transmit to the Régie a draft joint plan establishing conditions for the production and marketing of an agricultural product<sup>47</sup>; an association of producers may also submit such a plan for the marketing of an agricultural product<sup>48</sup>. The joint plan is submitted to a referendum and can only enter into force if it is approved by at least two-thirds of the producers having voted<sup>49</sup>. A producer marketing board administers the plan<sup>50</sup>. This marketing board is the negotiating agent for the producers and the sales agent for the product marketed under the plan<sup>51</sup>. It sets out in by-laws the conditions of production, marketing and joint offer for sale of the product subject to the plan<sup>52</sup>. The Régie can request, however, that a marketing board negotiate those conditions with a certified association or with a person interested in the marketing of a product subject to the plan<sup>53</sup>. Every person or partnership engaged in the marketing of a product marketed under a plan must negotiate with the board or its negotiating agent all terms and conditions relating to the production and marketing of the product<sup>54</sup>.

In summary, the regulation of agricultural production is already carried out along sectorial lines (by enforcing a joint plans in a given sector) or on a provincial level (designation of an exclusive representative agent for all producers in their relation with public authorities). It would only seem fair that agricultural *workers* be afforded a similarly collective means of negotiation and representation, along sectorial, regional or provincial lines, such that they may “meet on more equal terms the power and strength of” farm producers.

Another asset for labour relations reform in Quebec’s case is that the province already has experience with a variety of “parallel” labour relations models that rely on sectorial, regional or provincial negotiation.

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<sup>44</sup> Farm Producers Act, CQLR, c. P-28, s. 7.

<sup>45</sup> *Ibid.*, s. 8, para. 2 and s. 19(b).

<sup>46</sup> *An Act Respecting the Marketing of Agricultural, Food and Fish Products*, CQLR, c. M-35.1.

<sup>47</sup> *Ibid.*, s. 45.

<sup>48</sup> *Ibid.*, s. 46.

<sup>49</sup> *Ibid.*, s. 55.

<sup>50</sup> *Ibid.*, s. 64.

<sup>51</sup> *Ibid.*, s. 65.

<sup>52</sup> *Ibid.*, s. 92, 93, 97, 98, 100.

<sup>53</sup> *Ibid.*, s. 33.

<sup>54</sup> *Ibid.*, s. 112 ff.

For instance, the regime established for performing, recording and film artists is sector-based. Under the *Act Respecting the Professional Status and Conditions of Engagement of Performing, Recording and Film Artists*, the Labour Board is tasked with determining whether artists' association have the requisite representativeness in the negotiation sector in which they seek to operate. A wide margin of discretion is conferred to the Labour Board as to how it will determine the representativeness of the artists' association. It may proceed in any way it deems appropriate, including by way of referendum<sup>55</sup>. The Board is also entrusted with defining negotiating sectors and fields of activity in respect of which recognition may be granted<sup>56</sup>.

Recognition as an artists' association entails a number of rights and powers for the association, chief among them is the right to negotiate a "group agreement" which establishes the minimum working conditions of artists<sup>57</sup>. It is to be noted that individual contracts are concluded between artists and producers, but they cannot go below the minimum conditions set out in the negotiated group agreement. The group agreement binds the producer and every artist belonging to the negotiating sector who is engaged by the producer<sup>58</sup>.

Another regime in force in Quebec is that established by the *Act Respecting Collective Agreement Decrees*<sup>59</sup>, whose first version was adopted in 1934 under the inspiration of European models. This regime still requires an initial collective agreement as defined under the *Labour Code* negotiated by a certified union and an employer. Subsequently, a party to the agreement may ask the government to extend by decree the scope of this agreement on a territorial (for example, the Montreal area) or professional basis (for example, waste collection)<sup>60</sup>. Employees and employers covered by the scope of the decree are then bound by the working conditions set out therein. The regime of collective agreement decrees also provides for the establishment of a "parity committee" composed of an equal number of union and management representatives.<sup>61</sup> This committee is in charge of overseeing compliance with the decree. It is funded by a levy on the payroll of employers covered by the decree and has investigatory powers.

Two main objectives were pursued in establishing the collective agreement decrees regime: increasing unions' bargaining power by extending their reach beyond the workers they represent directly and avoiding the difficulties arising out of competition between different companies in a given industry. Recourse to the *Act Respecting Collective Agreement Decrees* has significantly dwindled over time,

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<sup>55</sup> *Act Respecting the Professional Status and Conditions of Engagement of Performing, Recording and Film Artists*, CQLR, c. S-32.1, s. 9(2), 16 & 18.

<sup>56</sup> *Ibid.*, s. 57.

<sup>57</sup> *Ibid.*, s. 24(7).

<sup>58</sup> *Ibid.*, s. 40.

<sup>59</sup> CQLR, c. D-2.

<sup>60</sup> *Ibid.*, s. 2.

<sup>61</sup> *Ibid.*, s. 16 ff.

however, particularly because of the establishment of a special regime in the construction industry. To reinvigorate this scheme and to reduce barriers to its use, some authors have proposed to eliminate the requirement that there already be a collective agreement formally entered into under the *Labour Code* and to adopt rules to determine union representation that are more flexible than the *Labour Code* rules on certification.

There are a number of other parallel labour relations regimes in which sectorial or provincial representation is used: such is the case for public servants<sup>62</sup>, construction industry employees<sup>63</sup>, provincial police officers<sup>64</sup>, prosecuting attorneys<sup>65</sup>, childcare service providers<sup>66</sup>. Furthermore, in the public and parapublic sector, collective bargaining is conducted at the sectorial and provincial level<sup>67</sup>.

The existence of these various parallel regimes prove that there are manageable ways to establish a labour relations regime based on sectorial, regional or provincial representation and negotiation. Such a regime would likely improve significantly the ability of agricultural workers — and migrant agricultural workers in particular, as they form a group whose voice is in even greater need of amplification — to join together and multiply their power.

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<sup>62</sup> Legislative certification and certification by governmental decree, depending on the category of employees: see sections 64 and 66 of the *Public Service Act*, CQLR, c. F-3.1.1.

<sup>63</sup> *Act Respecting Labour Relations, Vocational Training and Workforce Management in the Construction Industry*, CQLR, c. R-20, s. 28 ff.

<sup>64</sup> *Act Respecting the Syndical Plan of the Sûreté du Québec*, CQLR, c. R-14, s. 2 ff.

<sup>65</sup> *Act Respecting the Process for Determining the Remuneration of Criminal and Penal Prosecuting Attorneys and Respecting their Collective Bargaining Plan*, CQLR, c. P-27.1, s. 10 ff.

<sup>66</sup> Territory-based recognition : see s. 3 of *An Act Respecting the Representation of Certain Home Childcare Providers and the Negotiation Process for their Group Agreements*, CQLR c R-24.0.1.

<sup>67</sup> See *Labour Code*, CQLR, c. C-27, s. 111.1 to 111.22 and the *Act Respecting the Process of Negotiation of the Collective Agreements in the Public and Parapublic Sectors*, CQLR c R-8.2.



## The Call for a Temporary Foreign Worker National Advocacy Coalition

Lynne Fernandez, Errol Black Chair in Labour Issues, Canadian Centre for Policy Alternatives, Manitoba.

There are an estimated 230 million migrant workers (ILO 2014a) now circulating around the world, leaving desperate situations in their homelands to work in countries hungry to exploit their labour power. These workers constitute an important plank in the scaffolding of free trade and globalization; on one hand they keep national wage bills down by accepting pay and conditions that nationals can refuse, thereby keeping prices artificially low. Receiving countries also benefit by extracting necessary labour from migrants while not having to invest in their education and social safety net expenses (such as unemployment insurance, education and public pensions). The illegal status of many (in the US, for example) and the restrictive nature of Canada's Temporary Foreign Worker Program regarding citizenship application makes immigration difficult to impossible - depending on which stream of the program the worker enters the country. As a result, these workers are ineligible for the same level of benefits and protections enjoyed by citizens, and remain in the shadows of our society (Hennebry 2012). On the other hand, internationally migrants send between US\$436 - \$550 billion dollars in remittances every year to their families (ILO 2014b), considerably boosting the GDP of impoverished countries. But trapped as they are in a global trade system that promotes an international division of labour, the increase in GDP is not enough to allow these countries to develop their own economies and create jobs domestically (Petras and Veltmeyer 2001: 16).

Migrant workers leave their homelands to work in the Middle East, European Union and North America. Conditions in Canada, although often not as dire as in other receiving countries, fall far below what Canadian workers would endure (Preibisch, 2004; Read, Zell and Fernandez, 2013; UFCW, 2011; Trumper and Wong 2007; Walia, 2010). There are many advocacy groups across Canada dedicated to improving the lives of migrant workers. This paper will take an in-depth look at one such advocacy group working in Manitoba. It will explain how it has been able to make some changes to help workers and how it is evolving to continue the work. It will be argued that as important as this work is, meaningful change will require national and international connections between advocacy groups, NGOs, the union movement and progressive governments.

### **Manitoba's Migrant Workers Solidarity Network**

Manitoba receives approximately 400 mostly Mexican men every year under the Seasonal Agricultural Workers Program (SAWP)<sup>1</sup>. These workers came to public attention when in June 2007 the Manitoba Labour Board upheld their desire to join UFCW Local 832. Unfortunately the bargaining unit was decertified two years later. Although presented in the press as the unanimous decision of the workers (Santin 2009, A7), insiders had concerns with how pressure from The Mexican Consulate and some employers influenced the workers' decision (DeGroot and Mejicanos 2009). Furthermore, as noted by Santin, the collective agreement granted workers the right to receive overtime pay if they worked more than 70 hours a week, so employers simply

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<sup>1</sup> The Seasonal Agricultural Workers Program (SAWP) – a stream of Canada's burgeoning Temporary Worker Program (TWP) allows Manitoba farmers access to a large pool of foreign workers willing to leave their families to labour long hours for modest pay.

capped hours at 70 to avoid paying overtime. Because they come to Canada to work as many hours as possible – with or without overtime – capping the amount of hours they could work was a blow to the workers. The loss of certification, combined with the worrisome stories being collected by local advocates provided the impetus for the formation of a group to advocate on the workers' behalf.

This group first met in June 2009, and consisted of people from the labour movement, local Latino community, faith groups and academia. Eventually calling itself the Migrant Workers Solidarity Network (MWSN), the group soon agreed upon a short-term and long-term strategy. In the short-term, it decided to undertake a campaign of public education so consumers would understand who was harvesting their produce and how they were being treated. It also decided to meet with relevant provincial ministers to push the province towards adopting more progressive legislation and enforcing employment standards<sup>2</sup>.

Long-term goals included advocating for stronger protection for those who wanted to unionize; better monitoring of working conditions; convincing the government to grant provincial healthcare coverage to the workers as soon as they arrived<sup>3</sup>; advocating for better access to benefits; improving working conditions; and, pushing the federal government to provide a pathway to immigration.

Soon after the initial meeting, the group decided to conduct research and produce information pieces for the Manitoba branch of the Canadian Centre for Policy

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<sup>2</sup> Having an NDP government made this task possible. Many in the group had interacted with Ministers in the past and were well-known to them. It was generally acknowledged that an NDP government shared progressive values whether or not they acted upon them and that our role was to pressure it to stick to those values.

<sup>3</sup> At the time workers had to purchase private healthcare coverage from the Royal Bank of Canada.

Alternatives (CCPA MB). Having access to a research institute that could produce and circulate reports and fact sheets to a wide audience made it easier to educate and put pressure on the provincial government. It also allowed it to focus on one of its goals: pushing for provincial healthcare coverage for the workers.

### **The Healthcare Campaign**

The MWSN adopted the strategy used by a couple of other local advocacy groups in Winnipeg: Right to Housing (R2H) and Make Poverty History Manitoba (MPHM). Both these groups participate in community coalitions to determine issues of concern, then use CCPA MB. to facilitate and disseminate research with policy recommendations agreed upon by the community. A variety of community and advocacy groups then used the research for editorials in the media, public education and to lobby the government for change. Both groups realized considerable success on a few fronts (Bernas and MacKinnon 2015).

The conditions under which migrant agricultural workers operate made it impossible to do extensive consultations, but we had been able to talk to some and knew that the private healthcare coverage they had was not working well for many. Network members also considered it unjust that the workers paid taxes but were not allowed access to the public healthcare system. As was the case with R2H and MPHM, the group honed in on one simple, clear 'ask' and undertook a campaign to pressure the government to take action.

Although the Network wasn't part of a community coalition per se, it did have the support of the local labour community. Nationally and locally, UFCW had been working

for years to improve conditions of migrant farm workers. Manitoba is one of the provinces where farm workers can organize, and the certification of a group of migrant workers by UFCW 832 had been met with great enthusiasm in the labour community. Despite a relatively supportive labour environment under an NDP government, the pressure the workers faced to decertify and the ongoing inaccessibility of farm workers ended up frustrating the UFCW's ability to represent these workers. Lack of resources had also forced the union to close its Agricultural Workers Resource Centre in Portage la Prairie, so UFCW Local 832 was happy to work with MWSN in its advocacy work. It pledged resources to translate an information pamphlet explaining the workers' rights and how they could access information about employment standards and workplace health and safety. Also included was a phone number for the MWSN so workers could phone members with questions or concerns.

The MWSN launched its healthcare campaign with a CCPA MB. "Fast Facts" explaining how and why the farm workers were here, the conditions under which they worked, and a plea to grant the workers access to the provincial healthcare system (DeGroot and Mejicanos 2009). This Fast Facts was distributed widely through the CCPA network (which includes many elected officials and bureaucrats) and at local community events. MWSN members were invited to speak at local conferences and university classes about their advocacy. Another Fast Facts followed which concentrated on the healthcare issue and pointed out that the NDP had unanimously passed a resolution to grant migrant workers access to healthcare at its recent convention (Fernandez 2010). The Manitoba Federation of Labour (MFL), of which the UFCW is an affiliate, was also applying pressure on the government to open the healthcare system to the workers.

UFCW pledged more money to the MWSN so it could print postcards urging the government to grant the workers access to healthcare benefits. The MWSN distributed the postcards to the public who was asked to complete, sign and mail it to the provincial legislature. Anecdotally the Network heard that the Premier's office received hundreds of cards.

In 2011 the MWSN then decided to do a larger report and it set about looking for funds to pay one of the members to interview workers, transcribe the interviews and place the results in a political-economy context and conclude with policy recommendations. A local United Church provided funds for the project. Most of the group's (initial) interaction with the workers had been through one member who is affiliated with a church group that organizes Spanish language religious services for the workers. This individual is able to listen to their concerns on a variety of issues. Other members met (and still meet) with workers during their weekly trips into Winnipeg and Portage la Prairie for banking and shopping. The primary MWSN researcher, along with one other member, also travelled to Portage la Prairie to interact with workers who came to town to shop and use the laundromat. For obvious reasons it was (and is) impossible to meet workers on the farms.

It proved difficult for the primary researcher to establish a relationship with the workers as their schedules were erratic and she wasn't always able to talk to the same ones. At first they were hesitant to talk to '*una gringa*', so she needed to build a trusting relationship with them. Compounding the situation was an unusually difficult growing season overcome with serious flooding. Nonetheless, she was able to establish a relationship with 8 workers, and conducted in-depth interviews with them.

The interviews, plus a literature review and policy recommendations culminated in a report (*Migrant Voices: Stories of Agricultural Migrant Workers in Manitoba*) that was released in May 2013 (Read, Zell and Fernandez 2013). The group organized a public release of the report on the steps of the provincial legislature. A press release was circulated, invitations were sent and members of the local Latino community read moving quotes taken from the report. The three co-authors then presented the results of the report.

The launch received a fair amount of media attention, partly because the Minister of Immigration and Multiculturalism made it known she was going to join members at the launch to make an important announcement. The Minister, Christine Melnick, announced that the NDP was granting healthcare coverage to migrant workers. The combined efforts of the labour movement and the research and public advocacy work of the MWSN had finally paid off. But this victory was not the only success the MWSN enjoyed; it had also played a part in ensuring proper payment for some of the workers who complained of irregularities in their pay.

Some workers complained to MWSN members of being paid less than minimum wage through the piece rate system of payment. Others complained of having wages held back. The MWSN was able to arrange a meeting with the head of the province's special investigations unit for employers of temporary foreign workers. The information the group provided alerted the unit to specific problems that, when investigated, were fixed (Friesen 2014). The province's *Worker Recruitment and Protection Act* (WRAPA) has allowed it to investigate and remedy these and other irregularities with a variety of TFWs. WRAPA will be discussed in greater detail later in this paper.

## Still Going Strong

Boyed by the success of the healthcare campaign and the successful interventions of the special investigations unit, the MWSN continues working on behalf of agricultural workers. The media coverage of the report's launch caught the attention of people who have become members of the network and are interested in teaching English to the workers<sup>4</sup>. A couple of the farms have agreed to facilitate the English lessons and members have planned lessons, gathered materials and driven to these farms on several occasions to deliver classes. The network also began working more closely with the local branch of *Migrante* in an attempt to forge a more unified voice for all TFWs. Closer affiliation with *Migrante* has allowed the network to take preliminary steps in working on the issue of demanding a pathway to citizenship for all TFWs (Zell and Marcelino 2015). It is also communicating with national coalitions and participating in national forums to share information and strategies to help migrant workers access permanent residency.

At the same time as the group engages with other advocacy groups, it continues to educate the public about issues affecting migrant workers. For two years running it has held an Immigration Quiz at Winnipeg's Canada Day celebrations. The quiz asks people if their family members who initially immigrated to Canada would qualify for entry today. Many who take the quiz are shocked to find out that their ancestors would not be welcome in Canada. The group had a total of 20 prominent Manitobans (including

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<sup>4</sup> One of the recommendations in *Migrant Voices* is that governments need to help those workers who want to learn more English: our interviews revealed that workers, already isolated from Canadian society by their working/living conditions, wanted to be able to communicate with Canadians when they did have the chance to interact with them.



former Premier and Governor General Ed Schreyer) take the challenge. In every case, their ancestors would not have been allowed to immigrate to Canada under current Canadian immigration regulations (CCPA MB. 2014). The media has reported both years on the Canada Challenge, but as useful as these exercises are in educating the public, much more will have to be done before citizenship restrictions are improved. This clearly presents a much greater challenge that requires a broad-based, national effort.

### **The Limits of Political Will**

This account of the MWSN's activities shows how a dedicated group of advocates, with the support of local labour, can make concrete changes in migrant workers' lives. But we must acknowledge that central to the group's success is the relatively labour-friendly NDP government which has been in power for over 15 years in Manitoba.

In some ways the healthcare 'ask' was an easy one for the sitting government. Not only had the MFL been pushing for it, but the NDP party itself had unanimously passed a resolution at convention to grant the workers access. The small number of workers made granting them healthcare privileges affordable and allowed the government to appease many of its base supporters who had been critical of its failure to help exploited workers. The MWSN's public-education campaign likely made it harder for the opposition Conservatives to criticize the change; in fact there was no political push back at all. In short, granting healthcare coverage to these workers presented the NDP government with a win-win situation. It also allowed it to confirm its growing reputation

as a more worker-friendly government – a reputation flowing from *The Worker Recruitment and Protection Act (WRAPA)* passed in 2009.

The *WRAPA* has been held as an example of best practice in protecting migrant workers from recruiters and exploitive working conditions. It provides three layers of protection: Firstly, it creates a provincial registry of all TFW (not just seasonal agricultural workers) employers in the province so that Employment Standards knows where they are. Secondly, it has built-in mechanisms to prevent exploitation by recruiters<sup>5</sup>. Thirdly, its proactive structure allows for the formal collection of data about the workers' living and working conditions and pay, as well as any expenses claimed by the employer. The Act also gives the Director and a Special Investigations Team the ability to undertake proactive investigations of workplaces and employers' records (Fernandez 2015a). It was the power granted to the Special Investigations Team that allowed the Director to act on the workers' complaints to the MWSN about pay irregularities.

In 2013, the conservative Saskatchewan Party passed similar legislation in response to the growing evidence of abuse of TFWs (Stevens 2014). Saskatchewan's *Foreign Worker Recruitment and Immigration Services Act*, like Manitoba's *WRAPA*, protects workers from unscrupulous recruiters and empowers the government to investigate workplaces (Government of Saskatchewan website). Encouraging as it is that governments are strengthening legislation to protect workers, advocates must maintain a wary attitude towards such concessions. They must not mistake the political will to

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<sup>5</sup> Although the way the SAWP operates means that workers who come in under this program are not open to exploitation from recruiters, they are still highly exploitable once they arrive. The *WRAPA* affords them protection while in Manitoba.

stem blatant and well publicized abuses (Tomlinson 2013) for a desire to meaningfully change or dismantle the TFWP. After all, the program is doing what it is supposed to do: provide a pool of highly vulnerable workers to work in an exploitive, secondary labour market.

Even in relatively labour-friendly Manitoba, extra-provincial forces make it difficult for the government to navigate the TFWP. Crafted and managed as it is by the federal government, the ability to improve the program - such as making it easier for migrants to become landed immigrants – lies largely outside the purview of the provinces<sup>6</sup>. The globalized division of labour and intense price competition kept in place by increasingly corporate-friendly free trade agreements forces local producers to lobby government to maintain exploitive work conditions. In a 2006 letter obtained by the MWSN, the Vegetable Growers' Association of Manitoba lobbies the Employment Standards Code Review to maintain the status quo for migrant workers:

All of the current produce buying operations are actively competing with each other and all are aggressively trying to prepare themselves for Wal-Mart's entry into the market. [. . .] much of the means of competition has been funded by continuously lowering the price paid to the farmers that supply them. [. . .]. The buyers are sourcing more and more of their produce from Mexico where the labour and environmental laws are very different from Canada's. Many workers make \$5 per day with no benefits of any kind.

China is also entering the market [. . .]. Labour there is \$1 per day and there are no environmental laws.

Having described the situation vegetable producers are facing, the letter then goes on to explain how government makes things worse:

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<sup>6</sup> Although Manitoba has been able to use the Provincial Nominee Program to allow some TFWs to apply for citizenship (CBC News 2010), that avenue has largely been used for hog processing workers; SAWP workers remain without a means to immigrate.

[. . .], an even bigger problem has been (sic) the influence of government policies on our cost of production. Food safety, environmental and labour policy costs have been borne (sic) by the grower. These policies have affected our land costs, energy costs [. . .], material costs [. . .], municipal and school tax costs, labour costs (increasing minimum wages), CCP, EI, workplace safety and health etc.

The final conclusion of the producers is that:

[i]f the government decided that it must change agriculture from its present exemption<sup>7</sup>, we feel that we would need a societally supported price structure that would give farmers the cost of production plus a profit.

This letter leaves no doubt as to employers' desire to restrict migrant workers' rights.

Placed as they are in a global supply stream, they have little choice but to bend to competitive pressure of suppliers on one hand and consumers on the other. The producers do not explain how a "societally supported price structure" would be determined or implemented. Ironically government 'influence' would likely be required.

## **Political Realities**

When members of the MWSN leave the Labour Minister's office, there is a good chance that producers from the Vegetable Growers' Association take their place at the Minister's table. One Minister told members from the MWSN that the 'Wal-Martization' of the food industry was making it increasingly difficult for the government to respond to our concerns, no matter how much it wanted to. Maybe if consumers realized the high cost of low prices they would be willing to pay more for produce, but a common response group members hear is that despite the hardships TFWs face, "they're better

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<sup>7</sup> Manitoba granted farm workers the right to organize in 2007, so it's not clear what exemption is referred to; it could refer to other exemptions from Employment Standards, such as limits on hours worked, or not having to pay overtime.

off working here than in their own countries, so what are they complaining about?" Or, "if things are so bad here, why don't they just stay home?"

Clearly, looking for a way to increase prices to benefit workers is not a campaign the provincial government is going to engage in. After all, the hundreds of thousands of people who consume produce can vote; the workers who harvest produce cannot. The same can be said of all TFWs: without the ability to vote they will never, on their own, be on the political radar screen.

### **Labour Market Realities**

As mentioned earlier, the TFW program is doing what it is supposed to do: maintain a large pool of highly-exploitable workers within a globally divided labour market. This new arrangement doesn't just affect the Canadian economy; it has a profound effect on the communities where the migrant workers come from. The dislocation of parents from children, the separation of husbands from wives - and wives from husbands - places tremendous emotional strain on families and creates new gender dynamics between spouses (Cordero Díaz 2004). But stakes are high for countries like Mexico that receive hundreds of billions of dollars in remittances. Such injections of cash no doubt help maintain a certain level of economic and political stability in otherwise troubled communities (Acosta Uribe et al 2012), so it is no wonder that they are willing participants in the program.

At the same time, the Canadian economy can now be said to have a dual labour market with TFWs making up a large, permanent pool of workers in many industries (Foster 2012; Hennebry 2012). Seasonal agricultural workers, who have been coming in

increasing numbers since the 1960s, have clearly become a permanent feature of the agricultural sector. Ostensibly designed to fill temporary shortages of workers, Hennebry's research shows that 22 per cent of SAWP workers had returned to work in Ontario for more than 10 years; many had been returning for close to 25 years (2012, 13). The same research found that at least half the worker surveyed said that they would be interested in permanent residency in Canada (13).

Guest worker programs such as Canada's TFWP inevitably become larger and last longer than they were intended to, partly because employers become dependent upon having access to such workers. Indeed, employers will eventually tailor their workplaces and practices on the assumption that TFWs will remain a permanent component of their business (Martin 2010; Ruhs 2002. Cited in Foster 2012, 23) and will lobby energetically to keep migrant workers flowing into the country (CBC News August 14, 2015). Further proof that TFWs are an important part of Canada's labour market is the fact that their numbers did not decrease substantially during the 2008-09 Great Recession, despite the spike in the unemployment rate (Foster 2012, 30). It remains to be seen how the collapse of the price of oil will affect the labour market in Alberta and Saskatchewan where the TFWP was growing faster than in the rest of the country (Stevens 2014).

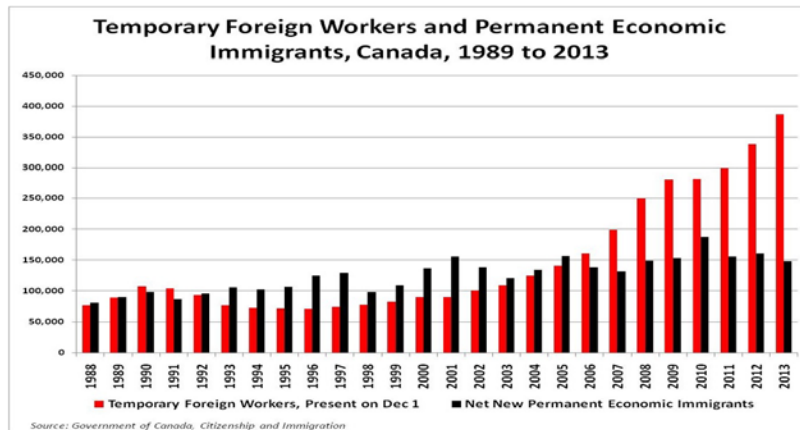
### **The Future of Advocacy**

Global political and economic forces shape the realities that progressive governments, the labour movement and advocacy groups are up against. The task at hand can often seem overwhelming and the obstacles insurmountable, especially in light of the weakening of the labour movement over the past 40 years. The National Union of Public

Government Employees (NUPGE) reports that no fewer than 204 regressive labour laws were passed in Canada between 1982 and 2013 (Fernandez 2015b).

Nonetheless, the MWSN's work shows that small changes are possible, and legislation such as *WRAPA* at least provides the maximum protection possible within the existing system (Fernandez 2015a). The fact that more conservative governments, such as the one in Saskatchewan, have adopted similar legislation is helpful, and provides hope that the newly elected NDP government in Alberta will make a similar move. But advocates must not allow these victories to make them complacent. The goal must remain to affect political change that will restore Canada's immigration system to one that welcomes workers as citizens. Advocates must continue acting locally to improve the conditions of TFWs, but they have to think nationally in order to take on the larger task of reforming immigration so that those trapped in the TFWP can open the door to permanent settlement.

This topic will become more urgent as our labour market shrinks and Canada's dependency ratio increases (the percentage of the population under 15 years of age or older than 64). When asked by Macleans magazine what she thought was the most important graph depicting the Canadian economy, CCPA senior economist Armine Yalnizyan presented this graph to show how the ratio of temporary workers to permanent economic immigrants is changing:



Her words about the trend this graph depicts are poignant:

Migrant workers can plug labour shortages and help the economy grow, but distribution of the gains from growth will become ever more lopsided. This is a radically new policy thrust in Canada, one that dramatically shifts bargaining power away from workers, reduces opportunity, and increases inequality by design. It redefines the future of Canada, a nation built by immigrants who had a stake in how their families helped define communities, markets and politics. It cheapens us all to view migrant labour as the fix to growing labour shortages: good enough to work here, but not good enough to stay and build their lives....and ours (CCPA 2015).

It is clearly time for a national discussion about TFWs, whether they be low-wage temporary workers now subject to the new 'four and four' rule (Zell and Marcelino 2015), or SAWP workers who have no possibility of applying for permanent residency. Even those Canadians who see no problem with the difficult conditions TFWs face agree that there should be a fair and accessible process for workers to apply for landed immigrant status. Most settler Canadians know the story of their own families' journey to this country, and want to see today's migrants/immigrants treated with at least the same degree of fairness.

Disparate advocacy groups across the country – such as the MWSN - need to join forces with each other and the labour movement to strategize around a comprehensive



and targeted campaign. A couple of fledgling national groups already exist: Migrant Workers Alliance for Change has already brought UFCW, UNIFOR, Kairos and Ontario advocacy groups under one tent and is reaching out nationally, and the Canadian Council of Refugees is also working on the rights of migrant workers from a national perspective. Bringing in more groups from across the country and agreeing on how to proceed will be a lot of work, but these steps must be taken if we want to ramp advocacy up to tackle bigger issues.

It may seem too simplistic to extrapolate smaller-scale experiences onto a larger stage, but looking at the MWSN's model might provide some guidance. Building a national coalition, agreeing on a simple but compelling 'ask', and launching a multi-pronged, national campaign – with many voices delivering the same clear message - could at least begin a conversation in Canada about what kind of a society we want to build.

Even if the political stars are not presently aligned for such action, they can be shifted one by one. There is much a national advocacy coalition could do to push the issue into the fore so that when political fortunes do shift, the public is already onside. One thing is certain: change will not happen without such an effort.

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I found this statement recently:

Mr. Speaker, I rise today to formally turn the page on an unfortunate period in Canada's past.

One during which a group of people - who only sought to build a better life - was repeatedly and deliberately singled out for unjust treatment ..... these immigrants made the difficult decision to leave their families behind in order to pursue opportunities in a country halfway around the world they called "gold mountain".

Prime Minister Harper was apologizing for the treatment of Chinese workers who came to work primarily on the railroad construction projects in the late 1800s and the subsequent exclusion of Chinese Immigrants until the mid 1900s. The same words could – and should - apply to the foreign workers who have toiled in Canada over the past 15 years. And yet foreign workers today appear to have become the forgotten people

As I contemplate the nine years I've spent working with the temporary foreign worker program, I am increasingly frustrated by the reality of the level of exploitation and attitudes of total dismissiveness towards the lives of foreign workers. While we acknowledge the sins of our past, we blithely continue and indeed increase the magnitude of those same sins.

How is the treatment of the Chinese workers any different from the treatment of TFWs in Canada? We have passed laws that require TFWs to leave Canada once they have worked here for a total of 4 years (unless you are a highly skilled worker that Canada wants). At least we didn't force the Chinese workers to leave. We have made it virtually impossible for foreign workers to bring family members – something for which the federal government has apologized to the Chinese community. We have refused to allow many of these foreign workers to immigrate to Canada. We have allowed the exploitation and marginalization of TFWs..... just as the Chinese workers were exploited and marginalized in the 1800s.

The recent refugee crisis in Syria has brought this issue into clearer focus for me. There is a crisis facing foreign workers in Canada. It is not unlike the one facing refugees: the crisis stems from the regressive immigration policies that the government of Canada has adopted. Canada is not prepared to accept thousands of foreign workers as immigrants - just as Canada is not prepared to accept Syrian refugees as immigrants. Approximately 70,000 foreign workers are being forced to leave Canada this year – despite having worked here for upwards of 8 to 10 years – because of federal government policies preventing immigration by foreign workers in lower skilled jobs. That is the immediate crisis faced by foreign workers.

However, this is part of a much larger crisis in Canada.....one exemplified by the temporary foreign worker program. The crisis is multi-layered but I think the conversation can start with the suggestion that this federal government has successfully deflected attention from their increasingly racist, classist, anti-democratic policies in the immigration area by goading labour into the “them and us” trap where Canadian workers have reacted in a manner that at least appears to target the foreign workers and immigrants rather than the government policies that create the problems. This has played neatly into the government’s overall mantra in dealing with immigrants: “them versus us” which has pervaded its’ statements about refugees and immigrants.

A review the history of the Temporary Foreign Worker program and the immigration rules indicates how the government’s legislation and policies have radically changed over the years in ways which, I believe, fundamentally impact the social and work culture in Canada as well as the nature of democracy in Canada. It is critical that we understand what is happening so that we can address the real issues in order to stop the exploitation of workers regardless of their legal status.

### The Context of Neo-Liberalism

The change in attitudes towards foreign workers and immigrants in Canada has not occurred in a vacuum. Canadians are increasingly apathetic, if not actively racist and

anti-immigration and that has its roots in our changing world and attitudes which are part of the neo-liberal economy which Canada has embraced. We need to talk about what “neo-liberalism” is and what it means to us and to foreign worker. The CorpWatch website provides us with a definition written by activists Elizabeth Martinez and Arnoldo Garcia with the American National Network for Immigrant and Refugee Rights:

1. The rule of the market. Elimination of government controls or restrictions, international “free trade” agreements, etc. – results in de-unionizing, removal of minimum protections and trade barriers, etc. with the free movement of capital, goods and services. “the global free market will take care of us”. The race to the bottom. The problem is that this should also result in the free movement of labour but that is a threat to the privileges enjoyed in the developed nations.
2. in reducing governments’ role, public expenditure on social services are cut.
3. deregulation
4. privatization
5. Eliminating the concept of “the public good” or “community” and replacing it with “individual responsibility”. This is an essential element of neo-liberalism. If people are poor it is their own fault – they are not a community responsibility which of course justifies the reduction of governments’ role and expenditures.

<http://www.corpwatch.org/article.php?id=376>

This last feature of neo-liberalism is one which we should be very aware of.

So against that backdrop, I’ll review some history of the TFW program in the context of the Alberta experience and the federal government immigration laws & policies.

### History of the TFW program

First of all, the “TFW program” does not actually include the Seasonal Agricultural Workers Program (“SAWP”) or the former Live-In Caregiver’s Program (“LCP”) although the lines are often blurred. My experience (and most of my comments) are restricted to the TFW program. However, I will point out that the LCP has been

dismantled and has become part of the TFW program since the fall of 2014. But more on that later.

The TFW program was first introduced in the 1970s by the federal government in order to reflect an increasingly globalized job market. It was aimed at skilled workers coming to work in Canada on a temporary basis, e.g.: trades people coming for plant shutdowns, visiting professors, employees of multinationals posted to Canada for a year or two. The backdrop to this is an immigration system that had been radically changed in 1967 and 1976 to a point system –intended to eliminate racist elements of our immigration system – which resulted in only skilled workers being allowed to immigrate to Canada. So we became less racist but more elitist.

One interesting chapter in our immigration history is the LCP. With the change in immigration processes, live-in caregivers were still coming to work in Canada but could not immigrate. Canadians objected! It was a result of a public uproar that the government was forced to implement the Live In Caregiver program which offered the ability to apply for permanent residency for live in caregivers in about 1981.

The first notable change to the TFW program occurred in 2002 when the then Liberal government introduced a “pilot project” to bring in TFWs in low skilled jobs. Interestingly, the impetus for this program apparently came from the meat packing industry in Manitoba. Manitoba in fact viewed this new low skilled pilot program as an immigration program since the federal government had, in the late 1990s, agreed to allow provinces to sponsor people for immigration. Indeed, Manitoba continues to administer their Provincial Nomination program in a manner to allow all TFWs in Manitoba, regardless of skill level, to have the opportunity to immigrate. That did not occur anywhere else in Canada (except perhaps the Yukon). In Ontario, for example, the government restricted their Provincial Nomination program to skilled workers. In Alberta, the numbers of low skilled workers able to participate in the Provincial Nominee Program was a small fraction of the total number of low skilled TFWs in Alberta.



So in 2002, the federal government introduced a foreign worker program which, for the first time since the live-in caregivers' first program, brought people to work in Canada without having the right or opportunity (under the federal immigration programs) to immigrate. This was a radical change – and one that went largely unnoticed at that time by the labour community or anyone else for that matter. In Manitoba, the union most affected, United Food & Commercial Workers, took an active role in the program and promoting permanent residency for the TFWs. Indeed their collective agreements with Maple Leaf Foods required the employer to assist in the processing of TFWs through the Provincial Nominee program. (UFCW has had a long history of working with agricultural workers as well.) But elsewhere in Canada no one was asking why Canada was bringing in workers – largely to fill permanent jobs – who would not be able to immigrate to Canada. There was no parliamentary debate, no royal commission as there had been when our immigration system changed in the 1960s and 1970s.

The program can be best described as very haphazard and poorly thought out at its inception. There was no analysis as to how low skilled worker might need more protections than a visiting professor did. So no protections were built into the program. The only “protection” the federal government implemented in the TFW low skill program was to require employers to provide an employment contract in which employers promised to provide airfare to and from a workers' home, provide reasonably priced accommodation and health care and promise to abide by the provincial employment laws. However, the federal government has taken absolutely no role in enforcing those minimal protections.

At about the same time that the low skill pilot project was introduced, the Canadian immigration system was effectively dysfunctional. It was taking years to process an application for permanent residency. In the meantime, Canada was booming and more workers were needed – not just for temporary jobs or assignments but primarily on a permanent basis. The TFW program became an alternative to the immigration program and the TFW skilled worker program rapidly expanded along with the low skilled program. This expansion of the TFW program, while the permanent immigration system

faltered, is in good part due to the government encouraging this expansion, pouring resources into the work permit processing system while neglecting the accumulating backlog in permanent residency applications. Indeed the permanent residency program became so overloaded that in 2012, the government simply cancelled thousands of applications for permanent residency.

By 2006, the TFW program had “exploded”. And now people were finally noticing that a TFW program existed. According to Citizenship and Immigration Canada (“CIC”) statistics the number of foreign workers present in Canada on December 1 of each year had increased from 101,098 in 2002 to 160,780 in 2006.

At that point it also became apparent that the program was one which was highly exploitative. The response from labour in Alberta was mixed. Some unions were hostile towards TFWs, many unions did nothing but did support the Alberta Federation of Labour (“AFL”) initiatives. Others were more engaged. For example, the UFCW locals representing meat packing plant workers were more proactive, having had the benefit of the Manitoba experience.

The AFL hired the author as the “Temporary Foreign Advocate” to provide free legal advice to TFWs and to provide policy advice to the AFL. Two reports documented the problems with TFW program, the abuses and provided recommendations. The first, released in November of 2007, documented the issues in the legal files opened by the Advocate and made recommendations. The concerns raised by the AFL and other advocates produced some results. The government of Alberta established a Temporary Foreign Worker Advisory office, created an Employment Standards “audit team” and appeared to be prepared to act on safeguards for TFWs. The federal government instituted the “Canadian Experience Class” providing skilled TFWs a program for permanent residency. They also promised to speed up processing times from an average of 3 months to a 2 week turnaround for processing of work permits and generally federal government staff were cooperative and appeared equally appalled by the level of exploitation of TFWs. The second report, “Entrenching Exploitation” was released in

April of 2009. One of the recommendations, the implementation of a “bridging” open work permit upon foreign worker’s application for permanent residency being accepted, was eventually implemented by the government in 2012 but generally, any improvements seemed to have stalled by 2010.

One of the biggest problems identified by the TFW Advocate reports was the preponderance of “recruiters” who were bringing TFWs to Canada and charging outrageous amounts of money. People were – and still are – paying those amounts of money because of their perception that they could immigrate. The extent of the federal government’s attempt to solve the corruption and exploitation by recruiters was to declare that recruiters could not charge fees. Recruiters blithely ignored that declaration with impunity. By comparison, under the SAWP program the government includes a prohibition against the use of recruiters and charging of fees in the agreements between Canada and the sending country.

Alberta did take further action. The government commenced a series of round table discussions in 2009 involving employers, unions, and community, culminating in a report by Teresa Woo-Paw Parliamentary Assistant to the Minister of Employment and Immigration issued in 2011. Interestingly, the report stated:

“Albertans who participated in the Temporary Foreign Worker (TFW) Program consultation understood that we need to address the related issues as part of a larger workforce retention strategy. The consultation strongly reaffirmed our need to attract immigrants, and to retain workers and newcomers with fair and safe workplaces and welcoming communities.

As a result of this review process, I have concluded that we cannot continue to use the TFW Program to fulfill our province’s long-term labour shortages. Doing so has significant, negative impacts for the long-term growth of our economy. Although temporary foreign workers (TFWs) have a place in our economy, the TFW Program is not a long-term solution to Alberta’s labour market needs.”

Then in 2012, the Alberta government introduced legislation providing for better prohibitions against the charging of recruitment fees. Unfortunately, enforcement of these provisions have fallen short. But while the government of Alberta was

acknowledging the fundamental problems in the TFW program, the federal government was going another direction.

2010 seems to mark a turning point in the federal government's agenda with respect to TFW issues. The downturn of 2008 certainly was a factor. By early 2009 TFWs were having a more difficult time renewing work permits (although the government was allowing more TFWs into the country) and finding themselves stranded in Canada. It should be remembered that a Conservative government was elected in 2006. The subsequent majority Conservative government elected in 2011 certainly spurred many changes in legislation and attitude towards, not just TFWs, but towards all immigrants and refugees in general. Certainly by 2010, there was a decided change in attitude towards TFWs on the part of the government. Processing times for new work permits started increasing (the two week processing promise has faded into ancient memory), federal government employees became less cooperative and increasingly distanced themselves from issues. At this time, the TFW and refugee issues were intermingling. Many TFWs who were unable to obtain new work permits as a result of the economic downturn in 2009 and 2010, were applying for refugee status.

Probably the most notable example of the federal government turning point in attitudes towards immigrants was the Sun Sea incident in 2010. The Sun Sea, a ship containing over 400 refugees from Sri Lanka arrived in Vancouver in August 2010. The response by the government was appalling. The Public Safety minister Vic Toews labeled the refugees as "suspected human smugglers and terrorists" (CCR, "Sun Sea: Five Years Later").

Vic Toews was quoted by the Toronto Star as saying:

"What I am concerned about is that the generosity of Canada's immigration and refugee laws are not taken advantage of," he said. "There seems to be a deliberate attempt to thwart Canadian laws."

[http://www.thestar.com/news/canada/2010/08/13/more\\_migrant\\_ships\\_headed\\_this\\_way\\_vic\\_toews\\_warns.html](http://www.thestar.com/news/canada/2010/08/13/more_migrant_ships_headed_this_way_vic_toews_warns.html)

What a bizarre comment that was when our Immigration and Refugee Protection Act actually provides for refugees coming to Canada and applying for refugee status. They were doing what the law permits. What is notable is the apparent start of this government's mantra that we are so very "generous" to immigrants and that immigrants & refugees "take advantage" of us.

The treatment of these refugees was appalling with the government directive to the Border Agency to detain the refugees, including children, in custody as long as possible, utilizing every court appeal process available to do so. (Canadian Council for Refugees, "Sun Sea: Five Years Later"). Ultimately 462 of the 492 passengers were granted refugee status (and some of 30 denied were denied because they helped in the operation of the vessel while it was at sea). The government quickly tabled a bill entitled "*Preventing Human Smugglers from Abusing Canada's Immigration System Act*" (Bill C-49) which died on the order table pending the 2011 federal election. This bill was revived in June 2011 (Bill C-4) by a majority Conservative government and eventually incorporated and passed in a broader bill "*Protecting Canada's Immigration System Act*". The message was clear: Canadians needed to be protected against immigrants. The Bill contained draconian provisions, e.g. arbitrary detention for up to one year for anyone seen to have been "smuggled" into Canada. For heaven's sake! They are REFUGEES! Refugees are in fear of their lives or freedom! Of course some of them are going to be "smuggled" across borders and into Canada! The Bill also provided that such refugees cannot apply for permanent residency for a period of 5 years, effectively isolating them in Canada and from their families. This kind of arbitrary prohibition against granting of permanent residency for people found to be *bona fide* refugees echoes policies with respect to TFWs. Sadly, there was little uproar about these horribly regressive measures.

Bills C-49 and C-4 were quickly followed by the now thoroughly debunked Fraser Institute Report entitled "Immigration and the Welfare State 2011" which stated: "The study concludes that in the fiscal year 2005/06 the immigrants on average received an

excess of \$6,051 in benefits over taxes paid.” It was now clear what the Conservative Party approach would be.

(<http://www.fraserinstitute.org/content/immigration-and-canadian-welfare-state-2011>)

For an excellent critique of the Fraser Institute report see:

<http://thetyee.ca/Opinion/2013/09/12/Fraser-Institute-Immigrants-Costly/>

The message now was not only did Canadians needed to be protected against immigrants but “they” were taking advantage of us.....they were costing “us” money.

This clearly was intended to set the stage for the Conservative government immigration strategies which have included the virtual elimination of the possibility of sponsoring parents and grandparents and the elimination of sponsoring dependent children older than 18. Recently the cost of the citizenship application was substantially increased with the “info-mercial” providing the rationale of “Relieving the Burden on Canadian Taxpayers”. But aren’t permanent residents also “Canadian taxpayers”? This is another clear example of the “them & us” approach.

The “them and us” mantra was adopted by Canadians in relation to attitudes towards foreign workers. In April of 2011, the federal government passed amendments to the Immigration Act providing that TFWs could only work in Canada for a cumulative total of 4 years (the time started ticking on April 1, 2011) at which point they were to leave and were banned from working in Canada for a further 4 year period. This effectively carved TFWs out from the right to reside in Canada.

Abuses of the TFW program came to light: Chinese miners being brought into British Columbia when local miners were unemployed and those Chinese miners paying outrageous fees to the recruiters; (see, for example:

<http://thetyee.ca/Opinion/2012/10/16/Chinese-Temp-Miners/>, and:

<http://thetyee.ca/News/2012/10/18/Chinese-Temp-Miners/> Royal Bank employees in Ontario training their foreign worker replacements; waitresses in Saskatchewan being laid off while a foreign worker was being hired. It should be kept in mind that the process for hiring foreign workers has always included the requirement that the employer

must prove to the HRSDC department that they were unable to hire a Canadian. Obviously, the government was being negligent. But who was targeted? The foreign workers became the “fall guys” for the government and were seen as people taking away jobs from Canadians and lowering wages. While some labour groups took pains to say they supported immigration for TFWs, the message was more typically portrayed as “they” are taking “our” jobs. And even with the more sensitive messages, little uproar ensued when subsequent regressive measures were enacted, severely impacting TFWs and their ability to stay and to permanently immigrate.

In the fall of 2013 came a huge setback for many TFWs who were in certain job categories: TFWs who were cooks, retail supervisors or retail food supervisors or in one of 3 administrative/bookkeeping skilled job categories had their ability to apply for permanent residency arbitrarily removed. Quite frankly, these jobs were ones which many TFWs who came to work in low skilled jobs were able to be able to obtain promotions into skilled jobs and therefore into categories eligible for permanent residency. I personally knew hundreds of food counter attendants who had worked for years for a promised promotion to a food services supervisor who experienced this devastating withdrawal of the opportunity to apply for residency. See:

<http://oppenheimer.mcgill.ca/Opinion-Creating-an-underclass-of?lang=fr>

The apparent rationale for this exclusion was that there were too many applicants under these categories. But surely since all those people were working in those jobs, they were needed in Canada? This is, in my opinion, a blatant example of classism and likely racism (the majority of low skilled tfws are from the Philippines). There was little uproar about that change.

A further example of elitist policies was major restrictions in the Canadian Experience Class which was the pathway for permanent residency most accessible to TFWs. The total number of applications for permanent residency was restricted to 8,000 (with a total of about 350,000 tfws in Canada) and individual caps of 200 in each of the lowest rung of “skilled” workers (National Occupation Code “B” occupations). Again, these changes attracted little attention.

Then in the spring of 2014 came another blow to TFWs: the government imposed a moratorium on the hiring of TFWs in the restaurant and hospitality industry. They suspended and then cancelled many applications, stranding TFWs already in Canada once again. Upon lifting the moratorium in June 2014, the government imposed further massive changes to the TFW program. They first of all engaged in a “smoke & mirrors” exercise in splitting the TFW program and setting up two programs: the “International Mobility Program” and the “Temporary Foreign Worker Program”. The first group do not require “labour market impact assessments” (LMIAs) (i.e. employers do not have to prove that they could not find a Canadian to work for them) and foreign workers typically get “open” work permits which do not restrict them to a particular employer). Under the Temporary Foreign Worker Program, employers are required to obtain LMIAs and foreign workers’ work permit are restricted as to job position, location and employer. The government created a new distinction within the TFW Program – “high wage” versus “low wage” as opposed to the former skilled versus low skilled distinction. (As of April 2015, the dividing line in Alberta is \$25.00/hour and in B.C. is \$22.00/hour.) The requirements for the former “low skilled” TFWs are now applied to the new category of “low wage” TFWs. The percentage of work performed by low wage workers is currently restricted to 20% of the workforce in a particular location and that will be lowered to 10% in July 2016. Employers cannot get LMIAs for TFWs beyond that limitation. So if an employer’s TFW workforce is above that mark, they will not even be able to keep their current employees. Another serious setback for TFWs in Canada is that the new rules contained a prohibition against hiring TFWs in the low wage hospitality/service sector in areas where unemployment is 6% or more. Again this means that those TFWs will not be able to stay.

The final obstacle to TFWs trying to remain in Canada by renewing their work permit is that it now costs an employer \$1,000 per TFW to apply for an LMIA. The fee is non-refundable and all applications are routinely turned down. This, of course, results in smaller employers simply not being able to apply to keep their employees who are TFWs.



This attitude does not extend to high wage earners. If you are a highly paid or highly skilled, the government promises that your employer will have an LMIA in 10 days. Others can wait the painful 3 to 6 months that it appears to be taking to process LMIA's.

The key problem is that again, the government has made absolutely no distinction between the ability of employers bringing new TFWs into Canada and the ability of TFWs who are already in Canada to be able to continue to work and live in Canada. Instead the government has steadfastly refused to open up pathways for permanent residency for those in low skilled and now "low wage" jobs.

Lest anyone still believe that our immigration policies are not class based (or race based), the elimination of the Live In Caregiver Program should convince them otherwise. This program was the ONLY permanent residency program for low skilled workers. The new Caregiver program now includes skilled workers and does not "guarantee" an opportunity to apply for permanent residency at all. Indeed the government has severely restricted the number permanent residency offers open to workers in this group. It is worth noting that the single largest source country for workers in the Live in Caregiver Program is the Philippines. In 2013, the largest single source country for TFWs was the Philippines (40,000 out of 104,000) but interestingly only 6,800 out of 175,000 (or 223,000 depending on which statistical chart you reference) foreign workers under the "International Mobility Program" are from the Philippines.

April 1 2015 marked a major crisis for many TFWs. On that date, a TFW who has worked in Canada for 4 years was no longer be able to extend their current work permits.....regardless of how long they have been in Canada (many have been here 6 to 8 years). Again we see that "them & us" theme when Immigration Minister Alexander commented on the coming into effect of the 4 year limit on April 1 of 2015. In stating that the government will be quick to deal with those who overstay, he said "Canadians are welcoming and generous but we need to ensure that we're putting Canadians first and standing up against potential abuse of our immigration system." Then he engages in outright falsehoods: "The purpose of the Temporary Foreign Worker Program is exactly

that – to be temporary.” And “.... temporary foreign workers have had four years to pursue pathways to permanent residence.” This last statement is particularly egregious since so many TFWs have had NO pathway to permanent residency and since the government has taken away those pathways for many more. Indeed, the CIC website provides a table that shows that in 2013 only 6,457 TFWs (including live in caregivers) obtained permanent residency. In 2013 there were 104,160 people with work permits in Canada as of December 31<sup>st</sup> in the TFW program. (Note that the change of the date from Dec. 1 to Dec. 31 of statistical snapshots of TFW populations now excludes all SAWP workers since they have to leave Canada by December 8<sup>th</sup> of each year.)

At the same time that the government has been decreasing the low wage/low skill TFW program while avoiding implementing any real protections for TFWs or providing opportunities for permanent residency, the government has rapidly increased the numbers of people under the “International Mobility Program”. Depending on which statistical chart you read, there are either 175,000 foreign workers in Canada under this program (Table 1.4 International Mobility Program work permit holders with a valid permit on December 31<sup>st</sup> by program, 2004 to 2013) or 284,050 foreign workers (Table 2.4. International Mobility Program work permit holders by program, 2004 to 2013). Under this program, the largest source country is the U.S. This class also includes spouses of skilled TFWs who can apply for open work permits and includes those TFWs who have had their permanent residency applications approved and are entitled to “bridging work permits”. It is worth noting at this time, that in the past Provincial Nominees who have permanent residency applications have been encountering major problems in Alberta in trying to obtain “bridging work permits”. It almost appears that CIC is actively trying to sabotage the Alberta Provincial Nominees, many of whom are low skilled.

### Other Immigration Developments

While Canada has become increasingly abusive to foreign workers, that attitude has extended to those immigrants (and those who were born here of immigrant parents) who have dual citizenship. The new Citizenship Act allows Canada to strip a person of their

Canadian citizenship and banish them if the person happens to be guilty of a terrorism offence or other threat to national security. It should be pointed out that the Criminal Code of Canada now includes as an act of “terrorism”:

“Every person who, by **communicating statements**, knowingly advocates or **promotes the commission of terrorism offences in general**-other than an offence under this section-while knowing that any of those offence will be committed **or being reckless as to whether any of those offences may be committed**, as a result of such communication, is guilty of an indictable offence and is liable to imprisonment for a term of not more than five years”

There are other severe problems with the Act and the revocation of citizenship including the process which is now an entirely bureaucratic – not a legal – one. The Act also requires that candidates for citizenship must promise that they will reside in Canada – despite the Charter of Rights & Freedoms clearly stating that all citizens shall have the right to leave or enter Canada. The result of this part of the legislation is that new Canadians could have their citizenship revoked if they chose to take a 2 year posting in a foreign country. Regardless, it is unconscionable that new Canadian citizens have different rules..... We have set up a 2<sup>nd</sup> class citizen regime.

Other aspects of the new Citizenship Act are problematic. With the increased obsession of ensuring new immigrants are fluent in English, English tests are now required for citizenship. This negatively impacts women as often wives of new immigrants may come to Canada without the English language skills their spouse has. It (and the increased fees) also negatively impacts those who came to Canada as refugees who were not required to learn English as part of their entry to Canada and indeed may not be literate.

Another very critical issue is the arbitrary and lengthy detention of people whom the government has deemed to not have status, etc. These people are often foreign workers who have overstayed their work permits. The most horrifying example is that of Lucia Vega Jimenez who committed suicide after being arbitrarily detained and threatened with deportation. But the stories and statistics set out in the 2015 investigative report by the International Human Rights Program of the University of Toronto, Faculty of Law, “We

Have No Rights” are mind numbing. Canada has arbitrarily detained up to 7,300 (in 2013) immigrants (or migrants) a year.....for indeterminate lengths of time, often extending into years and in one case to 8 years. The report found that many of these detainees suffered from mental health issues making the arbitrary and indefinite detention even more horrendous. To put it bluntly, this report shows that the government has completely violated the rights of the most vulnerable immigrants to Canada. As the report states:

“Canada is a land of immigrants, a multicultural haven for people from around the world. This mantra is part of our national identity – something in which Canadians take immense pride internationally, and that every school-aged child is taught to respect and revere. It is part of what makes Canada unique, special, and privileged.

And yet, while the vast majority of Canadians are immigrants themselves or descended from immigrants, Canada has entered a new era where the norm is to treat non-citizens as interlopers, illegals, threats to security, or criminals – in short, people less deserving of basic rights. This new reality has been dubbed “crimmigration” by experts and advocates. “

(IHRP, University of Toronto Faculty of Law)

### Conclusion

The evolution of “crimmigration” should give us all pause. It is not only “temporary” foreign workers who have suffered from exploitation, discrimination and total dismissal. We see immigrants, refugees and foreign workers characterized as stealing jobs from Canadians, as people who abuse the generosity of Canadians, as terrorists, as people from whom Canadians need protection. This attitude is one that spreads across the spectrum of immigrants to Canada, creating a second class of residents and citizens of this country. This is altering our country beyond recognition. But more frightening for all Canadians who believe in fundamental human rights, this attitude has justified the enacting of legislation that is often clearly contrary to our Charter of Rights and Freedoms – a reflection of a government that believes itself to be above the law. This broader threat to our democracy and our rights should give us all pause.....and encourage

us to ensure that all workers and immigrants in Canada are accorded full and equal human rights. The diminution of their rights is a diminution of the rights of all.

#### Sources and Resources:

“Never Home” - an excellent new website on “Legislating Discrimination in Canadian Immigration”:

<http://www.neverhome.ca/>

A Globe & Mail retrospective on Canada’s attitudes to immigration:

<http://www.theglobeandmail.com/news/national/canadas-long-winding-road-through-immigrationpolicy/article26234935/>

Martin Lukacs at the Guardian comments on Canada’s immigration policies:

<http://gu.com/p/4c5f5/sbl>

And another piece about Canada’s Immigration policies, by Audrey Macklin in the Guardian :

<http://www.theguardian.com/commentisfree/2015/mar/24/european-politicians-envy-canada-immigration-points-system>

the Chinese head tax apology:

<http://pm.gc.ca/eng/news/2006/06/22/address-prime-minister-chinese-head-tax-redress>

Definition of neo-liberalism:

<http://www.corpwatch.org/article.php?id=376>

AFL Temporary Foreign Worker Advocate, first report “TFWs – Alberta’s Disposable Workers”:

[http://www.afl.org/tags/temporary\\_foreign\\_workers?page=25](http://www.afl.org/tags/temporary_foreign_workers?page=25)

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Canadian Council for Refugees. Sun Sea Five Years Later:

<http://ccrweb.ca/en/sun-sea-five-years-later>

the “Teresa Woo-Paw” Roundtable report on TFWs (2011)

<http://tinyurl.com/pmuv58o>

International Human Rights Program of the University of Toronto, Faculty of Law, “We Have No Rights” (2015)

[http://ihrp.law.utoronto.ca/We\\_Have\\_No\\_Rights](http://ihrp.law.utoronto.ca/We_Have_No_Rights)

an interesting article on legal challenges to Conservative government policies on refugees:

<http://www.canadianlawyermag.com/5701/The-Charter-of-Rights-versus-the-government-of-wrongs.html>

## **Bringing up B.C.:**

### **The negative impacts of the Temporary Foreign Worker Program on vulnerable workers and proposals for regional action**

By Kaity Cooper and Jodie Gauthier

“I never thought I’ll be exploited in this country [Canada] and will have such a hard time [...] To me exploitation is like when somebody is squeezing and pressing your heart so much, but so much that you feel that you cannot almost breathe any more ... it hurts, it hurts in your chest and you cry but you do not have option. You then think, ‘tomorrow is going to be another day.’” - Carola, live-in caregiver (West Coast Domestic Workers’ Association 2014, 7)

Carola came from the Philippines to work as a domestic worker in Vancouver. She paid a recruitment agency \$5,000, which she borrowed from her sister and a bank, to find her a job in Canada. When she arrived, she was informed by the agency that the employer had “backed out.” The recruiter promised to find her a new job, but while she was waiting she was required to perform housework and tasks such as body massage without pay. The recruiter warned Carola not to leave the house, saying she did not have proper documents and was at risk of deportation.

After a month and a half, the recruiter sent Carola to work with a new employer, even though she did not have a work permit authorizing this work. This new employer refused to allow Carola to leave the house or use the phone, telling her she had problems with her papers. In the end, Carola managed to secretly call her sister in Toronto who set in motion her rescue (West Coast Domestic Workers’ Association, or “WCDWA” 2014, 29).

Carola’s experience is not unique. Since its inception in 2002, tens of thousands of migrant workers have come to Canada every year under the Temporary Foreign Worker Program (“TFWP”). And every year, researchers, advocacy organizations and field practitioners hear stories of exploitation and abuse similar to Carola’s.

The TFWP is an employer-driven temporary migration program that allows employers to access a flexible labour force, purportedly to respond to domestic labour shortages (Cousineau 2014, 5.1.3). The Government of Canada has characterized the TFWP as its “principal tool to help employers meet immediate skill requirements” and remain competitive in the Canadian economy (Fudge and MacPhail 2009, 5).

Not surprisingly, Canadian businesses have steadily increased their reliance on temporary foreign workers. In 2002, there were 29,313 TFWP work permit holders in Canada. In 2013 there were 104,160 (Government of Canada 2014). Although statistics are not available after 2013, the number of TFWP work permit holders will likely decline in 2015 as caps introduced by the Government of Canada in response to public outcry that foreign workers are being used to displace Canadians begin to take effect.

The TFWP has several streams. This paper will focus on the agricultural stream, including the Seasonal Agricultural Workers Program (“SAWP”), the in-home caregiver stream and the low-wage stream, collectively referred to as the “Lowest-Wage Streams.”

The TFWP, and in particular the Lowest-Wage Streams, have attracted much criticism. Researchers, advocacy organizations and field practitioners alike have argued that this stream of the TFWP lower wages and conditions of employment in the Canadian labour market (Fudge and MacPhail 2009, 43). They highlight the systemic patterns of exploitation of migrant workers and reveal the overwhelming hurdles migrant workers face in enforcing their legal rights (Faraday 2012, 12). They criticize the Government of Canada for expanding the TFWP without also implementing mechanisms to protect migrant workers (Fudge and MacPhail 2009, 28).

This paper is about the built-in features of the TFWP that make migrant workers in the Lowest-Wage Streams vulnerable to exploitation and often unable to enforce their legal rights. In particular, it will consider the issue of loss of status and the problem of immigration-related retaliation. The paper will focus on BC’s legal landscape as the writers are labour lawyers in British Columbia.

As follows, we will:

- Examine vulnerabilities faced by all migrant workers in the Lowest-Wage Streams, many of which translate into barriers to benefitting from statutory protections related to employment standards or enforcing legal rights;
- Identify three common pathways to loss of status created by the TFWP and the impact of loss of status on migrant workers (including the risk of immigration-related retaliation);
- Discuss three possible measures to mitigate the risk of immigration-related retaliation and promote the enforcement of employment standards protections for migrant workers; and
- Provide our recommendations for legislative change in British Columbia.



## I. The unique vulnerabilities of migrant workers

A common thread among many of the critiques of the TFWP is the unique vulnerability of migrant workers in the Lowest-Wage Streams to exploitation and abuse. Some of this vulnerability stems from the personal characteristics of migrant workers selected under the Lowest-Wage Streams, while some is created by the scheme itself.

### a. The personal characteristics of migrant workers

Migrant workers in the Lowest-Wage Streams share several personal characteristics that make them vulnerable to exploitation and abuse. In general, migrant workers are new or relatively new immigrants to Canada. They are likely to be unfamiliar with the Canadian legal system and Canadian workplace practices and cultural mores. It is also likely that their first language is not one of the two official languages recognized in Canada (Parfitt 2013, 2.2.6).

Migrant workers may be vulnerable because of where they come from. Most workers in the Lowest-Wage Streams come from countries with high levels of poverty and political unfreedoms. They come to Canada because they have limited economic opportunities in their home country. The resulting economic need leads migrant workers to highly value their Canadian jobs, and do whatever they can to keep them (Cousineau 2014, 5.1.6). They may also have paid a recruitment agency thousands of dollars to find a job in Canada, which further exacerbates their economic need.

Migrant workers in the Lowest-Wage Streams are less likely to have social support available to them. Unlike migrant workers in the high-wage stream, they are not generally permitted to bring their families with them to Canada. They are also likely to live and work in isolated rural communities or in the homes of their employers (Cousineau 2014, 5.1.6). This may result in family separation and social exclusion.

These personal characteristics, alone and in combination, make migrant workers in the Lowest-Wage Streams of the TFWP vulnerable. However, rather than mitigate this vulnerability, the TFWP actually compounds it by design.

### b. The features of the Lowest-Wage Streams

Several features of the Lowest-Wage Streams of the TFWP foster a heightened power imbalance between migrant workers and their employers. Below we discuss the top four.

i. Precarious immigration status

In general, the Lowest-Wage Streams of the TFWP are intended to provide Canadian employers with a flexible, but temporary, workforce. Employers who wish to hire migrant workers must first obtain a positive or neutral Labour Market Impact Assessment (“LMIA”). Only once the LMIA has been approved may the worker apply for a work permit.

LMIA's and work permits do not last indefinitely. Pursuant to changes to the TFWP introduced in 2014, work permits are only effective for one year. Thirty days before the expiry of the work permit, the employer must re-apply for a new LMIA and the worker for a new work permit (Cousineau 2014, 5.1.8).

There are also rules that limit the amount of time migrant workers under the Lowest-Wage Streams may remain in Canada. In 2011, the Government of Canada introduced the four in, four out rule. Under this rule, workers under the Lowest-Wage Streams, with the exception of SAWP workers, may only remain in Canada up to four years, after which they must wait an additional four years before applying to return (Law Commission of Ontario 2012, 83).

In general, the Lowest-Wage Streams do not offer a guaranteed pathway to permanent residence in Canada. By design, the TFWP ensures the majority of those classified as lower-skilled migrants will never be able to obtain secure immigration status. Currently, there is no path to permanent residency for agricultural workers. For low-wage workers, the best chance of obtaining permanent residence is through the Provincial Nominee Program (“PNP”). The PNP allows a province to nominate prospective immigrants based on specific economic and labour needs. In practice, it is employers who nominate workers (Fudge and MacPhail 2009, 23). To be eligible for the PNP, a worker must be offered full-time indeterminate employment at a wage that would allow the worker and their family to become economically established (Cousineau 2014, 5.1.9). Unfortunately, the minimum income threshold is a bar to many low-wage migrant workers, especially those with large families.

The Live-In Caregiver Program was previously the only Lowest-Wage Stream with a reliable path to permanent residence. Caregivers used to be able to apply for permanent residence after working in Canada for two years. However, in 2014 the Government of Canada introduced a cap on the number of applicants who can apply for permanent residence.

The ability of migrant workers under the Lowest-Wage Streams to remain in Canada is heavily dependent on their ability to maintain employment and a positive relationship with the employer listed on their work permit. This precarious immigration status negatively impacts their ability to demand decent working and living conditions. As researchers frequently document, workers fearing for their immigration status will be less likely to demand better employment standards (WCDWA 2013, 18).

Even when migrant workers do complain, it is likely that they will no longer be in Canada when their complaint is ready to be heard. Chronic underfunding and understaffing of British Columbia's employment standards system mean it can take months or even years for employment standards complaints to be resolved, making it highly likely that a migrant worker's temporary visa will have expired (WCDWA 2013, 20).

## ii. Unfree labour

Migrant workers entering Canada through the Lowest-Wage Streams generally have closed work permits. Closed work permits assign migrant workers to a particular employer and stipulate their occupation, residence and terms and duration of employment. Migrant workers are required to obtain written permission from immigration officials to alter their conditions of work or to change employers (Fudge 2011, 15). To change employers, a migrant worker must find a new employer with an open LMIA and successfully apply for a new work permit.

Unfortunately, long processing times make leaving bad employment situations extremely difficult (WCDWA 2013, 36).

It is a violation of the *Immigration and Refugee Protection Act* ("IRPA") to work outside the conditions of one's work permit. A migrant worker who performs such unauthorized work is inadmissible to Canada for failing to comply with IRPA (s. 41). If the inadmissibility comes to the attention of the Canada Border Services Agency ("CBSA"), the migrant worker may be removed from Canada and denied reentry.

Academics have developed the concept of unfree labour to describe migrant workers who are tied to a particular employer and not free to circulate in the labour markets of the countries in which they are working (Fudge 2011, 5). Unfree labour shifts power further in favour of employers as migrant workers are denied one of the most important protections a worker has in any workplace: the ability to leave when they are not being treated fairly or with respect.

### iii. Employer-provided housing

Another similarity among the Lowest-Wage Streams is employer-provided housing. Under all three streams, employers must either provide housing for migrant workers they employ or prove that affordable housing is available. Not surprisingly, the housing provided to migrant workers is often inadequate (WCDWA 2013, 30-32). Beyond the adequacy of the accommodations, employer-provided housing can also foster paternalistic relationships between employer and worker and can extend the employer's control from the workplace into workers' personal lives (Cousineau 2014, 5.1.6). It also links a worker's housing to their employment. A worker who complains about working conditions may not only be risking their job and status in Canada, but also their home.

### iv. Precarious employment

In a study of migrant workers in British Columbia with precarious immigration status, Sarah Marsden found precarious immigration status to be associated with deskilling, decreased job security and mobility, illegally low pay and long hours, and various health and safety risks, or what academics call precarious employment (Marsden 2014, 1).

There is growing recognition that precarious immigration status and unfree work together impact the ability of migrant workers to demand decent wages, working and living conditions and to enforce their employment rights. Case in point, in March of 2010, the Alberta Ministry of Employment and Immigration released its own inspection statistics of the 407 workplaces employing migrant workers. The report showed that 74% of the employers had violated Alberta's *Employment Standards Act* regarding pay rates and record keeping (Flecker 2011, 26).

## II. Pathways to inadmissibility

The personal characteristics of migrant workers combined with the design of the TFWP culminate to create a very vulnerable foreign workforce. One outcome of that vulnerability, and the focus of this paper, is the loss of legal status to remain in Canada.

As discussed above, loss of status, or inadmissibility, occurs when a migrant worker performs work outside the conditions of their work permit. This may be working without a work permit or beyond the period of authorized stay in Canada, but it may also merely be performing work other than the work designated on the permit, or working for a different employer or at a

different location (Immigration and Refugee Protection Regulations, s. 185). Due to their unique vulnerabilities, migrant workers may find themselves in a loss of status situation for reasons completely beyond their control. Below, we discuss three common pathways to inadmissibility.

a. Pathway #1: Fraud by recruitment agency

One common pathway to inadmissibility, which has been documented by the International Labour Organization, is the recruitment of migrant workers by private recruitment agencies with false information about jobs. Migrant workers are then sent to countries where they find that no job actually exists (WCDWA 2013, 24-25). Migrant workers are often told that the recruitment agency will find them a new job and will normalize their immigration status, but in the meantime they are directed to work outside the conditions of their work permit, often in exploitative conditions.

Canada is not immune to this trend. A 2010 Report on Human Trafficking issued by the RCMP states that many trafficking victims come to Canada on genuine work permits, only to find their jobs do not exist when they arrive (WCDWA 2014, 38).

Even if workers are aware that it is illegal to work outside the conditions of their work permit, and many are not, they may be tied to exploitative work nonetheless because of the high cost of illegal recruitment fees charged by the recruiter. Recruiters can control newly arrived workers through a mix of tactics including threats of deportation and promises of regularization of immigration status (WCDWA 2014, 38-39).

b. Pathway #2: Employer's illegal demands

A second common pathway to inadmissibility is through employer demands that migrant workers perform unauthorized work. In their study of human trafficking, the West Coast Domestic Workers' Association ("WCDWA") was informed by participants that employers routinely require them to work outside the conditions of their work permit. For example, an employer may require a live-in caregiver to care for elderly parents as well as children despite this work being unauthorized. One caregiver reported being forced by her employer to clean the homes of friends and neighbours after she asked to be paid BC's minimum wage (WCDWA 2014, 40).

In Marsden's study, several caregivers reported that when looking for a new job, often because of a layoff or poor working conditions, prospective employers would demand a "trial period,"

during which the worker would have to work without authorization while the employer decided whether to complete the application needed to renew the caregiver's work permit (Marsden 2014, 20).

Migrant workers in many fields feel that they cannot refuse to meet their employer's demands, even if illegal, because their status in Canada is closely associated with their relationship to their employer (Marsden 2014, 21).

### c. Pathway #3: Loss of employment and poverty

If a migrant worker loses their employment they are often encouraged to work outside the terms of their work permit because it is so difficult and time consuming to get a new permit. Even without losing their job, migrant workers may find themselves accepting unauthorized work because of illegally low wages or high levels of debt incurred to get to Canada.

In her study of migrant workers with precarious immigration status, Marsden found that workers without status or with a closed work permit may be compelled by poverty to accept unauthorized work in order to survive (WCDWA 2013, 36). Most of the workers interviewed for her study admitted that they had worked beyond the specific conditions of their permit or had worked without any authorization at all (Marsden 2014, 34).

Many migrant workers who have fallen out of status do not see going back to their original country as a good option because of insecurity and lack of opportunities for them and their children (Saad 2013, 10). It is likely that the number of migrant workers without status in Canada increased dramatically after April 1, 2015 when the work permits of an estimated 70,000 migrant workers expired under the Government of Canada's new cap system.

### III. Impact of inadmissibility

However migrant workers become inadmissible, the impacts are serious. They include psychological detriment, exploitation in the workplace and further barriers to enforcing legal rights.

In a study of refugee claimants whose applications were denied, Samia Saad examined the psychosocial impact of losing status. She found that the loss of social entitlements, the experience of vulnerability to abuse and exploitation and the overall sense of being persecuted and in danger that come with losing status create conditions for people to experience trauma.

Trauma produces debilitating emotional symptoms such as anger, guilt, shame, hopelessness, anxiety, fear and social withdrawal (Saad 2013, 10-11).

Saad also found that exploitation in the workplace was commonly encountered by migrants who had fallen out of status. In her study, participants all worked longer hours with less pay when compared to before they had lost status. However, despite the rise in exploitation, the migrant workers in Saad's study never placed a legal complaint about the abuses they suffered. Similarly, all participants in Marsden's study reported incidents or conditions which would in some way have breached employment standards or workers' compensation law, but few had actually interacted with the state to obtain redress.

Many of the workplace problems experienced by migrant workers may be addressed by rights-based protections under the *Employment Standards Act* ("ESA"), *Workers Compensation Act* or *Human Rights Code*. Standards set by these schemes apply equally to all residents in British Columbia, regardless of their immigration status. However, for migrant workers who have lost status, making a legal complaint is risky. One of the principal reasons for not complaining cited in both studies was the fear of deportation (Marsden 2014, 11).

Deportation is a real possibility for migrant workers trying to enforce their legal rights under the Lowest-Wage Streams. It can come about in a number of ways. For example, the SAWP contract provides for repatriation of an employee to his or her home country when the employer, in consultation with the government agent, terminates the employment based on non-compliance, refusal to work or "any other sufficient reason." There is very little accountability in this process. Government agencies of some countries have themselves been accused of blacklisting workers who have advocated for workplace rights and protections (Cousineau 2014, 5.1.6).

Another possibility is for a migrant worker's inadmissibility to become public record in an administrative decision or to be reported to the CBSA by an employee of the administrative agency.

By far the most common possibility, however, is immigration-based retaliation by an employer. The fact that employers often threaten to report workers to immigration if they quit their jobs or complain about working conditions is well documented. These employers know that migrant workers who seek or accept work outside the terms of their work permits risk deportation, criminal sanctions and the loss of the right to reside in Canada (Marsden 2014, 34). With an

anonymous tip line, the CBSA facilitates virtually risk free retaliation. Migrant workers who are reported are unlikely to remain in Canada long enough to pursue any legal complaint against their employer and ongoing workplace grievances are not recognized by Citizenship and Immigration Canada as grounds to stay. For many migrant workers, the threat of immigration-based retaliation is an effective deterrent to enforcing their legal rights.

#### IV. Risk mitigation measures

Many commentators have made recommendations regarding how migrant workers can be better protected from abuse and exploitation by employers.

Access to permanent immigration and citizenship for migrant workers is often a key feature of these recommendations. While Canada purports to be a multicultural nation that welcomes people from other countries, in recent years there has been an observable shift away from permanent forms immigration and towards temporary labour arrangements that often depend on access to vulnerable workers. These programs allow Canada and Canadian employers to extract a benefit from migrant workers without the obligation of providing these workers with all of the rights and benefits of permanent residency and citizenship.

Many view these types of temporary labour relationships as antithetical to workers' rights. In a comment published through the Canadian Centre for Policy Alternatives Kendra Strauss writes that recent federal reforms to "toughen up" rules around the TFWP will actually make things worse for many temporary foreign workers and also Canadian workers. Instead, Strauss argues that the federal government should focus on "creating a level playing field, in which genuine labour shortages are filled by workers with full and equal labour rights and a path to citizenship." She notes that this approach would do more to reduce labour market distortions than simply "tweaking" existing temporary work programs (Strauss 2014).

Similarly and in response to the federal government's recent changes to the oversight of the TFWP the Canadian Labour Congress noted that "no amount of government oversight will fully compensate for the fact that migrant workers are inherently vulnerable to employer abuse." It concluded that, without access to permanent residency and the legal means and support to escape abusive employers, no amount of compliance efforts would sufficiently protect the rights of migrant workers (Canadian Labour Congress 2014).



The BC Federation of Labour has provided a mix of short and long term recommendations with respect to the problems associated with the TFWP. It has long called for improved access to permanent, stable immigration for those seeking to enter Canada's workforce, and the group has noted that programs like the TFWP distort the labour market and reduce the need for employers to offer reasonable incentives like wage increases to attract workers. In a 2014 report the BC Federation of Labour recommended that the Province of British Columbia increase oversight and protection of workers in the TFWP, and that it also advocate for the elimination of approval of LMIA's in lower-skill categories until the program is reviewed with the goal of ending labour market distortions. It further issued a number of practical recommendations to the Government of Canada, asking that it:

- Allow migrants workers in all streams the right to join a union;
- Broaden migrant workers' access to permanent residency status;
- Establish a transparent public registry and licensing system for employers, brokers and immigration consultants accessing the TFWP;
- Require objective and transparent proof of shortages including evidence of hiring, training and retention of available members of the provincial workforce; and
- Require the posting of a significant financial bond which can be used to compensate migrant workers who suffer employment standard and contract violations (BC Federation of Labour 2014, 4).

The above recommendations relate most directly to workers who are still employed in the TFWP and those who will be in the future. However, due to the frequent loss of legal immigration status experienced by workers in the TFWP, recommendations must also consider how workers who have lost status should be treated. The group No One Is Illegal has called for the regularization of non-status immigrants living in Canada, noting that regularization is an issue of self-determination and justice that is directly related to the exploitation of workers and also to access to services such as education and medical coverage. This call for regularization includes the principle that "anyone with less than full status in Canada – including people on temporary work permits – must be eligible for the regularization program" (No One is Illegal).

Many of the above recommendations require action and reform at the federal level. However, there is a clear space for local and provincial action on this issue. As follows, we will explore three ways that municipalities and provinces can engage with the TFWP and seek solutions to its negative effects.

#### a. Sanctuary cities

While immigration falls within the federal jurisdiction, cities and municipalities have a unique role to play with respect to migrant workers, and particularly those migrant workers who have lost the legal status to remain in Canada.

Workers with status most often interact with government services and structures at a local level; through taking the bus, going to the doctor or seeking education for their children. Rather than taking a punitive or expulsion-based approach to the issue of immigration status, a number of cities and communities have instead begun to explore ways to make city services more accessible to individuals without legal status. These types of policies are most evident in sanctuary cities. Generally speaking, the term “sanctuary city” refers to a city which does not require proof of immigration status in order to access municipal and police services. Instead, individuals without legal immigration status are able access these services without fear of detention or deportation (West Coast LEAF 2015, 1).

While the sanctuary city movement is relatively well developed and extensive in the United States, it has only recently spread into Canada in a formal way. In 2013 Toronto’s City Council voted to declare itself a sanctuary city, and in 2014 the city of Hamilton, Ontario followed suit with a similar declaration. Vancouver’s City Council recently committed to exploring the idea of becoming a sanctuary city. Activism on this issue has recently grown in the city, and the movement for sanctuary policies experienced a major victory when Vancouver’s City Council ended a memorandum of understanding with the CBSA that empowered the city to assist with the enforcement of immigration law. The MOU had allowed extensive immigration enforcement activities in Vancouver’s transit system, which lead one woman, Lucia Vega Jimenez, to end her life due to the threat of deportation after she was discovered riding on Vancouver transit without paying the fare and was subsequently placed in detention. This tragedy revealed the fear and vulnerability of people living in the city without legal status, and galvanized those calling for a more just approach to the issue of immigration status (Ball 2014).

The sanctuary city movement has the potential to benefit migrant workers not only by improving access to basic services, but also through encouraging workers to pursue their legal rights. Punitive immigration enforcement often prevents people who have lost status from pursuing what they are legally entitled to as workers. Unscrupulous employers depend on these workers’ fear of detection (and resulting silence) to ensure that they will not speak out or complain about

these employer's failure to meet basic employment standards. The movement towards a sanctuary city model can counteract this type of exploitation by prioritizing justice for workers regardless of their immigration status, and can create safe spaces for workers to seek information about their legal rights and request help in pursuing them.

As well, the sanctuary city movement can transform workers into agents in the fight for their rights, as struggles for justice “could help to decompartmentalize migrants' lives, promoting their acceptance as members of society as well as a source of labour” (Marsden 2014). Workers who are silenced through fear of deportation are unable to participate in the political dialogue around how to address employment abuses, and are shut out from the political decisions that impact them directly. As participants in these systems of labour it is critical that the voices of migrant workers are heard, and sanctuary cities can provide a safe space for them to speak.

b. Anonymous complaints and proactive investigations

The standards set by the *Employment Standards Act* apply equally to all residents in BC, regardless of their immigration status. Standards set by the *ESA* include minimum wages, hours of work, leaves, notice and grounds for termination, advertising of work and recruitment practices. The fact that these standards exist, however, does not necessarily mean that they are enforced. Unfortunately, the system of enforcement under the *ESA* is woefully inadequate to address the unique vulnerabilities of migrant workers under the Lowest-Wage Streams. This is in large part because the enforcement system is a complaint-driven mechanism that requires workers to come forward and initiate the process. Even before workers may make a formal complaint to the Employment Standards Branch (“ESB”), they must complete a self-help kit and deliver it to their employer. Only certain workers are exempt from this process, including farm-workers, domestics, youth and workers with significant language difficulties (West Coast Domestic Workers' Association 2013, 20).

After the self-help kit has been delivered, and a formal complaint has been made, the ESB then facilitates a settlement discussion between the worker and the employer. Unfortunately, at this stage, workers have reported being “subjected to pressure from officers to settle for less than what they are entitled” (WCDWA 2013, 20). If they do not settle on adverse terms, they may endure delays that can last for years (WCDWA 2013, 20). Migrant workers on a short term visa are unlikely to see any compensation if their status expires before their complaint is resolved.

To maximize effective routes to individual claims-making, it is essential that the associated risk to workers be minimized. Two changes would go a long way to achieving this goal and improving the ability of the employment standards scheme to respond to the unique vulnerabilities of migrant workers. The first is to allow for anonymous and third-party complaints. The second is to take a proactive approach to enforcement that would shift the onus from vulnerable workers to the ESB (Law Commission of Ontario 2012, 128-129).

The *ESA* does currently provide a mechanism for confidential complaints. Section 75 provides that, if requested in writing by a complainant, the director must not disclose any identifying information about the complainant unless the disclosure is necessary for the purposes of a proceeding under the *ESA* or the director considers the disclosure in the public interest.

This protection could be expanded to allow for anonymous and third-party complaints, which the ESB would take responsibility for investigating. This change would provide the most protection for workers still on the job and those vulnerable to employer retaliation. This model has been adopted in Saskatchewan, which allows “the employee or a third party such as a parent, friend or a member of the community” to submit a claim against an employer, which the Compliance and Review Unit then investigates (Vosko 2013, 860-861). The anonymous complaint process is available if the worker is still employed at the workplace, believes that provisions of the province’s *Labour Standards Act* are not being followed, and wants to seek redress but is not in a position to file a formal complaint. Where a claim submitted by a worker is found to apply to more than one worker at the worksite, the Ministry will expand their inspection to protect all workers present (Vosko 2013, 861).

The second possible change is for the ESB to take a proactive approach to investigations (Law Commission of Ontario 2012, 128-129). In addition to investigating anonymous and third-party complaints, the ESB could also undertake regular enforcement sweeps of high-risk sectors. In the United States, proactive investigations are being used as a strategy in high-risk sectors where workers are unlikely to bring forward individual complaints. For example, in 2011 the US Department of Labor initiated an enforcement sweep in the agricultural industry. By June of that year, inspectors had conducted over twenty investigations, recovered \$670,770 in back wages for approximately six hundred agricultural workers, and assessed over \$128,850 in penalties (Vosko 2013, 865-866).

Proactive investigations offer the benefit of covering more ground than the investigation of individual complaints. They also provide low risk opportunities for the expression of grievances (Vosko 2013, 873).

Following this model, the ESB could randomly investigate employers in high risk workplaces, including those with high concentrations of migrant workers in the Lowest-Wage Streams. Given that 74% of the workplaces employing migrant workers investigated by the Alberta Ministry of Employment and Immigration had violated the province's *Employment Standards Act*, it is likely that these investigations would be fruitful (Flecker 2011, 26). To subsidize the cost of these measures, the ESB could require employers found to be in contravention of the *ESA* to cover the administrative costs of the investigation. This could act as a deterrent against not compensating workers for what they are genuinely owed.

#### c. Robust anti-retaliation provisions

As discussed above, the threat of immigration-related retaliation is a serious obstacle for migrant workers to enforce their employment rights. Research conducted by the WCDWA indicates that many live-in caregivers are reluctant to complain about poor working conditions, unpaid wages and other forms of exploitation because they fear reprisal action from employers that might lead to deportation (WCDWA 2014, 33). Saad's study of unsuccessful refugee claimants revealed similar fears.

The *ESA* explicitly prohibits employers from retaliating against a worker for bringing an employment standards complaint. Section 83 of the *ESA* provides that an employer must not "threaten to dismiss or otherwise threaten a person" because a complaint or investigation may be or has been made under the Act, an appeal or other action may be or has been taken or information may be or has been supplied. However, this provision provides little protection against immigration-related retaliation. Not only is the onus on workers to prove the retaliation, which is difficult if not impossible if an employer makes an anonymous complaint to the CBSA, but there is no mechanism to permit workers to remain in Canada until the resolution of their complaint. The provision also provides limited deterrence as fines are low, starting at \$500 per violation, and are only payable if the complaint proceeds to a determination by the ESB, which may take years. Migrant workers with short term visas face many obstacles in pursuing claims to determination, especially where the retaliation is immigration-related and jeopardizes their ability to remain in Canada.

While the provincial government does not have the jurisdiction to prevent the CBSA from accepting anonymous complaints or enforcing the *Immigration and Refugee Protection Act*, the retaliation provision of the *ESA* could be strengthened to better deter retaliatory conduct. Two changes would have this effect. First, the *ESA* could provide for a presumption of retaliation where workers face adverse consequences within a certain period of exercising their rights under the Act. Second, the *ESA* could provide for more serious penalties for breach of the retaliation provision.

A presumption of employer retaliation involves creating “a legal protection that any adverse or discriminatory action taken by an employer against the worker within a certain period of time after the worker [or another permitted party] complains will be presumed to be retaliatory” (Vosko 2013, 862-863). Such a provision shifts the burden of proof from workers to employers. It is important that the ESB pursue retaliation even in the absence of the worker. Otherwise immigration-related retaliation would be incentivized, as removing the worker from Canada would immunize the employer from penalty.

The second recommendation is more stringent penalties for retaliation. Recent legislation from California provides an example of the types of penalties that may prove to be effective. The Legislature of California explicitly recognizes that, “where there are immigrant workers involved, employer retaliation often involves threats to contact law enforcement agencies, including immigration enforcement agencies, if a worker engages in protected conduct” (Assembly Bill 263, s. 1(f)). To respond to this problem, the California *Labor Code* specifically prohibits employers from reporting, or threatening to report, a worker’s immigration status or suspected immigration status to a government official because the worker exercised a right under the *Labor Code* (California Labor Code, s. 1019). Employers who violate this provision face serious penalties including fines of up to \$10,000 per violation and the suspension of their business license (California Labor Code, ss. 98.6, 1019). The California *Labor Code* also has a presumption of retaliation where employers take certain actions within 90 days of an employee’s exercise of rights such as requesting additional proof of an employee’s work authorization, using the federal E-Verify system to confirm the employee’s eligibility to work and contacting immigration authorities (California Labor Code, s. 1019).

Adopting a presumption of retaliation and including penalties that actually matter to employers (like the suspension of a business license) would go a long way to protect migrant workers and keep them in BC long enough to pursue their complaint.

## V. Conclusion

In this paper we have considered the vulnerabilities faced by migrant workers in the Lowest-Wage Streams (including barriers to benefitting from statutory protections related to employment standards or enforcing legal rights), discussed the common pathways to the loss of status created by the TFWP and reviewed three possible measures to address abuses experienced by migrant workers and improve access to legal rights and protections.

The fact that immigration and programs like the TFWP fall within the federal jurisdiction does not prevent provinces and local governments from taking concrete steps to mitigate the negative effects of these types of temporary work programs. Vancouver City Council, for example, should implement sanctuary policies that empower workers to access services, seek legal assistance and participate in discussions around their rights. British Columbia's provincial government should act to implement proactive enforcement and inspection regimes that take the burden (and risks) of reporting employment standards violations off the shoulders of vulnerable workers. The provincial government should also pursue legislative changes that improve the protection of workers who could face profound immigration consequences if they report employment abuses by implementing robust anti-retaliation measures.

The above steps represent concrete improvements to the status quo, but the fact remains that the TFWP and temporary work programs in general have been found to exploit vulnerable workers and damage working standards and conditions for all workers in Canada. It is clear that the status quo is unacceptable. While making practical changes locally and provincially, governments must also advocate for permanent immigration as a just and equitable way to address labour shortages rather than continuing to accept temporary solutions that harm many and benefit few, and must also advocate for those workers who arrived in Canada hoping for the best and who, unfortunately and predictably, experience the worst.

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# **Temporary Migrant Workers: Worker Rights and Organizing Strategies - Perspectives from the U.S. Experience**

**Arthur N. Read<sup>1</sup>  
General Counsel  
Friends of Farmworkers, Inc.**

## **Importance of Advocacy as to the Terms of Temporary Worker Programs**

In the United States there is currently an alphabet soup plethora of nonimmigrant programs authorizing employment of foreign nationals each of which was created as a result of successful business political advocacy for such programs.<sup>2</sup> Even more importantly pro-business and anti-immigrant coalitions have continued to seek expanded nonimmigrant worker visa

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<sup>1</sup> **Note on the Author.** Arthur N. Read has been the General Counsel of Friends of Farmworkers, Inc. a non-profit legal services organization based in Philadelphia, Pennsylvania in the United States since 1982. He has been practicing labor and employment law in the states of New York, New Jersey and Pennsylvania since 1976 and has specialized in the representation of migrant workers since 1979. Mr. Read has been a member of the National Lawyers Guild Labor and Employment Committee since 1974 and has represented unions and workers. He has practical experience with both the U.S. H-2A temporary agricultural worker program and the H-2B temporary non-agricultural worker program. Much of this paper will draw on extensive investigation, advocacy and litigation in relationship to the H-2B program over the past 10 years.

In 2011 and 2012, Mr. Read participated in conferences of the Latin American Association of Labor Lawyers (ALAL) in Chile and Cuba and the Canadian Association of Labour Lawyers (CALL-ACAMS) in Quebec. Amongst prior publications of Mr. Read related to the issues in this article are:

- “Learning From the Past: Designing Effective Worker Protections for Comprehensive Immigration Reform” 16 *Temp. Pol. & Civ. Rts. L. Rev.* 423 (Spring 2007).
- “Protecting Worker Rights in the Context of Immigration Reform” 9 *Journal of Law and Social Change* 65 (2006).
- “Let the Flowers Bloom and Protect the Workers Too –A Strategic Approach Toward Addressing the Marginalization of Agricultural Workers” 6 *U. Pa. J. Lab. & Emp. L.* 525 (Spring 2004).

<sup>2</sup> Annexed is a summary of nonimmigrant visa categories and numbers of individuals issued visas for entry into the United States under those categories. Not all of the nonimmigrant categories permit employment authorization for work with U.S. employers.

programs without a pathway to permanent legal status or citizenship as a mechanism to obtain a plentiful supply of cheap labor without allowing expanded political participation and political integration of immigrant communities.

Repeatedly over the past 20 years pro-business political forces have supported expanded nonimmigrant temporary worker programs as a solution to the presence of more than 8 million “unauthorized” foreign nationals in the United States labor force<sup>3</sup> and as a “future flow” source for foreign nationals for U.S. employers.<sup>4</sup> In 2015 candidates for the Republican Party

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<sup>3</sup> Jeffrey S. Passel is a senior demographer at Pew Research Center has published an estimate that in the U.S. labor force, there were 8.1 million unauthorized immigrants either working or looking for work in 2012 and that this constituted 5.1% of the U.S. labor force. The report estimated that there were a total of 11.3 million unauthorized immigrants (including those not in the labor force) in the U.S. in 2014. See <http://www.pewresearch.org/fact-tank/2015/07/24/5-facts-about-illegal-immigration-in-the-u-s/>.

<sup>4</sup> In 2013 the AFL-CIO took the lead in attempting to craft with business interests a compromise “W visa” future flow worker program and in April 2013 described the key elements of this proposal as follows:

1. The W-Visa is not a temporary visa. Workers will have the ability to self-petition for permanent status after a year and they are not tied to a single employer.

2. Unlike other employer visa programs, this one will be data driven. Data will be compiled by a new bureau called the Bureau of Immigration and Labor Market Research. The bureau will be a separate and independent component within U.S. Citizenship and Immigration Services (USCIS). The director of the bureau will be appointed by the president and confirmed by the Senate. The bureau will be staffed by experts in economics, labor markets, demographics and other specialties needed to identify labor shortages and make recommendations, among other things, on the impact of immigration on labor markets as well as the methods of recruitment of U.S. workers into lesser-skilled, non-seasonal jobs. The bureau will publish shortage lists by occupation and make annual recommendations and reports to Congress on how to improve employment-based immigration. The bureau also will have a role in setting the annual W-Visa cap. USCIS will fund the bureau through registered employers and registered openings fees for employers.

3. W-Visa holders will be paid fairly, meaning their wages will not adversely affect the wages or working conditions of U.S. workers. Wages will be the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater. Extensive recruitment of U.S. workers will be required.

nomination for President are aggressively advocating for the forcible deportation of all unauthorized foreign nationals despite a widespread recognition in the business community that the economic consequences of such an action would be grossly disruptive

Analysis of temporary nonimmigrant visa programs in the United States indicates that they fall in to two fundamentally different categories: (1) temporary worker visa programs for highly skilled workers; and (2) temporary worker visa programs for low wage workers.<sup>5</sup> Much of the attention of organized labor in the United States has focused on the need to limit the size and scope of temporary worker visa programs for highly skilled workers. This is because their potential negative impact on wages and employment opportunities for competing U.S. workers is relatively self-evident. Meanwhile the limited protections for low skill and unskilled workers in temporary visa programs have been under concerted political attack by pro-business political forces in both major political parties in the U.S. throughout the past 20 years.

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4. W-Visa workers will be covered by state and federal employment laws to the same extent that other U.S. workers are covered. W-Visas will not be available to employers who have laid off workers within 90 days and will not be available to employers during a strike or lockout.

See <http://www.aflcio.org/Blog/Political-Action-Legislation/5-Things-You-Need-to-Know-About-the-Immigration-Agreement> (April 1, 2013). Bipartisan Congressional political support for comprehensive immigration reform including the future flow “W visa” collapsed later in 2013 and appears unlikely to be fruitful in the near future.

<sup>5</sup> The J-1 visa category, under which 331,068 visas were issued in 2014, purports to be primarily a non-employment cultural exchange program including “summer work travel,” “trainees and interns,” and other positions including camp counselors and “au pairs.” Because of its theoretical cultural purpose, the U.S. Department of Labor has no role in the approval of applications for employment and the program is administered without any attention to these issues by the U.S. State Department. See Southern Poverty Law Center, *Culture Shock: The Exploitation of J-1 Cultural Exchange Workers*, Feb.1, 2014, available at: <https://www.splcenter.org/20140202/culture-shock-exploitation-j-1-cultural-exchange-workers>. See also Daniel Costa, Economic Policy Institute, “J-1 Summer Work Travel Program Still Poorly Regulated,” Mar. 19, 2014, available at: <http://www.epi.org/blog/dhs-state-department-j1-summer-work-travel-poorly-regulated/>.

Fundamentally, the principal political problem for protection of low wage foreign born nonimmigrant authorized workers is a pro-business political consensus of many legislators that immigrant labor should be cheap labor.<sup>6</sup>

### **Reject a Pure Free Trade in Labor Analysis**

Academics supporting increased immigration have frequently trumpeted the success of employers in utilizing recent immigrants to reduce their costs of production and thereby producing goods more cheaply for consumers. One of the principal advocates of this approach is Professor Howard F. Chang of the University of Pennsylvania Law School, who has written a

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<sup>6</sup> One problematic aspect in U.S. law with significant numbers of the low wage jobs in which nonimmigrants are employed is the exemption of those categories of employment from many of the normal employment protections generally available to workers under U.S. law.

For example, employers of temporary H-2A agricultural workers are exempt under the National Labor Relations Act (NLRA) and most state labor laws from fundamental protections related to the right to organize and engage in collective concerted activity. *See* 6 *U. Pa. J. Lab. & Emp. L.* 525. Moreover, under most circumstances agricultural workers as defined under the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et seq.* are exempt from requirements to pay overtime, and in some circumstances even exempt from the requirements to pay minimum wages. *See*, U.S. Department of Labor, Wage and Hour Division, “Fact Sheet #12: Agricultural Employers Under the Fair Labor Standards Act (FLSA),” available at: <http://www.dol.gov/whd/regs/compliance/whdfs12.htm>.

Similarly, one of the surprising large categories of temporary non-agricultural H-2B workers are “Amusement and Recreation Attendants.” The U.S. Department of Labor (DOL) certified 6,788 H-2B positions in this industry in the first nine months of federal fiscal year 2015 (FY 2015). *See* [http://www.foreignlaborcert.doleta.gov/pdf/H-2B\\_SelectedStatistics\\_FY\\_2015\\_Q3.pdf](http://www.foreignlaborcert.doleta.gov/pdf/H-2B_SelectedStatistics_FY_2015_Q3.pdf). Employers in the carnivals and amusement park industry typically assert that they are exempt from federal FLSA minimum wage and overtime requirements pursuant to 29 U.S.C. §213(a)(3) and have historically paid their H-2B employees only a low weekly wage rate even when employees actually work 60-70 hours in a work week and have failed to maintain records of hours worked. State laws may require payment of state minimum wage or overtime, but U.S. DOL has failed to enforce these requirements in H-2B employment. *See* [http://mail.friendsfw.org/H-2B/Carnival/State\\_Min\\_Wage\\_Overtime\\_Amusement\\_Workers.pdf](http://mail.friendsfw.org/H-2B/Carnival/State_Min_Wage_Overtime_Amusement_Workers.pdf).

Several categories of the nonimmigrant temporary J-1 employment are likewise with employers who assert exemptions from federal laws covering most workers. For example, *au pairs* are likely exempt from NLRA and FLSA exemptions as domestic workers.

series of articles on this topic.<sup>7</sup> His initial statement of this approach sounds appealing to immigrant activists:<sup>8</sup>

Free trade in all services, including labor services, would imply free movement of people across borders. To provide many services, workers must cross borders to where the work must be performed, either on a temporary basis or to accept permanent employment.<sup>9</sup>

However, further elaboration of this approach in its pure form makes clear that it implies accepting reduced wages for employment within this country:

Immigration barriers interfere with the free flow of labor internationally and thereby cause wage rates for the same class of labor to diverge widely among different countries. For any given class of labor, residents of high-wage countries could gain by employing more immigrant labor, and residents of low-wage countries could gain by selling more of their labor to employers in high-wage countries. Economic efficiency in the global labor market would call for unrestricted migration, which would allow labor to move freely to the country where it earns the highest return. Market forces would thus direct labor to the market where its marginal product is highest. Given the large international differences in wages, it should be apparent that the potential gains from international trade in labor (and the costs we bear as a result of immigration barriers) are large.<sup>10</sup>

Immigration restrictions impose costs by driving up the cost of labor, which in turn drives up the cost of goods and services to consumers. Native workers may gain from higher wages, but this gain comes only at the expense of employers in the host country and ultimately consumers. The increase in wages for domestic labor is a pure transfer from owners of other factors of production

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<sup>7</sup> See Howard F. Chang, *Liberalized Immigration As Free Trade: Economic Welfare And The Optimal Immigration Policy*, 145 U. PA. L. REV. 1147 (1997) [hereinafter Chang I]; Howard F. Chang, *Migration As International Trade: The Economic Gains From The Liberalized Movement Of Labor*, 3 UCLA J. INT'L L. & FOR. AFF. 371 (1998-99) [hereinafter Chang II]. See also Howard F. Chang, *Immigration and the Workplace: Immigration Restrictions As Employment Discrimination*, 78 CHI.-KENT. L. REV. 291 (2003); Chang, *supra* note 40.

<sup>8</sup> A different and insightful analysis of labor migration in a historical and international context supports the underlying impossibility of sustaining political borders as barriers to the movement of labor. See Nigel Harris, *THE NEW UNTOUCHABLES: IMMIGRATION AND THE NEW WORLD WORKER* (1995). See also Kevin R. Johnson, *Open Borders?*, 51 UCLA L. REV. 193, 264 (2003) ("Experience demonstrates that, at least within modern sensibilities, border controls cannot be enforced.").

<sup>9</sup> See Chang II, *supra* note 47, at 372.

<sup>10</sup> See Chang II, *supra* note 47, at 373.

(for example, capital and land) in the host country and from consumers. Immigration restrictions not only redistribute wealth among natives but also destroy wealth by causing economic distortions.<sup>11</sup>

Professor Chang himself concedes that unrestrained free trade in labor may have adverse consequences for immigrant communities in this country:

Immigration not only expands wealth, but also can have important distributive effects. Those natives who must compete with immigrants in the labor market may find that immigration reduces their real income.

Empirical studies, however, consistently find that immigration has only a weak effect on native wages. This result may not be surprising, given that natives and immigrants tend to work in different occupations and therefore tend not to compete in the same labor markets. Thus, **immigration does have a more significant effect on the wages of earlier waves of immigrant workers, who are close substitutes for new immigrants.**<sup>12</sup>

[Emphasis added].

### **Avoiding an Adverse Impact on Domestic Workers from Usage of Temporary Foreign Workers**

Much of U.S. advocacy in relationship to the U.S. temporary non-agricultural worker visa program (H-2B) over the past 10 years has focused on implementing the established statutory legal requirement that the usage by employers of H-2B temporary non-agricultural workers cannot have an “adverse impact” on domestic U.S. employment authorized workers.<sup>13</sup>

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<sup>11</sup> See *Chang II*, *supra* note 47 at 379.

<sup>12</sup> See *Chang II*, *supra* note 47 at 408.

<sup>13</sup> Significantly, the categories of employment authorized workers colloquially referred to as “U.S. workers” includes any foreign national with employment authorization. This includes recent refugees who are assisted by refugee resettlement organizations seeking employment opportunities. It also includes foreign national individuals who have qualified for lawful status as victims of crimes or human trafficking (including labor trafficking). It also includes the beneficiaries of executive actions providing employment authorization to previously unauthorized foreign nationals. This has included beneficiaries of the administrative “Deferred Action for Childhood Arrivals (DACA)” See <http://www.nilc.org/dacaworkplacerrights.html>.

On November 20 and 21, 2014, President Barack Obama announced a series of administrative reforms of immigration policy, collectively called the Immigration Accountability Executive Action. These reforms center on plans to expand eligibility for the current Deferred Action for Childhood Arrivals (DACA) initiative, and to create a Deferred Action for Parents of

In particular, beginning in the late 1990's and accelerating during the Bush administration from 2001-2008, the U.S. Department of Labor (DOL) changed its methodology for the calculation of minimum required "prevailing wages" required to be paid both to U.S. workers and H-2B foreign national temporary workers such that those wages were far below the actual average prevailing wage rates determined by the DOL's own wage surveys.

When the Obama administration took office in early 2009, DOL prioritized responding to efforts by the Bush administration Department of Labor to seriously weaken protections for temporary agricultural H-2A workers. This decision was in part because of limited Congressional support for improving regulation of the H-2B (non-agricultural) worker program. As a result much of the advocacy for improving regulations for the H-2B program has required court challenges to the procedural failures of the Department of Labor and the Department of Homeland Security (DHS) to comply with the U.S. federal Administrative Procedure Act.<sup>14</sup>

In August 2010 a federal court ruled that the Department of Labor had failed to establish procedures for the calculation of the required minimum prevailing wage rate for H-2B temporary non-agricultural workers which complied with the requirement to avoid an adverse impact on

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Americans and Lawful Permanent Residents (DAPA) initiative for the parents of U.S citizens and lawful permanent residents who meet certain criteria. Both DACA and DAPA derive from the executive branch's authority to exercise discretion in the prosecution and enforcement of immigration cases. In both instances, the President has authorized the Department of Homeland Security (DHS) to defer for three years the deportation of qualified individuals who pose no threat to the United States in the hope that Congress will finally undertake comprehensive, more permanent immigration reform. These initiatives have been blocked by federal courts. *See* <http://www.immigrationpolicy.org/just-facts/understanding-initial-legal-challenges-immigration-accountability-executive-action>.

<sup>14</sup> Employers have challenged the rulemaking authority for the Department of Labor and insisted that only the Department of Homeland Security was authorized by the U.S. Congress to regulate the H-2B program. Ultimately, in April 2013 and again in April 2015, the Department of Labor and the Department of Homeland Security participated in a joint rulemaking for the H-2B program to overcome this issue.



U.S. workers.<sup>15</sup> In subsequent rulemaking proceedings in late 2010 and a new regulation in 2011 the Department of Labor agreed that its prior rules had failed to effectively protect U.S. workers.<sup>16</sup> Thereafter, in a further H-2B rulemaking in 2011 and 2012, DOL adopted further regulations that included improved provisions for recruitment of U.S. workers and protections for H-2B workers' rights.<sup>17</sup>

The lack of Congressional political support for administration of the H-2B program so as to protect U.S. workers from an adverse impact on wages delayed implementation of the 2011 H-2B rules until April 2013 following a further court order in March 2013 vacating the prior invalid wage rules.<sup>18</sup> H-2B employers exploited loopholes in the Department of Labor's April 2013 and over the next year relied upon employer provided wage surveys to again avoid paying the appropriate average area wage rate for the kind of job to H-2B workers in 2014.<sup>19</sup> Advocates

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<sup>15</sup> See *Comite' de Apoyo a los Trabajadores Agrícolas (CATA) v. Solis*, No. 2:09-cv-240, 2010 WL 3431761 (E.D. Pa. Aug. 30, 2010) (CATA I).

<sup>16</sup> See 2011 H-2B Wage Rule. 75 Fed. Reg. 61,578 (Oct. 5, 2010) and 76 Fed. Reg. 3452 (Jan. 19, 2011).

<sup>17</sup> See 2012 H-2B General Rule. 76 Fed. Reg. 15130 (Mar. 18, 2011) and 77 Fed. Reg. 10038 (Feb. 21, 2012). As a result of employer litigation challenges to DOL's rulemaking authority the Department of Labor was barred from enforcing the 2012 H-2B General Rule. See, *Bayou Lawn & Landscape Servs. v. Sec'y of Labor*, 713 F.3d 1080 (11th Cir. 2013) and *Bayou Lawn & Landscape Servs. v. Sec'y of Labor*, No. 3:12-cv-183 (N.D. Fla. Dec. 18, 2014) (Bayou II). On April 29, 2015, the Department of Labor and the Department of Homeland Security jointly promulgated a revised Interim Final H-2B General Rule which is now in effect. See 80 Fed. Reg. 24,146 (Apr. 29, 2015).

<sup>18</sup> See 78 Fed. Reg. 24,047 (Apr. 24, 2013) (2013 H-2B Wage Interim Final Rule).

<sup>19</sup> Another group of employers in the traveling fair and carnival industry took advantage of provisions allowing payment of lower wage rates pursuant to a collective bargaining agreement and assisted in the establishment of a purported labor organization – the Association of Mobile Entertainment Workers – to bargain for lower wage rates than would have otherwise been required. Challenges to this are pending before the National Labor Relations Board. See “Union Accused of Betraying Migrant Carnival Workers,” *New York Times* (Sept. 1, 2015). Available at: <http://www.nytimes.com/2015/09/02/business/union-accused-of-betraying-migrant-carnival-workers.html>. See also Daniel Costa, “H-2B Wage Rule Loophole Lets Employers

returned to federal court and obtained a court order enjoining the usage of employer provided wage surveys.<sup>20</sup> In April 2015, the Department of Labor and the Department of Homeland Security jointly issued a new Final H-2B Wage Rule which the federal agencies asserted would protect U.S. workers against adverse impact on wages from the H-2B temporary non-agricultural worker program.<sup>21</sup> Current Department of Labor regulations for the H-2B temporary non-agricultural worker program are far stronger than those that were in place over the past 20 years.<sup>22</sup>

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Exploit Migrant Workers” available at: <http://www.epi.org/blog/h-2b-wage-rule-loophole-lets-employers-exploit-migrant-workers/>.

<sup>20</sup> See *Comite de Apoyo a los Trabajadores Agricolas v. Perez*, 774 F.3d 173, 191 (3d Cir. 2014) (CATA III)

<sup>21</sup> See 80 Fed. Reg. 24,146 (Apr. 29, 2015). Advocates for workers’ rights filed a further challenge to this rule as to provisions that continued to *create loopholes for employers to avoid paying appropriate average prevailing wage rates*. See *Comite de Apoyo a los Trabajadores Agricolas v. Perez*, United States District Court District of New Jersey, 15-cv-04014 (June 12, 2015). (CATA IV). North America’s Building Trades Union (NABTU) filed amicus curiae brief challenging the elimination of the requirement to pay Davis Bacon Act prevailing wages for construction industry jobs.

Once again in the summer of 2015 Congressional supporters of H-2B employers are threatening federal appropriation riders to restrict the Department of Labor and Department of Homeland Security enforcement of the 2015 H-2B Wage Rule and to again permit employers to submit employer provided wage surveys without restriction. See Rachel Luban, “Congress Is Debating Whether or Not To Make It Easier for Bosses to Cheat Guestworkers,” *In These Times* (July 13, 2015).

<sup>22</sup> The current full H-2B Department of Labor Regulations are at:

- 20 C.F.R. Part 655, Subpart A. Labor Certification Process for Temporary Non-Agricultural Employment in the United States (H-2B Workers, available at: <http://www.ecfr.gov/cgi-bin/retrieveECFR?n=pt20.3.655#sp20.3.655.a>.
- 29 C.F. R. Part 503: Enforcement of Obligations For Temporary Nonimmigrant Non-Agricultural Workers Described In The Immigration And Nationality Act, available at: <http://www.ecfr.gov/cgi-bin/text-idx?SID=39e5926df649426303b928d6ac787206&mc=true&node=pt29.3.503&rgn=div5>.

See also [http://mail.friendsfw.org/H-2B/DOL\\_Reg/REGULATION\\_H-2B\\_2015-09.pdf](http://mail.friendsfw.org/H-2B/DOL_Reg/REGULATION_H-2B_2015-09.pdf).

## **Exposing Abuses of Temporary Nonimmigrant Workers**

Clearly one of the most important approaches to advocacy for changes in temporary foreign worker programs has been exposing the abuses of temporary foreign workers by employers, recruiters and labor contractors. One of the recent comprehensive journalistic exposes of the treatment of nonimmigrant temporary workers was published in July 2015. *See* Jessica Garrison and Ken Bensinger, “The New American Slavery: Invited to the U.S., Foreign Workers Find a Nightmare” *Buzz Feed News* (July 24, 2015).<sup>23</sup>

Several organizations active in advocacy on behalf of temporary workers have published important reports which help document these abuses.<sup>24</sup> United States government agencies have issued numerous reports critical of the operation of the H-2 temporary worker programs.<sup>25</sup>

## **Pre-Employment Expenses and Recruitment Costs**

One of the most legally successful results of advocacy in relationship to the H-2B temporary non-agricultural worker program has been in efforts to create legal protections against the shifting of pre-employment expenses of H-2 temporary workers from employers to workers. *See* U.S. Department of Labor, Wage and Hour Division, Field Assistance Bulletin No. 2009-2 -

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<sup>23</sup> *See* <http://www.buzzfeed.com/jessicagarrison/the-new-american-slavery-invited-to-the-us-foreign-workers-f#.umBDnDbAJ>.

<sup>24</sup> *See* Centro de los Derechos del Migrante, Inc. (CDM) publications available at: <http://www.cdmigrante.org/publications/>.

*See*, Southern Poverty Law Center, “Close to Slavery: Guestworker Programs in the United States” (Feb. 18, 2013) available at: <https://www.splcenter.org/20130218/close-slavery-guestworker-programs-united-states>.

*See*, Global Workers Justice Alliance, *Visas, Inc: Corporate Control And Policy Incoherence In The U.S. Temporary Foreign Labor System* (May 2012).

*See*, Economic Policy Institute at <http://www.epi.org/research/immigration/>.

<sup>25</sup> *See* U.S. Government Accountability Office, “H-2A and H-2B Visa Programs: Increased Protections Needed for Foreign Workers,” GAO-15-154: Published: Mar 6, 2015. Available at: <http://www.gao.gov/products/GAO-15-154>.

“Travel and Visa Expenses of H-2B Workers Under the FLSA” (Aug. 21, 2009).<sup>26</sup> Subsequent regulations for the H-2B program have barred employers from shifting their direct expenses to H-2B workers. The April 2015 regulations include important restrictions on charges by foreign recruiting agents of employers as well as restrictions on expenses which may be shifted to workers.<sup>27</sup>

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<sup>26</sup> Available at:  
[http://www.dol.gov/whd/FieldBulletins/FieldAssistanceBulletin2009\\_2.pdf](http://www.dol.gov/whd/FieldBulletins/FieldAssistanceBulletin2009_2.pdf) and  
[http://www.dol.gov/whd/FieldBulletins/FieldAssistanceBulletin2009\\_2.htm](http://www.dol.gov/whd/FieldBulletins/FieldAssistanceBulletin2009_2.htm).

<sup>27</sup> See 20 C.F.R. § 655.9

**§ 655.9 Disclosure of foreign worker recruitment.**

(a) The employer, and its attorney or agent, as applicable, must provide a copy of all agreements with any agent or recruiter whom it engages or plans to engage in the recruitment of H-2B workers under this *Application for Temporary Employment Certification*. These agreements must contain the contractual prohibition against charging fees as set forth in §655.20(p).

(b) The employer, and its attorney or agent, as applicable, must also provide the identity and location of all persons and entities hired by or working for the recruiter or agent referenced in paragraph (a) of this section, and any of the agents or employees of those persons and entities, to recruit prospective foreign workers for the H-2B job opportunities offered by the employer.

(c) The Department of Labor will maintain a publicly available list of agents and recruiters who are party to the agreements referenced in paragraph (a) of this section, as well as the persons and entities referenced in paragraph (b) of this section and the locations in which they are operating.

See 20 C.F.R. § 655.20(o):

§ 655.20(o) *Comply with the prohibitions against employees paying fees.* The employer and its attorney, agents, or employees have not sought or received payment of any kind from the worker for any activity related to obtaining H-2B labor certification or employment, including payment of the employer's attorney or agent fees, application and *H-2B Petition* fees, recruitment costs, or any fees attributed to obtaining the approved *Application for Temporary Employment Certification*. For purposes of this paragraph (o), payment includes, but is not limited to, monetary payments, wage concessions (including deductions from wages, salary, or benefits), kickbacks, bribes, tributes, in-kind payments, and free labor. All wages must be paid free and clear. This provision does not prohibit employers or their agents from receiving reimbursement for costs that are the responsibility and primarily for the benefit of the worker, such as government-required passport fees

See 20 C.F.R. § 655.20(j):

§ 655.20 (j) *Transportation and visa fees.*

(1)

(i) *Transportation to the place of employment.* The employer must provide or reimburse the worker for transportation and subsistence from the place from which the worker has come to work for the employer, whether in the U.S. or abroad, to the place of employment if the worker completes 50 percent of the period of employment covered by the job order (not counting any extensions). The employer may arrange and pay for the transportation and subsistence directly, advance at a minimum the most economical and reasonable common carrier cost of the transportation and subsistence to the worker before the worker's departure, or pay the worker for the reasonable costs incurred by the worker. When it is the prevailing practice of non-H-2B employers in the occupation in the area to do so or when the employer extends such benefits to similarly situated H-2B workers, the employer must advance the required transportation and subsistence costs (or otherwise provide them) to workers in corresponding employment who are traveling to the employer's worksite. The amount of the transportation payment must be no less (and is not required to be more) than the most economical and reasonable common carrier transportation charges for the distances involved. The amount of the daily subsistence must be at least the amount permitted in §655.173. Where the employer will reimburse the reasonable costs incurred by the worker, it must keep accurate and adequate records of: The costs of transportation and subsistence incurred by the worker; the amount reimbursed; and the date(s) of reimbursement. Note that the FLSA applies independently of the H-2B requirements and imposes obligations on employers regarding payment of wages.

(ii) *Transportation from the place of employment.* If the worker completes the period of employment covered by the job order (not counting any extensions), or if the worker is dismissed from employment for any reason by the employer before the end of the period, and the worker has no immediate subsequent H-2B employment, the employer must provide or pay at the time of departure for the worker's cost of return transportation and daily subsistence from the place of employment to the place from which the worker, disregarding intervening employment, departed to work for the employer. If the worker has contracted with a subsequent employer that has not agreed in the job order to provide or pay for the worker's transportation from the employer's worksite to such subsequent employer's worksite, the employer must provide or pay for that transportation and subsistence. If the worker has contracted with a subsequent employer that has agreed in the job order to provide or pay for the worker's transportation from the employer's worksite to such subsequent employer's worksite, the subsequent employer must provide or pay for such expenses.

(iii) *Employer-provided transportation.* All employer-provided transportation must comply with all applicable Federal, State, and local laws and regulations and

## **Nonimmigrant Temporary Worker Programs Tie Workers to a Single Employer**

One of the inherent sources of potential exploitation of workers in temporary foreign worker programs is that they restrict temporary nonimmigrant workers to employment only with the employer who files a petition for their employment.

Interestingly because of the tightened restrictions on pre-employment fees and expenses which can be shifted to employers, employer representatives have been more open to allowing temporary nonimmigrant workers to potentially leave their petitioning employer in hopes of escaping the employer's responsibility for pre-employment expenses.

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27 (continued)

must provide, at a minimum, the same vehicle safety standards, driver licensure requirements, and vehicle insurance as required under 49 CFR parts 390, 393, and 396.

(iv) *Disclosure.* All transportation and subsistence costs that the employer will pay must be disclosed in the job order.

(2) The employer must pay or reimburse the worker in the first workweek for all visa, visa processing, border crossing, and other related fees (including those mandated by the government) incurred by the H-2B worker, but not for passport expenses or other charges primarily for the benefit of the worker.

*See* 20 C.F.R. § 655.20(k)

§ 655.20 (k) *Employer-provided items.* The employer must provide to the worker, without charge or deposit charge, all tools, supplies, and equipment required to perform the duties assigned.

*See also* 20 C.F.R. § 655.20(p):

§ 655.20 (p) *Contracts with third parties to comply with prohibitions.* The employer must contractually prohibit in writing any agent or recruiter (or any agent or employee of such agent or recruiter) whom the employer engages, either directly or indirectly, in recruitment of H-2B workers to seek or receive payments or other compensation from prospective workers. The contract must include the following statement: "Under this agreement, [name of agent, recruiter] and any agent of or employee of [name of agent or recruiter] are prohibited from seeking or receiving payments from any prospective employee of [employer name] at any time, including before or after the worker obtains employment. Payments include but are not limited to, any direct or indirect fees paid by such employees for recruitment, job placement, processing, maintenance, attorneys' fees, agent fees, application fees, or petition fees."

## **Protections Against Retaliation**

One of the most important changes in U.S. immigration law and its enforcement over the last several years is the potential for victims of crime and human trafficking to obtain legal authorization to remain in the U.S. Coupled with regulatory restrictions on retaliation and the potential for immigration enforcement agencies to grant discretionary administrative relief the potential for workers to leave exploitative employers and obtain alternative immigration relief as well as the possibility of pursuing damage claims against their employer is one of the most important developments in legal protections for temporary workers.

For non-agricultural workers the National Labor Relations Board (NLRB) has demonstrated increased awareness of protections for nonimmigrant workers whose immigration status is tied to their employment. The willingness of the office of General Counsel of the NLRB to act expeditiously where such workers assert retaliation for concerted protected activities is a critical legal development.

## **Enforceability of Terms of Employment for Temporary Workers**

As a practical matter the theoretical Department of Labor and Department of Homeland Security guaranteed minimum terms and conditions of employment for temporary foreign workers have no meaning unless: (1) workers are aware of their rights and the required minimum terms of employment; (2) workers can enforce their rights; and (3) workers have real and effective protections against retaliation and blacklisting from future employment opportunities.<sup>28</sup>

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<sup>28</sup> Since temporary foreign workers are often recruited from the same communities in sending countries, the threat of retaliation extends not only to individual workers pursuing claims, but to other workers from the same communities. Supervisors and employers are often perceived by workers as being prepared to retaliate against whole communities if they do not restrict workers pursuing claims.

In the context of the continued advocacy for H-2B temporary non-agricultural workers current 2015 regulations have significantly improved the requirement for disclosure to workers of critical required terms of employment, although in practice this will be a serious continuing issue.

The U.S. experience under multiple programs providing legal protections for temporary seasonal and migrant workers clearly establishes that government enforcement agencies alone are incapable of enforcing the rights of workers. This is true for a variety of reasons. First, as a threshold problem government agencies – such as the Wage and Hour Division (WHD) of the U.S. Department of Labor – have insufficient resources to effectively pursue the volume of investigations and enforcement proceedings necessary to fully enforce the rights of workers employed under nonimmigrant temporary worker programs that they have jurisdiction to enforce. Moreover, without an effective ability to obtain accurate information from workers themselves as to the actual terms of employment, such enforcement agencies lack critical information necessary to identify and pursue violations.

Historically, the ability of workers themselves to pursue class and representative claims to enforce their rights has been the most effective mechanism for enforcement of required terms of employment. Several U.S. courts have questioned whether H-2B temporary non-agricultural workers have any enforceable contract claims and certainly questioned whether they can enforce the terms of employment required by the U.S. Department of Labor. *See Cuellar-Aguilar v. Deggeller Attractions, Inc.* E.D. Ark. Case No. 14-cv-114 (Oct. 29, 2014) and (Jan. 6, 2015), *appeal pending* U.S. Court of Appeals, 8th Cir., Case No. 15-1219. Establishing the right of H-2B workers to effectively enforce their rights in H-2B employment is critical.



Similarly, utilizing and developing effective remedies against retaliation and blacklisting is absolutely essential to effective advocacy on behalf of H-2B workers.

### **Guidance from International Law**

The "International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families"<sup>29</sup> is a United Nations multilateral treaty governing the protection of migrant workers and families which was signed on December 18, 1990 and entered into force on July 1, 2003 after the threshold of 20 ratifying States was reached in March 2003. Article Two of that Convention provides a series of definitions which are useful in discussing nonimmigrant foreign nationals including providing that the term "migrant worker" refers to a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.<sup>30</sup>

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<sup>29</sup> The text of the convention is available at: <http://www2.ohchr.org/english/bodies/cmw/cmw.htm>. The current listing of countries which have ratified the convention is available at: [https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg\\_no=iv-13&chapter=4&lang=en](https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-13&chapter=4&lang=en). Not surprisingly most of the countries ratifying this convention are "sending" countries whose nationals work in other countries, rather than "receiving" countries such as the United States and Canada.

<sup>30</sup> Article Two of the Convention provides that for purposes of the Convention:

1. The term "migrant worker" refers to a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.
2.
  - (a) The term "frontier worker" refers to a migrant worker who retains his or her habitual residence in a neighbouring State to which he or she normally returns every day or at least once a week;
  - (b) The term "seasonal worker" refers to a migrant worker whose work by its character is dependent on seasonal conditions and is performed only during part of the year;
  - (c) The term "seafarer", which includes a fisherman, refers to a migrant worker employed on board a vessel registered in a State of which he or she is not a national;
  - (d) The term "worker on an offshore installation" refers to a migrant worker employed on an offshore installation that is under the jurisdiction of a State of which he or she is not a national;

Although adoption of the Convention by the United States is politically unlikely, the protections in that Convention provide a critical listing of rights of “migrant workers” which should be protected under the laws of all countries. In those countries where adoption of international treaties is more likely to be successful than in the United States serious consideration should be given to prioritizing advocacy for ratification of this Convention.

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30 (continued)

- (e) The term "itinerant worker" refers to a migrant worker who, having his or her habitual residence in one State, has to travel to another State or States for short periods, owing to the nature of his or her occupation;
- (f) The term "project-tied worker" refers to a migrant worker admitted to a State of employment for a defined period to work solely on a specific project being carried out in that State by his or her employer;
- (g) The term "specified-employment worker" refers to a migrant worker:
  - (i) Who has been sent by his or her employer for a restricted and defined period of time to a State of employment to undertake a specific assignment or duty; or
  - (ii) Who engages for a restricted and defined period of time in work that requires professional, commercial, technical or other highly specialized skill; or
  - (iii) Who, upon the request of his or her employer in the State of employment, engages for a restricted and defined period of time in work whose nature is transitory or brief; and who is required to depart from the State of employment either at the expiration of his or her authorized period of stay, or earlier if he or she no longer undertakes that specific assignment or duty or engages in that work;
- (h) The term "self-employed worker" refers to a migrant worker who is engaged in a remunerated activity otherwise than under a contract of employment and who earns his or her living through this activity normally working alone or together with members of his or her family, and to any other migrant worker recognized as self-employed by applicable legislation of the State of employment or bilateral or multilateral agreements.

*See Article Two, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.*

## **Embodying and Experiencing Labour Apartheid**

**(Adriana Paz Ramírez, Justicia for Migrant Workers)**

### **Introduction**

One of the main reasons that prompted me to get involved in migrant farmworkers justice organizing back in 2005 was because of my direct experience of working in a tomato greenhouse alongside with South Asian, Mexican and Filipino workers, my first job after I emigrated from Bolivia<sup>1</sup>. One night at 11pm I received a phone call from a Mexican farm worker, Alberto, in the Fraser Valley asking me if I could help his co-worker Luciano who fell down from a tractor and broke his back and neck in three parts. Luciano had been lying in his bed in deep pain since two days ago and had not been taken into the hospital by his employer. When I inquired “why?!!” Alberto told me “the patron [employer] said he has not time to drive to the hospital in the middle of the week, the companero has to wait until the weekend”. I was left speechless by the employer’s answer. Alberto asked me if I could drive to his farm now to bring his co-worker to the hospital “senorita we are human beings too and my friend needs to see a doctor he is in big pain”, said Alberto with a grave and firm tone. That night my partner and I drove all the way down from Vancouver to the Fraser Valley to find the farm where the injured worker and the rest of his co-workers were anxiously waiting for us. We picked Luciano from his farm and brought him to the Surrey hospital but once there we learned that because Luciano was a temporary visa worker he could not be hospitalized or treated in the provincial medical system<sup>2</sup>.

Needless to say that Luciano’s case left me shocked, profoundly outraged and puzzled with many pieces hanging on the air. I could not (and still cannot) make sense of the whole incident: How come Luciano, a migrant worker that came legally to work to Canada through the Seasonal Agricultural Workers Program (SAWP), a bi-national agreement, with a work contract that says that migrant workers will be treated “same as Canadian counterparts” was left in his bed for two days after a fatal workplace accident? Why Alberto called me (who was a total stranger until then) in an act of clear desperation and isolation? Why Luciano’s temporary immigration status would be ground for the denial of health care? Little I knew that Luciano’s incident would be just one of the countless stories of fatal workplace accidents that leave migrant workers not only unattended by their employers but that cause them to be discarded from the program (SAWP) with no health care either in Canada or in their country of origin.

That night at Luciano’s farm suddenly the benevolent face and humanitarian myth of the Canadian state as well as the greatness of liberal values of ‘equality’ and ‘fairness’ were all dismantled

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<sup>1</sup> When I emigrated from Bolivia to Canada in 2003 I had no English language training and my first job was in a tomato greenhouse in Ladner, Delta, which was the first greenhouse to bring migrant farm workers from Mexico under the SAWP to the province of British Columbia. This experience impacted me in fundamental ways as it gave me first-hand knowledge and experience about the working and living conditions of migrant farm workers. Working for many months in the greenhouse also gave me access into a world that it is virtually invisible to most Canadians. I witnessed firsthand the sense of competition, stress, pressure and fear that are instilled to workers

<sup>2</sup> Migrant workers under the Seasonal Agricultural Workers Program (SAWP) are covered by a private health insurance that is paid by the workers. At that time, in 2004, their health insurance was limited in scope as it did not cover expensive treatments or exams. Now the scope of the insurance has been improved however 90% of the migrant farmworkers under the SWAP are still not covered under the BC medical services plan.

and stripped down while witnessing how migrant farm workers were treated in Canadian farms. In the years to follow this assertion only grew bigger in me in each farm I visited and in the many instances where I witnessed and accompanied workers to navigate, negotiate and in many cases to uphold their dignity against a migrant labour regime of hyper-exploitation. Undoubtedly farmworkers' acts of transnational resilience, dignity, love and courage are the reasons that keep me engaged in the farmworkers justice movement until today.

To contextualize Luciano's situation in this Fraser Valley's farm we need to take a close look at the developments of the migrant workers programs as state-sponsored employment and immigration policies which became very popular in so called "first world" countries. The rise in popularity in developed countries of the use of state-sponsored migrant labour programs has been associated with capitalist global expansion and to despotic neoliberal practices that aim to lower labour costs, create 'flexible' labour, increase corporate profit-making, and enhance access to global labour markets under the pretext of alleviating domestic labour shortages (Ness, 2011). The case of the Canadian agricultural industry and its long-term dependency on cheap migrant labour is illustrative of this trend. Since the creation of Canada's first guest worker program in the 1960s, the Seasonal Agricultural Workers Program (SAWP), the agricultural industry has used "immigration policy to restructure labour-capital relations within borders" to maintain its favoured position in increasingly competitive global markets (Preibisch 2010, 432). While heightened market competition has intensified demands for greater labour flexibilization, the overarching focus on global economic pressures masks more fundamental aspects of Canada's embrace of cheap flexible migrant labour. Temporary migrant workers programs that considerably restrict social, economic and political rights to specific ethno-racial groups rely on logics of economic exploitation that are thoroughly imbricated in neoliberal capitalist relations. By subjecting temporary migrant workers to multiple forms of political, cultural and spatial exclusion, state-sponsored migrant labour programs exercise racialized forms of labour discipline and control that seek to transform displaced groups of migrant workers into disposable populations of cheap labour. Racialized forms of labour discipline and control not only operate through the political arm of the state and its legal apparatuses, they also gain efficacy and traction through discourses of economic benevolence and the needs of the labour market. In Canada the SAWP has been touted as beneficial to Canadian agricultural employers, (Woodward 2006) migrants, and their families for providing much needed opportunities to work (Freeman 2006); the program is usually portrayed as a win-win program since it alleviates labour shortages in agricultural industry and offers job opportunities to peasants and farmers who are otherwise unemployed and face poverty in their home countries. Internationally, commentators have also praised the SAWP as a 'best practice' of managed migration model (Martin 2003) as theoretically the program grants and treats migrant agricultural workers the "same as Canadians" and gives them the benefit of earning salaries in Canadian currency.

The reality for migrant workers in Canada is often a far cry from these positive proclamations. Migrant farm workers who enter in Canada to work under any program of the Low Skill stream of the Temporary Foreign Workers Program<sup>3</sup> are subject to differential treatment under

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<sup>3</sup> Canada has the Temporary Foreign Workers Program that allows foreign workers to work on a temporary working-visa in selected industries and occupations that are categorized as 'low' and 'high' skill. Occupations corresponding to the 'high' or 'skilled' category according to the National Occupation Classification (NOC) correspond to A and B categories such managerial

labour and immigration laws, they are also denied access to political rights and social entitlements by virtue of their immigration status as temporary workers. Nandita Sharma (2006b) describes the development of the SAWP and the creation of the migrant worker category whose permanent and labour mobility is restricted through laws as a form of apartheid. She writes “like past forms of apartheid, its global manifestation is not based on keeping differentiated people apart but instead on organizing two (or more) separate legal regimes and practices for differentiated collectivities within the name nationalized space” (2006b, 1250). Other scholars such as Satzewich (1991), Thomas (2010) and Preibisch (2007) agree with Sharma and indicate that the logics and mechanisms of the incorporation of workers into the Canadian agricultural labour market take place at the intersection of race, ethnicity, citizenship and the capitalist economy. As a result workers in the SAWP are incorporated as an unfree labour force within the dominant relations of production, which are based on dominant notions of labour mobility and citizenship.

Aside from the racialized and capitalist economic logics of incorporation of agricultural workers into the labour market, the SAWP relies on racialized forms of governing and disciplining of migrant labour through legal and extra-legal mechanisms of labour control and coercion. In this paper I contend that the SAWP is a migrant labour regime that functions as an apartheid system of labour control and discipline that entails active involvement of the government in its policy design, implementation and management. Although the SAWP does not explicitly contain race based exclusions and restrictions on rights and entitlements of the program’s participants, following a guiding policy in line with the official de-racialization process of the Canadian immigration system since 1960 (Shakir 2008) adopting a ‘raceless’ legal framework. This does not mean that workers in the program do not experience systemic social and legalized forms of racism and discrimination. The ‘raceless racism’ of the structure of the program and its governance mechanisms are felt by workers on a daily basis and in multiple dimensions of their lives.

My purpose here is to examine how the SAWP work as a labour apartheid regime; and to examine the logics that inform its foundation, the main constitutive elements that organize and govern this system, and the forms of governance and contractual mechanisms of control and coercion, exploring how they actually work on the ground, and how are they embodied, lived and contested by migrant farm workers participating in these programs. To achieve this task I bring into relief perhaps the prime example of a labour apartheid model, which is the South African use of Black migrant workers in the mining industry. I use this example as a framework of reference in my exploration of highly repressive systems of migrant labour management. Comparing and exploring how coercive systems of labour control worked in the past and how they contrast with present models of labour control enables us to recognize patterns and mechanics of such systems, and to see how and when colonial legacies get translated into the present, as historical colonial continuities fade in and out in certain moments and in concrete sites of intersection between political ideologies and economic systems.

By using empirical evidences and theoretical claims I explore and illustrate how relations and expressions of power are re-inscribed in different arenas of workers’ lives under the SAWP as a

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positions and occupations requiring post secondary education. The second one is for “low skilled” workers, which in the NOC correspond to category C, these occupations include farm work, domestic and home care, fast food, restaurants and tourism industry and trades.

regime of labour control. I identify three major themes that allow us to perceive the forms of governance that result in workers' living and experiencing labour apartheid conditions in particular forms: a) Corporeal Control, b) Spatial and Residential Segregation, and c) Transnational Webs of Control and Domination. In the second part I explore workers' political subjectivities and workers' resistance; I categorize workers' forms of contestation that speak directly to the ways in which they experience labour apartheid into three groups: a) Those that create spaces of socialization, b) Those that develop networks of solidarity and ethics of community care, c) Those that restore and connecting intersectional identities.

My analysis in this paper aims to further the discussion of how race and racism is manifested and experienced today by migrant agricultural workers, and how we can understand racism today in the context of migrant labour regimes. **This paper also seeks to contribute to a discussion about the possibilities of a migrant farm worker-led movement in Canada that organizes from and around migrant and racial justice perspectives.** Like other (im)migrant communities in this country, the migrant farm worker community has not only been 'subject to' but also 'subject of' the creation of a counter narrative to the hegemonic official discourse of the liberal welfare state that portrays Canada as benevolent and inclusive, and that celebrates 'difference' and multiculturalism. By bringing migrant workers' particular forms of resistance into conversation with alternative forms of grassroots organizing that fall outside and at the margins of traditional organized labour struggles, this paper ultimately seeks to name the agency of migrant farm workers; their acts of labour, resistance and courage, and their survival mechanisms and expressions of political subjectivity that emerge from displacement and disenfranchisement in the context of migrant labour apartheid regimes.

## 1. The Canadian Seasonal Agricultural Workers Program (SAWP)

The Canadian SAWP is one example of a highly controlled and coercive migrant labour system that operates as a labour apartheid-like model in at least two aspects identified in this paper. The first aspect is related to the differential treatment that migrant workers are subjected to in employment relations and immigration matters. Migrant workers under the SAWP are governed by a distinct set of labour and immigration rules than those applied to the rest of Canadian workers who have permanent residency or citizenship status; the distinct regulations are applied to them by virtue of their non-citizen status. In other words, through a dual strategy of a combined labour and immigration policies, temporary worker programs (such the SAWP) have created a two-tiered legal system that severely weaken the rights, mobility and opportunities of the temporary migrant workers participating in such programs (Basok 2004; Becerril 2007; Preibisch 2004, 2005, 2007; Encalada and Preibisch 2010). The second aspect is related to the structure and policy design of the program. The SAWP has its own contractual and extra-legal mechanisms of coercion, control and disciplining of program participants (Encalada and Preibisch 2010; Ramsaroop 2008). The history and background of the SAWP provides useful insights to understand the program as a response to the needs of securing constant disenfranchised labour from the global South for the Canadian agricultural industry. The SAWP is the oldest Canadian Temporary Workers Program that has operated continuously since 1966. It was instituted as a response to a perceived shortage of labour in the horticultural industry and first implemented as a temporary solution (Basok 2002). It

started as a Memorandum of Understanding (MOU) between Canada and several Caribbean countries to allow entrance of workers from these countries to work on Canadian farms under a work permit visa based on the demand for labour and for the time periods sought by Canadian employers. Mexico was incorporated in 1974. Indigenous Maya Quiché farm workers from Guatemala were recruited to work in Quebec for the first time in the summer of 2003 through a "Low Skilled Pilot Project" (LSPP), another type of guest worker program. The SAWP operates in Alberta, Quebec, Manitoba, Ontario, Nova Scotia, New Brunswick, and Prince Edward Island, supplying labour for 20 per cent of seasonal farm jobs in vegetable, fruit, and tobacco farms and greenhouses. British Columbia was incorporated in 2004. In its first year, the SAWP brought 264 Jamaican workers to the province of Ontario to work on tobacco plantations. Forty-six years later, although still referred to as a temporary labour program, the SAWP brings approximately 30,000 farm workers annually to harvest the majority of fruits and vegetables consumed by Canadians (Institute on Research for Public Policy 2012). It has been suggested that these numbers show that the program has become a structural necessity for the Canadian agricultural industry, therefore undermining the 'temporary' nature of the program since workers are brought in all year round (Basok 2002).

Similar to other migrant labour regimes described by Wolpe (1972) the SAWP requires participants to leave their families in their home countries as a condition of work contract; it imposes restrictions of mobility in the labour market as well as geographical ones. It also requires workers' to be ready to work when they are needed and terminated (and consequently sent back home) when not, workers under this program have significantly less labour rights and protections than local workers do. The elements that make the SAWP resemble and function as a labour apartheid system of labour control lie in how the program exerts mechanisms of control and coercion that are applied to the work sphere and beyond through an array of legal and extra-legal strategies that are internalized by workers to varying degrees.

The complex governance of multiple aspects of workers' lives under Canadian labour migration programs highlights the active role of the Canadian state in the management and functioning of Canadian TWPs. Canadian government offices work with employer and business associations on policy design, administration and the enforcement of rules. These include the Ministry of Human Resources and Services (HRSDC) in partnership with private industry association organizations such as Western Agricultural Labour Initiative (WALI) in British Columbia, Foreign Agricultural Resource Management Services (FARMS) in Ontario and Nova Scotia, and FERME in Quebec, New Brunswick and Prince Edward Island (Justicia for Migrant Workers, 2011). Sending countries also participate in migrant worker recruitment and hiring by coordinating the administrative placement of workers with HRSDC, FARMS, FERME and WALI, including processing the paperwork. Under this system, there are no private labour brokers or independent recruiters that act as intermediaries between workers and employers. Seasonal labourers under the SAWP are not technically in a situation of labour bondage with the recruiters or the employer for the first years of work.

To assist my examination of the SAWP as a coercive migrant labour system I bring into relief the South African labour apartheid model as a frame of reference to look at the treatment of migrant workers under coercive labour regimes of the past as compared with today's regimes of

migrant labour in the context of neoliberal economic hegemony and state multiculturalism policies. Although the South African apartheid system -viewed as an entire structure of political, economic, ideological and racial domination- cannot be equated to the SAWP, we can nevertheless see similarities between both systems in regards to governing strategies, and practices and mechanisms of control and regulation of migrant labour population that cause workers under this program to feel and to experience labour apartheid-like conditions in their everyday lives while working on Canadian farms. Using a framework that refers to labour apartheid system of the past helps us to illuminate how and when historical and colonial continuities come in and out into the present posing questions such as: What kinds of historical continuities and patterns of colonial domination from the past get translated into the present and how? In which moments do these patterns and forms of colonial power from the past intersect with the present? How are these patterns different and how are similar in terms of the mechanics of their functioning and foundational premises?

In order to facilitate an overview of the main features, constitutive elements and functioning of South African labour apartheid model and the Canadian SAWP as systems of migrant labour, I identify ten comparative themes that support a systematic observation of two-tiered legal systems and practices that cause workers under the SAWP to experience apartheid-like conditions. These are 1) denial of political rights, 2) denial of citizenship, 3) spatial segregation, 4) justification of restriction of rights and freedoms, 5) restrictions on territorial movement and movement within the labour market, 6) family separation, 7) economic discrimination, 8) public health, 9) education, 10) sexual relations.

**1) Denial of Political Rights:** Temporary migrant workers do not enjoy the same political citizenship rights and social benefit programs afforded to Canadian citizens or permanent residents. For example SAWP workers are excluded from some schemes of provincial employment standards legislation. By virtue of their temporary immigration status and their occupation as farm workers they are excluded from many protections and entitlements of the Employment Standards Act (Fairey et al 2008).

**2) Denial of Citizenship:** The program does not grant or contain policies for family reunification or paths to eventual regularization on an individual basis regardless of how many years workers have been coming to work in Canada and regardless of the ties they develop in local communities. The program is designed to prevent permanent settlement of these labour groups. One of the program's contractual mechanisms stipulates that the Canadian government has to oversee that migrant workers do not overstay after their contract finishes. This is done through the AWOL (Absent Without Leave) recourse, which allows employers and government officers from the CIC (Citizenship and Immigration Canada) to keep track of the number of workers who overstay in Canada (Verma 2003). If workers overstay their work visas the jeopardize their ability to meet eligibility criteria to return to the program the next year, as one of the conditions for re-hiring is to have returned to the home country at the end of the contract and to have reported themselves to the ministry of labour in their country (Bolaria and Li 1988; Sharma 2006).

**3) Spatial Segregation:** In combination with contractual mechanisms, extra-legal coercive strategies are applied simultaneously to manage and control workers' lives outside their worksites; housing provision is one of them. The contracts establish that workers must live on or nearby the places where they work in accommodations provided by the employer. Program housing provision



shapes oppressive relationships of power and domination among workers and employers. Workers are housed in accommodations provided by the employer, which are often cramped and substandard. This extends the reach of employers' control over the lives of workers beyond the sphere of work including restrictions on socialization and spatial mobility. These living arrangements also facilitate the availability of workers to work as needed outside established work hours; workers are sometimes asked to wake up from bed to work at three in the morning to unload farm produce without considering these as work hours towards their pay cheques. Workers' everyday lives revolve around their work and the farm, contributing to conditions of geographic and social isolation and paternalistic and exploitative relationships between employers and workers. Workers depend almost entirely on their employers for the most essential things such as visits to the doctor, transportation to and from the farm, groceries, banking, and so forth (Basok 2002; Becerril 2007; Preibisch 2004). Employers are able to dictate and regulate the workers' private and personal matters; for instance, an employer decides when they have time off, what they do in their time off and what kind of social relationships they are allowed to establish (Paz Ramirez, 2008; Preibisch, 2007).

**4) Justification of Restriction of Rights and Freedoms:** In addition to being excluded from some from labour protections workers are also excluded from social benefits programs and safety nets such as Employment Insurance despite their contributions into this fund. This is justified by their temporary status and by their employer-specific work permit which makes them unavailable for work once their work contracts expire (Nakache and Kinoshita 2010). Their closed work permit and their temporary immigration status generate a series of restrictions to their rights and freedoms and have implications for workers' ability to challenge labour exploitation and economic marginalization. Although SAWP workers are technically and theoretically free, many workers make references to slavery when describing their experiences working in Canadian farms, such as the worker in the documentary *El Contrato*<sup>4</sup> who stated: "in my mind slavery has not yet disappeared."

**5) Restrictions on Territorial Movement and Within the Labour Market:** Under the SAWP the employer dictates the terms of the contract, which outlines strict regulations on both employment and migration. A farm worker comes with a temporary work permit visa tied to one single employer for periods of up to eight months, one of the characteristics that make it a "forced rotation" program (Wong 1984) which means that workers must return to their home countries at the end of their contracts in order to be eligible to participate in subsequent years. Before leaving their home countries, workers must sign a contract with their employer specifying wages and terms of employment, thereby signing away the right while in Canada to seek better working and living conditions. Furthermore, program grants employers the ability to specify the sex, age, and nationality of the workforce they are seeking, a practice that is in conflict with human rights legislation at federal and provincial levels (Preibisch 2010; McLaughlin 2010).

Work permits are issued for a specific employer, meaning that workers are only entitled to work for the employer that has been assigned; looking for job outside their contract is illegal for them. The fact that SAWP workers are tied to one single employer and therefore lack labour mobility is what essentially constitutes these workers as an 'unfree' labour force as they are not able to sell their labour force in the labour market. Workers' lack of labour mobility creates structural

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<sup>4</sup> Canadian National Film Board awarded documentary by Min Sook Lee that follows the lives of a group of Mexican migrant farm workers during their stay in the town of Leamington, Ontario.

vulnerabilities for them at the same time that it grants employers great power to exert mechanisms of labour control, including the ability to repatriate workers when they are not longer needed, if they fall sick or are injured or if they exhibit behaviour deemed undesirable or are deemed to lack a disposition to work. In other words, employers can act as de-facto immigration officers and decide whether a worker stays in Canada or not on the basis of employment.

**6) Family Separation:** One of the requisites of eligibility for SAWP participants that come from Mexico (this is not the case for Caribbean workers) is to be married and have children; and one of the conditions of work under the contract is to leave their families behind as program has no provisions for family members or spouses to come to Canada (Basok 2004).

**7) Economic Discrimination:** Wages under the SAWP are fixed and subject to federal and program deductions. The only way workers have to increase their income is to work longer hours. Overtime benefits are not available to farm labourers. Workers can work up to eighteen hours per day seven days a week for several months, their ability to refuse work is weakened by contractual and coercive measures. Program recruitment policies also give employers the possibility to exert coercive extra-legal mechanisms of control over migrant labour; hiring and recruitment mechanisms focus on third world workers who are unemployed or underemployed, constructing them as a mobile mass of disenfranchised workers who are highly appreciative of the opportunity to increase their income by coming to work in Canada (Preibisch 2008). Moreover, the program constructs these workers as vulnerable subjects whose perception of retaining work and make a living relies heavily on their performance and in their acceptance of substandard working and living conditions as well as abusive treatment. In order to maintain their jobs and spots in the program workers are constantly pressured to demonstrate high levels of performance even though they often have little or no training and are forced to work in unsafe environments (Preibisch 2010; McLaughlin 2008).

**8) Public Health:** In theory, migrant farm workers under the SAWP are eligible to use the health care system of the province where they work. Because health falls under provincial and each province has their own rules and guidelines to grant medical care to immigrants and migrants, in some province like in British Columbia migrant workers must wait a period of three months before becoming eligible for the medical provincial plan. In the meantime workers pay to a private health insurance that in some cases has insufficient coverage, especially when workers have serious injuries or diseases such as kidney infections, cancer or cardiovascular complications, which unfortunately are common. In British Columbia the vast majority of workers are enrolled in the MSP (BC medical services plan) plan even after their three months of residence in the province. In my years of interactions with workers I have not met one single worker that has the MSP care card. As result, when workers arrived to the hospital with serious illnesses they do not get treated because their insurance does not cover the expenses. In this cases most, if not all, of the times the worker in case ends up in plane back home as neither the employer nor the Mexican consulate would pay for the medical costs.

**9) Education:** Workers under the SAWP do not have access to any type of education programs or English Language Literacy classes provided by government. Aside from program policy restrictions on access to education, workers' schedules do not leave much free time for workers to engage in activities outside work. Many work related documents, job instructions and employment standard information are not available in the workers' native language.

**10) Sexual Relations:** Another extra-legal mechanisms of control in the SAWP include curfews, prohibition of visitors from the opposite sex, a requirement to inform their employers of their whereabouts when outside the farm, surveillance cameras outside and inside workers' houses, and peer-to-peer anonymous reporting behaviour mechanisms to the employer and to the Mexican Ministry of Labour officers are powerful forms of control and governance in the Foucauldian sense, serving as multiform tactics to exercise power beyond legal contractual mechanisms of domination. Many workers have lost their places in the program for not complying with these rules and were not able to return the following year as they were not 'called back' by their employers. Once a worker has lost his/her employer in Canada it is very difficult for them to become eligible again and to come back into the program the subsequent years.

The power that employers have to call workers back for next season (or not) is one of the most effective mechanisms of power and domination in the SAWP along with employers' ability to repatriate workers earlier before finishing the work contract. Many workers have been repatriated for becoming ill or being injured, for refusing work, challenging abuses or getting pregnant. The threat of repatriation and the possibility of not being called back by their employers the next season are effective instruments of control, regardless of their actual exercise or if they are just a possibility, they constitute a reality that workers must deal with in their everyday lives. Due to this complex power dynamics enacted by housing and working arrangements for SAWP workers the loss of their job also means loss of residence and residency in the host country (Paz Ramirez 2008; Preibisch 2007).

Although the implications of identifying key features and similarities between the SAWP with coercive systems of labour apartheid can serve as grounds for public opposition and contestation to the SAWP as an oppressive system of labour control; pointing out key differences has equal importance since it allows us to identify how oppressive structures are transformed and (re)inscribed throughout time. This exercise can also assist us in tearing down official discourses and narratives that obscure the underlying logics that perpetuate social inequalities and injustices. In the case of the SAWP I refer in particular to the official narrative that portrays this program as a "safe and humane" benevolent gesture in the form of opportunity granted to men and women of the global South to work in farms (Martin 2003; Woodward 2006). Instead I argue that SAWP functions as labour apartheid regime regulating migrant labour (as is experienced as such by workers participating in the program) that is put in place to assist the Canadian agricultural industry in its profit making.

**Table 1. Differential Treatment of Black Workers under South African Apartheid and Migrant Farm Workers under Canadian Migrant Workers Program**

	South African apartheid	Canadian Seasonal Agricultural Workers Program
<b>Denial of political rights</b>	Only those classified as 'Whites' could vote and participate in law and policy-making process	Denied effective means to participate in political/civil life and influence changes in the work contract
<b>Denial of citizenship</b>	Race-based exclusion	<b>Program-based exclusion:</b> migrant farm workers forbidden to apply for landed immigrant or citizenship status.

<b>Spatial segregation</b>	Bantustan system of separate settlement/housing for Black people	Work contract mandates that migrant farm workers live on the employers' property or close to the worksite. Municipal migrant housing bylaws impose spatial and territorial restrictions.
<b>Justification of restrictions of rights and freedoms</b>	Bantustan system denied citizenship rights on the grounds that Black workers were merely temporary migrant workers	<b>Program views</b> racialized agricultural workers as no more than mere temporary foreign workers.
<b>Restrictions on territorial movement and within the labour market</b>	Blacks had to carry a 'passbook' at all the times. A pass was issued only with approved work and employers had to sign it monthly, otherwise Black workers could be removed.	Migrant workers enter into the country only with working visa, and are tied to a single employer <sup>5</sup> . If workers lose their jobs, they also lose their right to stay in the country and are immediately deported.
<b>Family separation</b>	Black workers were not allowed to bring their spouses and family to the workplace from the Bantustans	Migrant workers are not allowed to bring their families from their home countries
<b>Economic discrimination</b>	Labour laws mandated discriminatory treatment in favor of Whites over non-whites. This translated into lower wages, work rules, benefits, entry qualifications and union certification <sup>6</sup> .	Migrant farm workers are excluded from some labour laws and protections by virtue of their non-citizen status and occupation (farm work). They are denied some benefits, and receive lower wages.
<b>Public Health</b>	Hospitals and ambulances were segregated. Hospitals for whites had high quality services and had more funding than hospitals for Blacks, which were terribly underfunded	Migrant farm workers pay for private health insurance coverage that is often insufficient and substandard <sup>7</sup> . Workers depend entirely on their bosses to visit the doctor because of language barriers and geographical isolation.
<b>Education</b>	Racially-segregated schools for blacks under the Bantu Education Act that restricted teaching to basic skills relevant to perform work for Whites.	Migrant workers do not have access to any type of education or English language literacy courses. Work-related information is often not translated into workers' native languages.
<b>Sexual relations</b>	Prohibition of mixed marriages and criminal offence for a White person to have sexual relations with a person of different race	Employers and sending countries government officials establish their own 'codes of conduct' for farm workers that prohibit them from developing romantic relationships. <sup>8</sup>

Ironically, the SAWP has been touted internationally as a best practices model of managed migration (Martin 2003), given its success it has served as a model for the further expansion of temporary labour migration in Canada through the Low Skilled Pilot Project (LSPP) in sectors including construction, tourism and hospitality, fast food, and also agriculture. The SAWP has been a topic of research study for a handful of academics since the early nineties; since then the production of research studies on the program has increased considerably over the last decade. Most literature has tended to focus on theorizing unfree labour from a policy and legal perspective, on citizenship issues, and on documenting migratory experiences and impacts on sending and receiving communities (Basok 1999, 2000, 2002; Binford 2002; Preibisch 2000, 2004; Sharma 2006; Griffith 2009 among others). Some of the more recent work focuses on workers' health and safety, impacts on mental/physical health, transnational families, gender divisions and gender as a

<sup>5</sup> As soon as the work contract expires, workers must return to their home countries.

<sup>6</sup> The result was that Blacks were restricted to low skilled and menial jobs.

<sup>7</sup> In some provinces there is coverage by universal health care plan but not in others.

<sup>8</sup> Many migrant farm workers have been deported and banned from the program for not following this rule

dimension of power in North-South relations (Preibisch and Hermoso Santamaria 2006; Preibisch and Otero 2008; Preibisch and Encalada Grez 2010; McLaughlin 2010; Hennebry 2008). Surprisingly, the literature on migrant farm workers in Canada has not explored racism and the processes of racialization to a significant degree. Although it is important to note Satzewhich's (1991) ground-breaking study that presented compelling evidence of the centrality of racism in the creation and organization of labour in the Canadian agriculture as well as other important contributions related to the centrality of racism in defining the demographics of the labour market in the Canadian agricultural sector (Preibisch and Bindford 2007; Perry 2012). However, what remains generally unexplored in the Canadian migrant farm worker and TWPs literature is the topic of migrant farm workers' subjective politics and grassroots resistance and organizing from a critical race and transnational perspective. Some of the questions I reflect upon are a) how contemporary labour apartheid regimes work today, using the SAWP as site of exploration, and how colonial power and race and racism are re-inscribed and are applied in the context of official state 'multiculturalism' and a 'raceless' legal framework b) how labour apartheid is lived, embodied, contested and challenged by migrant farm workers today, c) what are the kinds of productive politics are generated under the program; and, d) what are the ways and in which circumstances workers re-generate and assert their agency, power, and their political subjectivities?.

## **Experiencing and Embodying Labour Apartheid: Forms of Governance**

As argued in this paper the SAWP functions as a system of migrant labour apartheid with particular forms of governance through a combination of contractual and coercive strategies. Governance is understood here as "the ensemble formed by the institutions, procedures, analysis and reflections, calculations and tactics that allow the exercise of this very specific albeit complex of power, which has as its target population, as its principal form of knowledge political economy and as its essential technical means apparatuses of security" (Foucault 1991, 244). In this vein, this segment refers to both legal and extra legal mechanisms, tools and strategies to exercise power and domination. I am particularly interested in the disciplinary tactics deployed by employers (which are enabled by policy legislation and contractual agreements of the program) as forms of governance in the sense of "the management of population in its depths and its details" (Foucault 1991, 243). In addition I explore the ways that workers live, embody and 'govern' themselves under apartheid like conditions. For this I have identified three different dimensions a) Workers' Corporeal Control, b) Spatial and Residential Segregation, and d) Transnational webs of control and domination.

### **a) Workers' Corporeal Control**

"Look ... basically we [migrant farm workers] are treated like machines, but machines that are not even allowed to break [...] because if you do then they [employers] send you to Mexico [...] that is why many of us go to work even in pain or high fever so you are not sent back [to Mexico]".  
(Martin, interview. Langley, BC May 2011)

The above quote was spoken by a migrant farm worker, Martin, while we were in our way to the pharmacy to buy pain killers for lower back pain so that he could go to work the next day. Martin did not want to ask his employer to take him to see a doctor or to take time off work half a day to rest or file a workers' compensation claim, he was afraid he would be perceived as 'problematic worker' or 'lazy' on the

eyes of his employer and be sent back to Mexico or that asking would contribute to a negative file that would prevent him from returning to work in the same farm the following year. Martin had grounds to think this way, as in the past he had seen his employers sending workers back when they were injured or no longer able to perform their job. By the end of the season (five months later after our conversation) Martin was diagnosed with hernia in his lower back and required a surgical procedure as result of his repetitive job of lifting 60 pound sacks of potatoes for ten hours a day, six days a week. It was most likely he would have the surgical procedure back in Mexico.

The SAWP is a contemporary migrant labour regime that exercises power and control through a system of labour apartheid using a mix of legal and extra-legal strategies of control and discipline that are deeply internalized by the workers to the point that they police themselves and find survival strategies to help them succeed in the program. One of the ways in which workers internalize self-discipline is through the management of their bodies, which are their main instruments for performing strenuous and back breaking work for long hours throughout the months of the work contract. During my years of interactions with migrant farm workers and through interviews during my field research I found a pattern of three common strategies workers use: **a) avoiding seeking medical care, b) muting bodily signals of tiredness or symptoms of sickness, c) marking of their bodies with symbolic and physical identifiers.** Each one of these survival mechanism of corporeal control speak to the myriad of legal and extra-legal mechanisms of labour control, power and coercion that is exerted upon participants. These strategies provide accounts of how colonial power is re-inscribed and manifested in contemporary times in the context of the SAWP. They also they illuminate historical continuities between racialized labour market segmentation and the treatment of migrant labour in Canada's history.

Sharma (2006b) states that the creation of the non-immigrant or migrant worker category in the Canadian immigration system has allowed the legal application of a differential set of laws aimed to regulate labour mobility in restrictive ways as a form of apartheid. Sharma writes "like past forms of apartheid its global manifestation is not based on keeping differentiated people apart but instead on organizing two (or more) separate regimes" (2006b, 1250). Workers' experiences of corporeal control in the SAWP provides account for one of the ways in which this separate labour system works on the ground through legal and extra-legal rules applied only to workers under this program. Corporeal control experiences speak directly to a) discriminatory recruitment and hiring practices and procedures, b) restrictive immigration status dependent on their conditions of employment, c) systemic vulnerability based on workers' 'unfreedom' within the labour market and beyond, and d) systemic vulnerability in relation to occupational health and safety in workplaces that renders workers disposable and replaceable. Given this reading, the SAWP can be understood and theorized as the creation of a labour apartheid system that uses a 'raceless racism' legislative framework put in place to meet demands for (cheap) labour in the agricultural labour market and that finds historical and present day resonance in an on-going colonial project of racial subjugation and domination.

### **b) Restrictive Spatial Mobility and Residential Segregation**

Restrictive spatial mobility and residential segregation conditions of living for migrant workers in the SAWP are both explicit (in the case of residential segregation) and implicit (in the case of spatial mobility) hence these restrictions are enacted and reinforced through contractual and coercive mechanisms and respond to the demand for capital accumulation by the Canadian agricultural industry. According to Burawoy (1975) a system of migrant labour has myriad functions and roles but above all it is essential to the

functioning of a capitalist economic system. Some of its functions are to reproduce and maintain cheap sources of labour as well as to maintain the conditions that produce cheap and powerless labour. The reproduction of cheap labour however must be done outside the national boundaries, in the places where the production of labour takes place.

In the context of the SAWP as a migrant labour regime, the reproduction of the labour force takes place in the sending countries where workers come from, in this case Mexico and Caribbean countries. In the SAWP the residential segregation policy implies family separation as a condition of work for program participants; this condition is explicitly stated under the Memorandum of Understanding (MOU) between Canada and sending countries. As mentioned in a previous segment on workers' Corporeal Control, the ways that the Canadian government ensures migrant workers do not overstay after their contract finishes is through the AWOL (Absent Without Leave) mechanism, which allows employers and government officers from the CIC (Canadian Immigration and Citizenship) to keep track of the number of workers who overstay in Canada (Verma 2003). If workers overstay their work visas then risk to not meet the eligibility criteria to return to the program for next year, as one of the condition for re-hiring is to have returned to the home country at the end of the contract and report themselves to the ministry of labour in their country. As stated by Wong (1984) this is one of the characteristics that make the SAWP a "forced rotation" program.

As stated above, the residential segregation program's contractual mechanism translates into workers' family separation as work contract condition. For employers this means committed, reliable and dependable labour; for workers, their families and communities back home this means first of all a) disruption of their lives and the lives of their families as the fabric of relationships and communities are strained; b) unbalance in their personal lives as they become 'workers' -not husbands, mothers, fathers, sisters, or brothers with emotional needs; and c) transient, sometimes unable to settle here or there after decades of living eight months here and four months there. When asked what is the most challenging aspect of living a transient life, most participants on the focus groups responded "solitude and separation of families". *Anselmo* describes his experience as follows "The work is hard and it even causes physical pain sometimes, but what is most painful is *la soledad* [solitude]. During the day you kind of get away working in the fields but at night when you are alone in your bed is when the sadness and thoughts about your children and wife haunt you. Sometimes you know they are going through hard times and it feels pretty horrible to not be able to be there". The denial of citizenship, the residential segregation contractual policy and, in turn, the inability to settle in and establish themselves in one place alienates workers from their communities and their cultures. Furthermore, it alienates workers from themselves and the different aspects that comprise their humanity. The social, emotional, sexual and spiritual dimensions of their beings are cut off by a system that erases and negates the possibility of fulfillment of the various needs and dimensions of their lives. Instead they are deemed and managed as dispensable, displace-able and exploitable bodies.

In regards to **Restrictive Spatial Mobility**, in general, living on the same property where they work and under surveillance of their employers further workers' social and ethnic marginalization as well as workers' dependency on their employers. It also increases workers' condition of labour flexibility by making them 'immediately available' to perform work at any time and day as required by their employers since there is no separation from work and 'home'. During my research and my community organizing I gathered three

particular dimensions that restrictive mobility impacts on workers' lives: **a) social and physical mobility, b) access to health care and other services, and c) housing conditions.**

First, spatial segregation has significant implications on social and physical mobility of migrant farm workers as these basic entitlements are subject to partial concessions and negotiations under each set of 'farm rules,' as exemplified by *Oscar's* experience at an apple farm in Ontario last year:

*My former employer in Ontario wanted to make sure that we will not get in trouble on our days off, so he [employer] wrote down on a paper how far away from the farm we were allowed to go. I don't remember exactly how many meters was the distance we were supposed to circulate around. He even gave us the instructions written in Spanish and put them on the wall in the living room. You feel like the house is a prison with no bars.*

Individual work arrangements and farm rules are arbitrary and can vary significantly from farm to farm depending on individual employers. Unlike Oscar's employer, according to Angel some employers do take into account workers' social, recreational and spiritual needs and try to organize activities for them with, and from, a paternalistic sense. These activities range from soccer tournaments and bible study groups to barbeques and pot-lucks.

Second, spatial and residential segregation (combined with others factors such as language barriers and a lack of information about workers' rights) also have implications for workers' access to health care and other services, as they depend on their patron to get from and to (as well as off) the farm. In a conversation, Nicolas recalls how he could not get immediate health care after a work accident because he depended on this employer to get to the clinic. He fell down from a greenhouse picking cart and injured his left hip:

*I was in a lot of pain and could not keep working. I was unable to walk or be standing on my feet. During the break at around 3-4pm, more or less, I asked the supervisor to drive me to see a doctor before the [health] clinic closes. Her response was 'I have to wait until at least one more [worker] needs to see a doctor, I can't be driving back and forth [to town] just for one person'. I think that response is very bad on her part. Does she want us to all fall down or get sick at the same time?*

Third, it has considerable effects it has on the type of accommodations and housing conditions. The SAWP work agreement in British Columbia establishes the obligation for employers to provide accommodations for migrant farm workers they hire on the farm-site or nearby. All on-farm housing is subject to approval by either a municipal government inspector responsible for monitoring migrant workers' housing by-laws or by a private inspector hired by employer's association (Otero and Preibisch 2008). Workers pay a total of \$550 per season for housing. The types of housing available include trailers, new and converted houses on farm property, and motels and low-income apartments that are often infested by insects (J4MW-BC Migrant Farm Workers Housing Report 2007). In 2005, leading Mexican and Canadian newspapers reported that over forty Mexican workers lived in a dilapidated, two-story house on a BC blueberry farm, with cement floors and four to five men crammed into each room. The rest slept in unheated trailers and all of the workers shared two bathrooms outfitted with a plumbing system that was about to collapse, with two stoves for all of their cooking needs. Workers staged a work stoppage demanding an improvement in living conditions (J4MW archives 2005). In 2006, thirty two Mexican



workers employed at a blueberry farm wrote of public letter exposing the deplorable housing and working conditions to which they were subjected to the Canadian public. Among the list of complaints highlighted in the letter were: an absence of toilets in the fields, insufficient cooking utensils, inadequately equipped and poorly furnished rooms, and a broken sewage system. These brave actions by workers on two different blueberry farms in 2005 and 2006 resulted in the deportation of most workers back to Mexico, serving as a way to discipline the workers and discourage further actions (J4MW archives). During one of my house visits during my field research (2011) I encountered a group of workers who were drinking milk or Coca-Cola at nights because the drinking water was contaminated. A worker from that house told me “it seems that Canadians like dogs better than Mexicans,” while he was showing me his house and explaining the issues with the drinking water.

The existence of deplorable and undignified housing conditions is indicative of more than a simple lack of adequate regulation and enforcement of housing standards for migrant farm workers. Instead, there is an entrenched notion of liberal morality and superiority/inferiority (Goldberg 1993) held by employers when defining the parameters of what is deemed ‘acceptable housing’ for migrant labour. From the employer’s perspective workers from impoverished countries should be grateful for the opportunity to work in Canada. Community and labour groups such as Justicia for Migrant Workers (J4MW) have challenged the naturalization of (im)migrant farm workers’ exploitation based on who they are (linked to their ethnic identity) and on their occupation (as farm workers). In a letter to the editor of a local newspaper, J4MW activist Gil Valencia noted:

*It is not by accident that housing conditions for migrant and Indo-Canadian workers in the Fraser Valley resemble those of slums. The industry demands such conditions and the community is happy to pretend this is ‘normal’. The fact that the farm workers are almost exclusively from racial minorities strongly suggests an undercurrent of racism and discrimination. It’s an understood fact that farm work is below white folk, just as is the housing for farm workers (Valencia 2008).*

Valencia’s editorial makes reference to the historical social exclusions of racialized communities regardless of their immigration status, such as the case of South Asian farm workers who are permanent residents or Canadian citizens and whose presence in the country goes back to a century ago. In the words of Grace-Edward Galabuzzi “while Canada embraces globalization and romanticizes the idea of multiculturalism and cultural diversity, persistent expressions of xenophobia and structures of racial marginalization suggest continuing political and cultural attachment to the white-settler society,” (2006: xi). Post colonial scholar Sunera Thobani (1999) agrees with Galabuzzi’s reading of Canada’s multiculturalism policy, she further states that this state’s policy has functioned as means to disguise deep seated traditions and colonial histories of racial marginality and discrimination manifested most notably in immigration policies and practices. In this sense, despite Canadian state’s official process of de-racialization in the immigration system adopted during the 60’s -hence adopting a legal framework of ‘raceless racism’- in which in policy legislation claims to be color blind in application yet the effect of them it is not. Testimony to this are the countless past and present experiences of marginalized (im)migrant communities of colour and of course the story of First Nations people (Thobani 1999; Galabuzzi 2008; Mawani 2009).

The SAWP program then it is not an exemption of this “raceless racism” policy framework. Its contractual and coercive mechanisms of labour control also mirror and find historical resonance with other

oppressive systems of labour control from the past such as the South African apartheid with regards to the treatment of Black migrant mining workers. In the case of the migrant labour system under South African apartheid, state policies included: a) regulation of workers' entry and territorial movement (separation of workers from their families and conditions requiring them to return back to their communities once the work contract expired), b) restrictions on occupational mobility (workers tied to a single employer in a single occupation), and c) conditions of migrant labour powerlessness (inability of workers to make effective changes) (Burawoy 1975; Wolpe 1972). One of the main characteristics of South African apartheid was territorial and residential segregation. Thirteen per cent of South Africa was divided into ten 'homelands' (or Bantustans) for Blacks (who comprised more than 70 per cent of the population). Homelands were patchwork territories scattered across the country that could hardly be described as viable independent territories, some were very small and with precarious infrastructure and lacking basic services such as water, electricity, etc. Blacks were allowed to live outside the homelands only as temporary migrant workers. Residential segregation in urban areas was enacted through the Group Areas Act (1950) which was a cornerstone of apartheid policy. The country was partitioned into different areas allocated to different racial groups. Non-whites were restricted to designated living areas in every urban center (Schaefer 2008).

In the case of migrant farm workers in Canada, the SAWP establishes that workers live on, or near their farms in accommodations provided by the employer. In this sense the program restrains the kind of interactions that the worker will have with the host community and implicitly imposes residential segregation. Some of the key differences between the SAWP and other more explicit and coercive systems of racial apartheid such as in South Africa are: a) legislated versus de-facto differentiation; and b) implicit/explicit territorial and residential segregation. In regards to the legislated versus de-facto component, in South African apartheid the race-based segregation and differentiation was an official policy legislated and administered through apartheid institutions; while in the Canadian case the segregation, exclusion and 'differential inclusion' of migrant workers is done through 'exceptions' to the law based and justified by workers' immigration status (and in the case of farm workers, based on their occupation). Thus in the SAWP case, instead of segregation and differentiation being blatantly articulated on race, a dual strategy of precarious labour laws (for farm workers) coupled with racist immigration laws determine the precarious nature of migrant workers and create differential conditions for migrant workers as opposed to Canadian workers.

In regards to **territorial and residential segregation**, whereas South African apartheid had specific spatio-territorial segregation policies through the Bantustan system (or separate development and housing) for Black communities; the SAWP operates implicitly as a means of spatial isolation and residential segregation, both in terms of production and reproduction of labour. In terms of production migrant workers are allowed to reside in the country as long as their presence is useful to the needs of capitalist colonial state. In this sense, the work contract mandates migrant labour to be housed on the employer's property and reside in farming towns for specific periods of time. The residential segregation and spatial dimension of isolation of workers from local communities in Canada is both implicit and explicit. In terms of reproduction of labour, the spatio-territorial dimension of isolation in the SAWP are implicitly designed to isolate migrant workers from their families and communities since workers are not allowed to bring and live with their families in Canada.

Establishing a dialogue to between the ways in which labour apartheid systems of today (such as the SAWP) and past ones (such as the South African example) helps illuminate historical colonial continuities. This exercise is of importance as it could serve as grounds for public opposition and contestation to the SAWP as regime of labour control. Pointing the key differences is important since it allows us to identify how oppressive structures of power are transformed and (re)inscribed through time. In addition, examining key differences can help us tear down official discourses and narratives that obscure underlying logics which perpetuate social injustices and oppression.

### c) Transnational Webs of Control and Domination: Fear, Uncertainty and Anxiety

*We cannot get sick, if you are [sick] you have to keep working or there are not enough work hours or treat you bad you have to keep working. You cannot say 'I am going to look for another farm that gives me more work hours and pay me better'. This is not allowed to us. It is not right [...] it is fear what stop many of us from speaking up, it is the fear of not only losing our job and not coming back'.* (Focus Group, Pitt Meadows, May, 2011.)

Enforced ethnic divisions, fear, uncertainty and anxiety are forms of governance that discipline, control and organize production; combined they create a container of domination and control where power is orchestrated and then (re)inscribed. It is within this container that workers' relations, interactions, performances and exchanges take place. I will show how these methods of governance operate and how in turn, these impact over the lives of workers and that of their families. Achieving this end requires the application of the three main basic sites of colonial violation: community, body, and spirit defined by Perry (2012).

Testimonies of workers provide accounts of how **ethnicity** is used by farm owners as a form of a) organizing production process by creating 'ethnic divisions'; and b) a tactic for disciplining workers. A usual tactic that farm supervisors use is to organize teams or crews on the fields or greenhouses divided by ethnic group, e.g., South Asians, Filipinos, Mexicans and Guatemalans. The supposed rationale behind this separation is grouping skills and abilities that employers attribute to workers' ethnicity and not to that of individuals. At the same time, ethnicity and nationality are used to create rivalry among workers in order to increase productivity levels. A second and powerful form of governance in the SAWP is **fear**. Workers in individual conversations and in house meetings have accurately described the SAWP as a "fear regime." They call it a 'regime' because it permeates the entire experience of being temporary migrant workers; it also permeates different dimensions and many facets of their lives, in the public and private spheres, inside and outside their workplaces, in their houses and other social spaces, such as churches and social gatherings. Whether this fear is real or subjective does not matter, what is relevant is that it is a feeling workers must learn to live with. Labour relations at the workplace, both among workers and between workers and their employer are mediated by and based on fear. This results from the pressure to work harder and faster, and increases the uneven power of the employer. Alfonso illustrates this when he described a routine event at the workplace: "Whenever the employers come [into the greenhouse operations] we all know we have to work faster, he doesn't have to say a word [...] he doesn't need to [speak]."

**Fear** permeates the private lives of all these workers. Most of the time employers are the workers' landlords, a dual role grants them almost complete control over the workers' private sphere. This control regulates who is allowed or not to enter into a workers' house, and extends to setting up curfews and

carrying out direct surveillance, e.g. installing video cameras inside these houses. Further, employers believe themselves entitled to enter into workers' houses without notice, as would be the case of a landlord with his/her tenants. I witnessed such an instance during a house visit I was making to a group of Guatemalan women workers. The employer was inebriated and entered into the house without knocking or asking permission. Women in the program are exposed to sexual harassment from their employers, supervisors and also their own co-workers. Most of the time, these cases are not taken seriously, go unreported or remain concealed by silence.

A no less important form of governance in the SAWP is **uncertainty**. While participating in the program, uncertainty rules in several ways over these workers' private and working lives. First, workers under the SAWP do not have job security. If workers return year after year, it is because employers request they come back to work with them. Some workers described this procedure as a 'lottery system'. Second, individuals never know how many hours of work they will have even though their contracts establish that employers must guarantee at least forty hours per week. In fact working hours depend on the weather conditions and on the farm's financial situation. Some workers work as little as twenty hours per week in the off-season, creating pressure on the workers' families' financial situations back home. On the other hand, during peak season they can work up to 18 hours per day, or 126 hours per week, which puts their health at great risk. Third, workers do not know for how long they will stay in Canada, since the length of their contract is arbitrarily dictated by the needs of the employer instead of being established by the contract itself. Finally, in the case of work related accidents or illnesses, workers find themselves in a very uncertain and stressful situation. They generally cannot tell whether they will get adequate medical attention or whether they will be deported. In summary, uncertainty and fear rules workers' lives because their employers control and monitor nearly each and every one of their activities and behaviours whether private or public. Apparently exerting their rights, such as accessing benefits, going outside the farm to the 'wrong' place or during the 'wrong' day, places workers at risk of losing their livelihoods, by being labelled by their employers as a 'trouble maker' or as a 'undisciplined worker' – both of which go against the standard of an 'ideal' candidate for the SAWP.

Living and working under oppressive and restrictive conditions or attempting to escape or change such oppressive conditions, from a place of vulnerability, generates fear, anxiety and uncertainty –which are precisely the forms of governance that rule the SAWP. However, there are breaking points in which workers regain a sense of power to challenge and to resist. For some workers breaking points also occur when they experience intense stress at work or a deep sense of 'betrayal' from their employers despite of their years of loyalty to el patron, commitment and hard work they gave during their time in the program. Such instances typically happens when they are easily discarded by their employers because they fell sick or injured or not being paid for long periods of time. How do these ruptures happen? How does power get regenerated? Under which circumstances does resistance take place? And what does resistance look like? These are some of the questions I explore next.

### **Resisting Labour Apartheid: Migrant Farm Workers' Politics and Everyday Acts of Resistance**

While control, fear and coercion are undoubtedly the main features that define the migrant farm workers' experience under a labour apartheid regime such as the SAWP, their accounts are not solely tales of suffering and exploitation. Their encounters in Canada are also examples of resistance and struggle to push

back against the powers that constrain their daily lives. They are attempts to take back their dignity and humanity, essential aspects that the SAWP regime denies them in different ways and through myriad strategies of control and domination explored in the previous section. While most of the literature about migrant farm workers in Canada suggest that workers consent to their own oppression and engage in ‘performances of subordination’ as a survival strategy to succeed in the program (Basok 1999; McLaughlin 2010) and while that assertion it is partially true from a liberal understanding of freedom under the rule of law, here I contend that workers do resist against powers that oppress them. However, they do so in ways that are not usually recognized as resistance. Resistance has typically been recognized in two forms, either as open acts of defiance and confrontation against employers or participation in organized forms of collective opposition such as strikes and union campaigns, SAWP workers’ resistance does not fall neatly into either category. Migrant farm workers return to Canada to work year after year as part of the SAWP program, most of the times with the same employer. It could be said that they ‘choose’ to return and at least in appearance they consent to an oppressive system of labour control. Nonetheless, this does not imply nor should mean that workers do not resist and challenge and push back against labour apartheid conditions. It does mean that we need to engage deeper into their lives and to reframe our notions and ways of measuring resistance. In spite of close control and harsh restrictions against their agencies, migrant workers still manage to assert dignity and respect.

The lack of research and literature on migrant farm workers’ resistance suggests that their daily struggles to restore some basic aspects of their humanity have not been taken seriously or been acknowledged as acts of resistance. To develop a more nuanced understanding of migrant farm workers’ politics and accounts of resistance, the following section examines the concrete ways in which migrant workers resist the dehumanization, isolation and competition that pervade their everyday lives as participants of the SAWP program. Several key questions guide my analysis: What does resistance mean and what does it look like for migrant farm workers in the context of labour apartheid? How do they signify and understand their own acts of defiance and rebellion? How does solidarity get created and under what specific conditions and circumstances? What are the limitations to, and of, these acts of resistance? And finally, how can these daily acts of ‘unnoticed’ resistance (re)shape the nature of the struggle and inform a new political vision for social movements? In general, the expressions and strategies of resistance that workers engage in are multiple and varied; they range from individual small scale acts of rebellion of their own invention to organized collective actions like wild cat strikes, issuing public statements to the media or claiming wages back collectively using direct action strategy. These acts of rebellion first speak to the specificity of their circumstances and conditions of oppression (time, space, locality, particular forms of powers that they confront, racism and the particular ways they experience it) and second are culturally specific to their identities. Workers exercise subtle forms of resistance such as ‘stealing’ products of the farm produce to give out to friends or to exchange, filing workers’ compensation claims, parental benefits or even visiting a doctor against their employer’s wishes. Such expressions of resistance and rebellion go unnoticed and are even discounted as such because they fall outside the traditional repertoire of resistance strategies that take place within the framework of the organized labour movement and/or are not linked to an effective political movement. Here I grouped these resistance strategies into three main categories that respond to and account for the ways in which they experience labour apartheid: a) Creating spaces of socialization, b) Developing networks of solidarity and ethics of community care, and c) Restoring and connecting intersectional identities.

### **a) Creating Spaces of Socialization**

Despite strict rules about social interaction, migrant farm workers fight and rebel in terrains that are subjective and rooted in their cultural identities mixing fun and pleasure while asserting their dignity and agency. They seek out opportunities to enjoy sensual pleasures of food, drink, dancing and dressing up as an important reclamation to take their bodies back and (re)assert a sense of dignity that is often taken away in the context of a workplace environment and an exploitative industry that commodifies their racialized bodies. In some houses, workers organize social gatherings and parties against the rules of the employer/landlord. They invite other farm workers, friends, and supporters to eat their traditional food cooked with special ingredients they bring from their countries and share it during special occasions and with people they appreciate.

Creating spaces of socialization on their own terms is one of the ways in which workers refuse to conform and comply with restrictions they face in regards to their sociality, spatial and territorial segregation. Moreover, workers take risks in organizing and participating in the creation of their spaces of socialization, because they are going against coercive rules enacted by their individual employers. This speaks to and reveals the specific ways in which these workers live, experience and contest the labour apartheid regime that is applied to radicalized workers. If we compare other migrant labour systems such as the LSPP (Low Skill Pilot Project) for occupations A and B, we do not find the same restrictions in spatial and territorial mobility or in socialization. Understanding that creating spaces of socialization can cause workers at the end of the season to get a negative report from their employers (hence possibly losing their place in the program) gives us an appreciation of why we should recognize these spaces as forms of resistance to the powers that restrict workers from a fundamental aspects of their humanity and agency, including free social interaction without fear of losing the source of their livelihood.

### **b) Developing networks of solidarity and ethics of community care**

Gender, ethnicity, race and cultural specificity shape and inform migrant farm workers' resistance repertoire. Their actions are sometimes individual, unorganized and subjective and other times are collective and organized. Their actions relate to specific aspects of their identity and to the particular systems of oppression they confront based on those aspects of their identity. Sometimes their actions are directly linked to labour processes, gender conventions and class status. For example, a group of Mexican farm workers in Chilliwack shared how they struggled to maintain a sense of group unity, ethnic identity and class solidarity at the workplace against the employer's attempts to create division and competitiveness among different groups of racialized workers. They expressed how their supervisor pits workers against each other based on ethnic backgrounds of ethnic divisions and nationality in order to increase production in the greenhouse. One worker explained, "the supervisor is always finding ways to make us to compete with the South Asian [workers] since we found out and understood his strategy, we decided to slow down the pace and we agreed that none will 'run' anymore because that only benefits no one else than the patron [boss] while we break our backs," (Migrant farm workers group interview, April 2011). Controlling the pace of work and slowing down production are well-used historical forms employed by workers to regain terrain and to develop a racialized working class consciousness that generates bonds of solidarity and protection.

As noted by Lowe (1996), class solidarity in the case of racialized workers is often mediated and articulated through race, gender and place of origin, opening the potential for cross racial and multi-lingual alliances among workers engaged in solidarity and resistance strategies. This was the case for Bonifacio, a Mexican worker whom I meet in a farm in the Fraser Valley who called me one night to let me know that he was back in Canada but this time in the province of Alberta. The main reason of his call was to ask for advice and contacts in Alberta to support Guatemalan farm workers. He explained, “Guatemalan workers are in very bad conditions, they are treated very badly. Their house is awful, worse than ours [Mexicans], it is really sad to see how they have them living in there. We [Mexican workers] want to help them but don’t know what to do or who could provide support in [the province of] Alberta.” Bonifacio, as an experienced worker in the program, knew that a strategy in place involving outside supporters was needed in order to support Guatemalan co-workers and also to protect themselves (the Mexican cohort) from employer or consular officials’ retaliation. Similarly, in the first Mexican workers’ wildcat strike I witnessed in 2005, South Asian farm co-workers shared food as a gesture of sympathy with Mexican workers during the days of the conflict. As a Mexican worker told me “it seems that they [South Asian workers] are supportive [of their situation and strike], these days they have been bringing us Indian tortillas [chapatis] for dinner” (J4MW archives 2005). Even though these solidarities are not strictly expressed or articulated necessarily in terms of class identity and can be sporadic, nevertheless they point to the recognition of intersections of class and race based economic exploitation. Based on practices and networks solidarity that are mediated through aspects of their identities such as race, class and nationality, workers develop ethics of community care for each other that become very evident in cases of aggression or overt inhumane treatment from the employer.

By developing networks of solidarity and ethics of community care, workers not only refuse to engage in ‘divide and conquer’ dynamics instigated by employers to create competitive and stressful work environments in which workers see each other as potential enemies fighting on their own to keep a place on the program. This strategy allows workers to counteract and manage to revert individualist and selfish capitalist values, and instead allows them to restore values of collective care and solidarity based on the racialized working class consciousness they have fostered in the common spaces of socialization that they created.

## **b) Connecting Intersectional Identities and Overlapping Oppressions in a Transnational Context**

The oppressive mechanisms and forms of coercive governance entrenched in the SAWP have emotional impacts on workers participating in the program. Emotional impacts can sometimes become an entry point to establish broader connections with other types of oppressions, such as gender oppression and violence. By establishing connections between different forms of oppression that are rooted in aspects of identity but that nevertheless generate a similar sense of powerlessness, power can in turn be generated as a result of the process of mirroring oppressive experiences. This is perhaps what happened to Octavio and a group of twenty workers in a blueberry farm in Pitt Meadows in 2012 who got a payback of two months of unpaid wages as result of a collective action. This money, of course, was not easily won. Workers stated that, after two months of frustration and without pay, feelings of helplessness and hesitation transformed into taking action to recover their wages. The workers (re)gained a sense of power when watching a soap opera about the oppression and the struggle for dignity of a battered woman. Mirroring the experience of their own

oppression with the situation of domestic violence in the soap opera allowed them to connect with feelings and experiences of powerlessness. This led to a refusal of self-victimhood and instead (re)generated a will to challenge and transform their situation. Far from being an anecdotal story of a soap opera that inspired worker to take action, looking at carefully it is not surprising that the experience of a battered woman, even as a fictitious character, provoked a powerful identification with workers. The situation of a battered woman impacted daily by structural violence in a complex relationship of dependency with her oppressor in many ways mirrored the economic dependency and fear and anxiety that migrant workers feel in Canada. Not unlike a battered woman who feels trapped in an abusive relationship and cannot find a way to get out of her situation because she does not have the economic means to sustain herself and her children; workers feel trapped in abusive and exploitative relationships, which nevertheless represent a way to secure a livelihood for their loved ones. Living under oppressive and restrictive conditions as well as attempting to escape or change such oppressive conditions, generate fear, anxiety and uncertainty –which are precisely some of the main forms of governance of the SAWP. But in the case of Octavio and his co-workers, there are breaking points or ruptures during which workers regain a sense of power and the ability to challenge and to resist oppression.

The way workers frame and make sense of their acts of resistance differs from the typical ‘labour disputes’ that are mediated through labour unions or political institutions. For racialized migrant farm workers these acts of resistance are viewed as ways to regain control over the conditions of their lives and their relationships with one other more, rather than being about a ‘working class struggle.’ Most of the time migrant workers do not identify themselves as part of the Canadian working class because their struggles are specific to their conditions of ‘temporariness’ and the intersections of race, gender, immigration and employment status that prevent them from enjoying essential freedoms. Unionized or organized (white) workers’ struggles often revolve around better wages and benefits under union collective agreements. For migrant farm workers these are not the primary concerns. From their specific localities their salaries are actually good salaries and are precisely the reason why they want come to Canada in the first place. This was articulated by a group of workers who were invited by city labour activists to consider joining the “Living Wage Campaign” led by the Hospital Employees Union (HEU). “It would be good to have higher wages but to begin with it would be good if employers would start by following the contract as it says that we [SAWP workers] enjoy same rights as Canadians; that we can refuse unsafe work, have vacations to visit family and so on [...] that is not true. Our contract is a dead letter, a dead paper. Nobody follows it. We are imposed under each employer’s rules,” said Juan (J4MW archives, 2009). Sure, workers have expressed they wished could earn higher wages because of the hazards and risks their jobs involve and because of the absence of overtime and severance payment. Their concerns generally have more to do with health and safety issues, living conditions, lack of access to health care, unpredictable work hours (sometimes too few, sometimes exhausting long work with not breaks) and long periods of family separation.

Engaging in the task of (re)framing and troubling formulaic conceptions of ‘working class resistance’ and mapping out migrant farm workers’ daily struggles offers insight into how power intersects and plays out on the ground for these workers. Their actions teach us how complexities are navigated and confronted by migrant workers. In addition, their daily strategies of resistance and survival do have an impact and sometimes (although not always) do have consequences on power relations and (re)shape the nature of the struggle. In the same way that resistance must be reconceptualised because it so often departs from the



dominant labour conception based on the way workers express it in subjective ways; the notion and meaning of what constitutes victory and failure must also be reconceptualised. Despite the stakes and risks workers confront when they challenge oppressive structures, in many instances for migrant workers victories do not always mean they get what they want or to effectively change a concrete situation. Of course workers want to improve their conditions and to meet their immediate needs; however, many of their victories have to do with the possibility of creating some cracks where resistance can come to the surface by making a subjective statements in direct or indirect ways. As stated by Kelley (1996) in his expanded definition of politics “[...] Politics comprises the many battles to roll back constraints and exercise power over, or create some spaces within the institutions and social relationships that dominate our lives” (1996: 10). In the context of transnational migrant farm workers, what ultimately matters to them is to preserve a sense of dignity and to regain their humanity. For example, as in the blueberry workers wildcat strike, twenty workers ended up being deported to Mexico by their employer with the assent of the Mexican consulate. Workers’ demands to improve housing and working conditions were not met; however from the point of view of the workers this was considered neither a failure nor a victory. As Daniel, one of the main organizers of the strike, put it “we are going back to Mexico with broken illusions and with no money but we are leaving with our heads up and that is what we will tell to our families. We could not keep living [in the farm] as animals with no dignity” (J4MW archives, October, 2005).

## Conclusions

Contrary to official government discourse which portrays the SAWP as a just and humane labour migration scheme that matches foreign workers needing jobs with Canadian employers needing workers, this paper instead presents the SAWP as a migrant labour regime that functions as a labour apartheid system. Working through multiple strategies of control and domination, SAWP exerts influence through legal and extra-legal mechanisms. The mere existence and the legal continuation of regimes of differential inclusion/exclusion such as the SAWP illuminates a significant history of Canada’s record of inequitable race relations rooted in coloniality.

As argued in this paper, migrant labour systems are places where political ideologies and the capitalist economy intersect; and the labour market is organized and classified to serve the needs of the political ideology and the economic system in place. In an age of neoliberal economic hegemony the SAWP is often articulated and justified by Canadian bureaucrats and industry representatives as a structural necessity of the agricultural industry, necessary in order to be able to keep up with the pressures of highly competitive global markets. In an era of state multiculturalism where overt racism has been eliminated from immigration policy legislation and replaced by the discourse of diversity and multiculturalism, the social and political exclusion of SAWP workers and their incorporation into the labour market has been articulated as an exception to the standard citizen track in the immigration system (Satzewich 1991; Perry 2010). Both neoliberal and multiculturalism discourses facilitate the erasure of power dynamics, inequitable race relations, and our understandings of race and racism (Bannerji 2000; Thobani 2007).

While labour laws may provide some minimal standards for temporary foreign workers, as seen in this paper these same regulations do not take into consideration the various systemic and colonial practices that discriminate against the migrant population. These laws do not account for the ways in which workers’ bodies are racialized by being subjected to back-breaking work enduring long hours in harsh weather conditions and with minimal protections for occupational health and safety. The laws do not account either

for the constant fear of repatriation that workers face if they complain about their working and living conditions, or if they are injured at work. Restrictions that segregate workers from their families further entrench their vulnerability and isolation. In this regard my examination of the SAWP challenges the ways in which colonialism works, and how race and racism are understood (or erased) today. How do we need to understand racism in a context of state multiculturalism and self-proclaimed color blind legal frameworks? If racial discrimination and subjugation are not evident in official narratives and racial discourses have been erased from language, does it then mean that they do not exist? Where should we look to find the ways in which pervasive forms of racism are a tangible reality for displaced, racialized communities?

As much as the SAWP constitutes a repressive structure of racial power that disciplines and controls workers' public and private lives through mechanisms of coercion, fear and oppression, this system of labour control is contested by workers through unorganized, individual and/or collective strategies of creative resistance. Workers' particular forms and expressions of resistance however must be (re)framed and (re)conceptualized based on their direct experiences and in accordance with the specific context and circumstances that motivate their emergence. (Re)thinking resistance from the point of view of transnational and racialized workers (who struggle at the margins, outside -and in spite of- legal frameworks, state and mainstream labour institutions) also requires the rejection of formulaic interpretations of formal politics, political struggles, and romantic interpretations of working class and oppressed people to avoid turning them into either noble heroes or poor victims. Workers must be seen in the full complexity of their multifaceted and contradictory humanity.

The lack of research and absence of literature on migrant farm workers' resistance in Canada suggests that workers' daily struggles have not been taken seriously enough or perhaps not even acknowledged. Furthermore, most literature around the SAWP has suggested that workers participate and consent to their own oppression when they conform to the rules of the program. Although my research findings on workers' resistance are not exhaustive they nevertheless present compelling evidence and point to directions for future research on the topic.

Workers' expressions of political subjectivities and infrapolitics of resistance provide insight into complex interworkings of power and power relations that are not evident on the surface. We must be willing to delve beneath the surface to appreciate how seemingly innocuous or futile acts of resistance do have an impact and can actually shape the politics of workplace struggles and beyond. If we want to engage in challenging and transforming the current racial labour apartheid regime that rules the Canadian agricultural industry we must first develop a language and vocabulary that ties the economic exploitation and socio-political marginalization of migrant farm workers to racial oppression. This implies breaking through the neoliberal discourse used by states, employers and even academic literature that analyses the program as purely a consequence of the rise of neoliberal hegemony. By creating a counter narrative that names the program as a form of de-facto racial labour apartheid, we can begin to develop cultures of resistance that connect and speak to the particular concerns, needs and demands of racialized migrant farm workers. Second, we must be willing to reflect upon questions like: Why after more than forty years of migrant farm workers presence in the country do they remain at the margins of established political movements and organized labour organizations? How do migrant farm workers struggle outside of established organizations and social movements? What kind of impact do migrant workers' hidden struggles and daily concerns have on movements that claim (or attempt) to speak for the dispossessed? Workers' acts and strategies of daily

resistance contain the seeds for a new political vision of social change; the challenge that lies before us asks how much we engage in understanding and making sense of their struggles and meet them where they are at.

As mentioned in my introduction, racialized communities have not only been subject to oppression and disenfranchisement but also have been (and continue to be) subjects of the creation of political and cultural organizations and have mobilized around their cultural, class, race and gender identities. Some examples of these are found in the Chinese community, who created the National Coalition of Chinese Headtax Payers to make the connection between historic exclusions and ongoing injustices against Chinese immigrants. South Asian immigrant farm workers in British Columbia carried forward a momentous struggle over decades resulting in the historic founding of the Canadian Farm Workers Union. Similar are the organizing efforts of the Filipino community that fight for a “genuine and just integration” stemming from their experiences as temporary workers under the Live-in Care Givers Program (LCP). Yet by in large, these narratives of resistance remain part of the ‘hidden history’ or, in the language of Foucault, stay as part of subjugated narratives and knowledge. In any case, my point is that there are experiences and legacies of resistance against racial-ethnic exclusions in Canada. Lisa Lowe calls these experiences “sites of collective memory” (1996: 21) that act as ‘collective critical consciousness’ and remain sceptical of liberal democracies’ values and notions of ‘fairness’, ‘equality’, and ‘citizenship’. For Lowe (1996) the act of remembering is what allows present (and future) disenfranchised communities to articulate and challenge their current exclusion from the economic, social and political spheres of the nation state.

In the context of migrant farm workers’ plight on Canadian farms, there are grassroots groups who build their analysis and organizing efforts with migrant farm workers by drawing from the sources of collective sites of memory rooted in working class immigrant communities. Justicia for Migrant Workers (J4MW), a national grassroots volunteer-driven collective comprised primarily of organizers of colour, has linked the histories of indentured servitude inflicted onto immigrant communities, such as the Chinese rail road workers that were brought to build the Trans-Canada Railways, and the historic exploitation of South Asian farm workers on the West Coast, with today’s migrant workers programs like the SAWP. Justicia members saw the need to stand up in solidarity with migrant farm workers and understand their plight as an intersection of class and anti-racist struggles. Their organizers take the time to approach workers in the places where they live, work, dance, shop, eat, pray and have fun. Some of their organizers have also visited workers’ families and communities in their home countries and carried out small projects with migrant communities. By engaging with the workers in multiple dimensions of their lives, they have learned multiple lessons together, especially that organizing and resisting, even when they ‘lose’ a fight, can still make a difference.

Organizations and movements that start with the daily struggles, concerns, desires and dreams of disenfranchised communities are the seeds of a new political vision. The building blocks of their vision are workers’ every day hidden transcripts of resistance, the subjugated narratives, the sites of collective memory, and the accumulated experiences found in the multifaceted lives of marginalized (im)migrant workers. What to do next with these building blocks is the question and the challenge that lies ahead of us.

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## **Health Issues**

### **Under Canada-Sponsored Migrant Worker Indentureship**

\*Indentureship - the state of being a servant bound to service for a specified time in return for passage from and return to an economic colony  
(adapted from the *Oxford English Dictionary* On-line).

## **Table of Contents**

Introduction	1
Thai Fishing Industry	1
World Cup Soccer Industry	2
Final Comments	4
Who Are Our Temporary Migrant Workers?	4
Do Migrant Workers Have Access to BC Medical?	5
Is Private Insurance Comparable?	5
Barriers to Achieving Health Care Coverage	7
Families of Migrant Workers	8
Pregnancy	8
Retaliation	9
Coverage under Workers' Compensation?	9
Injury Statistics; Are They Maintained?	11
Absence of Enforcement of Health Regulations	12
Conclusions	14
Human Rights Complaint	14
Abuse Tracker	16
Boycotts	16
Picketing/Leafletting	17
Strikes	17
Class Actions	17
Future Research	18
Readings	18



## **Health Issues under Canada-Sponsored Migrant Worker Indentureship\***

\*Indentureship - the state of being a servant bound to service for a specified time in return for passage from and return to an economic colony (adapted from the *Oxford English Dictionary* On-line).

### **Introduction**

There is evidence that Canada may permit the existence of “third world” working conditions and living conditions for some of our temporary migrant workers. There is also evidence that for others – perhaps a significant number – it permits the existence of working and living conditions that most Canadians would find appalling, and that are certainly far below even the most basic standard we have come to expect in this country.

There is an important additional aspect to the broader issue of living and working conditions for temporary migrant workers that we want to mention briefly at the outset. It relates to the temporary migrant workers exploited in other countries with whom we do business. These are the countries whose products and services we enjoy at a cost substantially lower than it would be under normal production conditions. Some argue that we are exploiting these temporary migrant workers by our purchase of products and utilization of services from those countries.

### **Thai Fishing Industry**

There are two examples we want to mention just briefly – one is the Thai fishing industry, and the other is the World Cup soccer industry.

One of the most extreme examples is that of Thai fishermen. Thailand has a dominant presence in the Southeast Asians fishing sector, earning about \$7 billion annually in exports. Much of the product is destined for North America – to Walmart, Sysco - whose food transport trucks seem to be everywhere here in Vancouver in the early hours of the morning - and Kroger. Thai fish products are also used in a range of well-known canned pet food such as IAMS and Fancy Feast.

The workers on the Thai boats, the fishermen, have been taken from Indonesia, Myanmar, Thailand, Cambodia, and Laos to work under slavery like conditions – deprived of any medical care, force to work without pay, minimal food and water, and inhuman hours.<sup>1</sup>

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1 Esther Htusan & Margie Mason, “It was like our lives were already over: Thousands return home after years of slavery on Thai seafood boats”, *Vancouver Sun*, September 17, 2015.

\*\*We are grateful to Dr. Mia Reimers, a third year law student at the University of Alberta in Edmonton, for her excellent research on the Kafala sponsorship system so brutally implemented in Qatar for the world cup construction and to Rowan MacPhail, a fourth year Law & Legal Studies student at Carleton University in Ottawa for her excellent research and drafting this paper. McGrady & Company and Dr. O’Hagan had the benefit of both working with us during the summer, 2015.

## World Cup Soccer Industry

The second example I want to briefly mention is the Kafala sponsorship system being used to build facilities for the soccer World Cup in 2022. I will describe it briefly because in a number of dramatic ways it bears some structural resemblance to the system the Canadian

government has put in place. The ostensible purpose of the Kafala system is to ensure that foreign migrant workers do not overwhelm the population of national workers. It requires that each worker be sponsored by an employer.

Like our Temporary Foreign Workers program in which the Canadian government is an absentee party when it comes to regulation and enforcement in substance rather than mere word, the Qatar government has delegated control over migrant workers to private interests. Workers are tethered to private employers, unable to change jobs, as here, without the employer's permission. Passports are confiscated even though that is illegal. Employers themselves can make workers illegal because they have the power to cancel residency visas. Huge recruitment fees must be paid by the workers.

The temporary migrant workers in Qatar are from Nepal, India, Sri Lanka, and Bangladesh. The figures in the most recent report are only addressing issues in the Nepalese migrant community. Their 2014 death rate amongst those constructing the building infrastructure for the World Cup is one every 2 days. If the figures from the other nationalities are added in, the expectation is that the figure will be one every day. A number of these are from workplace accidents; others are from sudden cardiac arrest and heart attacks from working long hours and temperatures that regularly exceed 50°C.<sup>2</sup>

The Qatar migrant worker death rate, much of it is World Cup construction related since 2010, was recently graphically presented in an article from the *Washington Post*, reproduced by Andrew Barr in the *National Post*, May 29, 2015.

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<sup>2</sup> Owen Gibson & Pete Pattison, "Death toll among Qatar's 2022 World Cup Workers revealed", *The Guardian*, December 23, 2014.

# An unprecedented death toll in Qatar

 = 1 worker death

## London

2012 Olympics



## Vancouver

2010 Olympics



## South Africa

2010 World Cup



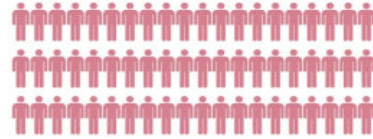
## Brazil

2014 World Cup



## Sochi

2014 Olympics



## Beijing

2008 Olympics



## Qatar

2022 World Cup (so far)



WAPO.ST/**WONKBLOG**

Sources: The Guardian, Building and Wood Workers International, WorkSafe British Columbia, Al Jazeera, The New York Time, International Trade Union Confederation

## Final Comments

There are two final comments we want to make in this introduction before proceeding to the substance of the paper. The first is to acknowledge the extraordinary work over many years by some members of the British Columbia academic community. One is Dr. Gerardo Otero, a Professor of International Studies at SFU. His work on the subject of migrant worker rights, particularly health and safety issues, is extraordinary. Others from British Columbia who have written admirably on migrant worker rights include Professor Judy Fudge of the Faculty of Law University of Victoria, and Professor Fiona MacPhail of the University of Northern British Columbia. Another activist who has worked tirelessly and has done extraordinary work is David Faurey, a well-known labour economist. David is our closing speaker tomorrow afternoon.

The second is to acknowledge that this paper is intended to be a survey of health issues and possible remedies, rather than an in-depth analysis of some aspects of the health risks faced by migrant workers. The survey nature of this paper will become evident as our colleagues present their more detailed research-oriented papers.

### **Who Are Our Temporary Migrant Workers?**

Migrant workers, those workers who come to Canada under the Temporary Foreign Workers program, work in Canada for any amount of time between six weeks and four years. Under the Temporary Foreign Workers program, there are four streams under which migrant workers can be granted temporary work visas: the Live-In Caregiver Program, the Seasonal Agricultural Program, low skill occupations, and high skill occupations.<sup>3</sup>

In 2013, the largest number of Temporary Foreign Workers entering Canada was under the high skill stream (76,324), followed by the Seasonal Agricultural Program stream (41,700), the low skilled stream (38,668), and then the Live-In Caregiver Program (23,848).<sup>4</sup>

It is difficult to know what to make of the policy introduced by the Canadian government effective April 1, 2015, that required any “low skill” temporary migrant worker who has been here for 4 years to leave; and that bars them from re-entry for 4 years – what has been called the 4 in 4 out rule. Some have described it as leading to a mass exodus, others have described it as another smoke and mirrors policy. Tough looking on paper, but with no substance, no reality, and no enforcement - both for lack of will, and for lack of personnel resulting from successive lay-offs in the federal public sector.

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<sup>3</sup> Government of Canada, *Facts and Figures: Immigrant Overview, Temporary Residents* (Ottawa, ON: Government of Canada, Citizenship and Immigration, 2013), 14.

<sup>4</sup> Government of Canada, *Facts and Figures*, 29.

They do not take seriously the statements of Immigration Minister, Chris Alexander, when he solemnly intones, “Let there be no mistake: we will not tolerate people going ‘underground’. Flouting our immigration laws is not an option ...”<sup>5</sup>

There can be no question however that it has had an unsettling, some have said even terrorizing, impact on the significant component of the temporary migrant work force, who will be intimidated by it and in fact leave.

Although migrant workers come from upwards of 50 countries, they primarily come from the Philippines, Mexico, the United States, Jamaica, India, and Guatemala.<sup>6</sup>

The largest portion of migrant workers are in the age range of 30 to 44, with an approximate 3:1 male to female ratio.<sup>7</sup>

In BC, migrant workers are employed in a wide range of industries. These include, but are not limited to, agriculture, fast food, engineering, the entertainment industry, construction, banks, mining, and hospitality.<sup>8</sup>

Migrant workers have high incidence rates of workplace injuries and illness. In fact, immigrant workers, including temporary foreign workers, are approximately twice as likely to be injured at work than non-immigrant workers. Additionally, migrant workers are less likely to report their injury and make a workers’ compensation claim.

### **Do Migrant Workers Have Access to BC Medical?**

Migrant workers who have work permits valid for a minimum of 6 months have access to BC medical services after they have lived in BC for 3 months.<sup>9</sup> There does not appear to be any available information regarding what percentage of workers reside and work in Canada for longer than 6 months, only that SAWP workers (those with the shortest available work visa) can be granted a work visa for up to 8 months.

According to BC MSP, if a worker’s permit is valid for less than 6 months, they must be privately insured for the entire duration of their stay.

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5 Les Whittington & Nicholas Keung, “Temporary foreign workers warned to leave Canada as required” *Toronto Star*, April 1, 2015.

6 Government of Canada, *Facts and Figures*, 17.

7 Government of Canada, *Facts and Figures*, 9, 26.

8 Bill Curry, “Everything you need to know about temporary foreign workers,” *Globe and Mail*, May 2, 2014; Colin Singer, “Decline in Foreign Worker Approvals To Worsen With Introduction of Harsh Penalties,” Monday, July 15, 2015; BC Chamber of Commerce, “Canada’s Chambers call on feds to fix air access, TFW program,” BC Chamber of Commerce, September 30, 2013; CUPE, “Fact Sheet: Temporary Foreign Workers Program,” CUPE, August 28, 2013; Justine Hunter, “B.C. freezes worker-immigration program as backlog grows,” *Globe and Mail*, March 31, 2015.

9 Welcome BC, *Welcome to British Columbia: Information for Temporary Foreign Workers* (BC: Welcome BC, 2015), 4; Gerardo Otero and Kerry Preibish, *Farmworker Health and Safety: Challenges for British Columbia* (WorkSafeBC, 2010), 70-73; Anette Sikka, Katherine Lippel, and Jill Hanley, “Access to Health Care and Workers’ Compensation for Precarious Migrants in Quebec, Ontario and New Brunswick,” *McGill Journal of Law and Health* 5, no. 2 (2011): 209.

## Is Private Insurance Comparable?

During the first 3 months of their employment and residence in BC, employers are required to provide private health insurance for migrant workers.<sup>10</sup> According to Professors Otero and Preibisch, it is the employers who are required to cover the cost of medical insurance for the first 3 months of employment. Employers are, however, entitled to recoup this fee by deducting one dollar a day from the workers' salaries.<sup>11</sup>

The private insurance provided to the temporary foreign workers is not comparable to BC's Medical Service Plan. It has been accurately described as "bare-bones protection", charges often must be paid upfront with reimbursement taking up to six weeks, and many first points of medical access (i.e., walk-in clinics) do not accept private health insurance.<sup>12</sup>

During the first 3 months of employment, employers who have hired Temporary Foreign Workers under the low skilled stream must pay for their employees' health insurance.<sup>13</sup> Under the high skill stream, employers are not required to pay for employees' private health insurance.

Lastly, walk-in clinics are the most available form of health care a migrant worker can access. However, walk-in clinics often lack the specialization and diagnostic tools to diagnose work related injuries.<sup>14</sup>

In regards to private health insurance (migrant workers' coverage during their first three months of employment), further barriers exist in addition to the ones discussed above. Under private health care schemes, it is often required that individuals pay for services upfront and they will be reimbursed up to 6 weeks later; this is often a huge deterrent for those seeking medical care.<sup>15</sup> As mentioned above, the insurance that most migrant farm workers receive through private insurance was described as "bare-bones protection" by one Mexican migrant worker.<sup>16</sup>

Lastly, as mentioned above, walk-in clinics are the most accessible health service available to migrant workers. But most walk-in clinics do not accept private health care

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10 Canadian Council for Refugees, *Report Card: Migrant workers in British Columbia* (Montreal, QC, Canadian Council for Refugees, 2013), 1; Kerry Preibisch and Jenna Hennebry, "Temporary Migration, Chronic Effects: The Health of International Migrant Workers in Canada," *Canadian Medical Association Journal* 183, no. 9 (2011): 1036; Otero and Preibisch, *Farmworker Health and Safety*, 70; Sikka, Lippel, and Hanley, "Access to Health Care," 209.

11 Professors Otero and Preibisch, *Farmworker Health and Safety*, 70.

12 Otero and Preibisch, *Farmworker Health and Safety*, 71, 72.

13 Welcome BC, *Welcome to British Columbia*, 4; Government of Canada, *Temporary foreign workers: Your rights are protected* (Ottawa: Government of Canada, Citizenship and Immigration, 2013).

14 Otero and Preibisch, *Farmworker Health and Safety*, 70.

15 Otero and Preibisch, *Farmworker Health and Safety*, 72.

16 Otero and Preibisch, *Farmworker Health and Safety*, 71.

plans.<sup>17</sup> Thus, although migrant workers are legislated to receive MSP 3 months after they arrive in BC, their experiences with the BC MSP are not up to the same standards that most residents experience.

Despite the fact that workers are eligible for MSP after 3 months, Professors Otero and Preibisch found that only 8% of their study sample of agricultural migrant workers were “enrolled in public health care.”<sup>18</sup>

### **Barriers to Achieving Health Care Coverage, Private or Public**

Although migrant workers are supposed to have access to medical services, there are many barriers that prevent them from adequately receiving health care – whether it is private health care or BC medical.

While covered under BC’s Medical Services Plan (MSP), migrant workers still do not have the same access to services that most BC residents do. The primary reasons for this are simple – most employers do not bother to inform their employees of this right.

But even when migrant workers are informed of their rights, access is often difficult, or practically speaking, impossible. The obstacles are many:

- ✓ long work hours,
- ✓ language barriers,
- ✓ limited literacy,
- ✓ fear of jeopardizing their employment if they report health concerns to their employer,
- ✓ geographic remoteness of employment locations,
- ✓ lack of transportation, and
- ✓ a lack of understanding of the coverage they receive.<sup>19</sup>

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17 Sandra Elgersma, *Immigration Status and Legal Entitlement to Insured Health Services* (Ottawa: Library of Parliament, 2008), 7.

18 Kerry Preibisch and Gerardo Otero, “Does Citizenship Status Matter in Canadian Agriculture? Workplace Health and Safety for Migrant and Immigrant Laborers,” *Rural Sociology* 79, no. 2 (2014): 191.

19 Otero and Preibisch, *Farmworker Health and Safety*, 30, 66, 70; Janet McLaughlin, “Determinants of Health of Migrant Farm Workers in Canada,” *Health Policy Research Bulletin* 17 (2010): 32; Jaqueline Oxman-Martinez et al., “Intersection of Canadian Policy Parameters Affecting Women with Precarious Immigration Status: A Baseline for Understanding Barriers to Health,” *Journal of Immigration and Minority Health* 7, no. 4 (2005): 247; Michael Pysklywec et al., “Doctors Within Borders: Meeting the Health Care Needs of Migrant Farmworkers in Canada,” *Canadian Medical Association Journal* 183, no. 9 (2011): 1041-42.

In fact, according to a study conducted by Professors Otero and Preibisch in 2010, 74% of surveyed Mexican migrant farm workers in BC said they have a “poor or very poor understanding” of their medical insurance.<sup>20</sup>

Another aspect that limits migrant workers’ access to health care is their employer. Employers often do not bring workers to a doctor when they report illnesses, occasionally retain care cards and/or social insurance cards, and may even repatriate a worker before they can receive health care.<sup>21</sup>

Otero and Preibisch also found that even though employers are required to register employees for BC’s MSP after they have been working in Canada for 3 months, many continue to simply provide private health care as it is cheaper than MSP.<sup>22</sup>

### **Families of Migrant Workers**

In theory, migrant workers do have the potential opportunity to bring their children with them to Canada for the duration of their stay. However, it can almost never be achieved for those migrant workers in the low-skilled, Agricultural, or Live-In Caregiver streams.<sup>23</sup> Conversely, high-skill migrants are generally able to bring their families with them if they choose.

Although low skilled migrant workers are “not barred” from being accompanied by their families, they are responsible for all travel and accommodation costs, which makes it not feasible for most temporary foreign workers.<sup>24</sup> An additional barrier for Live-In Caregivers is that their family members must live with their employer, and therefore, must gain permission from the employer.<sup>25</sup> This means that the vast majority of migrant workers leave their children in their origin country to be cared for by relatives – in fact, 95% of SAWP workers have children who they have had to leave in their country of origin while working in Canada.<sup>26</sup>

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20 Otero and Preibisch, *Farmworker Health and Safety*, 70.

21 Otero and Preibisch, *Farmworker Health and Safety*, 66; Harsha Walia, “Transient Servitude: Migrant Labour in Canada and the Apartheid of Citizenship,” *Race & Class* 52, no. 1 (2010): 74; David Fairey et al., *Cultivating Farmworker Rights: Ending the Exploitation of Immigrant and Migrant Farmworkers in BC* (Vancouver: Canadian Centre for Policy Alternatives – BC Office, Justicia for Migrant Workers, Progressive Intercultural Community Services, and the BC Federation of Labour, 2008), 55; Aaron Orkin et al., “Medical Repatriation of Migrant Farm Workers in Ontario: A Descriptive Analysis,” *Canadian Medical Association Journal Open* 2, no. 3 (2013): 193.

22 Otero and Preibisch, *Farmworker Health and Safety*, 7, 72, 73.

23 Judy Fudge, *The Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers* (Vancouver, BC: Metropolis British Columbia, 2011), 30, 17.

24 Fudge, *The Precarious Migrant Status*, 30; Judy Fudge and Fiona MacPhail, “The Temporary Foreign Worker Program in Canada: Low-Skilled Workers as an Extreme Form of Flexible Labour,” *Comparative Labour Law and Policy Journal* 31, no. 5 (2009): 123.

25 Government of Canada, *Help Centre: Can my family come to Canada with me if I am a live-in caregiver?* (Ottawa: ON: Government of Canada, Citizenship and Immigration, 2015).

26 Jenna Hennebry, Janet McLaughlin, and Kerry Preibisch, “Out of the Loop: (In)access to Health Care for Migrant Workers in Canada,” *Journal of International Migration and Integration* (2015): 8.



## **Pregnancy**

According to the Commission for Labor Cooperation, if a female temporary foreign worker becomes pregnant while working in Canada, she is entitled to continue working for as long as she is able to adequately perform her job.<sup>27</sup> Additionally, as long as residency requirements are met, pregnant temporary foreign workers are also eligible for EI if they take time off of work during their pregnancy.<sup>28</sup>

Despite these supposed pregnancy rights, Orkin et al found that temporary foreign workers have been repatriated for becoming pregnant; thus, they were not able to carry their child to term or receive health care or EI benefits in Canada.<sup>29</sup>

There does not appear to be any oversight to ensure that migrant workers know about their health care rights. For example, when asked about their understanding of their medical insurance, 74% of Mexican agricultural workers said that their understanding was “poor or very poor”.<sup>30</sup>

## **Retaliation**

Even when medical services are available, 69% of migrant farm workers fear jeopardizing their employment by taking time off work while injured, 42% of Mexican migrant workers believe that their bosses do not do “what is necessary to guarantee the health and safety of his workers,” and that 45% of surveyed migrants were afraid of the repercussions if they reported their concerns to their employers.<sup>31</sup>

## **Coverage under Workers’ Compensation?**

As insurance rates vary greatly depending on the industry and are dependent on many factors, we contacted WorkSafeBC for a specific example of insurance premiums. As many migrant workers work in agriculture, the example discussed relates to berry farming in BC. If a berry farm employs 15 workers, has an annual payroll of \$750,000, has been open since 2012, and had no accidents between 2012 and 2014, their insurance rate in 2016 would be \$1.49 for every \$100 of payroll. Thus, their insurance premium for the 2016 year would be \$11,175.

However, if an accident occurs in 2014 and the employees’ claim costs \$2,000, the employer’s rate would be readjusted to \$1.53 per \$100 of payroll and insurance would then cost \$11,475: a \$300 increase compared to if there had been no accidents.

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27. Commission for Labor Cooperation, *Guide to Labor and Employment Laws for Migrant Workers* (Washington: Commission for Labor Cooperation, 2000), 26.

28 Commission for Labour Cooperation, *Guide to Labor and Employment Laws*, 27, 28.

29 Orkin et al., “Medical Repatriation,” 195.

30 Otero and Preibisch, *Farmworker Health and Safety*, 70.

31 Preibisch and Otero, “Does Citizenship Status,” 185, 192; Canadian Press, “BC’s migrant workers suffer ill health, poor conditions: Studies,” *Vancouver Observer*, April 18, 2011.

If the claim for the accident in 2014 actually costs \$10,000 (instead of \$2,000) then the employer's rate would become \$1.61, raising insurance costs to \$12,075: \$900 more than if no accident had occurred.

Similar to the situation for migrant workers and health care, migrant workers do have access to workers' compensation, but many barriers prevent workers from being fairly compensated.<sup>32</sup>

These obstructions include:

- ✓ language barriers,
- ✓ literacy issues,
- ✓ doctors not knowing that migrant works are eligible for workers' compensation,
- ✓ fear of losing their job,
- ✓ reluctance to take time off work to make the claim and recover from an injury as it equates to lost wages,<sup>33</sup>
- ✓ employers have also been shown to discourage workers from making claims,
- ✓ employers intimidate workers who are considering making claims,
- ✓ they often do not rehire employees who have made workers' compensation claims,<sup>34</sup> and
- ✓ finally, if a worker performs a task at the request of their employer that is outside of their job description, they are not eligible for workers' compensation if they are injured during the task.<sup>35</sup>

These barriers are very effective at limiting workers' compensation claims. In fact, it is estimated that only approximately 10% of the accidents that cause injuries to migrant farm workers are reported to the Workers' Compensation Board.<sup>36</sup> Bogyo found that migrant farm workers' claims were one third lower than both other agricultural workers and workers in all industries, despite working in a high risk environment, often with poor

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32 Otero and Preibisch, *Farmworker Health and Safety*, 75; West Coast Domestic Workers' Association, *Access to Justice for Migrant Workers in British Columbia* (Vancouver: West Coast Domestic Workers' Association, 2013), 33; Workers' Advisers Office, *Temporary Foreign Workers Factsheet* (BC: Ministry of Jobs, Tourism and Skills Training and Responsible for Labour, 2013), 1.

33 Otero and Preibisch, *Farmworker Health and Safety*, 30; West Coast Domestic, *Access to Justice*, 33; Janet McLaughlin, "Falling Through the Cracks: Seasonal Foreign Farm Workers' Health and Compensation Across Borders," *The IAVGO Reporting Service* 21, no. 1 (2007): 9; Tanya Basok, "Canada's Temporary Migration Problem: A Model Despite Flaws," *Migration Policy Institute* (Washington, DC), November 12, 2007; Fairey et al., *Cultivating Farmworker Rights*, 54.

34 Otero and Preibisch, *Farmworker Health and Safety*, 30, 41, 76; Fairey et al., *Cultivating Farmworker Rights*, 29, 54.

35 Preibisch and Hennebry, *Temporary Migration*, 1036.

36 Otero and Preibisch, *Farmworker Health and Safety*, 76.

conditions and safety precautions.<sup>37</sup> It is clear that migrant workers (specifically migrant farm workers) are most likely injured at a rate equivalent or higher than other workers, but for reasons discussed above, are not reporting their accidents and injuries.

Another obstacle in filing for workers' compensation is the applicable knowledge needed to file. 93% of surveyed migrant workers did not know how to file a workers' compensation claim.<sup>38</sup>

It is estimated that only approximately one quarter of injured migrant workers received workers' compensation for their claims.<sup>39</sup> This statistic is from Ontario, but it is likely that the statistic would be similar in BC.

### **Injury Statistics; Are They Maintained?**

As far as we could find, there are no injury statistics kept for migrant workers in BC. The only literature that vaguely discussed migrant workers' injuries was from Ontario which found that between 2001 and 2011, of the 170,215 migrant farm workers who have worked in Ontario, 787 of them (0.46%) were "repatriated for health-related reasons"; but no statistics on injuries were discussed.<sup>40</sup>

We contacted WorkSafeBC, Canadian Agricultural Injury Reporting, Foreign Agricultural Resource Management Services, and the Canadian Centre for Occupational Health and Safety, none of whom kept statistics that differentiate between migrant workers' injuries and permanent residents' injuries.

Although there is no direct number of migrant workers injured, some organizations have estimated the percentage of migrant workers who have been injured in agricultural jobs (but not in any other industry temporary foreign workers work in). For example, one study by McLaughlin and Hennebry estimate the percentage of migrant workers who have been injured on the job to be about 15%, which is a similar finding to a study conducted by Veruzco and Lozano which found that 16.8% of Mexican agricultural migrant workers had been injured at work.<sup>41</sup> A more recent study by Hennebry, however, estimated that injury rates were in the 25% range.<sup>42</sup>

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37 Terrance Bogyo, "WorkSafeBC's Policy, Legislation and Responses to OHS and Newcomer Workers" (paper presented at the IWH Research and Policy Knowledge Exchange Forum on Immigration, Work and Health in British Columbia, Vancouver, BC, February 12, 2009), 37.

38 Canadian Press, "BC's migrant workers."

39 J. McLaughlin and J. L. Hennebry, "Background on Health and Safety for Migrant Farmworkers in Canada," *Policy Points* 1 (2010): 5.

40 Orkin et al, "Medical Repatriation," 194.

41 McLaughlin and Hennebry, "Background on Health," 5; Janet McLaughlin, *Migration and Health: Implications for Development: A Case Study of Mexican and Jamaican Migrants in Canada's Seasonal Agricultural Workers Program* (Ottawa, ON: FOCUS, 2009), 4.

42 Jenna Hennebry, "Permanently Temporary? Agricultural Migrant Workers and Their Integration in Canada," *IRPP* 26 (2012): 17.

The World Health Organization estimates that immigrant workers (including migrant workers) suffer from work place injuries at approximately double the rate of other workers.<sup>43</sup> Although no exact number can be drawn from these injury estimates, it must be acknowledged that migrant workers do have higher injury statistics than the general population. This may be caused by a multitude of interlocking factors, including higher risk occupations, less safety training, and poor to none enforcement of safety regulations.

### **Absentee Government - No Enforcement of Health and Safety Regulations for Migrant Workers?**

Health and safety regulations are rarely enforced in workplaces that hire large numbers of migrant workers. This is primarily due to the complaint-driven nature of the enforcement process.<sup>44</sup> By requiring migrant workers to lodge a complaint before health and safety standards are enforced, the vulnerable situation migrant workers are in is not acknowledged.<sup>45</sup> As with workers' compensation claims and illnesses, workers may fear the consequences of making a complaint. Additional issues of this scheme are that it relies heavily on a knowledge of ones' rights in the work place. Government services do not have the capacity to address complaints if they are made in "foreign languages which are not spoken widely in immigrant communities" - all problematic for migrant workers.<sup>46</sup>

Between the period of 1994 to 2001 and the period between 2002 and 2006, inspection reports in BC fell 62%.<sup>47</sup> New initiatives for inspection in agriculture (an area that employs upwards of 40% of all low skilled migrant workers) were implemented between 2007 and 2009, but were drastically cut in 2010.<sup>48</sup>

A study conducted in Quebec found that less than half of employers who employ temporary foreign workers were observing the legal health and safety requirements.<sup>49</sup> Furthermore, as Rennie discovered through a request under the *Access to Information Act*, "not one Canadian employer of Temporary Foreign Workers has been inspected to date despite a Conservative government promise to do so".<sup>50</sup>

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43 McLaughlin, "Migration and Health," 1.

44 Mark Thompson, "Migrant Workers in Canada: Emerging Policy Issues" (paper presented at the IWH Research and Policy Knowledge Exchange Forum on Immigration, Work and Health in British Columbia, Vancouver, BC, February 12, 2009), 7, 8; Fairey et al., *Cultivating Farmworker Rights*, 6, 23.

45 Fairey et al., *Cultivating Farmworker Rights*, 6.

46 Thompson, "Migrant Workers in Canada," 7, 8.

47 Otero and Preibisch, *Farmworker Health and Safety*, 79, 80.

48 Otero and Preibisch, *Farmworker Health and Safety*, 80.

49 Thompson, "Migrant Workers in Canada," 12.

50 Steve Rennie, "Tory government fails to inspect a single place hiring temporary foreign workers despite promise made last year," *National Post*, June 20, 2014.

Sections 217, 217.1, and 219 of the *Criminal Code* may be useful for enforcing employers' responsibility to ensure their workers' safety.<sup>51</sup> There have been a few high profile cases in recent years regarding the liability of corporations for criminal negligence in their employee deaths. These cases include *R. v. Metron Construction Corp.*, 2013 ONCA 541; *R. v. Kazenelson*, 2015 ONSC 3639; *R. c. Transpave Inc.*, 2008 QCCQ 1598; *R. c. Scrocca*, 2010 QCCQ 8218; and *R. v. Katsheshuk Fisheries*, [2014] NJ No. 260.

Metron Construction Corp. was fined \$750,000 for criminal negligence that caused four deaths in 2009. Six workers were on a platform fourteen stories in the air with only two restraining devices. The platform collapsed and the four workers who were not strapped in died and one worker who was strapped in incorrectly experienced serious injuries. The court found that Metron had not taken reasonable care to ensure their workers' safety.

Kazenelson was the project manager for Metron during the incident and in 2015 he was found guilty on four counts of criminal negligence causing death and one count of criminal negligence causing bodily harm. His sentence has not been determined.

In 2008, Transpave Inc. was fined \$100,000 for the death of a young employee. The court found that there was a disabled safety device which caused the worker's death. There was no program to ensure that the safety device worked, the safety device had been inactive for 2 years, and the employee did not receive proper training, so he did not know he was in danger. After the accident, Transpave spent \$500,000 on safety improvements and the \$100,000 fine agreed upon by the judge was a joint submission from the Crown and Transpave.

Scrocca was sentenced to a conditional sentence for 2 years less a day to be served in the community for the death of his employee. The brakes on a backhoe did not function properly and lead to this employee's death. Scrocca argued that because he did not have the requisite *mens rea*, he should not be held responsible for the death. The court, however, said the duty of care imposed under s. 217.1 of the *Criminal Code* had been breached by not servicing his equipment, and that was sufficient for a finding of guilt.

In *R. v. Katsheshuk Fisheries* an untrained employee accidentally caused the death of another worker. Katsheshuk Fisheries was then fined \$78,261 for the tragic incident.

These sections have yet to be applied to employers of temporary foreign workers, but they have significant potential as deterrents.

An area of enforcement of regulations that the literature tends to focus on is that of the housing of migrant agricultural workers. The houses that migrant farm workers live in must be inspected only at the beginning of the season, and inspections besides this initial

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51 Leo B. McGrady, Q.C. "Corporate Criminal Negligence: New Ways to Protect Employees' Health and Safety" (Vancouver, BC: February 2006).

inspection are “rare or non-existent.”<sup>52</sup> As a result, workers live in overcrowded residences, rarely have air conditioning or fans, often do not have access to clean drinking water, and often feel as though their health has been negatively impacted by their living arrangements.<sup>53</sup>

## Conclusions

Statutory rights alone are meaningless. In fact, they are probably worse than meaningless, because they raise expectations of enforcement that never materialize, and in the end simply compound the frustration, misery, and loss.

The ideal solution of course is membership in an activist union with a passion and commitment for temporary migrant worker rights, such as UFCW, CUPE, or BCGEU.

In the absence of such membership, or perhaps in addition to it, well-funded nonprofit activist agencies such as Vancouver Community Legal Assistance Society (VCLAS) or Justicia for Migrant Workers (J4MW), or Migrante BC would perform an invaluable role.

## Human Rights Complaints<sup>54</sup>

There have been a number of dramatic cases in the past year that support the view that human rights complaints are valuable sources of remedies, and perhaps deterrence.

Here in British Columbia, *PN v FR and another* (Tribunal Member McCreary)<sup>55</sup> illustrates the point. In the *PN* case, complaints were filed alleging discrimination based on sex, family status, age, ancestry, colour, and place of origin, contrary to section 13. *PN* is a mother from the Philippines. She was hired through an agency to work for the respondent as a housekeeper.

The facts of the case are compelling, as is the decision finding the respondent employer guilty of almost all aspects of the complaints of discrimination (page 25). The abuse is catalogued in chart form from pages 13 to 16 and includes using both the respondent’s migrant worker’s children to manipulate and harass her.

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52 Greg Laychak, “Down on the Farm: Migrant workers unhappy with conditions at Chiliwack operation,” *BC Local News*, December 10, 2014; Luis Aguiar, Patricia Tomic, and Ricardo Trumper, “Mexican migrant agricultural workers and accommodations on farms in the Okanagan Valley, British Columbia,” *Metropolis British Columbia* 11, no. 4 (2011): 24; Justicia for Migrant Workers, *Housing Conditions for Temporary Migrant Agricultural Workers in BC* (Vancouver: Justicia for Migrant Workers, 2007), 3.

53 Canadian Press, “BC’s migrant workers”; Preibisch and Otero, “Does Citizenship Status,” 189.

54 See Devyn Cousineau and Kaity Cooper, “At Risk: The Unique Challenges Faced by Migrant Workers in Canada”, *CLE Human Rights Conference -2014*

55 *PN v FR and another* (Tribunal Member McCreary), 2015 BCHRT 60.

In the end, the Tribunal ordered almost \$6,000 in lost wages and \$50,000 as damages for injury to dignity, feelings, and self-respect, as well as interest until those sums are paid (page 32).

The difficulty with relying on legal proceedings of this nature is of course that they are costly, time-consuming, require legal counsel as a general rule, often require expert evidence, and an ability to speak English or have access to translation services. Legal counsel in the *PN* case who achieved such a remarkable result was Devyn Cousineau, one of our speakers, who at the time was employed by VCLAS

The second human rights complaint that supports utilization of human rights legislation as a partial solution is that of *O.P.T. and MPT v Pretove Food Ltd.*, 2015 OHRTD No. 682 (M. Hart, Vice-Chair). Again the facts of this case are compelling. It involved allegations from temporary foreign workers employed in a fish processing plant in Wheatley, a small lakeside town in Southwest Ontario.

The allegations involved unwanted sexual solicitations, sexual assaults and touching, a sexually poisoned work environment, discrimination in respect of employment because of sex and reprisal. Virtually all of the allegations were found to have been proven. The remedies ordered included damages of \$150,000 for compensation for injury to OPT's dignity feelings and self-respect, prejudgment interest of almost \$15,000 plus post-judgment interest, \$50,000 plus almost \$5,000 in prejudgment interest were ordered payable to M.P.T.

One of the most interesting aspects of the judgment was the order that the fish processing company must provide any temporary migrant worker with human rights information and training in their native language for a period of 3 years from the date of the decision.

It is also noteworthy that the workers had also organized wildcat strikes in order to obtain the return of their passports. They had worked closely with Justicia for Migrant Workers. That community organization put them in contact with Unifor, prior to the filing of the complaint.

This case also reflects the difficulty with relying on legal proceedings of this nature. The complaint was originally filed in 2012. The proceedings were supported by the union, the CAW, (now UNIFOR), and Justicia for Migrant Workers. It also required expert evidence (paragraph 25) about the nature of foreign worker programs in Canada from Dr. Preibisch, of the University of Guelph, and one of the co-authors of many of the health-related temporary migrant workers studies we have relied on for this paper.

The third and final case we have chosen involved the worst abuse. The human rights case of *Moka Balikama on behalf of all Black workers who work for Khaira Enterprises Ltd. and Khaira Enterprises Ltd., Khalid Mahmood Bajwa and Hardilpreet Singh Sidhu*, 2014 BCHRT 107 (Tribunal Member N. Trerise), is helpful from a number of perspectives. First and foremost, it demonstrates the appalling working and living conditions that may exist in British Columbia for temporary migrant workers. This case

involved 55 African workers employed by a Surrey based company on contract to the provincial government.

They complained of these slavery-like conditions:

- No safe drinking water; forced to drink from the nearby creek.
- No toilet facilities at the camp.
- Daily shortage of food and malnourished workers.
- Unsafe food handling; unrefrigerated meats.
- Unsafe transportation of workers and overloaded and unsafe vehicles.
- Underpayment and non-payment of wages.
- Employment standards violations including misrepresentations of hours worked, physical and verbal abuse of workers.
- Workplace racism.
- Death threats to workers.
- Refusal of adequate medical treatment for injured workers.
- Failure to report workplace injuries to the Worker's Compensation Board.

The level of enforcement and oversight by the provincial government appeared to be almost nonexistent as a result of office closures and staff layoffs dating back over 10 years including those in the Golden area where this camp was located.<sup>56</sup>

Damages and interest was awarded totaling an estimated \$700,000.00.

Secondly, the case also demonstrates the unacceptable time required to litigate this type of case. In this complaint the time lapse between the filing and the judgment was about 4 years. The case itself took some 26 days of evidence. Expert evidence was also required. The case was handled on behalf of the complainants by the non-profit BC Public Interest Advocacy Center.

During that entire period of time the workers would have been without their wages from the respondent company, and without any compensation for their psychological and emotional damage. In addition, their families in Africa, whom they were attempting to support by working here in British Columbia, suffered as well but were uncompensated.

### **Abuse Tracker**

An abuse tracker is a publicly funded website, widely publicized, which in its original form tracked all information and documents relating to child abuse by Catholic clergy. It includes a database of the names of all US clergy accused of sexually abusing children and/or possessing child pornography. Links are provided to publicly filed court and mainstream media articles. It can be viewed at this website, [bishop-accountability.org](http://bishop-accountability.org), if you wish more information on how it operates.

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<sup>56</sup> NUPGE, *Forestry workers abuse connected to BC cutbacks*, August 13, 2010; see also David Ball, "African Tree Planters Win Racial Discrimination Case", *The Tyee*, May 23, 2014.



It provides an interesting model for the publication of names of employers who force temporary migrant workers to work under conditions that violate their human rights and/or provincial employment standards.

## **Boycotts**

Boycotts can be a wonderfully effective tool, though woefully underutilized. They are often combined with corporate campaigns. This website lists successful boycott campaigns from 1986 to 2009, and also offers interesting and helpful advice to those interested in organizing effective boycotts:

<http://www.ethicalconsumer.org/portals/0/downloads/successful%20boycotts.pdf>

For information and advice on corporate campaigns - as practiced by unions, see this very helpful website: [https://en.wikipedia.org/wiki/Comprehensive\\_campaign](https://en.wikipedia.org/wiki/Comprehensive_campaign). The support of religious, community, civic, consumer, environmental and other groups must be won and continuously displayed to the employer and the public.

## **Picketing/Leafletting**

These activities are generally quite legal and can be very effective. The only limitation is that if you use picketing, even indirectly, to function as a “picket line”, discouraging workers, suppliers, or trades people from servicing the corporation you are picketing, then it becomes illegal. But if you are simply attempting to apply consumer pressure by providing information, these activities are legal.

## **Strikes**

There have been some recent remarkable successes achieved by striking/protesting migrant workers. Some of the most dramatic examples come from Mexico, in which the workers used tactics learned from their time as temporary workers in the U.S. After 3 months of strikes and protests, berry pickers in Baja California, Mexico won pay increases of up to \$4 a day, social security benefits, and overtime. The organizing skills they utilized were learned on Florida tomato farms, with the assistance of organized labour and community coalitions.

They also benefited from the international boycott of Driscoll's, a name familiar to all of us here in Vancouver.

Workers from Oaxaca or Guerrero travel to Washington State for the berry season. The Mexican migrant workers are working with their support organization, Families United for Justice, and community groups, to press for better wages and working conditions. They have been engaging in strikes and protests, along with boycotts of major corporations supplied by Driscoll, such as Costco.

Similar actions were taken by migrant workers in Vermont against the state dairy industry and in particular Ben and Jerry's ice cream shops.<sup>57</sup>

### **Class Actions<sup>58</sup>**

One of the best examples of the use class actions is the Denny's restaurant action on behalf of 70 temporary foreign workers. It was launched in 2012 against Northland Properties Corporation which operates Denny's. The case was based on Denny's failure to provide the promised work, refusal to pay overtime and to cover expenses such as travel fees. It was settled for \$1.3 million. The company also paid the plaintiff's legal fees, donating \$80,000.00 to a charity of their choice. The filing of the class action is discussed by legal counsel and some of the activists involved on this YouTube clip:

<https://www.youtube.com/watch?v=iYOA0EN09-w>

Of particular interest is that the class action was one of a number of strategies developed by the workers and their allies, UFCW Canada, Migrante B.C., Migrante Canada, Agricultural Workers Alliance, Coalition for Migrant Workers Justice, and others. There is some wonderful footage on YouTube of the protest in front of the Robson Street Denny's restaurant by their supporters. The protesters included one of our speakers here, Naveen Mehta from the UFCW Canada.

Class actions have also been filed against a number of major US corporations in connection with the Thai seafood slave labour scandal referred to above. The corporations include Mars Inc., IAMS Co, Proctor and Gamble, Nestles, and Costco.

### **Future Research**

Almost all of the research done on access to health care and workers' compensation in BC has been done on migrant workers taking part in the Seasonal Agricultural Workers Program (SAWP); as a result, the barriers discussed above are barriers that arose from research directed at SAWP workers. In order to fully understand the accessibility of health care and workers' compensation for migrant workers in BC, research on Live-In Caregivers, low skill migrant workers, and high skill migrant workers should be conducted. Additionally, as no statistics were found on injuries amongst migrant workers, a study that examined how often migrant workers in the four different programs (SAWP, Live-In Caregiver, low skill, high skill – including those working in agriculture, hospitality, engineering, etc.) are injured, the medical treatment they receive, and whether or not they reported their injuries to the Workers' Compensation Board would be useful.

### **Readings**

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57 Sonia Singh, "How Migrant Farmworkers Are Cross – Pollinating Strategies and Winning", *Labor Notes* July 6, 2015.

58 See Leo B. McGrady QC, "Enforcing Employee Rights Through Class Actions" (The Lawyers Weekly, Toronto Ontario: August 2004); "Unions and Class Actions" (Canadian Association of Labour Lawyers, BC Branch, Law Courts Inn, Vancouver, BC: January 16, 2006); "Enforcing Employment Rights With Class Actions", *Continuing Legal Education Employment Law Conference*, May 12, 2006, Vancouver Canada

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Seeking International Human Rights Law Protections  
For Temporary Foreign Workers in Canada

Dr. Mia Reimers

Paper Prepared for SFU Labour Studies Program Conference  
“Temporary Migrant Workers:  
Labour Rights and Organizing Strategies”

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## Table of Contents

Introduction.....	1
I: Factual Background: Temporary Foreign Worker Program.....	2
II: The ILO and its Commitment to Migrant Workers.....	5
i.    Origins and Structure.....	5
ii.   The ILO's recent statements on the Rights of Workers And Migrant Workers.....	7
iii.  ILO Conventions No 97 and No 143.....	8
III: Treaties of General Application and Migrant Workers.....	10
IV: Convention on the Protection of All Migrant Workers and Members of their Families .....	12
i.    History of the Migrant Workers' Convention.....	12
ii.   Rights and Limitations.....	14
iii.  Ratification.....	16
V: Canada's Rejection of the Migrant Worker's Convention.....	17
VI: Consideration of the ILO Conventions.....	18
Conclusion.....	22
Bibliography.....	23
Appendix A: Convention on the Protection of All Migrant Workers and Members of their Families.....	29
Appendix B: ILO Convention No 97, Migration for Employment Convention.....	55
Appendix C: ILO Convention No 143, Migrant Workers (Supplementary Provisions) Convention.....	61

## Introduction

For too many years the plight of migrant workers in Canada have been misunderstood and ignored. This has recently changed as workers speak out, activists and organizations critically analyse the Foreign Temporary Work Program (TFWP), and the press highlight the appalling circumstances faced by workers under the program. For instance, one janitor recruited by the TFWP for the cleaning contractor at the University of Alberta reported that his employer threatened his job if he contacted a union about his mistreatment. This would mean automatic deportation.<sup>1</sup> Likewise, two Temporary Foreign Workers (TFWs) in Ontario were found to be particularly vulnerable to the unwanted sexual advances of their employer because of their dependence on him to remain employed in Canada. An Ontario Human Rights Tribunal decision awarded them compensation for injury to their dignity.<sup>2</sup> And finally, Canadians were confronted with the appalling story of Lucia Vega Jimenez. She had already been deported from British Columbia, came back, and was working illegally in a hotel. While detained by Canada Border Services and awaiting a second deportation she committed suicide.<sup>3</sup>

When international human rights protections are sought to uphold migrant workers' rights, the natural response is to look to, and urge Canada to ratify the United Nations Convention on the Protection of all Migrant Workers and Members of their Families (Migrant Workers' Convention).<sup>4</sup> It is the "first comprehensive universal codification of migrants' rights" which pertains to *all* migrant workers, both regular and illegal.<sup>5</sup> However, Canada has shown no interest in becoming a party to the Convention, and even if it did, because of the Convention's

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<sup>1</sup> "Janitors allege deportation, threats, withheld cash", *CBC News*, October 1 2010.

<http://www.cbc.ca/news/canada/edmonton/janitors-allege-deportation-threats-withheld-cash-1.920725>

<sup>2</sup> Joe Friesen, "Migrant workers win redress for abuse", *The Globe and Mail*, May 28, 2015, A3; *O.P.T. v. Presteve Foods Ltd*, 2015 O.H.R.T.D. No 682, LexisNexis.

<sup>3</sup> Andrea Woo, "Woman who died in CBSA custody feared returning to domestic troubles in Mexico", *The Globe and Mail*, January 31, 2014, <http://www.theglobeandmail.com/news/british-columbia/woman-who-died-in-cbsa-custody-feared-returning-to-domestic-trouble-in-mexico/article16644691/>

<sup>4</sup> *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, December 18, 1990, United Nations Treaty Series 2220, 30 (entered into force July 1, 2003) and see "Amnesty International Submission to the UN Universal Periodic Review: 16<sup>th</sup> Session of the UPR Working Group," Canada without Poverty, <http://www.cwp-csp.ca/action/poverty-and-human-rights/the-un-universal-periodic-review/>; Canadian Council for Refugees, <http://ccrweb.ca> and Kairos Canada, <http://www.kairoscanada.org/>. The Migrant Workers' Convention is appended as Appendix A.

<sup>5</sup> Ryszard Cholewinski, *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment* (Oxford: Clarendon Press, 1997), 199-200.



numerous qualifications, and the possibility of reservation, it may not extend any more protections than are currently available in other instruments. Although they are more limited, the International Labour Organization's Conventions number 97 (ILO Convention No 97) and 143 (ILO Convention No 143) would be more effective because they present strong rights in relation to freedom of employment and mobility. In addition, unlike the Migrant Workers' Convention ratifying states cannot reserve or opt-out of the Conventions' articles.

This paper consists of six parts. Part I examines the TFWP and its restrictions on the rights and freedoms of TFWs. In Part II, I establish that international concern for migrant workers predated the Migrant Workers' Convention beginning with the founding of the International Labour Organization (ILO) in 1919 and developing into the stand-alone ILO Conventions No 97 and No 143. Part III examines fundamental rights guarantees in two treaties of general application and their applicability to migrant workers. Part IV examines the strengths and weaknesses of the Migrant Workers' Convention. Although it is comprehensive, the treaty also suffers from defects due to its protracted drafting history and has received few ratifications. Part V examines Canada's refusal to become a party. In Part VI, I return to examining ILO Conventions No 97 and No 143. Because of the shortfalls of the Migrant Workers' Convention, I argue we should turn to these as alternative instruments to bolster rights protections for TFWs. Canada may perceive them to be less threatening than the Migrant Workers' Convention, but they likely will be more effective in guaranteeing rights because a country cannot reserve out of articles in ILO conventions and the ILO's tripartite organization means a continuing role for labour activists to ensure the government and employers abide by the Conventions. Finally, in recent Canadian Charter of Rights and Freedoms jurisprudence, the Supreme Court of Canada has relied on ILO conventions to interpret Charter rights. For these reasons, ratification of ILO Convention No 97 and No 143 would provide a strong source of international law to address human rights violations prevalent in the TFWP.

## **I. Factual Background: Temporary Foreign Worker Program**

The number of people who reside outside of their country of origin are large and growing. The ILO posits that if one were to consider all migrants together, the number would be

equivalent to the world's fifth most populous country.<sup>6</sup> These numbers are both reflective of displacement due to hunger, persecution and other factors, and the global migration for work.

Unlike the mid-twentieth century though, states now seek foreign labour on a temporary, rather than a permanent, basis. In Canada, this is ostensibly premised on a desire to immediately respond to labour market needs and to remain internationally competitive,<sup>7</sup> so there has been exploding growth in the use of TFWs. The number of TFWs grew 15% per annum between 2003 and 2008 and an average of 7% per annum from 2009 to 2011, totalling nearly 450,000.<sup>8</sup> A government minister puts the number of TFWs at 2% of the workforce. But because there are many streams in the TFWP, the minister can also downplay the potential for abuse by boasting “[c]ontrary to the myth, a typical temporary foreign worker is in fact an American lawyer working on a transaction here thanks to a NAFTA visa, a French scientist doing advanced research at a Canadian university on a research work permit, or a young Aussie on her gap year working at a ski hill, as part of a reciprocal Youth Mobility Program.”<sup>9</sup> But a government publication reveals that the top sources of TFWs are the United States, the Philippines and Mexico.<sup>10</sup>

The TFWP focuses on three categories of workers admitted under the Immigration and Refugee Protection Act (IRPA).<sup>11</sup> Agricultural workers are admitted through bilateral agreements with Mexico and several Caribbean states or granted a work permit for a specified employer for a specified time. These workers sign contracts with their employers and live in housing provided by them.<sup>12</sup> The Live-in-Caregiver Program likewise requires migrants to work and live in the home of a particular employer. If a caregiver wants to change employers, she or he must apply for a new permit.<sup>13</sup> Temporary permits are also issued for low and high-skilled workers. The potential employer must receive a Labour Market Opinion (LMO) from the

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<sup>6</sup> International Labour Organization, *Towards a Fair Deal for Migrant Workers in the Global Economy* (Geneva: International Labour Office, 2004), 8.

<sup>7</sup> Melissa Pang, *Background Paper: Temporary Foreign Workers* (2013) Parliamentary Information and Research Service, <http://www.parl.gc.ca/Content/LOP/ResearchPublications/2013-11-e.pdf>, 6.

<sup>8</sup> *Ibid.*, 1.

<sup>9</sup> Jason Kenney, “Foreign workers in Canada: Let’s separate the facts from the myths”, *The Globe and Mail*, June 20, 2014), <http://www.theglobeandmail.com/globe-debate/foreign-workers-in-canada-lets-separate-the-facts-from-the-myths/article19256920/>

<sup>10</sup> Pang, *Background Paper*, 3.

<sup>11</sup> *Immigration and Refugee Protection Act*, Statutes of Canada 2001, c. 27.

<sup>12</sup> Pang, *Background Paper*, 4.

<sup>13</sup> *Ibid.*

government to receive a permit. The LMO is supposed to ensure there is indeed a labour shortage and that the employer will offer a market wage rate and acceptable working conditions.<sup>14</sup> If the permit is issued, the worker and employer sign a contract and the employer is to provide suitable accommodation.<sup>15</sup> The work permit is issued for up to two years and is renewable for up to four.<sup>16</sup> A reorganization to the program took effect in 2014 but it did not affect the need for an LMO or that the TFW permit be tied to a singular employer.<sup>17</sup> There is no recognition in the IRPA of workers who come to Canada illegally or stay illegally to work.

Because there is no effective mechanism to monitor employers and ensure they comply by the LMO, the program leaves TFWs vulnerable to abuse. Before the year 2010 there was not a single federal employee assigned to monitoring abuses of the program, while approximately 200 handled employer applications.<sup>18</sup> Despite the 2014 reorganization, monitoring is still entirely voluntary under the HRSDC Monitoring Initiative. Most information that the federal government receives is complaint-based through employment standards boards, but only Alberta, Saskatchewan and Newfoundland keep specific track of complaints received by TFWs. Labour lawyer and scholar Fay Faraday notes “you’ve got the federal immigration sphere working quite separately from provincial enforcement agencies, and having those silos is not productive for actually ensuring compliance on the ground.”<sup>19</sup>

NGOs and trade unions have ably documented that the government’s hands-off approach and the tethering of TFWs to specific employers and accommodations allows and fosters exploitation and abuse. The Canadian Council for Refugees, for instance, relates the story of Delia, a live-in caregiver whose employers shared her labour with two other families. Since she was required to put in so much overtime, she had no days off. Delia is in the same situation as many TFWs; if a complaints result in termination, there is no option to find another employer

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<sup>14</sup> Erin Murphy Fries, *The International Labour and Human Rights of Migrant Workers under Canada’s Temporary Foreign Workers Program* (Master’s Thesis, Faculty of Law Lund University, 2012), 18.

<sup>15</sup> Pang, *Background Paper*, 4.

<sup>16</sup> Fries *Human Rights of Migrant Workers*, 19.

<sup>17</sup> Employment and Social Development Canada, “Improving Clarity, Transparency and Accountability of the Temporary Foreign Worker Program,” [http://www.esdc.gc.ca/eng/jobs/foreign\\_workers/reform/index.shtml](http://www.esdc.gc.ca/eng/jobs/foreign_workers/reform/index.shtml).

<sup>18</sup> Bill Curry, “Ottawa slow to monitor temporary foreign worker compliance”, *The Globe and Mail*, October 10, 2014), <http://www.theglobeandmail.com/news/politics/ottawa-slow-to-monitor-temporary-foreign-worker-program-compliance/article21042738/>

<sup>19</sup> Amber Hildebrandt, “Few provinces track complaints by temporary foreign workers”, CBC News, May 27, 2014, <http://www.cbc.ca/news/canada/few-provinces-track-complaints-by-temporary-foreign-workers-1.2648734>

under the program and they will be sent home.<sup>20</sup> If they are terminated, they may be forced to work illegally ever fearful immigration officials will find out.<sup>21</sup> Amongst those workers who are repatriated, this unspoken employer threat is known as a ‘shut up or be shipped out’ policy. So prevalent is the threat that in 2010 hundreds of repatriated workers in Mexico and Guatemala descended on the Canadian embassies in those countries to protest this policy.<sup>22</sup>

The Alberta Federation of Labour and Yessy Byl have led the way in highlighting abuses related to employer-provided housing.<sup>23</sup> Her report revealed some employers use the housing requirement for their own benefit by deducting exorbitant rents from the TFWs paychecks for employer-owned housing.<sup>24</sup> Accommodations provided are often unsanitary, crowded, and lack basic facilities such as washing machines.<sup>25</sup> Because the government’s recent changes to the TFWP did nothing to ameliorate these conditions that leave migrant workers vulnerable to abuse, activists have started to look to international human rights law – specifically the Migrant Workers’ Convention – to offer protections.

## **II. The International Labour Organization and its Commitment to Migrant Workers**

### **i. Origin and Structure**

The Migrant Workers’ Convention is built on the foundation the ILO established for global labour and human rights. When it was founded after World War I, there was a concern that in a post-war atmosphere of unregulated trade across borders, wages would ‘race to the bottom’ and some states would receive an unfair economic advantage.<sup>26</sup> States drafted the ILO Constitution to achieve peace through social justice and the maintenance of similar employment standards in

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<sup>20</sup> Canadian Council of Refugees, “Migrant Workers in Canada: Used and Abused,” <http://ccrweb.ca/sites/ccrweb.ca/files/migrantworkers4pager.pdf>

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

<sup>22</sup> United Food and Commercial Workers, *The Status of Migrant Farm Workers in Canada, 2010-2011*, January 2012, [http://www.ufcw.ca/templates/ufcwcanada/images/awa/publications/UFCW-Status\\_of\\_MF\\_Workers\\_2010-2011\\_EN.pdf](http://www.ufcw.ca/templates/ufcwcanada/images/awa/publications/UFCW-Status_of_MF_Workers_2010-2011_EN.pdf), 9.

<sup>23</sup> Alberta Federation of Labour, “Alberta’s Disposable Workforce: The Six Month Report of the AFL’s Temporary Foreign Worker Advocate,” (2007), [http://s3.amazonaws.com/migrants\\_heroku\\_production/datas/609/19-Temporary-Foreign-Workers-Alberta-s-Disposable-Workforce\\_original.pdf?1364161746](http://s3.amazonaws.com/migrants_heroku_production/datas/609/19-Temporary-Foreign-Workers-Alberta-s-Disposable-Workforce_original.pdf?1364161746), 11-12.

<sup>24</sup> *Ibid.*

<sup>25</sup> United Food and Commercial Workers, *Status of Migrant Farm Workers*.

<sup>26</sup> Fries, *Human Rights of Migrant Workers*, 25.

an increasingly interdependent world.<sup>27</sup> When the United Nations was created in 1945, the ILO became a specialized agency within it.

The ILO constitution demonstrates its commitment to the human right of all workers. Its preamble states that “lasting peace can be established only if it is based upon social justice.”<sup>28</sup> In listing the injustices that must be reformed to ensure the peace of nations, the preamble refers to “protection of the interests of workers when employed in countries other than their own.”<sup>29</sup> The Declaration of Philadelphia, adopted and annexed to the Constitution in the 1940s, expanded the scope of the ILO to cover human rights, in general. In particular, section II(a) has been regarded as an instrumental statement in the protection and advancement of economic and social human rights.<sup>30</sup> The section states “all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity.”<sup>31</sup>

The ILO’s structure is unique to the UNs since it is comprised of both states and private interests. Those states who are members of the UN are by extension automatically members of the ILO. The International Labour Conference, the supreme organ of the ILO, is tripartite consisting of two representatives of government, one representative of workers and one representative of employers per state.<sup>32</sup> The Conference’s primary function is setting standards through conventions and by recommendations. Conventions are subject to ratification by national delegations which then legally bind the State to apply and implement them.<sup>33</sup> Unlike conventions administered under the UN regime though, states cannot register reservations in ILO conventions. The rationale is that permitting reservations would interfere with the goal of developing uniform labour legislation, and since Conventions arise from the tripartite International Labour Conference, state reservations would be anathema to the worker and employer representatives, and there would be no effective way to receive authorization from

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<sup>27</sup> International Labour Organization, *Origins and History*, <http://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm>

<sup>28</sup> *The Constitution of the International Labour Organisation*, October 9, 1946, Canada Treaty Series 1946, No. 48.

<sup>29</sup> *Ibid.*

<sup>30</sup> Cholewinski, *Migrant Workers in International Human Rights Law*, 80.

<sup>31</sup> *Constitution of the International Labour Organisation*.

<sup>32</sup> Héctor Bartolomei de la Cruz, Geraldo von Potobsky & Lee Swepston, *The International Labor Organization: The International Standards System and Basic Human Rights* (Boulder: Westview Press, 1996), 7.

<sup>33</sup> *Ibid.*, 20.

them.<sup>34</sup> Non-binding recommendations provide guidelines for member states. The guidelines are often in regards to the conventions, providing more detail of the standards or setting out more advanced standards.<sup>35</sup>

## **ii. The ILO's Recent Statements on the Rights of Workers and Migrant Workers**

In 1998 the ILO expanded its human rights agenda, by adopting the Declaration on Fundamental Principles and Rights at Work. The Declaration urged states to ratify 8 key conventions which uphold the fundamental rights of workers. These conventions cover:

- (a) freedom of association and the right to organize for collective bargaining (No 87 and 98),
- (b) the elimination of forced or compulsory labour (No 29 and 105),
- (c) the abolition of child labour (No 138 and 182),
- (d) the elimination of discrimination in employment and occupation (No 100 and No 111).<sup>36</sup>

But, so fundamental were these human rights principles at work, by virtue of ILO membership, “even if they have not ratified the Conventions in question, [all members] have an obligation...to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions.”<sup>37</sup> The four fundamental rights together provides a comprehensive blanket of human rights protections in employment. The title indicates the ILO's human rights agenda because “it highlights that these are not ‘worker rights’ but ‘rights at work;’ that is, they are rights that all persons possess by virtue of being human, and they are human rights with particular applicability at work.”<sup>38</sup>

Although the Declaration notes that the problems of migrant workers should be given special attention,<sup>39</sup> and the ILO subsequently confirmed migrant workers should receive the benefits of the rights and principles expressed within those conventions,<sup>40</sup> there is little specific reference to migrant workers in them. For instance Convention 111 on Discrimination

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<sup>34</sup> *Ibid*, 50.

<sup>35</sup> Cholewinski, *Migrant Workers in International Human Rights Law*, 82.

<sup>36</sup> ILO, *Fair Deal*, 72.

<sup>37</sup> *ILO Declaration on Fundamental Principles and Rights at Work*, 86 Session, Geneva, June 1998, 37 International Legal Materials 1237.

<sup>38</sup> Janet R. Bellace, “Achieving Social Justice: The Nexus between the ILO's Fundamental Rights and Decent Work,” *Employee Rights and Employment Policy Journal* 15 (2011): 14.

<sup>39</sup> *Declaration on Fundamental Principles and Rights at Work*.

<sup>40</sup> International Labour Organization, *ILO's Multilateral Framework on Labour Migration; Non-binding principles and guidelines for a rights-based approach* (Geneva: International Labour Office, 2006), 15.

(Employment and Occupation) states members should undertake and institute policy with a view to eliminating discrimination on the basis of “race, colour, sex, religion, political opinion, national extraction or social origin.”<sup>41</sup> The above grounds do not include discrimination based on employment status.<sup>42</sup> Despite the reference to “national extraction,” there is no protection from being discriminated against for being a migrant worker. Because a majority of delegates when the convention was debated did not want the term “national origin” included as an enumerated grounds because it would offer equality of treatment to migrant workers, the term “national extraction” was substituted.<sup>43</sup> The ILO has subsequently confirmed that the protected ground of “national extraction” does not refer to citizenship, rather there should be no discrimination between citizens of the same country based on national origin or place of birth.<sup>44</sup>

### **iii. ILO Conventions No 97 and No 143**

The ILO did adopt two conventions in specific relation to migrant workers. Because of their specialized nature, and low ratification, these conventions do not form part of the core eight. ILO Convention No 97, Migration for Employment Convention (revised) was adopted in 1949 to recognize the need for labour migration out of war-torn Europe to states that required it.<sup>45</sup> Therefore the Convention does not apply to illegal labour. The Convention also provides protections during the entire migration process including “adequate and free service to assist migrants for employment, and in particular to provide them with accurate information”<sup>46</sup> and “tak[ing] all appropriate steps against misleading propaganda.”<sup>47</sup> The member is also to “facilitate the departure, journey and reception of migrants for employment,”<sup>48</sup> and to provide in Article 6 “without discrimination in respect of nationality, race, religion or sex, to immigrants lawfully within its territory, *treatment no less favourable than that which it applies to its own*

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<sup>41</sup> *ILO Convention No 111 concerning Discrimination in Respect of Employment and Occupation*, June 25, 1958, United Nations Treaty Series 362 (entered into force June 15, 1960, entered into force for Canada November 26, 1965), Article 1.

<sup>42</sup> ILO, *Fair Deal*, 75.

<sup>43</sup> de la Cruz, *International Labour Organization*, 264-265.

<sup>44</sup> Fries, *Human Rights of Migrant Workers*, 36.

<sup>45</sup> ILO, *Fair Deal*, 75.

<sup>46</sup> *ILO Convention No 97 Migration for Employment (Revised)*, July 1, 1949, United Nations Treaty Series 120 (entered into force January 22, 1952), Article 2. The Convention is appended at Appendix B.

<sup>47</sup> *Ibid*, Article 3.

<sup>48</sup> *Ibid*, Article 4.

*nationals*” in a host of matters including wages, accommodation and social security once the migrant is in the receiving state.<sup>49</sup>

ILO Convention No 143, Migrant Workers (Supplementary) Provision, was adopted in 1975 to respond to global recession, unemployment and a concurrent increase in illegally trafficked migrant workers.<sup>50</sup> Therefore Part I of the Convention is titled ‘Migrations in Abusive Situations’ and is concerned with stopping “clandestine movements” and illegal employment of migrants while also extending rights to illegals already in receiving countries.<sup>51</sup> To prevent legal migrants from losing their status, Article 8 importantly sets out that loss of a job would not “in itself imply the withdrawal of his authorisation of residence or, as the case may be, work permit” and the worker would not “be regarded as in an illegal or irregular situation.”<sup>52</sup> He or she would enjoy the same equality as citizens in seeking “alternative employment, relief work and retraining.”<sup>53</sup>

Part II of ILO Convention No 143 is titled ‘Equality of Opportunity and Treatment.’ It offers a corrective to Convention No 111’s denial of nationality as a grounds for non-discrimination.<sup>54</sup> It expands ratifying states’ positive obligations to migrant workers. Article 10 mandates states to

declare and pursue a national policy designed to promote and to guarantee, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, of social security, of trade union and cultural rights and of individual and collective freedoms for persons who as migrant workers or as members of their families are lawfully within its territory.<sup>55</sup>

Further, Article 12 requires states to legislate and educate adherence to the policy. This Convention reiterates the equality of treatment in employment that is set out in ILO Convention No 97.<sup>56</sup> In other words, Article 12 “recognizes the challenges that migrant workers face, which are not experienced by nationals, and places an obligation on destination countries to take extra

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<sup>49</sup> *Ibid*, Article 6. Emphasis added.

<sup>50</sup> Fries, *Human Rights of Migrant Workers*, 40.

<sup>51</sup> *ILO Convention No 143 concerning migration in abusive conditions and the promotion of equality of opportunity and treatment of migrant workers*, June 24, 1975, United Nations Treaty Series 1120 (entered into force December 9, 1978), Article 3. This Convention is appended in Appendix C.

<sup>52</sup> *Ibid*, Article 8.

<sup>53</sup> *Ibid*.

<sup>54</sup> *Ibid*. (The preamble of the convention makes specific note that Convention 111 does not include distinctions based on nationality).

<sup>55</sup> *ILO Convention No 143*, Article 10.

<sup>56</sup> *Ibid*, Article 12.



steps to protect the rights of migrant workers.”<sup>57</sup> ILO Convention No 143 also recognizes the migrant worker as a whole person, expanding rights out of a labour context by requiring receiving states to assist and encourage the retention of national, ethnic and cultural identities and ties, including “the possibility for children to be given some knowledge of their mother tongue.”<sup>58</sup>

Article 14 of ILO Convention No 143, although considered by Ryszard Cholewinski, a migration specialist at the ILO, to be “the most enlightened provision in international human rights regarding the right of migrant workers to free choice of employment,”<sup>59</sup> also rankles most migrant-receiving states. The Article states that a member may:

make the free choice of employment, while assuring migrant workers the right to geographical mobility, subject to the conditions that the migrant worker has resided lawfully in its territory for the purpose of employment for a prescribed period not exceeding two years or, if its laws or regulations provide for contracts for a fixed term of less than two years, that the worker has completed his first work contract.<sup>60</sup>

Major receiving states interpret this article as limiting their sovereignty to make migration policy and undermining targeted temporary guest worker programs.<sup>61</sup> This expansive ILO Convention gave several states, as will be discussed in Part V, the impetus to work towards creating the UN Migrant Workers’ Convention – an arguable more limited instrument than the ILO Conventions. This paper will revisit the relevant articles of ILO Convention No 97 and ILO Convention No 143 and discuss its ratification history in Part VI.

### **III. Treaties of General Application and Migrant Workers**

The ILO was the first organization to establish universal human rights, albeit as they related to labour and occupation. It should be no surprise then that members of other international organizations – in this case the United Nations – used ILO conventions as a model and drafted its treaties to be consistent. Therefore, the two main treaties of general application include many of

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<sup>57</sup> Fries, *Human Rights of Migrant Workers*, 41.

<sup>58</sup> *ILO Convention No 143*, Article 12.

<sup>59</sup> Cholewinski, *Migrant Workers in International Human Rights Law*, 414.

<sup>60</sup> *ILO Convention No 143*, Article 14.

<sup>61</sup> Roger Bohning, “The ILO and the New UN Convention on Migrant Workers,” *International Migration Review*, 24 (1991): 699.

the same rights but they are necessarily less detailed and broader in scope than the ILO conventions.<sup>62</sup>

The International Covenant on Civil and Political Rights (ICCPR),<sup>63</sup> adopted in 1966, and in force from 1976, outlines civil and political rights that all humans, including migrants possess. Canada as a party “undertakes to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>64</sup> The Human Rights Committee has since confirmed that the ICCPR applies to non-citizens.<sup>65</sup> Article 12 should apply to migrant workers, whereby everyone lawfully within a state shall have the “right to liberty of movement and freedom to choose his residence.”<sup>66</sup> These rights are qualified by restrictions “provided by law.”<sup>67</sup> They also do not apply to illegal migrant workers. Where migrant rights are concerned in the ICCPR, Cholewinski notes “the general consensus which emerged from the drafting process was that state parties may discriminate against aliens so long as such distinctions are considered strictly necessary, or justified in accordance with objective and reasonable criteria.”<sup>68</sup>

The other 1966 treaty, the International Covenant on Economic, Social and Cultural Rights (ICESCR), more closely follows the standards set by the ILO on social and economic rights;<sup>69</sup> but like the ICCPR, the included rights are qualified. Article 6 provides the “right to work” of which he or she freely chooses.<sup>70</sup> Article 7 recognizes everyone has the right to just and favourable conditions of work, including fair wages without distinction of any kind, safe and healthy working conditions, rest, leisure and reasonable limits on working hours. Article 11 recognized the right of everyone to an adequate standard of living including housing, and

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<sup>62</sup> de la Cruz, *International Labour Organization*, 129.

<sup>63</sup> *International Covenant on Civil and Political Rights*, December 19, 1966, 999 United Nations Treaty Series 171, (entered into force March 23, 1976, entered into force for Canada August 19, 1976).

<sup>64</sup> *Ibid*, Article 2(1).

<sup>65</sup> Human Rights Committee, General Comment 15, ‘The position of aliens under the Covenant’ (Twenty-seventh session, 1986), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Document HRI\GEN\1\Rev.1, (1994). See also Vincent Chetail, “The Human Rights of Migrants in General International Law: From Minimum Standards to Fundamental Rights” *Georgetown Immigration Law Journal*, 28 (2013): 244.

<sup>66</sup> *International Covenant on Civil and Political Rights*, Article 12(1).

<sup>67</sup> *Ibid*, Article 12(3).

<sup>68</sup> Cholewinski, *Migrant Workers in International Human Rights Law*, 51.

<sup>69</sup> de la Cruz, *International Labour Organization*, 128.

<sup>70</sup> *International Covenant on Economic, Social and Cultural Rights*, December 16, 1966, United Nations Treaty Series 993, (entered into force January 3, 1976, entered into force for Canada May 19, 1976), Article 6.

appropriate steps to be taken to ensure the realization of the right.<sup>71</sup> At one time it was unclear if Article 2(2), which enumerates the grounds for which the ICESCR rights will be exercised without discrimination, would apply to migrant workers since citizenship or nationality are not mentioned.<sup>72</sup> In 2009, the Committee on Economic, Social and Cultural Rights confirmed that the reference to “other status” in the article could be interpreted as citizenship or nationality.<sup>73</sup> But because Article 4 sets out that the rights can be limited as determined by law compatible with promoting the general welfare of society,<sup>74</sup> it is unlikely migrant workers will enjoy the full benefit of these rights. This is because legislation to restrict access to the labour market would undoubtedly be considered an objective and reasonable basis to differentiate between national and foreign labour.<sup>75</sup> A recent collection interpreting each Article of the ICCPR notes that there have been few reservations to Article 6, the right to work of choice, because “it is not understood as requiring them to guarantee the right to work to any non-citizen.”<sup>76</sup>

#### **IV. Convention on the Protection of all Migrant Workers and Members of their Families**

##### **i. History of the Migrant Workers’ Convention**

The idea for the Migrant Workers’ Convention originated with objections to the ILO’s Convention No 143 as creating a rights regime that would impinge on state sovereignty over labour decisions. Soon after No 143 was adopted in 1975, Mexico and Morocco promoted the idea of a UN convention with the same goal in elaborating a rights regime that specifically recognized the vulnerability of migrant workers. They, and other countries whose nationals migrated for work, wanted an instrument that Western nations were not reluctant to ratify. A

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<sup>71</sup> *Ibid*, Articles 7 and 11.

<sup>72</sup> *Ibid* Article 2(2); see e.g. David Weissbrodt, *The Human Rights of Non-Citizens* (Oxford: Oxford University Press, 2008), 191.

<sup>73</sup> Committee on Economic, Social and Cultural Rights, General Comment No 20 *Non-Discrimination in Economic, Social and Cultural Rights* (art 2, para 2) 42nd Session, UN Document E/C 12/GC/20 (June 10, 2009), 8 cited in Ryszard Cholewinski, “Human Rights of Migrants: Dawn of a New Era?” *Georgetown Immigration Law Journal* 24 (2010): 588.

<sup>74</sup> *International Covenant on Economic, Social and Cultural Rights*, Article 2 (1) and (3).

<sup>75</sup> Ben Saul, David Kinley & Jaqueline Mowbray, *International Covenant on Economic, Social and Cultural Rights: Cases, Material and Commentary* (Oxford: Oxford University Press, 2014), 315.

<sup>76</sup> *Ibid*.

convention under the UN seemed a more palatable option because those states could then submit reservations from particular articles, while still supporting the general principle of protections for migrants' human rights.<sup>77</sup> And for conservative countries like Mexico and Morocco at the time, putting such an important issue under the auspices of the UN would mean it was removed from the influence of unions in the ILO's tripartite composition.<sup>78</sup>

The catalyst to the Migrant Workers' Convention were discussions at an international racism conference in 1978 that led to two General Assembly resolutions.<sup>79</sup> The first resolution came in that same year. It noted the increasing use of migrant labour and the presence of their families in host countries. It recommended that states ratify ILO Convention No 143 and to more rigorously apply provisions of ILO and UN conventions to prevent discrimination against migrant workers. Most importantly, it requested states in conjunction with the appropriate UN bodies to explore "the possibility of drawing up an international convention on the rights of migrant workers."<sup>80</sup> The second resolution, adopted in 1979, noted the positive response to the idea of a Migrant Workers' Convention and established a working group to draft it.<sup>81</sup> The positive responses to the first resolution, however, came from migrant-sending and communist countries. If receiving countries responded, they expressed a negative view, as did the ILO, since such a convention resulted in a duplication of effort.<sup>82</sup> It is also notable that Canada, along with other major receiving countries, abstained from voting on the second resolution which created the working group.<sup>83</sup>

The consensual drafting phase of the Migrant Workers' Convention lasted a decade; numerous states participated at different stages leading to a watering down of rights in the interests of national sovereignty.<sup>84</sup> The first draft by the representatives of Mexico and Morocco

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<sup>77</sup> Graziano Battistella, "Migration and Human Rights: the uneasy but essential relationship" in *Migration and Human Rights: The United Nations Convention on Migrant Worker's Rights*, ed. Antoine Pécoud et al. (Cambridge: Cambridge University Press, 2009), 54.

<sup>78</sup> Antoine Pécoud & Paul De Guchteneire. "Migration, Human Rights and the United Nations: An Investigation into the Obstacles to the UN Convention on Migrant Workers' Rights" *Windsor Yearbook of Access to Justice* 24 (2006): 246.

<sup>79</sup> Cholewinski, *Migrant Workers in International Human Rights Law*, 140.

<sup>80</sup> *Measures to improve the situation and ensure the human rights and dignity of all Migrant Workers*, General Assembly Resolution 33/163, UNGAOR, 33rd Session, Supplement No. 45, UN Document A/33/45, 152-153.

<sup>81</sup> *Measures to improve the situation and ensure the human rights and dignity of all Migrant Workers*, General Assembly Resolution 34/172, UNGAOR, 34th Session, Supplement No. 46, UN Document A/34/46, 188-189.

<sup>82</sup> Battistella, "Migration and Human Rights," 54.

<sup>83</sup> *Ibid.*

<sup>84</sup> Cholewinski, *Migrant Workers in International Human Rights Law*, 143-144.

was rejected by the major receiving countries who feared the legalization of illegal migration. Then a group of Mediterranean and Scandinavian countries took over and drafted a second version by 1984. This essentially European draft was repeatedly modified by migration and human rights experts from other countries until its adoption in 1990.<sup>85</sup> Despite the contributions of many nations, migration expert Graziano Battistella notes “the final text ensured that migrants would receive only such protections as traditional labour-receiving countries were already granting them.”<sup>86</sup>

## **ii. Rights and Limitations**

Certainly, the Migrant Workers’ Convention is the most comprehensive and complete statement on human rights of migrant workers. Its provisions for migrant workers’ rights in all phases of the migration process is more expansive than ILO Convention No 97.<sup>87</sup> For instance, it requires information about their migrant status and employment situation be given to the migrant before their departure or upon admission into the receiving state.<sup>88</sup> It also has a more generous definition of migrant workers than the preceding ILO conventions. A migrant worker as defined by Article 2(1) “refers to a person who is to be engaged in remunerated activity in a state of which he or she is not a national.”<sup>89</sup> This definition is open to undocumented migrants. So, for instance, workers illegally in a receiving state are to have equality of treatment to nationals in areas such as remuneration and conditions of work, and states are to further ensure their rights in these regards are not to be denied by reason of their irregularity.<sup>90</sup> Enjoyment of these rights, however, may be short-lived because they will still be subject to deportation under state laws.<sup>91</sup> The Convention also reiterates the rights articulated in ILO Convention No 143 that fall outside of the employment arena, including protection of cultural links and basic access to education for

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<sup>85</sup> Battistella, “Migration and Human Rights,” 56.

<sup>86</sup> *Ibid*, 57.

<sup>87</sup> *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, December 18, 1990, United Nations Treaty Series 2220 (entered into force July 1, 2003), Article 1(2).

<sup>88</sup> *Ibid*, Article 37.

<sup>89</sup> *Ibid*, Article 2(1).

<sup>90</sup> *Ibid*, Article 25.

<sup>91</sup> Isabelle Slinckx, “Migrants’ rights in UN human rights conventions” in *Migration and Human Rights: The United Nations Convention on Migrant Worker’s Rights*, ed. Antoine Pécoud et al. (Cambridge: Cambridge University Press, 2009), 147.

migrant children.<sup>92</sup> Finally, a concluding section sets out a framework for state cooperation to both promote migrant rights and regulate the conditions that lead to irregular migration.<sup>93</sup>

Antoine Pécoud, a UNESCO migration specialist, summarizes the Convention as

an attempt to ensure that migrants have their fundamental human rights respected. Rather than establish new rights it offers a more precise interpretation of human rights in the case of migrants. Most of the rights listed in the ICRMW were formulated in earlier Conventions but their application to non-nationals had not been specified.<sup>94</sup>

Qualifications and the possibility of state reservation means the Migrant Workers' Convention does not particularly strengthen rights established in preceding international instruments, particularly for undocumented workers. Despite the wide-ranging definition of migrant workers noted above, only the rights listed in Part III of the Convention applies to *all* workers. These articles (8-35) mainly deal with equality of treatment in basic fundamental freedoms and employment rights. Then Part IV (articles 36-56) lists "other rights" for those migrant workers "who are documented or in a regular situation."<sup>95</sup> These are generally more substantive rights to the same benefits enjoyed by nationals, such as the right to access vocational programs and social and health services, to access housing and protections from exploitation in rents,<sup>96</sup> liberty of movement within the receiving state and the choice of residence,<sup>97</sup> and the ability to gain alternative employment in the event of loss or termination of work.

Of interest to Canadian activist organizations is also Article 52(1), the right of documented migrants to freely choose their remunerated activity. However, 52(2) reflects the national sovereignty concerns that went into the drafting because this right is subject to legislation regarding temporary workers.<sup>98</sup> Part V allows for further limitations. It refers to exemptions of the previously mentioned rights depending on categorization of worker set out in Article 2(2) (a) to (h). For the purposes of this paper, the categories of "seasonal worker" in

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<sup>92</sup> *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, Articles 30 & 31.

<sup>93</sup> *Ibid*, Part VI.

<sup>94</sup> Pécoud, "Obstacles to the UN Convention on Migrant Workers' Rights," 246.

<sup>95</sup> *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, Part IV.

<sup>96</sup> *Ibid*, Article 43.

<sup>97</sup> *Ibid*, Article 39.

<sup>98</sup> *Ibid*, Article 52.

2(2)(b) and “specified-employment worker” in 2(2)(g) are the most relevant. Article 59 in Part V specifies seasonal workers are only extended those substantive rights in Part IV that are compatible with the seasonal nature of their work.<sup>99</sup> Specified-employment workers, who are in a state for a defined period of time, will not be extended the right of vocational programs, to freely choose their remunerated activity, or to access alternative employment.<sup>100</sup> These clauses, notes Cholewinski, “were part of another compromise in order to satisfy the demands of those non-European countries of immigration, such as Australia, Canada and the USA, which do not permit migrant workers the right to free choice of employment after a period of work and residence.”<sup>101</sup> Such qualifications have effectively reduced the ‘right’ to free choice of employment to a mere recommendation.<sup>102</sup> Finally Article 79 reassures states that “[n]othing in the present Convention shall affect the rights of each State Party to establish the criteria governing admission of migrant workers and members of their families.”<sup>103</sup> The ability of states ratifying the convention to register reservations also reduces the potential impact it could have in alleviating oppressive conditions migrant workers face. Although Article 88 prevents reservation on any of the categories of migrant workers included, including illegals<sup>104</sup> a state could submit reservations to specific articles regarding illegals, for instance.<sup>105</sup>

### iii. Ratification

Despite the recognition of state sovereignty in relation to migration policy in the Migrant Workers’ Convention, states have been slow to ratify it. In fact, it is the UN convention that has taken the longest to enter into force, at 13 years from its adoption in 1990 to 2003 when the 20<sup>th</sup> state ratified it.<sup>106</sup> Today, there is still only 41 states that have ratified it; this is a “marked

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<sup>99</sup> *Ibid*, Article 59.

<sup>100</sup> *Ibid*, Article 62.

<sup>101</sup> Cholewinski, *Migrant Workers in International Human Rights Law*, 152.

<sup>102</sup> *Ibid*, 201.

<sup>103</sup> *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, Article 79.

<sup>104</sup> *Ibid*, Article 88.

<sup>105</sup> Cholewinski, *Migrant Workers in International Human Rights Law*, 149.

<sup>106</sup> Paul De Guchteneire & Antoine Pécoud, “Introduction: The UN Convention on Migrant Workers’ Rights” in *Migration and Human Rights: The United Nations Convention on Migrant Worker’s Rights*, ed. Antoine Pécoud et al. (Cambridge: Cambridge University Press, 2009), 1.

indifference” compared to the quickly and widely-ratified ICCPR and the ICESCR.<sup>107</sup> As of yet no major Western receiving states have ratified it. This paper will now examine the reasons Canada has not, and likely will not, ratify it.

## V. Canada’s Rejection of the Migrant Workers’ Convention

Canada was never comfortable with the Migrant Workers’ Convention since it duplicates existing UN conventions and domestically available protections. Canada is already a party to the ICCPR and ICESCR, which guarantee an umbrella of fundamental, political, social, economic and cultural rights. As discussed above, both are acknowledged to extend to non-nationals. The Migrant Workers’ Convention also suffers a lack of visibility within the Canadian government.<sup>108</sup> Since it has had few ratifications and none from developed nations, it is not seen as a priority in human rights protections and “no country wants to take the risk of isolating or penalising itself by ratifying” it first.<sup>109</sup> Canada also argues that there are domestic protections and fundamental, legal, and equality rights set out in the Canadian Charter of Rights and Freedoms that apply to non-nationals. As for workplace rights, provincial health and safety legislation theoretically provide additional protections,<sup>110</sup> and human rights codes can provide justice for workplace abuses.<sup>111</sup> However, the ‘shut up or be shipped out’ threat implicit in the TFWP weighs against TFWs using these avenues.

Like other migrant-receiving states, Canada also perceives the Migrant Workers’ Convention as threatening its sovereignty in setting domestic labour policies. On the surface, articles like Article 52 which seemingly guarantee migrant workers the right to seek out and choose their own employment, fly in the face of the national migration strategy in the TFWP to determine rights to meet Canada’s labour needs.<sup>112</sup> Further, Canadian officials think ratifying the Convention would mean a complete overhaul of its TFW programs, since it would require the state to become much more involved in the migration process to ensure it was meeting its

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<sup>107</sup> *Ibid.*

<sup>108</sup> Éugénie Depatie-Pelletier, Dina Epale, Victor Piché, “Obstacles to ratification of the ICRMW in Canada” in *Migration and Human Rights: The United Nations Convention on Migrant Worker’s Rights*, ed. Antoine Pécoud et al. (Cambridge: Cambridge University Press, 2009), 193.

<sup>109</sup> Pécoud, “Obstacles to the UN Convention on Migrant Workers’ Rights,” 259.

<sup>110</sup> Depatie-Pelletier, “Obstacles to ratification of the ICRMW in Canada,” 205.

<sup>111</sup> See e.g. *O.P.T. v. Presteve Foods Ltd.*

<sup>112</sup> *Ibid.*, 207-208.



obligations. Currently, Canada serves only as a facilitator to recruit foreign employees for a single employer.<sup>113</sup>

## **VI. Consideration of the ILO Conventions**

Despite the international and domestic human rights instruments to which Canada is bound, human rights abuses on TFWs still occur and could continue to occur if the Migrant Workers' Convention was ratified. It is clear from NGO and trade union research that the precarious employment status of TFWs prevent them from voicing their complaints. The way the program is structured means the government can remain blind to changes in the working conditions of migrant workers after their employment contracts begin. For the reasons about qualifications and reservations expressed above, the Migrant Workers' Convention is not the ideal instrument to offer further protections. In addition, the Convention rests on the assumption that states are the drivers of labour migration, whereas in states like Canada it is private agencies and networks that organize most of it. This allows states to 'disengage' so they have less interest in instruments like the Migrant Workers' Convention.<sup>114</sup> There is very little chance that this government, with its hostility to labour in general, will ratify the Convention. This paper has also demonstrated that despite the Conventions' commendable breadth, it was drafted to preserve state autonomy in labour and migration policy.

Canada has also shown little interest in ILO Convention No 97 and ILO Convention No 143, unfortunately. These conventions are almost as unpopular as the Migrant Workers' Convention because of state reluctance to be bound in the area of migration policy, or for Canada, to enter into a binding agreement when it is the provinces that have jurisdiction over most employment matters.<sup>115</sup> Low ratification rates are also a disincentive to ratify; ILO Convention No 97 has only entered into force in 51 countries, and ILO Convention No 143, with its controversial Article 14, has only entered into force in 25 countries.

However, activist individuals and organizations should try to persuade Canada to ratify these conventions, or at least to ratify ILO Convention No 97. Several persuasive arguments could be

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<sup>113</sup> *Ibid*, 201.

<sup>114</sup> Pécoud, "Obstacles to the UN Convention to the UN Convention on Migrant Workers' Rights," 253-254; ILO, *Fair Deal*, 44.

<sup>115</sup> Fries, *Human Rights of Migrant Workers*, 73.

made. First, Canada would not subject itself to the same ‘stigma’ in ratifying No 97 as it would if it ratified the Migrant Workers’ Convention. ILO Convention No 97 has been ratified by the major migrant-receiving countries of France, UK and Germany. Second, the definition in the Convention of a migrant worker is more limited than the Migrant Workers’ Convention. That definition excludes frontier and self-employed workers whereas the Migrant Workers’ Convention includes them.<sup>116</sup> Third, qualifiers are also present where implementation is to be to the extent that national law and practices allow.<sup>117</sup> Fourth, Canada could not reserve from any articles since these are ILO conventions, but Canada could reserve from the annexes appended to Convention No 97<sup>118</sup> which further detail how states will be bound.<sup>119</sup> Canada could do the same for Convention No 143 by declaring that Part I or Part II be excluded from ratification.<sup>120</sup> Such limitations may make ILO Conventions No 97 and No 143 more amenable to Canada’s concerns, but these actions would not radically affect the protections sought for migrant workers.

ILO Convention No 97 and No 143 are not foolproof instruments to prevent human rights abuses on TFWs, but if ratified, would be better than the ICCPR and ICESCR alone or by the Migrant Workers’ Convention. Labour scholar Judy Fudge notes that neither Convention was developed to extend protections to migrant workers in programs like the TFWP.<sup>121</sup> But since there is no apparent desire to update them, activists should champion what protections ILO Convention No 97 and No 143 can guarantee for now. Readers will be reminded that Article 6 of No 97 guarantees legal migrants the same treatment as nationals receive in regards to remuneration, working conditions and housing. These are important rights to TFWs and if adhered to, may not lead to the situation No 143 contemplates in Article 8 where workers should not be made illegal by loss of employment. As demonstrated, it is the fear of being made illegal which makes TFWs vulnerable to exploitation and abuse. But if equality of treatment to migrants were legislated as part of Canada’s obligations in ILO Convention No 97 it may alleviate the

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<sup>116</sup> *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, *supra*, Article 2.

<sup>117</sup> See e.g. *ILO Convention No 97*, Article 3; *ILO Convention No 143*, Article 10.

<sup>118</sup> *ILO Convention No 97*, Article 14(1).

<sup>119</sup> See e.g. *Ibid*, Annex I: *Recruitment, Placing and Conditions of Labour of Migrants for Employer Recruited otherwise than under Government-Sponsored arrangements for Group Transfer*.

<sup>120</sup> *ILO Convention No 143*, Article 16(1).

<sup>121</sup> Judy Fudge, “The Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers” *Comparative Labour Law and Policy Journal* 34 (2012): 123.

conditions leading to abuse even if No 143 were not ratified, or Part I, pertaining to illegals, were excluded.

Readers should also be reminded that Canada is a dualist nation; once a convention is ratified, its obligations must be implemented by domestic law. Since most labour and employment matters fall within provincial jurisdiction, ratification would necessitate national and provincial dialogue. Dialogue and the creation of legislation opens space for activist individuals and organizations to lobby for serious reforms to the TWFP, and for clear statements about migrant workers' equality to nationals and freedom to choose their employment.

The ILOs tripartite composition also means activists, NGOs and trade unions would have an ongoing political platform to lobby for compliance and strengthened legislation were Canada to ratify Conventions No 97 and No 143, but fail to live up to its obligations. ILO conventions require government parties to submit a report every five years detailing its adherence to the convention. Employers' and workers' organizations may supplement the government's report.<sup>122</sup> Activists, through liaising with workers' organizations may highlight ongoing concerns and human rights abuses in the supplement. That interested groups can affect international standards is unique to the ILO,<sup>123</sup> and a powerful tool. If the highlighted concerns are serious enough, the state may have to appear in front of the conference committee to explain itself. The committee also has discretion in publishing its findings and publicizing the failures of the state in meeting its obligations.<sup>124</sup>

If a state continues to refuse to conform to its obligations after this publicity, activists may seek redress by working with the worker representative to submit a formal complaint.<sup>125</sup> The state will be allowed to comment, but if the ILO is not satisfied with the response, it can find a violation of the convention.<sup>126</sup> Other than continuing supervision, the ILO can do little else if the state continues to violate the convention. NGOs and trade unions, however, could use their resources to keep the pressure on for the state to comply, loudly publicizing its failures and suggesting remedies. They could also use the tripartite function of the ILO to engage with the

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<sup>122</sup> UN Guide for Minorities, Pamphlet No 10, "Minorities and the International Labour Organization," Online: Office of the High Commissioner of Human Rights, undated, <http://www.ohchr.org/Documents/Publications/GuideMinorities10en.pdf>, 1.

<sup>123</sup> Cholewinski, *Migrant Workers in International Human Rights Law*, 85.

<sup>124</sup> UN Guide for Minorities, 2.

<sup>125</sup> *Ibid*, 5.

<sup>126</sup> *Ibid*.

employer representative to ensure employer organizations understand the obligations necessary for compliance, even if the state does not.

Activist organizations will also find a powerful legal argument in ILO Conventions No 97 and 143, as the Supreme Court of Canada has relied on Canada's ratification of another ILO convention - Convention No 87, Concerning Freedom of Association and the Right to Organize - to interpret workers' rights to collectively bargain and strike under the Canadian Charter of Rights and Freedoms. In *BC Health Services* the Court stated that international law commitments provide a persuasive source for interpreting the scope of the Charter.<sup>127</sup> Therefore, it found it reasonable that section 2(d), Freedom of Association, *be interpreted to give at least the same level of protection as the ILO Convention*.<sup>128</sup> ILO Convention No 87 also figured in the recent decision of *Saskatchewan Federation of Labour* that found the right to strike was constitutionally guaranteed under section 2(d). The Court found the recognition by the ILO Committee on Freedom of Association that the right to strike is an important corollary to associational activity under the Convention to be persuasive.<sup>129</sup> Following the Court's analysis in these cases, section 15 Charter challenges to the TFWP or any other labour legislation that discriminates against migrant workers will require the Court to examine Canada's international law commitments. ILO Convention No 97's article 6, that Migrant Workers should be treated no less favourably in employment matters than nationals and ILO Convention No 143's statements that migrant workers have a right to alternate employment and will not be made illegal by job loss clearly articulates specific rights and obligations in a way that the treaties of general application that Canada has ratified do not. These would be persuasive sources to argue the discriminatory TFWP falls far short of international law in protecting migrant workers' rights.

## Conclusion

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<sup>127</sup> *Health Services and Support: Facilities Subsector Bargaining Association v British Columbia*, 2007 SCC 27 [*BC Health Services*], CanLII, paragraph 78.

<sup>128</sup> *Ibid*, paragraph 80. Emphasis added.

<sup>129</sup> *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4 [*Saskatchewan Federation of Labour*], CanLII, paragraphs 67-75.

As the preceding pages detail, temporary foreign workers suffer a lack of mobility, freedom and choice under the TFWP that Canadian workers are never subject to. Canada chose not to reform the permit system that ties a TFW to a specific employer, so international law may be a vehicle to press obligations on the state to end or reform the TFWP. This paper has argued that, if ratified, the Migrant Workers' Convention will not expand rights for migrant workers beyond what they already enjoy in other international and domestic instruments. The Convention, while bringing together varied rights a migrant worker should enjoy at work and in the host country, suffers from qualifications which exempts temporary workers from many of these rights. Canada is also not receptive to the Convention. It will not risk being the first migrant-receiving country to ratify because it perceives the Migrant Workers' Convention as putting limits on its sovereignty and its international economic competitiveness.

Canada instead should be urged to ratify ILO Conventions No 97 and No 143. These are more effective international law instruments to protect TFWs from abuses and to press obligations on the state, and as the precursors to the Migrant Workers' Convention, they cover the same workplace rights. There are qualifications, but if Canada ratified, no reservations could be made unlike with the Migrant Workers' Convention. Although it will not be an easy task, ILO Convention No 97 and No 143's limited scopes may be able to persuade Canada to ratify, as could the fact that it would not be alone: several major European economies have already ratified No 97. If ratified, activists and organization could respond strategically to any violations through Canada's worker representative to the ILO in its tripartite organization. Finally, the Supreme Court has found Canada's international obligations in the ILO are a persuasive means to interpret the scope of Charter rights.

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## APPENDIX A

### **International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families**

**Adopted by General Assembly resolution 45/158 of 18 December 1990**

#### **Preamble**

The States Parties to the present Convention,

Taking into account the principles embodied in the basic instruments of the United Nations concerning human rights, in particular the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child,

Taking into account also the principles and standards set forth in the relevant instruments elaborated within the framework of the International Labour Organisation, especially the Convention concerning Migration for Employment (No. 97), the Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (No.143), the Recommendation concerning Migration for Employment (No. 86), the Recommendation concerning Migrant Workers (No.151), the Convention concerning Forced or Compulsory Labour (No. 29) and the Convention concerning Abolition of Forced Labour (No. 105), Reaffirming the importance of the principles contained in the Convention against Discrimination in Education of the United Nations Educational, Scientific and Cultural Organization,

Recalling the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Declaration of the Fourth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, the Code of Conduct for Law Enforcement Officials, and the Slavery Conventions,

Recalling that one of the objectives of the International Labour Organisation, as stated in its Constitution, is the protection of the interests of workers when employed in countries other than their own, and bearing in mind the expertise and experience of that organization in matters related to migrant workers and members of their families,

Recognizing the importance of the work done in connection with migrant workers and members of their families in various organs of the United Nations, in particular in the Commission on Human Rights and the Commission for Social Development, and in the Food and Agriculture Organization of the United Nations, the United Nations Educational, Scientific and Cultural Organization and the World Health Organization, as well as in other international organizations,

Recognizing also the progress made by certain States on a regional or bilateral basis towards the protection of the rights of migrant workers and members of their families, as well as the importance and usefulness of bilateral and multilateral agreements in this field,

Realizing the importance and extent of the migration phenomenon, which involves millions of people and affects a large number of States in the international community,

Aware of the impact of the flows of migrant workers on States and people concerned, and desiring to establish norms which may contribute to the harmonization of the attitudes of States through the acceptance of basic principles concerning the treatment of migrant workers and members of their families,

Considering the situation of vulnerability in which migrant workers and members of their families frequently-find themselves owing, among other things, to their absence from their State of origin and to the difficulties they may encounter arising from their presence in the State of employment,

Convinced that the rights of migrant workers and members of their families have not been sufficiently recognized everywhere and therefore require appropriate international protection,

Taking into account the fact that migration is often the cause of serious problems for the members of the families of migrant workers as well as for the workers themselves, in particular because of the scattering of the family,

Bearing in mind that the human problems involved in migration are even more serious in the case of irregular migration and convinced therefore that appropriate action should be encouraged in order to prevent and eliminate clandestine movements and trafficking in migrant workers, while at the same time assuring the protection of their fundamental human rights,

Considering that workers who are non-documented or in an irregular situation are frequently employed under less favourable conditions of work than other workers and that certain employers find this an inducement to seek such labour in order to reap the benefits of unfair competition,

Considering also that recourse to the employment of migrant workers who are in an irregular situation will be discouraged if the fundamental human rights of all migrant workers are more widely recognized and, moreover, that granting certain additional rights to migrant workers and members of their families in a regular situation will encourage all migrants and employers to respect and comply with the laws and procedures established by the States concerned,

Convinced, therefore, of the need to bring about the international protection of the rights of all migrant workers and members of their families, reaffirming and establishing basic norms in a comprehensive convention which could be applied universally,

Have agreed as follows:

## **Part I: Scope and Definitions**

### **Article 1**

1. The present Convention is applicable, except as otherwise provided hereafter, to all migrant workers and members of their families without distinction of any kind such as sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.
2. The present Convention shall apply during the entire migration process of migrant workers and members of their families, which comprises preparation for migration, departure, transit and the entire period of stay and remunerated activity in the State of employment as well as return to the State of origin or the State of habitual residence.

### **Article 2**

For the purposes of the present Convention:

1. The term "migrant worker" refers to a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.
2.
  - (a) The term "frontier worker" refers to a migrant worker who retains his or her habitual residence in a neighbouring State to which he or she normally returns every day or at least once a week;
  - (b) The term "seasonal worker" refers to a migrant worker whose work by its character is dependent on seasonal conditions and is performed only during part of the year;
  - (c) The term "seafarer", which includes a fisherman, refers to a migrant worker employed on board a vessel registered in a State of which he or she is not a national;
  - (d) The term "worker on an offshore installation" refers to a migrant worker employed on an offshore installation that is under the jurisdiction of a State of which he or she is not a national;

(e) The term "itinerant worker" refers to a migrant worker who, having his or her habitual residence in one State, has to travel to another State or States for short periods, owing to the nature of his or her occupation;

(f) The term "project-tied worker" refers to a migrant worker admitted to a State of employment for a defined period to work solely on a specific project being carried out in that State by his or her employer;

(g) The term "specified-employment worker" refers to a migrant worker:

(i) Who has been sent by his or her employer for a restricted and defined period of time to a State of employment to undertake a specific assignment or duty; or

(ii) Who engages for a restricted and defined period of time in work that requires professional, commercial, technical or other highly specialized skill; or

(iii) Who, upon the request of his or her employer in the State of employment, engages for a restricted and defined period of time in work whose nature is transitory or brief; and who is required to depart from the State of employment either at the expiration of his or her authorized period of stay, or earlier if he or she no longer undertakes that specific assignment or duty or engages in that work;

(h) The term "self-employed worker" refers to a migrant worker who is engaged in a remunerated activity otherwise than under a contract of employment and who earns his or her living through this activity normally working alone or together with members of his or her family, and to any other migrant worker recognized as self-employed by applicable legislation of the State of employment or bilateral or multilateral agreements.

### **Article 3**

The present Convention shall not apply to:

(a) Persons sent or employed by international organizations and agencies or persons sent or employed by a State outside its territory to perform official functions, whose admission and status are regulated by general international law or by specific international agreements or conventions;

(b) Persons sent or employed by a State or on its behalf outside its territory who participate in development programmes and other co-operation programmes, whose admission and status are regulated by agreement with the State of employment and who, in accordance with that agreement, are not considered migrant workers;

(c) Persons taking up residence in a State different from their State of origin as investors;

(d) Refugees and stateless persons, unless such application is provided for in the relevant national legislation of, or international instruments in force for, the State Party concerned;

(e) Students and trainees;

(f) Seafarers and workers on an offshore installation who have not been admitted to take up residence and engage in a remunerated activity in the State of employment.

### **Article 4**

For the purposes of the present Convention the term "members of the family" refers to persons married to migrant workers or having with them a relationship that, according to applicable law, produces effects equivalent to marriage, as well as their dependent children and other dependent persons who are recognized as members of the family by applicable legislation or applicable bilateral or multilateral agreements between the States concerned.

### **Article 5**

For the purposes of the present Convention, migrant workers and members of their families:

(a) Are considered as documented or in a regular situation if they are authorized to enter, to stay and to engage in a remunerated activity in the State of employment pursuant to the law of that State and to international agreements to which that State is a party;

(b) Are considered as non-documented or in an irregular situation if they do not comply with the conditions provided for in subparagraph (a) of the present article.

## **Article 6**

For the purposes of the present Convention:

(a) The term "State of origin" means the State of which the person concerned is a national;

(b) The term "State of employment" means a State where the migrant worker is to be engaged, is engaged or has been engaged in a remunerated activity, as the case may be;

(c) The term "State of transit," means any State through which the person concerned passes on any journey to the State of employment or from the State of employment to the State of origin or the State of habitual residence.

## **Part II: Non-discrimination with Respect to Rights**

### **Article 7**

States Parties undertake, in accordance with the international instruments concerning human rights, to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention without distinction of any kind such as to sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.

## **Part III: Human Rights of All Migrant Workers and Members of their Families**

### **Article 8**

1. Migrant workers and members of their families shall be free to leave any State, including their State of origin. This right shall not be subject to any restrictions except those that are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present part of the Convention.

2. Migrant workers and members of their families shall have the right at any time to enter and remain in their State of origin.

### **Article 9**

The right to life of migrant workers and members of their families shall be protected by law.

### **Article 10**

No migrant worker or member of his or her family shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

### **Article 11**

1. No migrant worker or member of his or her family shall be held in slavery or servitude.

2. No migrant worker or member of his or her family shall be required to perform forced or compulsory labour.

3. Paragraph 2 of the present article shall not be held to preclude, in States where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court.

4. For the purpose of the present article the term "forced or compulsory labour" shall not include:

(a) Any work or service not referred to in paragraph 3 of the present article normally required of a person who is under detention in consequence of a lawful order of a court or of a person during conditional release from such detention;

(b) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;

(c) Any work or service that forms part of normal civil obligations so far as it is imposed also on citizens of the State concerned.

## **Article 12**

1. Migrant workers and members of their families shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of their choice and freedom either individually or in community with others and in public or private to manifest their religion or belief in worship, observance, practice and teaching.

2. Migrant workers and members of their families shall not be subject to coercion that would impair their freedom to have or to adopt a religion or belief of their choice.

3. Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

4. States Parties to the present Convention undertake to have respect for the liberty of parents, at least one of whom is a migrant worker, and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

## **Article 13**

1. Migrant workers and members of their families shall have the right to hold opinions without interference.

2. Migrant workers and members of their families shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of their choice.

3. The exercise of the right provided for in paragraph 2 of the present article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputation of others;

(b) For the protection of the national security of the States concerned or of public order (ordre public) or of public health or morals;

(c) For the purpose of preventing any propaganda for war;

(d) For the purpose of preventing any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

## **Article 14**

No migrant worker or member of his or her family shall be subjected to arbitrary or unlawful interference with his or her privacy, family, , correspondence or other communications, or to unlawful attacks on his or her honour and reputation. Each migrant worker and member of his or her family shall have the right to the protection of the law against such interference or attacks.



## **Article 15**

No migrant worker or member of his or her family shall be arbitrarily deprived of property, whether owned individually or in association with others. Where, under the legislation in force in the State of employment, the assets of a migrant worker or a member of his or her family are expropriated in whole or in part, the person concerned shall have the right to fair and adequate compensation.

## **Article 16**

1. Migrant workers and members of their families shall have the right to liberty and security of person.
2. Migrant workers and members of their families shall be entitled to effective protection by the State against violence, physical injury, threats and intimidation, whether by public officials or by private individuals, groups or institutions.
3. Any verification by law enforcement officials of the identity of migrant workers or members of their families shall be carried out in accordance with procedure established by law.
4. Migrant workers and members of their families shall not be subjected individually or collectively to arbitrary arrest or detention; they shall not be deprived of their liberty except on such grounds and in accordance with such procedures as are established by law.
5. Migrant workers and members of their families who are arrested shall be informed at the time of arrest as far as possible in a language they understand of the reasons for their arrest and they shall be promptly informed in a language they understand of any charges against them.
6. Migrant workers and members of their families who are arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that while awaiting trial they shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings and, should the occasion arise, for the execution of the judgement.
7. When a migrant worker or a member of his or her family is arrested or committed to prison or custody pending trial or is detained in any other manner:
  - (a) The consular or diplomatic authorities of his or her State of origin or of a State representing the interests of that State shall, if he or she so requests, be informed without delay of his or her arrest or detention and of the reasons therefor;
  - (b) The person concerned shall have the right to communicate with the said authorities. Any communication by the person concerned to the said authorities shall be forwarded without delay, and he or she shall also have the right to receive communications sent by the said authorities without delay;
  - (c) The person concerned shall be informed without delay of this right and of rights deriving from relevant treaties, if any, applicable between the States concerned, to correspond and to meet with representatives of the said authorities and to make arrangements with them for his or her legal representation.
8. Migrant workers and members of their families who are deprived of their liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of their detention and order their release if the detention is not lawful. When they attend such proceedings, they shall have the assistance, if necessary without cost to them, of an interpreter, if they cannot understand or speak the language used.
9. Migrant workers and members of their families who have been victims of unlawful arrest or detention shall have an enforceable right to compensation.

## **Article 17**

1. Migrant workers and members of their families who are deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person and for their cultural identity.
2. Accused migrant workers and members of their families shall, save in exceptional circumstances, be separated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons. Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.
3. Any migrant worker or member of his or her family who is detained in a State of transit or in a State of employment for violation of provisions relating to migration shall be held, in so far as practicable, separately from convicted persons or persons detained pending trial.
4. During any period of imprisonment in pursuance of a sentence imposed by a court of law, the essential aim of the treatment of a migrant worker or a member of his or her family shall be his or her reformation and social rehabilitation. Juvenile offenders shall be separated from adults and be accorded treatment appropriate to their age and legal status.
5. During detention or imprisonment, migrant workers and members of their families shall enjoy the same rights as nationals to visits by members of their families.
6. Whenever a migrant worker is deprived of his or her liberty, the competent authorities of the State concerned shall pay attention to the problems that may be posed for members of his or her family, in particular for spouses and minor children.
7. Migrant workers and members of their families who are subjected to any form of detention or imprisonment in accordance with the law in force in the State of employment or in the State of transit shall enjoy the same rights as nationals of those States who are in the same situation.
8. If a migrant worker or a member of his or her family is detained for the purpose of verifying any infraction of provisions related to migration, he or she shall not bear any costs arising therefrom.

#### **Article 18**

1. Migrant workers and members of their families shall have the right to equality with nationals of the State concerned before the courts and tribunals. In the determination of any criminal charge against them or of their rights and obligations in a suit of law, they shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.
2. Migrant workers and members of their families who are charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law.
3. In the determination of any criminal charge against them, migrant workers and members of their families shall be entitled to the following minimum guarantees:
  - (a) To be informed promptly and in detail in a language they understand of the nature and cause of the charge against them;
  - (b) To have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing;
  - (c) To be tried without undue delay;
  - (d) To be tried in their presence and to defend themselves in person or through legal assistance of their own choosing; to be informed, if they do not have legal assistance, of this right; and to have legal assistance assigned to them, in any case where the interests of justice so require and without payment by them in any such case if they do not have sufficient means to pay;
  - (e) To examine or have examined the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them;
  - (f) To have the free assistance of an interpreter if they cannot understand or speak the language used in court;

(g) Not to be compelled to testify against themselves or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Migrant workers and members of their families convicted of a crime shall have the right to their conviction and sentence being reviewed by a higher tribunal according to law.

6. When a migrant worker or a member of his or her family has, by a final decision, been convicted of a criminal offence and when subsequently his or her conviction has been reversed or he or she has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to that person.

7. No migrant worker or member of his or her family shall be liable to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in accordance with the law and penal procedure of the State concerned.

#### **Article 19**

1. No migrant worker or member of his or her family shall be held guilty of any criminal offence on account of any act or omission that did not constitute a criminal offence under national or international law at the time when the criminal offence was committed, nor shall a heavier penalty be imposed than the one that was applicable at the time when it was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, he or she shall benefit thereby.

2. Humanitarian considerations related to the status of a migrant worker, in particular with respect to his or her right of residence or work, should be taken into account in imposing a sentence for a criminal offence committed by a migrant worker or a member of his or her family.

#### **Article 20**

1. No migrant worker or member of his or her family shall be imprisoned merely on the ground of failure to fulfil a contractual obligation.

2. No migrant worker or member of his or her family shall be deprived of his or her authorization of residence or work permit or expelled merely on the ground of failure to fulfil an obligation arising out of a work contract unless fulfilment of that obligation constitutes a condition for such authorization or permit.

#### **Article 21**

It shall be unlawful for anyone, other than a public official duly authorized by law, to confiscate, destroy or attempt to destroy identity documents, documents authorizing entry to or stay, residence or establishment in the national territory or work permits. No authorized confiscation of such documents shall take place without delivery of a detailed receipt. In no case shall it be permitted to destroy the passport or equivalent document of a migrant worker or a member of his or her family.

#### **Article 22**

1. Migrant workers and members of their families shall not be subject to measures of collective expulsion. Each case of expulsion shall be examined and decided individually.

2. Migrant workers and members of their families may be expelled from the territory of a State Party only in pursuance of a decision taken by the competent authority in accordance with law.

3. The decision shall be communicated to them in a language they understand. Upon their request where not otherwise mandatory, the decision shall be communicated to them in writing and, save in exceptional circumstances on account of national

security, the reasons for the decision likewise stated. The persons concerned shall be informed of these rights before or at the latest at the time the decision is rendered.

4. Except where a final decision is pronounced by a judicial authority, the person concerned shall have the right to submit the reason he or she should not be expelled and to have his or her case reviewed by the competent authority, unless compelling reasons of national security require otherwise. Pending such review, the person concerned shall have the right to seek a stay of the decision of expulsion.

5. If a decision of expulsion that has already been executed is subsequently annulled, the person concerned shall have the right to seek compensation according to law and the earlier decision shall not be used to prevent him or her from re-entering the State concerned.

6. In case of expulsion, the person concerned shall have a reasonable opportunity before or after departure to settle any claims for wages and other entitlements due to him or her and any pending liabilities.

7. Without prejudice to the execution of a decision of expulsion, a migrant worker or a member of his or her family who is subject to such a decision may seek entry into a State other than his or her State of origin.

8. In case of expulsion of a migrant worker or a member of his or her family the costs of expulsion shall not be borne by him or her. The person concerned may be required to pay his or her own travel costs.

9. Expulsion from the State of employment shall not in itself prejudice any rights of a migrant worker or a member of his or her family acquired in accordance with the law of that State, including the right to receive wages and other entitlements due to him or her.

### **Article 23**

Migrant workers and members of their families shall have the right to have recourse to the protection and assistance of the consular or diplomatic authorities of their State of origin or of a State representing the interests of that State whenever the rights recognized in the present Convention are impaired. In particular, in case of expulsion, the person concerned shall be informed of this right without delay and the authorities of the expelling State shall facilitate the exercise of such right.

### **Article 24**

Every migrant worker and every member of his or her family shall have the right to recognition everywhere as a person before the law.

### **Article 25**

1. Migrant workers shall enjoy treatment not less favourable than that which applies to nationals of the State of employment in respect of remuneration and:

(a) Other conditions of work, that is to say, overtime, hours of work, weekly rest, holidays with pay, safety, health, termination of the employment relationship and any other conditions of work which, according to national law and practice, are covered by these terms;

(b) Other terms of employment, that is to say, minimum age of employment, restriction on work and any other matters which, according to national law and practice, are considered a term of employment.

2. It shall not be lawful to derogate in private contracts of employment from the principle of equality of treatment referred to in paragraph 1 of the present article.

3. States Parties shall take all appropriate measures to ensure that migrant workers are not deprived of any rights derived from this principle by reason of any irregularity in their stay or employment. In particular, employers shall not be relieved of any legal or contractual obligations, nor shall their obligations be limited in any manner by reason of such irregularity.

## **Article 26**

1. States Parties recognize the right of migrant workers and members of their families:

- (a) To take part in meetings and activities of trade unions and of any other associations established in accordance with law, with a view to protecting their economic, social, cultural and other interests, subject only to the rules of the organization concerned;
- (b) To join freely any trade union and any such association as aforesaid, subject only to the rules of the organization concerned;
- (c) To seek the aid and assistance of any trade union and of any such association as aforesaid.

2. No restrictions may be placed on the exercise of these rights other than those that are prescribed by law and which are necessary in a democratic society in the interests of national security, public order (ordre public) or the protection of the rights and freedoms of others.

## **Article 27**

1. With respect to social security, migrant workers and members of their families shall enjoy in the State of employment the same treatment granted to nationals in so far as they fulfil the requirements provided for by the applicable legislation of that State and the applicable bilateral and multilateral treaties. The competent authorities of the State of origin and the State of employment can at any time establish the necessary arrangements to determine the modalities of application of this norm.

2. Where the applicable legislation does not allow migrant workers and members of their families a benefit, the States concerned shall examine the possibility of reimbursing interested persons the amount of contributions made by them with respect to that benefit on the basis of the treatment granted to nationals who are in similar circumstances.

## **Article 28**

Migrant workers and members of their families shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned. Such emergency medical care shall not be refused them by reason of any irregularity with regard to stay or employment.

## **Article 29**

Each child of a migrant worker shall have the right to a name, to registration of birth and to a nationality.

## **Article 30**

Each child of a migrant worker shall have the basic right of access to education on the basis of equality of treatment with nationals of the State concerned. Access to public pre-school educational institutions or schools shall not be refused or limited by reason of the irregular situation with respect to stay or employment of either parent or by reason of the irregularity of the child's stay in the State of employment.

## **Article 31**

1. States Parties shall ensure respect for the cultural identity of migrant workers and members of their families and shall not prevent them from maintaining their cultural links with their State of origin. 2. States Parties may take appropriate measures to assist and encourage efforts in this respect.

## **Article 32**

Upon the termination of their stay in the State of employment, migrant workers and members of their families shall have the right to transfer their earnings and savings and, in accordance with the applicable legislation of the States concerned, their personal effects and belongings.

### **Article 33**

1. Migrant workers and members of their families shall have the right to be informed by the State of origin, the State of employment or the State of transit as the case may be concerning:

(a) Their rights arising out of the present Convention;

(b) The conditions of their admission, their rights and obligations under the law and practice of the State concerned and such other matters as will enable them to comply with administrative or other formalities in that State. 2. States Parties shall take all measures they deem appropriate to disseminate the said information or to ensure that it is provided by employers, trade unions or other appropriate bodies or institutions. As appropriate, they shall co-operate with other States concerned.

3. Such adequate information shall be provided upon request to migrant workers and members of their families, free of charge, and, as far as possible, in a language they are able to understand.

### **Article 34**

Nothing in the present part of the Convention shall have the effect of relieving migrant workers and the members of their families from either the obligation to comply with the laws and regulations of any State of transit and the State of employment or the obligation to respect the cultural identity of the inhabitants of such States.

### **Article 35**

Nothing in the present part of the Convention shall be interpreted as implying the regularization of the situation of migrant workers or members of their families who are non-documented or in an irregular situation or any right to such regularization of their situation, nor shall it prejudice the measures intended to ensure sound and equitable-conditions for international migration as provided in part VI of the present Convention.

## **Part IV: Other Rights of Migrant Workers and Members of their Families who are Documented or in a Regular Situation**

### **Article 36**

Migrant workers and members of their families who are documented or in a regular situation in the State of employment shall enjoy the rights set forth in the present part of the Convention in addition to those set forth in part III.

### **Article 37**

Before their departure, or at the latest at the time of their admission to the State of employment, migrant workers and members of their families shall have the right to be fully informed by the State of origin or the State of employment, as appropriate, of all conditions applicable to their admission and particularly those concerning their stay and the remunerated activities in which they may engage as well as of the requirements they must satisfy in the State of employment and the authority to which they must address themselves for any modification of those conditions.

### **Article 38**

1. States of employment shall make every effort to authorize migrant workers and members of the families to be temporarily absent without effect upon their authorization to stay or to work, as the case may be. In doing so, States of employment shall take into account the special needs and obligations of migrant workers and members of their families, in particular in their States of origin.

2. Migrant workers and members of their families shall have the right to be fully informed of the terms on which such temporary absences are authorized.

### **Article 39**

1. Migrant workers and members of their families shall have the right to liberty of movement in the territory of the State of employment and freedom to choose their residence there.

2. The rights mentioned in paragraph 1 of the present article shall not be subject to any restrictions except those that are provided by law, are necessary to protect national security, public order (ordre public), public health or morals, or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.

#### **Article 40**

1. Migrant workers and members of their families shall have the right to form associations and trade unions in the State of employment for the promotion and protection of their economic, social, cultural and other interests.

2. No restrictions may be placed on the exercise of this right other than those that are prescribed by law and are necessary in a democratic society in the interests of national security, public order (ordre public) or the protection of the rights and freedoms of others.

#### **Article 41**

1. Migrant workers and members of their families shall have the right to participate in public affairs of their State of origin and to vote and to be elected at elections of that State, in accordance with its legislation.

2. The States concerned shall, as appropriate and in accordance with their legislation, facilitate the exercise of these rights.

#### **Article 42**

1. States Parties shall consider the establishment of procedures or institutions through which account may be taken, both in States of origin and in States of employment, of special needs, aspirations and obligations of migrant workers and members of their families and shall envisage, as appropriate, the possibility for migrant workers and members of their families to have their freely chosen representatives in those institutions.

2. States of employment shall facilitate, in accordance with their national legislation, the consultation or participation of migrant workers and members of their families in decisions concerning the life and administration of local communities.

3. Migrant workers may enjoy political rights in the State of employment if that State, in the exercise of its sovereignty, grants them such rights.

#### **Article 43**

1. Migrant workers shall enjoy equality of treatment with nationals of the State of employment in relation to:

(a) Access to educational institutions and services subject to the admission requirements and other regulations of the institutions and services concerned;

(b) Access to vocational guidance and placement services;

(c) Access to vocational training and retraining facilities and institutions;

(d) Access to housing, including social housing schemes, and protection against exploitation in respect of rents;

(e) Access to social and health services, provided that the requirements for participation in the respective schemes are met;

(f) Access to co-operatives and self-managed enterprises, which shall not imply a change of their migration status and shall be subject to the rules and regulations of the bodies concerned;

(g) Access to and participation in cultural life.

2. States Parties shall promote conditions to ensure effective equality of treatment to enable migrant workers to enjoy the rights mentioned in paragraph 1 of the present article whenever the terms of their stay, as authorized by the State of employment, meet the appropriate requirements.

3. States of employment shall not prevent an employer of migrant workers from establishing housing or social or cultural facilities for them. Subject to article 70 of the present Convention, a State of employment may make the establishment of such facilities subject to the requirements generally applied in that State concerning their installation.

#### **Article 44**

1. States Parties, recognizing that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State, shall take appropriate measures to ensure the protection of the unity of the families of migrant workers.

2. States Parties shall take measures that they deem appropriate and that fall within their competence to facilitate the reunification of migrant workers with their spouses or persons who have with the migrant worker a relationship that, according to applicable law, produces effects equivalent to marriage, as well as with their minor dependent unmarried children.

3. States of employment, on humanitarian grounds, shall favourably consider granting equal treatment, as set forth in paragraph 2 of the present article, to other family members of migrant workers.

#### **Article 45**

1. Members of the families of migrant workers shall, in the State of employment, enjoy equality of treatment with nationals of that State in relation to:

(a) Access to educational institutions and services, subject to the admission requirements and other regulations of the institutions and services concerned;

(b) Access to vocational guidance and training institutions and services, provided that requirements for participation are met;

(c) Access to social and health services, provided that requirements for participation in the respective schemes are met;

(d) Access to and participation in cultural life.

2. States of employment shall pursue a policy, where appropriate in collaboration with the States of origin, aimed at facilitating the integration of children of migrant workers in the local school system, particularly in respect of teaching them the local language.

3. States of employment shall endeavour to facilitate for the children of migrant workers the teaching of their mother tongue and culture and, in this regard, States of origin shall collaborate whenever appropriate.

4. States of employment may provide special schemes of education in the mother tongue of children of migrant workers, if necessary in collaboration with the States of origin.

#### **Article 46**

Migrant workers and members of their families shall, subject to the applicable legislation of the States concerned, as well as relevant international agreements and the obligations of the States concerned arising out of their participation in customs unions, enjoy exemption from import and export duties and taxes in respect of their personal and household effects as well as the equipment necessary to engage in the remunerated activity for which they were admitted to the State of employment:

(a) Upon departure from the State of origin or State of habitual residence;

(b) Upon initial admission to the State of employment;



- (c) Upon final departure from the State of employment;
- (d) Upon final return to the State of origin or State of habitual residence.

#### **Article 47**

1. Migrant workers shall have the right to transfer their earnings and savings, in particular those funds necessary for the support of their families, from the State of employment to their State of origin or any other State. Such transfers shall be made in conformity with procedures established by applicable legislation of the State concerned and in conformity with applicable international agreements.
2. States concerned shall take appropriate measures to facilitate such transfers.

#### **Article 48**

1. Without prejudice to applicable double taxation agreements, migrant workers and members of their families shall, in the matter of earnings in the State of employment:
  - (a) Not be liable to taxes, duties or charges of any description higher or more onerous than those imposed on nationals in similar circumstances;
  - (b) Be entitled to deductions or exemptions from taxes of any description and to any tax allowances applicable to nationals in similar circumstances, including tax allowances for dependent members of their families.
2. States Parties shall endeavour to adopt appropriate measures to avoid double taxation of the earnings and savings of migrant workers and members of their families.

#### **Article 49**

1. Where separate authorizations to reside and to engage in employment are required by national legislation, the States of employment shall issue to migrant workers authorization of residence for at least the same period of time as their authorization to engage in remunerated activity.
2. Migrant workers who in the State of employment are allowed freely to choose their remunerated activity shall neither be regarded as in an irregular situation nor shall they lose their authorization of residence by the mere fact of the termination of their remunerated activity prior to the expiration of their work permits or similar authorizations.
3. In order to allow migrant workers referred to in paragraph 2 of the present article sufficient time to find alternative remunerated activities, the authorization of residence shall not be withdrawn at least for a period corresponding to that during which they may be entitled to unemployment benefits.

#### **Article 50**

1. In the case of death of a migrant worker or dissolution of marriage, the State of employment shall favourably consider granting family members of that migrant worker residing in that State on the basis of family reunion an authorization to stay; the State of employment shall take into account the length of time they have already resided in that State.
2. Members of the family to whom such authorization is not granted shall be allowed before departure a reasonable period of time in order to enable them to settle their affairs in the State of employment.
3. The provisions of paragraphs 1 and 2 of the present article may not be interpreted as adversely affecting any right to stay and work otherwise granted to such family members by the legislation of the State of employment or by bilateral and multilateral treaties applicable to that State.

#### **Article 51**

Migrant workers who in the State of employment are not permitted freely to choose their remunerated activity shall neither be regarded as in an irregular situation nor shall they lose their authorization of residence by the mere fact of the termination of their remunerated activity prior to the expiration of their work permit, except where the authorization of residence is expressly dependent upon the specific remunerated activity for which they were admitted. Such migrant workers shall have the right to seek alternative employment, participation in public work schemes and retraining during the remaining period of their authorization to work, subject to such conditions and limitations as are specified in the authorization to work.

## **Article 52**

1. Migrant workers in the State of employment shall have the right freely to choose their remunerated activity, subject to the following restrictions or conditions.

2. For any migrant worker a State of employment may:

(a) Restrict access to limited categories of employment, functions, services or activities where this is necessary in the interests of this State and provided for by national legislation;

(b) Restrict free choice of remunerated activity in accordance with its legislation concerning recognition of occupational qualifications acquired outside its territory. However, States Parties concerned shall endeavour to provide for recognition of such qualifications.

3. For migrant workers whose permission to work is limited in time, a State of employment may also:

(a) Make the right freely to choose their remunerated activities subject to the condition that the migrant worker has resided lawfully in its territory for the purpose of remunerated activity for a period of time prescribed in its national legislation that should not exceed two years;

(b) Limit access by a migrant worker to remunerated activities in pursuance of a policy of granting priority to its nationals or to persons who are assimilated to them for these purposes by virtue of legislation or bilateral or multilateral agreements. Any such limitation shall cease to apply to a migrant worker who has resided lawfully in its territory for the purpose of remunerated activity for a period of time prescribed in its national legislation that should not exceed five years.

4. States of employment shall prescribe the conditions under which a migrant worker who has been admitted to take up employment may be authorized to engage in work on his or her own account. Account shall be taken of the period during which the worker has already been lawfully in the State of employment.

## **Article 53**

1. Members of a migrant worker's family who have themselves an authorization of residence or admission that is without limit of time or is automatically renewable shall be permitted freely to choose their remunerated activity under the same conditions as are applicable to the said migrant worker in accordance with article 52 of the present Convention.

2. With respect to members of a migrant worker's family who are not permitted freely to choose their remunerated activity, States Parties shall consider favourably granting them priority in obtaining permission to engage in a remunerated activity over other workers who seek admission to the State of employment, subject to applicable bilateral and multilateral agreements.

## **Article 54**

1. Without prejudice to the terms of their authorization of residence or their permission to work and the rights provided for in articles 25 and 27 of the present Convention, migrant workers shall enjoy equality of treatment with nationals of the State of employment in respect of:

(a) Protection against dismissal;

(b) Unemployment benefits;

(c) Access to public work schemes intended to combat unemployment;

(d) Access to alternative employment in the event of loss of work or termination of other remunerated activity, subject to article 52 of the present Convention.

2. If a migrant worker claims that the terms of his or her work contract have been violated by his or her employer, he or she shall have the right to address his or her case to the competent authorities of the State of employment, on terms provided for in article 18, paragraph 1, of the present Convention.

#### **Article 55**

Migrant workers who have been granted permission to engage in a remunerated activity, subject to the conditions attached to such permission, shall be entitled to equality of treatment with nationals of the State of employment in the exercise of that remunerated activity.

#### **Article 56**

1. Migrant workers and members of their families referred to in the present part of the Convention may not be expelled from a State of employment, except for reasons defined in the national legislation of that State, and subject to the safeguards established in part III.

2. Expulsion shall not be resorted to for the purpose of depriving a migrant worker or a member of his or her family of the rights arising out of the authorization of residence and the work permit.

3. In considering whether to expel a migrant worker or a member of his or her family, account should be taken of humanitarian considerations and of the length of time that the person concerned has already resided in the State of employment.

### **Part V: Provisions Applicable to Particular Categories of Migrant Workers and Members of their Families**

#### **Article 57**

The particular categories of migrant workers and members of their families specified in the present part of the Convention who are documented or in a regular situation shall enjoy the rights set forth in part m and, except as modified below, the rights set forth in part IV.

#### **Article 58**

1. Frontier workers, as defined in article 2, paragraph 2 (a), of the present Convention, shall be entitled to the rights provided for in part IV that can be applied to them by reason of their presence and work in the territory of the State of employment, taking into account that they do not have their habitual residence in that State.

2. States of employment shall consider favourably granting frontier workers the right freely to choose their remunerated activity after a specified period of time. The granting of that right shall not affect their status as frontier workers.

#### **Article 59**

1. Seasonal workers, as defined in article 2, paragraph 2 (b), of the present Convention, shall be entitled to the rights provided for in part IV that can be applied to them by reason of their presence and work in the territory of the State of employment and that are compatible with their status in that State as seasonal workers, taking into account the fact that they are present in that State for only part of the year.

2. The State of employment shall, subject to paragraph 1 of the present article, consider granting seasonal workers who have been employed in its territory for a significant period of time the possibility of taking up other remunerated activities and giving them priority over other workers who seek admission to that State, subject to applicable bilateral and multilateral agreements.

#### **Article 60**

Itinerant workers, as defined in article 2, paragraph 2 (A), of the present Convention, shall be entitled to the rights provided for in part IV that can be granted to them by reason of their presence and work in the territory of the State of employment and that are compatible with their status as itinerant workers in that State.

#### **Article 61**

1. Project-tied workers, as defined in article 2, paragraph 2 (of the present Convention), and members of their families shall be entitled to the rights provided for in part IV except the provisions of article 43, paragraphs I (b) and (c), article 43, paragraph I (d), as it pertains to social housing schemes, article 45, paragraph I (b), and articles 52 to 55.

2. If a project-tied worker claims that the terms of his or her work contract have been violated by his or her employer, he or she shall have the right to address his or her case to the competent authorities of the State which has jurisdiction over that employer, on terms provided for in article 18, paragraph 1, of the present Convention.

3. Subject to bilateral or multilateral agreements in force for them, the States Parties concerned shall endeavour to enable project-tied workers to remain adequately protected by the social security systems of their States of origin or habitual residence during their engagement in the project. States Parties concerned shall take appropriate measures with the aim of avoiding any denial of rights or duplication of payments in this respect.

4. Without prejudice to the provisions of article 47 of the present Convention and to relevant bilateral or multilateral agreements, States Parties concerned shall permit payment of the earnings of project-tied workers in their State of origin or habitual residence.

#### **Article 62**

1. Specified-employment workers as defined in article 2, paragraph 2 (g), of the present Convention, shall be entitled to the rights provided for in part IV, except the provisions of article 43, paragraphs I (b) and (c), article 43, paragraph I (d), as it pertains to social housing schemes, article 52, and article 54, paragraph 1 (d).

2. Members of the families of specified-employment workers shall be entitled to the rights relating to family members of migrant workers provided for in part IV of the present Convention, except the provisions of article 53.

#### **Article 63**

1. Self-employed workers, as defined in article 2, paragraph 2 (h), of the present Convention, shall be entitled to the rights provided for in part IV with the exception of those rights which are exclusively applicable to workers having a contract of employment.

2. Without prejudice to articles 52 and 79 of the present Convention, the termination of the economic activity of the self-employed workers shall not in itself imply the withdrawal of the authorization for them or for the members of their families to stay or to engage in a remunerated activity in the State of employment except where the authorization of residence is expressly dependent upon the specific remunerated activity for which they were admitted.

### **Part VI: Promotion of sound, equitable, humane and lawful conditions in connection with international migration of workers and members of their families**

#### **Article 64**

1. Without prejudice to article 79 of the present Convention, the States Parties concerned shall as appropriate consult and co-operate with a view to promoting sound, equitable and humane conditions in connection with international migration of workers and members of their families.

2. In this respect, due regard shall be paid not only to labour needs and resources, but also to the social, economic, cultural and other needs of migrant workers and members of their families involved, as well as to the consequences of such migration for the communities concerned.

## **Article 65**

1. States Parties shall maintain appropriate services to deal with questions concerning international migration of workers and members of their families. Their functions shall include, inter alia :

- (a) The formulation and implementation of policies regarding such migration;
- (b) An exchange of information, consultation and co-operation with the competent authorities of other States Parties involved in such migration;
- (c) The provision of appropriate information, particularly to employers, workers and their organizations on policies, laws and regulations relating to migration and employment, on agreements concluded with other States concerning migration and on other relevant matters;
- (d) The provision of information and appropriate assistance to migrant workers and members of their families regarding requisite authorizations and formalities and arrangements for departure, travel, arrival, stay, remunerated activities, exit and return, as well as on conditions of work and life in the State of employment and on customs, currency, tax and other relevant laws and regulations.

2. States Parties shall facilitate as appropriate the provision of adequate consular and other services that are necessary to meet the social, cultural and other needs of migrant workers and members of their families.

## **Article 66**

1. Subject to paragraph 2 of the present article, the right to undertake operations with a view to the recruitment of workers for employment in another State shall be restricted to:

- ( a ) Public services or bodies of the State in which such operations take place;
- ( b ) Public services or bodies of the State of employment on the basis of agreement between the States concerned;
- ( c ) A body established by virtue of a bilateral or multilateral agreement.

2. Subject to any authorization, approval and supervision by the public authorities of the States Parties concerned as may be established pursuant to the legislation and practice of those States, agencies, prospective employers or persons acting on their behalf may also be permitted to undertake the said operations.

## **Article 67**

1. States Parties concerned shall co-operate as appropriate in the adoption of measures regarding the orderly return of migrant workers and members of their families to the State of origin when they decide to return or their authorization of residence or employment expires or when they are in the State of employment in an irregular situation.

2. Concerning migrant workers and members of their families in a regular situation, States Parties concerned shall co-operate as appropriate, on terms agreed upon by those States, with a view to promoting adequate economic conditions for their resettlement and to facilitating their durable social and cultural reintegration in the State of origin.

## **Article 68**

1. States Parties, including States of transit, shall collaborate with a view to preventing and eliminating illegal or clandestine movements and employment of migrant workers in an irregular situation. The measures to be taken to this end within the jurisdiction of each State concerned shall include:

- (a) Appropriate measures against the dissemination of misleading information relating to emigration and immigration;

(b) Measures to detect and eradicate illegal or clandestine movements of migrant workers and members of their families and to impose effective sanctions on persons, groups or entities which organize, operate or assist in organizing or operating such movements;

(c) Measures to impose effective sanctions on persons, groups or entities which use violence, threats or intimidation against migrant workers or members of their families in an irregular situation.

2. States of employment shall take all adequate and effective measures to eliminate employment in their territory of migrant workers in an irregular situation, including, whenever appropriate, sanctions on employers of such workers. The rights of migrant workers vis-à-vis their employer arising from employment shall not be impaired by these measures.

#### **Article 69**

1. States Parties shall, when there are migrant workers and members of their families within their territory in an irregular situation, take appropriate measures to ensure that such a situation does not persist.

2. Whenever States Parties concerned consider the possibility of regularizing the situation of such persons in accordance with applicable national legislation and bilateral or multilateral agreements, appropriate account shall be taken of the circumstances of their entry, the duration of their stay in the States of employment and other relevant considerations, in particular those relating to their family situation.

#### **Article 70**

States Parties shall take measures not less favourable than those applied to nationals to ensure that working and living conditions of migrant workers and members of their families in a regular situation are in keeping with the standards of fitness, safety, health and principles of human dignity.

#### **Article 71**

1. States Parties shall facilitate, whenever necessary, the repatriation to the State of origin of the bodies of deceased migrant workers or members of their families.

2. As regards compensation matters relating to the death of a migrant worker or a member of his or her family, States Parties shall, as appropriate, provide assistance to the persons concerned with a view to the prompt settlement of such matters. Settlement of these matters shall be carried out on the basis of applicable national law in accordance with the provisions of the present Convention and any relevant bilateral or multilateral agreements.

### **Part VII: Application of the Convention**

#### **Article 72**

1.

(a) For the purpose of reviewing the application of the present Convention, there shall be established a Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (hereinafter referred to as "the Committee");

(b) The Committee shall consist, at the time of entry into force of the present Convention, of ten and, after the entry into force of the Convention for the forty-first State Party, of fourteen experts of high moral standing, impartiality and recognized competence in the field covered by the Convention.

2.

(a) Members of the Committee shall be elected by secret ballot by the States Parties from a list of persons nominated by the States Parties, due consideration being given to equitable geographical distribution, including both States of origin and States of employment, and to the representation of the principal legal systems. Each State Party may nominate one person from among its own nationals;

(b) Members shall be elected and shall serve in their personal capacity.

3. The initial election shall be held no later than six months after the date of the entry into force of the present Convention and subsequent elections every second year. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to all States Parties inviting them to submit their nominations within two months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties that have nominated them, and shall submit it to the States Parties not later than one month before the date of the corresponding election, together with the curricula vitae of the persons thus nominated.

4. Elections of members of the Committee shall be held at a meeting of States Parties convened by the Secretary-General at United Nations Headquarters. At that meeting, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the States Parties present and voting.

5.

(a) The members of the Committee shall serve for a term of four years. However, the terms of five of the members elected in the first election shall expire at the end of two years; immediately after the first election, the names of these five members shall be chosen by lot by the Chairman of the meeting of States Parties;

(b) The election of the four additional members of the Committee shall be held in accordance with the provisions of paragraphs 2, 3 and 4 of the present article, following the entry into force of the Convention for the forty-first State Party. The term of two of the additional members elected on this occasion shall expire at the end of two years; the names of these members shall be chosen by lot by the Chairman of the meeting of States Parties;

(c) The members of the Committee shall be eligible for re-election if renominated.

6. If a member of the Committee dies or resigns or declares that for any other cause he or she can no longer perform the duties of the Committee, the State Party that nominated the expert shall appoint another expert from among its own nationals for the remaining part of the term. The new appointment is subject to the approval of the Committee.

7. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee.

8. The members of the Committee shall receive emoluments from United Nations resources on such terms and conditions as the General Assembly may decide.

9. The members of the Committee shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

### **Article 73**

1. States Parties undertake to submit to the Secretary-General of the United Nations for consideration by the Committee a report on the legislative, judicial, administrative and other measures they have taken to give effect to the provisions of the present Convention:

(a) Within one year after the entry into force of the Convention for the State Party concerned;

(b) Thereafter every five years and whenever the Committee so requests.

2. Reports prepared under the present article shall also indicate factors and difficulties, if any, affecting the implementation of the Convention and shall include information on the characteristics of migration flows in which the State Party concerned is involved.

3. The Committee shall decide any further guidelines applicable to the content of the reports.

4. States Parties shall make their reports widely available to the public in their own countries.

#### **Article 74**

1. The Committee shall examine the reports submitted by each State Party and shall transmit such comments as it may consider appropriate to the State Party concerned. This State Party may submit to the Committee observations on any comment made by the Committee in accordance with the present article. The Committee may request supplementary information from States Parties when considering these reports.

2. The Secretary-General of the United Nations shall, in due time before the opening of each regular session of the Committee, transmit to the Director-General of the International Labour Office copies of the reports submitted by States Parties concerned and information relevant to the consideration of these reports, in order to enable the Office to assist the Committee with the expertise the Office may provide regarding those matters dealt with by the present Convention that fall within the sphere of competence of the International Labour Organisation. The Committee shall consider in its deliberations such comments and materials as the Office may provide.

3. The Secretary-General of the United Nations may also, after consultation with the Committee, transmit to other specialized agencies as well as to intergovernmental organizations, copies of such parts of these reports as may fall within their competence.

4. The Committee may invite the specialized agencies and organs of the United Nations, as well as intergovernmental organizations and other concerned bodies to submit, for consideration by the Committee, written information on such matters dealt with in the present Convention as fall within the scope of their activities.

5. The International Labour Office shall be invited by the Committee to appoint representatives to participate, in a consultative capacity, in the meetings of the Committee.

6. The Committee may invite representatives of other specialized agencies and organs of the United Nations, as well as of intergovernmental organizations, to be present and to be heard in its meetings whenever matters falling within their field of competence are considered.

7. The Committee shall present an annual report to the General Assembly of the United Nations on the implementation of the present Convention, containing its own considerations and recommendations, based, in particular, on the examination of the reports and any observations presented by States Parties.

8. The Secretary-General of the United Nations shall transmit the annual reports of the Committee to the States Parties to the present Convention, the Economic and Social Council, the Commission on Human Rights of the United Nations, the Director-General of the International Labour Office and other relevant organizations.

#### **Article 75**

1. The Committee shall adopt its own rules of procedure.

2. The Committee shall elect its officers for a term of two years.

3. The Committee shall normally meet annually.

4. The meetings of the Committee shall normally be held at United Nations Headquarters.

#### **Article 76**

1. A State Party to the present Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Convention. Communications under this article may be received and considered only if submitted by a State Party that has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure:



(a) If a State Party to the present Convention considers that another State Party is not fulfilling its obligations under the present Convention, it may, by written communication, bring the matter to the attention of that State Party. The State Party may also inform the Committee of the matter. Within three months after the receipt of the communication the receiving State shall afford the State that sent the communication an explanation, or any other statement in writing clarifying the matter which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending or available in the matter;

(b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;

(c) The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where, in the view of the Committee, the application of the remedies is unreasonably prolonged;

(d) Subject to the provisions of subparagraph ( c ) of the present paragraph, the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of the respect for the obligations set forth in the present Convention;

(e) The Committee shall hold closed meetings when examining communications under the present article;

(f) In any matter referred to it in accordance with subparagraph ( b ) of the present paragraph, the Committee may call upon the States Parties concerned, referred to in subparagraph ( b ), to supply any relevant information;

(g) The States Parties concerned, referred to in subparagraph ( b ) of the present paragraph, shall have the right to be represented when the matter is being considered by the Committee and to make submissions orally and/or in writing;

(h) The Committee shall, within twelve months after the date of receipt of notice under subparagraph (b) of the present paragraph, submit a report, as follows:

(i) If a solution within the terms of subparagraph (d) of the present paragraph is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;

(ii) If a solution within the terms of subparagraph (d) is not reached, the Committee shall, in its report, set forth the relevant facts concerning the issue between the States Parties concerned. The written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report. The Committee may also communicate only to the States Parties concerned any views that it may consider relevant to the issue between them.

In every matter, the report shall be communicated to the States Parties concerned.

2. The provisions of the present article shall come into force when ten States Parties to the present Convention have made a declaration under paragraph 1 of the present article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter that is the subject of a communication already transmitted under the present article; no further communication by any State Party shall be received under the present article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

## **Article 77**

1. A State Party to the present Convention may at any time declare under the present article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim that their individual rights as established by the present Convention have been violated by that State Party. No communication shall be received by the Committee if it concerns a State Party that has not made such a declaration.

2. The Committee shall consider inadmissible any communication under the present article which is anonymous or which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of the present Convention.

3. The Committee shall not consider any communication from an individual under the present article unless it has ascertained that:

(a) The same matter has not been, and is not being, examined under another procedure of international investigation or settlement;

(b) The individual has exhausted all available domestic remedies; this shall not be the rule where, in the view of the Committee, the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to that individual.

4. Subject to the provisions of paragraph 2 of the present article, the Committee shall bring any communications submitted to it under this article to the attention of the State Party to the present Convention that has made a declaration under paragraph 1 and is alleged to be violating any provisions of the Convention. Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

5. The Committee shall consider communications received under the present article in the light of all information made available to it by or on behalf of the individual and by the State Party concerned.

6. The Committee shall hold closed meetings when examining communications under the present article.

7. The Committee shall forward its views to the State Party concerned and to the individual.

8. The provisions of the present article shall come into force when ten States Parties to the present Convention have made declarations under paragraph 1 of the present article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter that is the subject of a communication already transmitted under the present article; no further communication by or on behalf of an individual shall be received under the present article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party has made a new declaration.

## **Article 78**

The provisions of article 76 of the present Convention shall be applied without prejudice to any procedures for settling disputes or complaints in the field covered by the present Convention laid down in the constituent instruments of, or in conventions adopted by, the United Nations and the specialized agencies and shall not prevent the States Parties from having recourse to any procedures for settling a dispute in accordance with international agreements in force between them.

## **Part VIII: General provisions**

### **Article 79**

Nothing in the present Convention shall affect the right of each State Party to establish the criteria governing admission of migrant workers and members of their families. Concerning other matters related to their legal situation and treatment as migrant workers and members of their families, States Parties shall be subject to the limitations set forth in the present Convention.

### **Article 80**

Nothing in the present Convention shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Convention.

### **Article 81**

1. Nothing in the present Convention shall affect more favourable rights or freedoms granted to migrant workers and members of their families by virtue of:

(a) The law or practice of a State Party; or

(b) Any bilateral or multilateral treaty in force for the State Party concerned.

2. Nothing in the present Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act that would impair any of the rights and freedoms as set forth in the present Convention.

#### **Article 82**

The rights of migrant workers and members of their families provided for in the present Convention may not be renounced. It shall not be permissible to exert any form of pressure upon migrant workers and members of their families with a view to their relinquishing or foregoing any of the said rights. It shall not be possible to derogate by contract from rights recognized in the present Convention. States Parties shall take appropriate measures to ensure that these principles are respected.

#### **Article 83**

Each State Party to the present Convention undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any persons seeking such a remedy shall have his or her claim reviewed and decided by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

#### **Article 84**

Each State Party undertakes to adopt the legislative and other measures that are necessary to implement the provisions of the present Convention.

### **Part IX: Final provisions**

#### **Article 85**

The Secretary-General of the United Nations is designated as the depositary of the present Convention.

#### **Article 86**

1. The present Convention shall be open for signature by all States. It is subject to ratification.

2. The present Convention shall be open to accession by any State.

3. Instruments of ratification or accession shall be deposited with the Secretary-General of the United Nations.

#### **Article 87**

1. The present Convention shall enter into force on the first day of the month following a period of three months after the date of the deposit of the twentieth instrument of ratification or accession.

2. For each State ratifying or acceding to the present Convention after its entry into force, the Convention shall enter into force on the first day of the month following a period of three months after the date of the deposit of its own instrument of ratification or accession.

#### **Article 88**

A State ratifying or acceding to the present Convention may not exclude the application of any Part of it, or, without prejudice to article 3, exclude any particular category of migrant workers from its application.

#### **Article 89**

1. Any State Party may denounce the present Convention, not earlier than five years after the Convention has entered into force for the State concerned, by means of a notification in writing addressed to the Secretary-General of the United Nations.

2. Such denunciation shall become effective on the first day of the month following the expiration of a period of twelve months after the date of the receipt of the notification by the Secretary-General of the United Nations.

3. Such a denunciation shall not have the effect of releasing the State Party from its obligations under the present Convention in regard to any act or omission which occurs prior to the date at which the denunciation becomes effective, nor shall denunciation prejudice in any way the continued consideration of any matter which is already under consideration by the Committee prior to the date at which the denunciation becomes effective.

4. Following the date at which the denunciation of a State Party becomes effective, the Committee shall not commence consideration of any new matter regarding that State.

#### **Article 90**

1. After five years from the entry into force of the Convention a request for the revision of the Convention may be made at any time by any State Party by means of a notification in writing addressed to the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate any proposed amendments to the States Parties with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that within four months from the date of such communication at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting shall be submitted to the General Assembly for approval.

2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties in accordance with their respective constitutional processes.

3. When amendments come into force, they shall be binding on those States Parties that have accepted them, other States Parties still being bound by the provisions of the present Convention and any earlier amendment that they have accepted.

#### **Article 91**

1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of signature, ratification or accession.

2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.

3. Reservations may be withdrawn at any time by notification to this effect addressed to the Secretary-General of the United Nations, who shall then inform all States thereof. Such notification shall take effect on the date on which it is received.

#### **Article 92**

1. Any dispute between two or more States Parties concerning the interpretation or application of the present Convention that is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of

the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each State Party may at the time of signature or ratification of the present Convention or accession thereto declare that it does not consider itself bound by paragraph 1 of the present article. The other States Parties shall not be bound by that paragraph with respect to any State Party that has made such a declaration.

3. Any State Party that has made a declaration in accordance with paragraph 2 of the present article may at any time withdraw that declaration by notification to the Secretary-General of the United Nations.

### **Article 93**

1. The present Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Convention to all States.

In witness whereof the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Convention.

## APPENDIX B

### **C97 Migration for Employment Convention (Revised), 1949**

The General Conference of the International Labour Organisation,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Thirty-second Session on 8 June 1949, and

Having decided upon the adoption of certain proposals with regard to the revision of the Migration for Employment Convention, 1939, adopted by the Conference at its Twenty-fifth Session, which is included in the eleventh item on the agenda of the session, and

Considering that these proposals must take the form of an international Convention,

adopts this first day of July of the year one thousand nine hundred and forty-nine the following Convention, which may be cited as the Migration for Employment Convention (Revised), 1949:

#### Article 1

Each Member of the International Labour Organisation for which this Convention is in force undertakes to make available on request to the International Labour Office and to other Members--

- (a) information on national policies, laws and regulations relating to emigration and immigration;
- (b) information on special provisions concerning migration for employment and the conditions of work and livelihood of migrants for employment;
- (c) information concerning general agreements and special arrangements on these questions concluded by the Member.

#### Article 2

Each Member for which this Convention is in force undertakes to maintain, or satisfy itself that there is maintained, an adequate and free service to assist migrants for employment, and in particular to provide them with accurate information.

#### Article 3

1. Each Member for which this Convention is in force undertakes that it will, so far as national laws and regulations permit, take all appropriate steps against misleading propaganda relating to emigration and immigration.
2. For this purpose, it will where appropriate act in co-operation with other Members concerned.

#### Article 4

Measures shall be taken as appropriate by each Member, within its jurisdiction, to facilitate the departure, journey and reception of migrants for employment.

#### Article 5

Each Member for which this Convention is in force undertakes to maintain, within its jurisdiction, appropriate medical services responsible for--

- (a) ascertaining, where necessary, both at the time of departure and on arrival, that migrants for employment and the members of their families authorised to accompany or join them are in reasonable health;
- (b) ensuring that migrants for employment and members of their families enjoy adequate medical attention and good hygienic conditions at the time of departure, during the journey and on arrival in the territory of destination.

#### Article 6

1. Each Member for which this Convention is in force undertakes to apply, without discrimination in respect of nationality, race, religion or sex, to immigrants lawfully within its territory, treatment no less favourable than that which it applies to its own nationals in respect of the following matters:

- (a) in so far as such matters are regulated by law or regulations, or are subject to the control of administrative authorities--
  - (i) remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home work, minimum age for employment, apprenticeship and training, women's work and the work of young persons;
  - (ii) membership of trade unions and enjoyment of the benefits of collective bargaining;
  - (iii) accommodation;

(b) social security (that is to say, legal provision in respect of employment injury, maternity, sickness, invalidity, old age, death, unemployment and family responsibilities, social security scheme), subject to the following limitations:

(i) there may be appropriate arrangements for the maintenance of acquired rights and rights in course of acquisition;

(ii) national laws or regulations of immigration countries may prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds, and concerning allowances paid to persons who do not fulfil the contribution conditions prescribed for the award of a normal pension;

(c) employment taxes, dues or contributions payable in respect of the person employed; and

(d) legal proceedings relating to the matters referred to in this Convention.

2. In the case of a federal State the provisions of this Article shall apply in so far as the matters dealt with are regulated by federal law or regulations or are subject to the control of federal administrative authorities. The extent to which and manner in which these provisions shall be applied in respect of matters regulated by the law or regulations of the constituent States, provinces or cantons, or subject to the control of the administrative authorities thereof, shall be determined by each Member. The Member shall indicate in its annual report upon the application of the Convention the extent to which the matters dealt with in this Article are regulated by federal law or regulations or are subject to the control of federal administrative authorities. In respect of matters which are regulated by the law or regulations of the constituent States, provinces or cantons, or are subject to the control of the administrative authorities thereof, the Member shall take the steps provided for in paragraph 7 (b) of Article 19 of the Constitution of the International Labour Organisation.

#### Article 7

1. Each Member for which this Convention is in force undertakes that its employment service and other services connected with migration will co-operate in appropriate cases with the corresponding services of other Members.

2. Each Member for which this Convention is in force undertakes to ensure that the services rendered by its public employment service to migrants for employment are rendered free.

#### Article 8

1. A migrant for employment who has been admitted on a permanent basis and the members of his family who have been authorised to accompany or join him shall not be returned to their territory of origin or the territory from which they emigrated because the migrant is unable to follow his occupation by reason of illness contracted or injury sustained subsequent to entry, unless the person concerned so desires or an international agreement to which the Member is a party so provides.

2. When migrants for employment are admitted on a permanent basis upon arrival in the country of immigration the competent authority of that country may determine that the provisions of paragraph 1 of this Article shall take effect only after a reasonable period which shall in no case exceed five years from the date of admission of such migrants.

#### Article 9

Each Member for which this Convention is in force undertakes to permit, taking into account the limits allowed by national laws and regulations concerning export and import of currency, the transfer of such part of the earnings and savings of the migrant for employment as the migrant may desire.

#### Article 10

In cases where the number of migrants going from the territory of one Member to that of another is sufficiently large, the competent authorities of the territories concerned shall, whenever necessary or desirable, enter into agreements for the purpose of regulating matters of common concern arising in connection with the application of the provisions of this Convention.

#### Article 11

1. For the purpose of this Convention the term migrant for employment means a person who migrates from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant for employment.

2. This Convention does not apply to--

(a) frontier workers;

(b) short-term entry of members of the liberal professions and artistes; and

(c) seamen.

#### Article 12

The formal ratifications of this Convention shall be communicated to the Director- General of the International Labour Office for registration.

#### Article 13

1. This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Director-General.

2. It shall come into force twelve months after the date on which the ratifications of two Members have been registered with the Director-General.

3. Thereafter, this Convention shall come into force for any Member twelve months after the date on which its ratification has been registered.

#### Article 14

1. Each Member ratifying this Convention may, by a declaration appended to its ratification, exclude from its ratification any or all of the Annexes to the Convention.

2. Subject to the terms of any such declaration, the provisions of the Annexes shall have the same effect as the provisions of the Convention.

3. Any Member which makes such a declaration may subsequently by a new declaration notify the Director-General that it accepts any or all of the Annexes mentioned in the declaration; as from the date of the registration of such notification by the Director-General the provisions of such Annexes shall be applicable to the Member in question.

4. While a declaration made under paragraph 1 of this Article remains in force in respect of any Annex, the Member may declare its willingness to accept that Annex as having the force of a Recommendation.

#### Article 15

1. Declarations communicated to the Director-General of the International Labour Office in accordance with paragraph 2 of Article 35 of the Constitution of the International Labour Organisation shall indicate --

a) the territories in respect of which the Member concerned undertakes that the provisions of the Convention and any or all of the Annexes shall be applied without modification;

b) the territories in respect of which it undertakes that the provisions of the Convention and any or all of the Annexes shall be applied subject to modifications, together with details of the said modifications;

c) the territories in respect of which the Convention and any or all of the Annexes are inapplicable and in such cases the grounds on which they are inapplicable;

d) the territories in respect of which it reserves its decision pending further consideration of the position.

2. The undertakings referred to in subparagraphs (a) and (b) of paragraph 1 of this Article shall be deemed to be an integral part of the ratification and shall have the force of ratification.

3. Any Member may at any time by a subsequent declaration cancel in whole or in part any reservations made in its original declaration in virtue of subparagraph (b), (c) or (d) of paragraph 1 of this Article.

4. Any Member may, at any time at which the Convention is subject to denunciation in accordance with the provisions of Article 17, communicate to the Director-General a declaration modifying in any other respect the terms of any former declaration and stating the present position in respect of such territories as it may specify.

#### Article 16

1. Declarations communicated to the Director-General of the International Labour Office in accordance with paragraph 4 or 5 of Article 35 of the Constitution of the International Labour Organisation shall indicate whether the provisions of the Convention and any or all of the Annexes will be applied in the territory concerned without modification or subject to modifications; and if the declaration indicates that the provisions of the Convention and any or all of the Annexes will be applied subject to modifications, it shall give details of the said modifications.

2. The Member, Members or international authority concerned may at any time by a subsequent declaration renounce in whole or in part the right to have recourse to any modification indicated in any former declaration.

3. The Member, Members or international authority concerned may, at any time at which this Convention and any or all of the Annexes are subject to denunciation in accordance with the provisions of Article 17, communicate to the Director-General a declaration modifying in any other respect the terms of any former declaration and stating the present position in respect of the application of the Convention.

#### Article 17

1. A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Director-General of the International Labour Office for registration. Such denunciation shall not take effect until one year after the date on which it is registered.

2. Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article, will be bound for



another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this Article.

3. At any time at which this Convention is subject to denunciation in accordance with the provisions of the preceding paragraphs any Member which does not so denounce it may communicate to the Director-General a declaration denouncing separately any Annex to the Convention which is in force for that Member.

4. The denunciation of this Convention or of any or all of the Annexes shall not affect the rights granted thereunder to a migrant or to the members of his family if he immigrated while the Convention or the relevant Annex was in force in respect of the territory where the question of the continued validity of these rights arises.

#### Article 18

1. The Director-General of the International Labour Office shall notify all Members of the International Labour Organisation of the registration of all ratifications, declarations and denunciations communicated to him by the Members of the Organisation.

2. When notifying the Members of the Organisation of the registration of the second ratification communicated to him, the Director-General shall draw the attention of the Members of the Organisation to the date upon which the Convention will come into force.

#### Article 19

The Director-General of the International Labour Office shall communicate to the Secretary-General of the United Nations for registration in accordance with Article 102 of the Charter of the United Nations full particulars of all ratifications, declarations and acts of denunciation registered by him in accordance with the provisions of the preceding articles.

#### Article 20

At such times as it may consider necessary the Governing Body of the International Labour Office shall present to the General Conference a report on the working of this Convention and shall examine the desirability of placing on the agenda of the Conference the question of its revision in whole or in part.

#### Article 21

1. Should the Conference adopt a new Convention revising this Convention in whole or in part, then, unless the new Convention otherwise provides:

a) the ratification by a Member of the new revising Convention shall ipso jure involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 17 above, if and when the new revising Convention shall have come into force;

b) as from the date when the new revising Convention comes into force this Convention shall cease to be open to ratification by the Members.

2. This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention.

#### Article 22

1. The International Labour Conference may, at any session at which the matter is included in its agenda, adopt by a two-thirds majority a revised text of any one or more of the Annexes to this Convention.

2. Each Member for which this Convention is in force shall, within the period of one year, or, in exceptional circumstances, of eighteen months, from the closing of the session of the Conference, submit any such revised text to the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action.

3. Any such revised text shall become effective for each Member for which this Convention is in force on communication by that Member to the Director-General of the International Labour Office of a declaration notifying its acceptance of the revised text.

4. As from the date of the adoption of the revised text of the Annex by the Conference, only the revised text shall be open to acceptance by Members.

#### Article 23

The English and French versions of the text of this Convention are equally authoritative.

#### ANNEX

##### ANNEX I

#### RECRUITMENT, PLACING AND CONDITIONS OF LABOUR OF MIGRANTS FOR EMPLOYMENT RECRUITED OTHERWISE THAN UNDER GOVERNMENT- SPONSORED ARRANGEMENTS FOR GROUP TRANSFER

##### Article 1

This Annex applies to migrants for employment who are recruited otherwise than under Government-sponsored arrangements for group transfer.

## Article 2

For the purpose of this Annex--

(a) the term recruitment means--

(i) the engagement of a person in one territory on behalf of an employer in another territory, or

(ii) the giving of an undertaking to a person in one territory to provide him with employment in another territory,

together with the making of any arrangements in connection with the operations mentioned in (i) and (ii) including the seeking for and selection of emigrants and the preparation for departure of the emigrants;

(b) the term introduction means any operations for ensuring or facilitating the arrival in or admission to a territory of persons who have been recruited within the meaning of paragraph (a) of this Article; and

(c) the term placing means any operations for the purpose of ensuring or facilitating the employment of persons who have been introduced within the meaning of paragraph (b) of this Article.

## Article 3

1. Each Member for which this Annex is in force, the laws and regulations of which permit the operations of recruitment, introduction and placing as defined in Article 2, shall regulate such of the said operations as are permitted by its laws and regulations in accordance with the provisions of this Article.

2. Subject to the provisions of the following paragraph, the right to engage in the operations of recruitment, introduction and placing shall be restricted to--

(a) public employment offices or other public bodies of the territory in which the operations take place;

(b) public bodies of a territory other than that in which the operations take place which are authorised to operate in that territory by agreement between the Governments concerned;

(c) any body established in accordance with the terms of an international instrument.

3. In so far as national laws and regulations or a bilateral arrangement permit, the operations of recruitment, introduction and placing may be undertaken by--

(a) the prospective employer or a person in his service acting on his behalf, subject, if necessary in the interest of the migrant, to the approval and supervision of the competent authority;

(b) a private agency, if given prior authorisation so to do by the competent authority of the territory where the said operations are to take place, in such cases and under such conditions as may be prescribed by--

(i) the laws and regulations of that territory, or

(ii) agreement between the competent authority of the territory of emigration or any body established in accordance with the terms of an international instrument and the competent authority of the territory of immigration.

4. The competent authority of the territory where the operations take place shall supervise the activities of bodies and persons to whom authorisations have been issued in pursuance of paragraph 3 (b), other than any body established in accordance with the terms of an international instrument, the position of which shall continue to be governed by the terms of the said instrument or by any agreement made between the body and the competent authority concerned.

5. Nothing in this Article shall be deemed to permit the acceptance of a migrant for employment for admission to the territory of any Member by any person or body other than the competent authority of the territory of immigration.

## Article 4

Each Member for which this Annex is in force undertakes to ensure that the services rendered by its public employment service in connection with the recruitment, introduction or placing of migrants for employment are rendered free.

## Article 5

1. Each Member for which this Annex is in force which maintains a system of supervision of contracts of employment between an employer, or a person acting on his behalf, and a migrant for employment undertakes to require--

(a) that a copy of the contract of employment shall be delivered to the migrant before departure or, if the Governments concerned so agree, in a reception centre on arrival in the territory of immigration;

(b) that the contract shall contain provisions indicating the conditions of work and particularly the remuneration offered to the migrant;

(c) that the migrant shall receive in writing before departure, by a document which relates either to him individually or to a group of migrants of which he is a member, information concerning the general conditions of life and work applicable to him in the territory of immigration.

## APPENDIX C

### **C143 Migrant Workers (Supplementary Provisions) Convention, 1975**

The General Conference of the International Labour Organisation,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Sixtieth Session on 4 June 1975, and

Considering that the Preamble of the Constitution of the International Labour Organisation assigns to it the task of protecting the interests of workers when employed in countries other than their own, and

Considering that the Declaration of Philadelphia reaffirms, among the principles on which the Organisation is based, that labour is not a commodity, and that poverty anywhere constitutes a danger to prosperity everywhere, and recognises the solemn obligation of the ILO to further programmes which will achieve in particular full employment through the transfer of labour, including for employment ...,

Considering the ILO World Employment Programme and the Employment Policy Convention and Recommendation, 1964, and emphasising the need to avoid the excessive and uncontrolled or unassisted increase of migratory movements because of their negative social and human consequences, and

Considering that in order to overcome underdevelopment and structural and chronic unemployment, the governments of many countries increasingly stress the desirability of encouraging the transfer of capital and technology rather than the transfer of workers in accordance with the needs and requests of these countries in the reciprocal interest of the countries of origin and the countries of employment, and

Considering the right of everyone to leave any country, including his own, and to enter his own country, as set forth in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, and

Recalling the provisions contained in the Migration for Employment Convention and Recommendation (Revised), 1949, in the Protection of Migrant Workers (Underdeveloped Countries) Recommendation, 1955, in the Employment Policy Convention and Recommendation, 1964, in the Employment Service Convention and Recommendation, 1948, and in the Fee-Charging Employment Agencies Convention (Revised), 1949, which deal with such matters as the regulation of the recruitment, introduction and placing of migrant workers, the provision of accurate information relating to migration, the minimum conditions to be enjoyed by migrants in transit and on arrival, the adoption of an active employment policy and international collaboration in these matters, and

Considering that the migration of workers due to conditions in labour markets should take place under the responsibility of official agencies for employment or in accordance with the relevant bilateral or multilateral agreements, in particular those permitting free circulation of workers, and

Considering that evidence of the existence of illicit and clandestine trafficking in labour calls for further standards specifically aimed at eliminating these abuses, and

Recalling the provisions of the Migration for Employment Convention (Revised), 1949, which require ratifying Members to apply to immigrants lawfully within their territory treatment not less favourable than that which they apply to their nationals in respect of a variety of matters which it enumerates, in so far as these are regulated by laws or regulations or subject to the control of administrative authorities, and

Recalling that the definition of the term "discrimination" in the Discrimination (Employment and Occupation) Convention, 1958, does not mandatorily include distinctions on the basis of nationality, and

Considering that further standards, covering also social security, are desirable in order to promote equality of opportunity and treatment of migrant workers and, with regard to matters regulated by laws or regulations or subject to the control of administrative authorities, ensure treatment at least equal to that of nationals, and

Noting that, for the full success of action regarding the very varied problems of migrant workers, it is essential that there be close co-operation with the United Nations and other specialised agencies, and

Noting that, in the framing of the following standards, account has been taken of the work of the United Nations and of other specialised agencies and that, with a view to avoiding duplication and to ensuring appropriate co-ordination, there will be continuing co-operation in promoting and securing the application of the standards, and

Having decided upon the adoption of certain proposals with regard to migrant workers, which is the fifth item on the agenda of the session, and

Having determined that these proposals shall take the form of an international Convention supplementing the Migration for Employment Convention (Revised), 1949, and the Discrimination (Employment and Occupation) Convention, 1958,

adopts the twenty-fourth day of June of the year one thousand nine hundred and seventy-five, the following Convention, which may be cited as the Migrant Workers (Supplementary Provisions) Convention, 1975:

## Part I. Migrations in Abusive Conditions

### Article 1

Each Member for which this Convention is in force undertakes to respect the basic human rights of all migrant workers.

### Article 2

1. Each Member for which this Convention is in force shall systematically seek to determine whether there are illegally employed migrant workers on its territory and whether there depart from, pass through or arrive in its territory any movements of migrants for employment in which the migrants are subjected during their journey, on arrival or during their period of residence and employment to conditions contravening relevant international multilateral or bilateral instruments or agreements, or national laws or regulations.

2. The representative organisations of employers and workers shall be fully consulted and enabled to furnish any information in their possession on this subject.

### Article 3

Each Member shall adopt all necessary and appropriate measures, both within its jurisdiction and in collaboration with other Members--

(a) to suppress clandestine movements of migrants for employment and illegal employment of migrants, and

(b) against the organisers of illicit or clandestine movements of migrants for employment departing from, passing through or arriving in its territory, and against those who employ workers who have immigrated in illegal conditions, in order to prevent and to eliminate the abuses referred to in Article 2 of this Convention.

### Article 4

In particular, Members shall take such measures as are necessary, at the national and the international level, for systematic contact and exchange of information on the subject with other States, in consultation with representative organisations of employers and workers.

### Article 5

One of the purposes of the measures taken under Articles 3 and 4 of this Convention shall be that the authors of manpower trafficking can be prosecuted whatever the country from which they exercise their activities.

### Article 6

1. Provision shall be made under national laws or regulations for the effective detection of the illegal employment of migrant workers and for the definition and the application of administrative, civil and penal sanctions, which include imprisonment in their range, in respect of the illegal employment of migrant workers, in respect of the organisation of movements of migrants for employment defined as involving the abuses referred to in Article 2 of this Convention, and in respect of knowing assistance to such movements, whether for profit or otherwise.

2. Where an employer is prosecuted by virtue of the provision made in pursuance of this Article, he shall have the right to furnish proof of his good faith.

### Article 7

The representative organisations of employers and workers shall be consulted in regard to the laws and regulations and other measures provided for in this Convention and designed to prevent and eliminate the abuses referred to above, and the possibility of their taking initiatives for this purpose shall be recognised.

### Article 8

1. On condition that he has resided legally in the territory for the purpose of employment, the migrant worker shall not be regarded as in an illegal or irregular situation by the mere fact of the loss of his employment, which shall not in itself imply the withdrawal of his authorisation of residence or, as the case may be, work permit.

2. Accordingly, he shall enjoy equality of treatment with nationals in respect in particular of guarantees of security of employment, the provision of alternative employment, relief work and retraining.

### Article 9

1. Without prejudice to measures designed to control movements of migrants for employment by ensuring that migrant workers enter national territory and are admitted to employment in conformity with the relevant laws and regulations, the migrant worker shall, in cases in which these laws and regulations have not been respected and in which his position cannot be regularised, enjoy equality of treatment for himself and his family in respect of rights arising out of past employment as regards remuneration, social security and other benefits.

2. In case of dispute about the rights referred to in the preceding paragraph, the worker shall have the possibility of presenting his case to a competent body, either himself or through a representative.

3. In case of expulsion of the worker or his family, the cost shall not be borne by them.

4. Nothing in this Convention shall prevent Members from giving persons who are illegally residing or working within the country the right to stay and to take up legal employment.

## Part II. Equality of Opportunity and Treatment

### Article 10

Each Member for which the Convention is in force undertakes to declare and pursue a national policy designed to promote and to guarantee, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, of social security, of trade union and cultural rights and of individual and collective freedoms for persons who as migrant workers or as members of their families are lawfully within its territory.

### Article 11

1. For the purpose of this Part of this Convention, the term migrant worker means a person who migrates or who has migrated from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant worker.

2. This Part of this Convention does not apply to--

(a) frontier workers;

(b) artistes and members of the liberal professions who have entered the country on a short-term basis;

(c) seamen;

(d) persons coming specifically for purposes of training or education;

(e) employees of organisations or undertakings operating within the territory of a country who have been admitted temporarily to that country at the request of their employer to undertake specific duties or assignments, for a limited and defined period of time, and who are required to leave that country on the completion of their duties or assignments.

### Article 12

Each Member shall, by methods appropriate to national conditions and practice--

(a) seek the co-operation of employers' and workers' organisations and other appropriate bodies in promoting the acceptance and observance of the policy provided for in Article 10 of this Convention;

(b) enact such legislation and promote such educational programmes as may be calculated to secure the acceptance and observance of the policy;

(c) take measures, encourage educational programmes and develop other activities aimed at acquainting migrant workers as fully as possible with the policy, with their rights and obligations and with activities designed to give effective assistance to migrant workers in the exercise of their rights and for their protection;

(d) repeal any statutory provisions and modify any administrative instructions or practices which are inconsistent with the policy;

(e) in consultation with representative organisations of employers and workers, formulate and apply a social policy appropriate to national conditions and practice which enables migrant workers and their families to share in advantages enjoyed by its nationals while taking account, without adversely affecting the principle of equality of opportunity and treatment, of such special needs as they may have until they are adapted to the society of the country of employment;

(f) take all steps to assist and encourage the efforts of migrant workers and their families to preserve their national and ethnic identity and their cultural ties with their country of origin, including the possibility for children to be given some knowledge of their mother tongue;

(g) guarantee equality of treatment, with regard to working conditions, for all migrant workers who perform the same activity whatever might be the particular conditions of their employment.

### Article 13

1. A Member may take all necessary measures which fall within its competence and collaborate with other Members to facilitate the reunification of the families of all migrant workers legally residing in its territory.

2. The members of the family of the migrant worker to which this Article applies are the spouse and dependents 1400 nt children, father and mother.

#### Article 14

A Member may--

- (a) make the free choice of employment, while assuring migrant workers the right to geographical mobility, subject to the conditions that the migrant worker has resided lawfully in its territory for the purpose of employment for a prescribed period not exceeding two years or, if its laws or regulations provide for contracts for a fixed term of less than two years, that the worker has completed his first work contract;
- (b) after appropriate consultation with the representative organisations of employers and workers, make regulations concerning recognition of occupational qualifications acquired outside its territory, including certificates and diplomas;
- (c) restrict access to limited categories of employment or functions where this is necessary in the interests of the State.

#### Part III Final Provisions

#### Article 15

This Convention does not prevent Members from concluding multilateral or bilateral agreements with a view to resolving problems arising from its application.

#### Article 16

- 1. Any Member which ratifies this Convention may, by a declaration appended to its ratification, exclude either Part I or Part II from its acceptance of the Convention.
- 2. Any Member which has made such a declaration may at any time cancel that declaration by a subsequent declaration.
- 3. Every Member for which a declaration made under paragraph 1 of this Article is in force shall indicate in its reports upon the application of this Convention the position of its law and practice in regard to the provisions of the Part excluded from its acceptance, the extent to which effect has been given, or is proposed to be given, to the said provision and the reasons for which it has not yet included them in its acceptance of the Convention.

#### Article 17

The formal ratifications of this Convention shall be communicated to the Director-General of the International Labour Office for registration.

#### Article 18

- 1. This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Director-General.
- 2. It shall come into force twelve months after the date on which the ratifications of two Members have been registered with the Director-General.
- 3. Thereafter, this Convention shall come into force for any Member twelve months after the date on which its ratifications have been registered.

#### Article 19

- 1. A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an Act communicated to the Director-General of the International Labour Office for registration. Such denunciation should not take effect until one year after the date on which it is registered.
- 2. Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article, will be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this Article.

#### Article 20

- 1. The Director-General of the International Labour Office shall notify all Members of the International Labour Organisation of the registration of all ratifications and denunciations communicated to him by the Members of the Organisation.
- 2. When notifying the Members of the Organisation of the registration of the second ratification communicated to him, the Director-General shall draw the attention of the Members of the Organisation to the date upon which the Convention will come into force.

#### Article 21