

Made in Canada

How the Law Constructs Migrant Workers' Insecurity

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EXECUTIVE SUMMARY AND SUMMARY OF RECOMMENDATIONS

In the past decade, Canada's labour market has undergone a significant shift to rely increasingly on migrant workers who come to Canada from around the globe on time-limited work permits to provide labour in an expanding range of industries. Since 2000, the number of migrant workers employed in Canada has more than tripled. Expanding in response to employer demand, with little public debate, the greatest proportionate growth in migrant labour has been among low-skill, low-wage workers in sectors such as caregiving, agriculture, hospitality, food services, construction and tourism. This report provides a critical analysis of the federal and provincial laws that regulate and constrain the rights of low-wage migrant workers, proposes a rights-based framework to assess their treatment, identifies the ways in which the law constructs migrant workers' insecurity through each stage of the labour migration cycle, and examines options for systemic change to increase workers' security.

The introduction of this report provides an overview. While labour shortages in a broad range of occupations are chronic, migrant workers in low-wage occupations which require less formal training are – by the operation of law – constructed as “temporary.” Each of Canada's temporary labour migration programs has its own distinct legal and policy regime that structures the migrant workers' experience of life and rights in Canada. Yet, there are significant areas of common experience and concern for the different communities of low-wage migrant workers that can provide a focus for sustainable reform. Temporary migration must not be permitted to facilitate, institutionalize and normalize a second-tier, low-wage/low-rights “guest worker” program and Canada's dependence on temporary migration must be reversed. Instead, a critical and urgent public discussion must be engaged in about the role of temporary migration programs and why broad classes of workers who have historically played a significant role in building Canada are now, in law, excluded from permanent residence. As long as Canada operates temporary labour migration programs, however, the laws and policies that facilitate this migration must provide real security for migrant workers. The federal and provincial governments must ensure that laws and policies protect fundamental freedoms, human rights, well-recognized labour standards and principles of fairness. This protection is needed for migrant workers who are currently in Canada and those who may yet arrive. The recommendations in this report are founded on the

recognition that the current laws create serious conditions of insecurity for migrant workers that must be rectified.

Part A outlines the immigration laws and policies that shape both the general framework for temporary labour migration and the four specific streams of temporary labour migration for lower skilled workers: the Live-in Caregiver Program (“LCP”), the Seasonal Agricultural Worker Program (“SAWP”), the Pilot Project for Occupations Requiring Lower Levels of Formal Training (National Occupational Classification C & D) (“NOC C & D Pilot Project”), and the Agricultural Stream of the NOC C & D Pilot Project. It also provides information about the demographics of workers who arrive in Canada under each of these four streams of temporary migration. Canada’s immigration system provides numerous pathways to permanent residence for economic immigrants in professional, managerial and other occupations designated as “skilled.” However, in Ontario the only migrants in lower skilled occupations who can access permanent residence are live-in caregivers under the LCP and they can do so only after an extended period of labour with precarious temporary status. All other migrant workers in Ontario in lower skilled occupations are “permanently temporary.” Part A tracks the specific evolution of temporary migration programs from the LCP that provides a two-step process for permanent immigration, through the SAWP which provides managed migration by way of bilateral government-to-government agreements with significant government involvement, to the current NOC C & D program which allows employers to privately recruit workers from all over the world. The evolution of these temporary migration programs shows a progressive stepping down in government’s commitment to workers and government involvement and accountability in program administration. While government creates the conditions which allow the migrant work relationships to be formed, the governance of the relationship is increasingly privatized between employer and worker. This evolution creates increasing “flexibility” for employers and correspondingly increasing insecurity for workers.

Part B reviews legal principles and values that provide a rights-based framework for assessing whether current laws and policies support security and decent work for migrant workers. This rights-based framework draws on binding legal principles established under the *Canadian Charter of Rights and Freedoms* and the *Ontario Human Rights Code* as well as widely accepted principles and policy guidelines adopted by the United Nations and International Labour Organization to identify principles and best practices to support migrant workers’ security. Under this analysis, migrant workers’ security can be measured with reference to their access to and experience of fundamental human rights, rights at work, voice, social inclusion, social security, and effective rights enforcement.

Part C then uses this rights-based framework to examine the specific federal and Ontario laws that apply through the six stages of a migrant worker's "labour migration cycle:" (i) recruitment; (ii) obtaining a work permit; (iii) information prior to and on arrival in Ontario; (iv) living and working in Ontario; (v) expiry/renewal of work permit and (vi) pathway to permanent residence/repatriation. The report examines the ways in which the laws and policies that apply at each of these six stages individually and cumulatively respond to or constrain migrant worker experiences to create conditions of insecurity/security. What becomes apparent is that at each stage of the migration cycle, a further layer of insecurity is added which the laws have either actively created or failed to adequately acknowledge or alleviate.

- Abuse of migrant workers in the recruitment phase of the labour migration cycle persists, with privately-recruited workers often paying thousands of dollars each in recruitment fees. Bill 210 provides some protection for live-in caregivers but its enforcement relies largely upon complaints filed by vulnerable workers rather than a system of mandatory registration, licensing and proactive investigation and enforcement. It also provides no protection against recruitment fees for migrant workers outside the LCP. Meanwhile, workers under the SAWP are subject to a system of perpetual recruitment under which they never gain job security and their right to return is dependent on maintaining employer good will from year to year.
- Workers under all four of the lower skilled labour migration programs must be employed on "tied" work permits. They can work only for the employer named on the permit, doing the job identified on the permit, in the location specified on the permit, for the period authorized on the permit. This dependence on the specific employer decreases workers' capacity to resist unfair treatment. Permits also prohibit migrant workers from enrolling in courses of education and training which contributes to worker deskilling.
- Migrant workers arrive in Ontario with very little information about the nature of their rights in the temporary migration stream; their employment, social and human rights while in Ontario; mechanisms for how to enforce their rights; and information about community-based organizations that could assist them at different stages in the labour migration cycle.
- Most migrant workers in Ontario either lack access to legal rights to unionize and bargain collectively or work in sectors that are mostly non-unionized. Their primary workplace protections are found in employment standards legislation. While they are legally entitled to the same workplace rights as Canadian citizens and permanent residents,

there is a significant gap between their rights on paper and their treatment in reality. Their insecurity is compounded by the fact that many workers are required to live on the property of their employer, or do so in practice. As a result, they are always “available” for additional work and complaints about working or living conditions make them vulnerable not only to losing their jobs but also to becoming homeless. Migrant workers have for years raised concerns about employers’ failure to provide them with appropriate health and safety training and/or appropriate health and safety equipment. When they are injured on the job, they frequently face job loss and repatriation. In the event of termination, workers lack access to an effective adjudicative forum in which to challenge their dismissal as unjust. They have no right to a hearing before involuntary repatriation.

- Migrant workers under the SAWP can only work for a maximum of eight months in a calendar year after which they must leave the country. NOC C & D workers can work for a maximum of four years after which they must leave the country for four years. These mandatory dislocations speak more to disrupting individual workers’ connection to Canada rather than to whether there is a chronic or ongoing labour shortage that the particular worker can fill. While individual workers bear the full burden of insecurity through mandatory removals, employers continue to be able to recruit new groups of migrant workers.
- Apart from live-in caregivers under the LCP, migrant workers in lower skilled occupations remain in a precarious position because they have no access to permanent residence.

Part D offers concluding observations and makes recommendations for reform. Existing laws have failed to adequately take into account migrant workers’ perspective and experiences. Law and policy development have not been adequately rooted in and accountable to the rights-based framework. Instead, exploitation that arises at the recruitment stage is compounded by limitations that arise at each of the successive stages of the migration cycle. The result is that the laws construct the migrant worker – and migrant work experience – in ways that predictably produce significant insecurity and undermine the possibility of decent work. As has been recognized in international guidelines for best practices and in domestic human rights law, a multi-dimensional approach is needed to build effective protection for decent work. This multi-dimensional approach must weave together: (i) strong, proactive government oversight and enforcement; (ii) protection for the effective and meaningful exercise of fundamental rights, including collective representation; (iii) substantive workplace and social rights that are responsive to migrant workers’ real circumstances; (iv) effective and accessible mechanisms

for enforcing rights; and (v) active involvement of community organizations to support migrant workers' voice. To this end, this report makes the following recommendations that correspond with each stage of the labour migration cycle:

Recruitment

1. Legislation must be extended to ensure that all migrant workers have effective protection against the charging of recruitment fees and to ensure that employers will be jointly and severally liable for recruitment fees that have been collected by private recruiters.
2. Ontario should adopt a proactive system of employer registration, recruiter licensing (including the mandatory provision of an irrevocable letter of credit or deposit), mandatory filing of information about recruitment and employment contracts, and proactive government inspection and investigation in line with the best practices adopted under Manitoba's Worker Recruitment and Protection Act and Regulations.
3. The limitation period for filing complaints about improper recruitment fees should be extended to reflect the current four-year period which live-in caregivers have to complete their qualifying work to apply for permanent residence.
4. Workers under the SAWP should be entitled to job security, including seniority and recall rights.

Work Permits

5. Work permits should be sector-specific or province-specific and must be framed in a way that allows a worker to engage in alternate work or modified duties in the event of injury or illness.
6. Work permits should not prohibit migrant workers from enrolling in educational or training programs outside of working hours.
7. Public employment services should be developed to facilitate the matching of employers seeking LMOs (Labour Market Opinions) with migrant workers presently in Ontario.
8. Employment insurance benefits must be made accessible in practice to migrant workers.

Information Prior To and On Arrival in Ontario

9. Canadian government officials should provide migrant workers with information about their rights in the applicable labour migration program; their employment, social and human rights in Ontario; mechanisms for enforcing their rights; and government and community

organizations and services that are available to assist them in Ontario. This information should be provided both in person and in writing, in the language spoken by the migrant worker, before a migrant worker departs their country of origin and again upon arrival in Ontario.

10. A comprehensive plain language guide for migrant workers should be developed and made readily accessible outlining their rights through each stage of the labour migration cycle; identifying the relevant enforcement mechanisms and contact information for enforcement agencies; and providing contact information for established and recognized community organizations and worker advocates who can assist migrant workers through their labour migration cycle.
11. Migrant workers and worker advocates should be provided with transparent information about how prevailing wage rates are determined. Migrant workers must not be paid less than the prevailing wage.

Working and Living in Ontario

12. Provincial legislation should be amended to ensure that migrant workers in all sectors – including agriculture and caregiving – have access to effective and meaningful legal protection for the right to unionize and bargain collectively.
13. Resources should be devoted to emphasize proactive enforcement of employment standards in sectors and workplaces employing migrant workers. Proactive enforcement should be supplemented by collaboration with community organizations, inspections targeted at sectors at risk for non-compliance, the ability to expand reactive investigations beyond the initial complaint when evidence demonstrates a broader pattern of violations, and monitoring after a hearing to ensure remedies are implemented.
14. Ontario should establish an independent publicly funded Office of the Migrant Worker Advocate to provide information and advice to migrant workers free of charge, including information about rights, how to enforce them, legal support in making claims to enforce rights, a hotline, outreach to migrant worker communities, and coordination with community groups, advocates and legal clinics supporting migrant workers.
15. The Ontario Ministry of Labour should develop innovative partnerships, including funding arrangements, with established community organizations who are working with migrant workers to collaborate on identifying rights violations.

16. Provincial legislation, including the *Employment Standards Act, 2000*, should be amended to ensure that anonymous complaints can trigger investigations and to permit complaints to be filed by third-parties such as community organizations and public interest groups.
17. Employee voice should be enhanced by facilitating worker representation and consultation in developing the contracts that apply to migrant workers, including workers under the SAWP.
18. Provincial legislation, including the *Employment Standards Act, 2000*, should be amended to ensure that all terms of migrant workers' contracts – including disputes about unjust termination – can be heard before a single expert administrative body (i.e. employment standards officers and the Ontario Labour Relations Board) in an expedited process.
19. Where terminated, SAWP workers must be provided with the right to a hearing prior to repatriation.
20. Workers should be provided with protection for their security of status, security of housing, and security of employment under open or sector-specific work permits while a legal dispute about their employment is ongoing.

Renewal/Expiry of Work Permits

21. Rather than being excluded from Canada after four years of work, migrant workers should have a right to apply for permanent residence.

Pathways to Permanent Residence

22. NOC C & D skill level migrant workers – including workers in the SAWP and NOC C & D Pilot Project – must be provided with pathways to permanent residence.

INTRODUCTION

In the past decade, Canada's labour market has undergone a significant shift to rely increasingly on migrant workers who come to Canada from around the globe on time-limited work permits to provide labour in an expanding range of industries. Since 2000, the number of temporary foreign workers employed in Canada has more than tripled.¹ In 2006, for the first time, the number of temporary foreign workers entering Canada exceeded the number of economic immigrants who were granted permanent resident status and this trend has continued since then.² The greatest proportionate growth over the past decade has been among low-skill, low-wage workers in sectors such as caregiving, agriculture, hospitality, food services, construction and tourism. This paper focuses on the legal regulation of this segment of the migrant worker population: low-wage workers who migrate to Toronto and the surrounding regions under four streams of Canada's Temporary Foreign Worker Program: the Live-in Caregiver Program, the Seasonal Agricultural Worker Program, the Pilot Project for Occupations Requiring Lower Levels of Formal Training (National Occupational Classification C & D) ("NOC C & D Pilot Project"), and the Agricultural Stream of the NOC C & D Pilot Project.

¹ Canada Facts and Figures 2009: Immigration Overview Permanent and Temporary Residents (Ottawa: Citizenship and Immigration Canada, 2010) at p. 64; Canada Facts and Figures 2010: Immigration Overview Permanent and Temporary Residents (Ottawa: Citizenship and Immigration Canada, 2011) at p. 68; Citizenship and Immigration Canada, *Preliminary tables – Permanent and temporary residents 2011*, online at www.cic.gc.ca/english/resources/statistics/facts2011-preliminary/index.asp (accessed 7 March 2012). In December 2000, there were 89,746 temporary foreign workers present in Canada. That number has increased each year since 2000 with preliminary figures for December 2011 rising to a total of 300,111 temporary foreign workers.

² Canada Facts and Figures 2010, above note 1 at pp. 6 and 66. In 2006, 138,250 economic immigrants (encompassing principal applicants, spouses and dependants) were granted permanent resident status. In the same year, 139,000 temporary migrant workers entered Canada. This pattern has persisted since 2006, with the exception of 2010 when economic immigrant permanent residents slightly outnumbered temporary migrant worker entries (186,913 to 182,276 respectively). Preliminary figures for 2011 show a return to the pattern with 156,077 economic immigrants receiving permanent resident status compared to 190,769 temporary migrant workers entering Canada: *Preliminary tables – Permanent and temporary residents 2011*, above note 1.

Table 1. Economic Class Permanent Residents, Temporary Foreign Worker Entries and Temporary Foreign Workers Present (All Skill Levels), 2000-2011

Year	Permanent Residents (Economic Immigrants)	Temporary Foreign Worker Entries*	Temporary Foreign Workers Present**
2000	136,287	116,540	89,746
2001	155,717	119,657	96,390
2002	137,863	110,861	101,099
2003	121,047	103,198	109,679
2004	133,747	112,508	125,034
2005	156,312	122,662	140,690
2006	138,250	139,000	160,854
2007	131,245	164,720	199,246
2008	149,071	192,180	249,796
2009	153,491	178,268	281,349
2010	186,913	182,276	282,771
2011	156,077	190,769	300,111

Source: Figures compiled from Citizenship and Immigration Canada, Facts and Figures 2009: Immigration Overview Permanent and Temporary Residents (Ottawa: CIC, 2010); Facts and Figures 2010: Immigration Overview Permanent and Temporary Residents (Ottawa: CIC, 2010); and Preliminary tables – Permanent and temporary residents 2011, available online at www.cic.gc.ca/english/resources/statistics/facts2011-preliminary/index.asp

* "Temporary Foreign Worker Entries" refers to the sum of all temporary workers who enter Canada for the first time (initial entry) on a valid immigration document such as a work permit and all temporary workers who re-enter Canada in the calendar year with a new work permit.

** "Temporary Foreign Workers Present" refers to all temporary workers with a valid work permit who are present in Canada on 1 December of a given year and includes workers whose permit began in an earlier year but remains valid in the observation year.

The rapid growth of the temporary labour migration programs has been employer-driven. The program has expanded over the past decade with relatively little public debate. While the work itself persists, the workers are legally constructed as "temporary." These "low-skill" migrant workers have fewer effective legal protections than Canadian workers. They are vulnerable to abuse by recruiters, consultants and employers. Because of their legally, economically and socially marginalized position, they face tremendous difficulty enforcing the rights they do have. This report provides a critical analysis of the federal and provincial laws that regulate and constrain the rights of low-wage

migrant workers in Toronto, proposes a rights-based framework to assess their treatment, and examines options for systemic change to increase workers' security.

The dominant narrative in policy discourse depicts temporary labour migration in terms of a win-win-win scenario for participants: (i) as the receiving country, Canada benefits from enabling employers to access a flexible labour force that can respond to domestic labour shortages; (ii) countries that export labour benefit from remittances that workers send to their families and from the transfer of skills/knowledge acquired by workers in Canadian workplaces; and (iii) individual migrant workers benefit from accessing greater incomes than would be available in their home countries to support or improve their families' standard of living.³ In addition, this discourse is bolstered by a narrative that assumes that Canada's shortage of low-skilled labour is a temporary phenomenon and that there is no present or long-term need to recruit permanent economic immigrants to work in occupations requiring lower levels of formal training. Finally, it is supported by a narrative that migrant workers have the same workplace rights as Canadian workers.

These narratives are, however, incomplete and highly contested. Community organizations, unions, academic research, policy papers and media coverage are increasingly shining a light on the precarious conditions under which migrant workers labour. They are pointedly assessing the human cost of temporary labour migration asking who benefits, in what ways, and at what costs in these relationships. At the same time, a rights-based framework for analysis is emerging which focuses on the quality of migrant workers' experience of economic and social security, including a critical examination of the degree to which migrant workers are able to effectively access and enforce formal rights, exercise fundamental human freedoms, and experience social inclusion.⁴

³ For an analysis and critique of this "triple-win" narrative, see Kerry Preibisch, "Development as Remittances or Development as Freedom? Exploring Canada's Temporary Migration Programs from a Rights-Based Approach," in *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case*, Fay Faraday, Judy Fudge and Eric Tucker, editors (Toronto, Irwin Law, 2012) at pp. 81-108, especially at pp. 81-84 and sources cited therein.

⁴ A rich literature is developing in Canada on these issues. For some recent examples, see Preibisch, "Development as Remittances or Development as Freedom?", above note 3; Jenna Henneby, "Permanently Temporary? Agricultural Workers and Their Integration in Canada" (February 2012), *IRPP Study*, No. 26; Adelle Blackett, "Regulating Decent Work for Domestic Workers" (2011) 23:1 *Canadian Journal of Women and the Law* 1-44; Judy Fudge, "Global Care Chains, Employment Agencies, and the Conundrum of Jurisdiction: Decent Work for Domestic Workers in Canada" (2011) 23:1 *Canadian Journal of Women and the Law* 235-264; Kerry Preibisch, "Pick-Your-Own Labor: Migrant Workers and Flexibility in Canadian Agriculture" (Summer 2010), 44:2 *International Migration Review* 404-441; Delphine Nakache and Paula J. Kinoshita, "The Canadian Temporary Foreign Worker Program: Do Short-Term Economic Needs Prevail over Human Rights Concerns?" (May 2010), *IRPP Study*, No. 5; Judy Fudge and Fiona MacPhail, "The Temporary Foreign Worker Program in Canada: Low-Skilled Workers as an Extreme Form of Flexible Labour" (2009) 31:5 *Comparative Labor Law and Policy Journal* 5-45; Alberta Federation of Labour, *Entrenching Exploitation: The Second Report of the*

Counter-narratives are emerging from this research and from community-level organizing that demand a more nuanced and critical debate about the regulation of migrant labour. They challenge the assumptions that the shortage of low-skill labour is temporary⁵ and that temporary labour migration is neutral in its impact on the domestic labour market. They question whether labour migration in fact leads to sustainable development or whether it instead sustains structural dependence on labour migration while providing only enough money so that workers become “better migrants.”⁶ They highlight the fact that migrant workers face insurmountable hurdles to enforcing formal rights. And they expose enduring systemic patterns of exploitation of migrant workers that are replicated as Canada’s temporary migration programs expand to promote greater “flexibility” with fewer built-in safeguards for workers.

Laws fundamentally shape the nature and quality of potential relationships and interactions between members of society. Laws encourage and facilitate certain kinds of relationships while discouraging others. Laws can work together to create conditions of security. However, as the Supreme Court of Canada has recognized, laws can also operate to disempower segments of society in a way that “substantially orchestrates, encourages and sustains” a violation of fundamental rights and in a way that “is creating conditions which in effect substantially interfere” with a group’s rights and its capacity to participate in

Alberta Federation of Labour Temporary Foreign Worker Advocate (Edmonton: Alberta Federation of Labour, April 2009).

⁵ At times, federal and provincial government statements also recognize the chronic nature of this labour shortage. Without addressing the temporary foreign worker programs, in a recent speech, federal Minister of Citizenship, Immigration and Multiculturalism Jason Kenney pointed to chronic labour shortages expected over the next decade in western Canada that extend “right across the entire skill spectrum.” Speaking notes for The Honourable Jason Kenney, P.C., M.P. Minister of Citizenship, Immigration and Multiculturalism at the National Metropolis Conference, Toronto (1 March 2012), available online at: <http://www.cic.gc.ca/english/departement/media/speeches/2012/2012-03-01.asp> (accessed 12 March 2012). Meanwhile, a 2011 Alberta government review of the temporary foreign worker program in that province found that “Alberta’s workforce challenge is driven largely by a shortage of workers in permanent positions” and that while employers have become dependent on the temporary foreign worker program, there is “strong agreement that the TFW Program is not the solution to the permanent, long-term workforce needs of our province.” Teresa Woo-Paw, *Impact of the Temporary Foreign Worker (TFW) Program on the Labour Market in Alberta* (August 2011), Report submitted to the Alberta Minister of Employment and Immigration, at p. 2-3, online at <http://employment.alberta.ca/documents/Impact-TFW-Program-on-the-Labour-Market-in-Alberta.pdf>.

⁶ See, for example, Jenna Hennebry, “Who Has Their Eye on the Ball? ‘Jurisdictional Fútbol’ and Canada’s Temporary Foreign Worker Program” (July-August 2010) *Policy Options* 62 at 63. At p. 63 Hennebry writes that rather than supporting long-term sustainable development in sending countries, “evidence tends to point toward heightened relationships of dependency, increased emigration and brain drain.” She notes that “it is estimated that one-third to one-half of the Philippines’ population is directly dependent on remittances from family members working overseas.” Moreover, she writes that workers coming to Canada under the Seasonal Agricultural Worker Program “spent the greatest majority of remittances on basic subsistence (food, potable water, clothing), followed by consumption of household goods (such as electricity, stoves, etc.), followed by improvements to communication such as telephone lines or cellular phones in order to co-ordinate remittance sending and keeping in touch with migrants working in Canada – essentially ‘making better migrants’.”

society.⁷ Recognizing the dynamic and integral role that law has in shaping the quality of these relationships, current government laws and policies must be scrutinized for the ways in which they operate to create an ever more precarious, contingent, and “disposable”⁸ labour force.

A significant challenge arises because the regulation of migrant workers lies at the intersection of employment and immigration laws. While the entry of migrant workers and their right to remain in Canada are governed by federal immigration law and policy, their employment and social rights are governed primarily by provincial laws and policy. As a result, enforcing rights involves advocating at a range of administrative tribunals and courts in both federal and provincial jurisdictions, giving rise to disputes about which level of government has responsibility or accountability for which dimensions of the relationship.⁹ A further challenge is presented by the fact that there are distinct communities of migrant workers. Each of Canada’s temporary labour migration programs (low-skill migrant workers, live-in caregivers and seasonal agricultural workers) has its own distinct legal and policy regime that structures the migrant workers’ experience of life and rights in Canada. Each program draws workers from different parts of the world raising logistical challenges to developing communication and collective action among and across communities of workers.

Mapping that complex legal terrain, however, illuminates significant areas of common experience and concern for the different communities of low-wage migrant workers. It is these areas of common concern that could provide a focus for sustainable reform to bring transparency and accountability into the system and that could support critical debate as both the federal and Ontario governments embark on reforms to the immigration system.¹⁰

Part A of this paper outlines the immigration laws and policies that shape both the general framework for temporary labour migration and the specific streams

⁷ *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016 at para. 22 and 26.

⁸ See Alberta Federation of Labour, *Temporary Foreign Workers: Alberta’s Disposable Workforce* (Edmonton: Alberta Federation of Labour, November 2007).

⁹ See, for example, *Greenway Farms Inc. v. UFCW Local 1518*, 2009 CanLII 37839 (BC LRB) and *UFCW Local 832 v. Mayfair Farms (Portage) Ltd.*, (26 June 2007), Case No. 595/06/LRA (Man. L.R.B.) in which provincial labour boards rejected employers’ arguments that migrant workers were not subject to provincial labour legislation.

¹⁰ Citizenship and Immigration Canada news release (1 March 2012), “Minister Kenney outlines a vision of a fast and flexible immigration system,” online at <http://www.cic.gc.ca/english/department/media/releases/2012/2012-03-01.asp> (accessed 12 March 2012). Numerous specific proposals to change the immigration system were announced in the federal government’s 2012 budget: *Economic Action Plan 2012* (Ottawa: Public Works and Government Services Canada, 29 March 2012), online at <http://www.budget.gc.ca/2012/plan/pdf/Plan2012-eng.pdf> (accessed 30 March 2012). On 2 March 2012 the Ontario government announced that it “will develop its first-ever immigration strategy” and announced the establishment of an expert roundtable on immigration: “Ontario Developing ‘First-ever’ Immigration Strategy,” news release 2 March 2012, online at <http://news.ontario.ca/mci/en/2012/03/ontario-developing-first-ever-immigration-strategy.html> (accessed 12 March 2012).

of temporary labour migration. Part B reviews some of the legal principles and values that can provide touchstones for assessing whether the laws support security and decent work for migrant workers. Part C then examines the federal and Ontario laws that apply throughout the “labour migration cycle” of a low-skill/low-wage migrant worker’s experience in Canada. By examining the laws through the stages of:

- (a) recruitment,
- (b) obtaining a work permit,
- (c) information prior to and on arrival in Ontario,
- (d) living and working in Ontario,
- (e) expiry/renewal of work permit, and
- (f) pathway to permanent residency/repatriation,

this report examines the ways in which the applicable laws and policies individually and cumulatively respond to or constrain migrant worker experiences to create conditions of insecurity/security. It also examines options for reform that may enable the laws to build more accountability and security throughout the stages of the work cycle. Part D provides concluding analysis and summarizes the recommendations for reform.

As long as Canada and Ontario rely on programs of temporary migration to supply labour for domestic businesses, they have an obligation to ensure that the laws and policies that shape and facilitate migration provide real security for migrant workers. They must ensure that the laws and policies protect fundamental freedoms, human rights, well-recognized labour standards and principles of fairness. Temporary migration must not facilitate, institutionalize and normalize a second-tier low-wage/low-rights “guest” workforce. Migrant workers must be provided with strong, effective and enforceable protections that are responsive to their real circumstances. This protection is needed for migrant workers who are currently in Ontario and it is needed for migrant workers who arrive in the future. The recommendations set out in this report are founded on the recognition that the current laws create serious conditions of insecurity for migrant workers that must be rectified.

Ultimately, though, a much broader, critical and urgent public discussion must be engaged about the role of temporary labour migration if the goal is to build a sustainable economy and sustainable community. This debate must fully integrate both the labour and immigration dimension of the issue and ensure that workers’ perspective is central. This debate must critically address why particular work and particular workers are, through law, constructed as “temporary.” Does constructing the work and workers as temporary deflect from addressing substantive working conditions that yield chronic labour shortages? Is the construction of “temporary” status realistic or consistent with principles of equality and fairness? It must also critically address the

fundamental question of why broad classes of workers – workers who have historically played a significant role in building Canada – are now, in law, generally ineligible for pathways to permanent residence and citizenship. Ultimately, it is recommended that pathways to permanent residence be provided for workers at all skill levels. It is hoped that this report will contribute to that larger debate while recognizing that urgent and systemic action is needed to protect migrant workers who currently work in Ontario and whose numbers have continued to grow.

To begin, though, I make a comment about the terminology used in this report. While Canadian temporary labour migration programs use the term “temporary foreign workers,” to the extent possible, this paper instead uses the term “migrant workers.” This term is better reflective of the perspective of the migrant workers themselves¹¹ and better reflective of the understanding of labour migration in international law.¹² It is also more conducive to critical thinking about the existing programs. In this respect I adopt the position of Kerry Preibisch who has written as follows:

Referring to migrants in TMPs [temporary migration programs] as temporary obscures their long-term, structural importance ... and the decade-long tenure of some migrants; indeed, only their visa is temporary. Further, labelling migrants as foreign is part of a nationalist discourse that contributes ideologically to their legal and social disenfranchisement within labour market and society.¹³

¹¹ As used in this paper, the term “migrant worker” refers to individuals who have migrated internationally to work in Canada. It is beyond the scope of this paper to address the circumstances of Canadian citizens and permanent residents who migrate from one province to another (i.e. Newfoundland to Alberta) or who migrate between rural and urban/northern and southern communities in search of work.

¹² See the United Nations, *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, adopted by the United Nations General Assembly resolution 45/158 of 18 December 1990 which in Article 2 states “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.”

¹³ Preibisch, “Development as Remittances or Development as Freedom?”, above note 3 at p. 86 [emphasis in the original]. See also, Kerry Preibisch, “Local Produce, Foreign Labor: Labor Mobility Programs and Global Trade Competitiveness in Canada,” (2007) 72 *Rural Sociology* 418; and Nandita Sharma, *Home Economics: Nationalism and the Making of Migrant Workers in Canada* (Toronto: University of Toronto Press, 2006). The discourse of “foreign-ness” is particularly damaging as it has no endpoint; it supports an ideology and label of “otherness” that endures even after an individual secures permanent status in Canada: see, for example, the 2011 Ontario provincial election campaign in which Progressive Conservative Leader Tim Hudak criticized a Liberal proposal to encourage businesses to hire recent immigrants – who had Canadian citizenship or permanent resident status – as an “affirmative action program for foreign workers.” CBC News, “Hudak defends ‘foreign worker’ comments,” online at <http://www.cbc.ca/news/canada/toronto/story/2011/09/07/hudak-immigrant-tax-credit248.html> (accessed 23 March 2012).

In the personal profiles that follow in this report, three migrant workers in the Toronto area tell the story of their experiences in their own words. These profiles are not selected to illustrate “worst case” scenarios. Instead, their stories are representative of just some of the concerns and experiences – each with their own variations – that are echoed as migrant workers make their way through the labour migration cycle.

Lilliane's Story

I came to Canada from Uganda to work as a live-in caregiver. Back home, when you work for a family, you make no money. You make the food, feed the family, feed the children but you don't eat with the family. You are discriminated against. So when I was asked me to come and work in Canada I got so excited for the chance for something better. Unfortunately, when I came it was not what I expected. My employer treated me just like back home.

I arrived in March 2008 and started work the very next day. I was very tired because of the long flight and the change in time, but my employer woke me up early in the morning and told me “You cannot be sleeping like that. You came to work.” When I arrived, my employer took my work permit and passport because she said they belonged to her.

I looked after two small children. I did not have my own bedroom. I shared a room with the youngest child. His crib was in my room. I had no private space. I was not allowed to have visitors in the house. The only people I was close to were the children. I loved those children. You have a strong bond with them. But it is so hard when you have no adults who you are close to.

Even though my contract said that I was only to work around 45 hours per week, I had to work from before 8 a.m. until around 11 p.m. after the children were asleep. I was told my attention must always be on the children. I did not have a day off. I had to ask permission even to go to the hairdresser to braid my hair. And when I went to the hairdresser my employer told me I was not allowed to be out of the house on my own and that she would call Immigration and Immigration would give me two weeks' notice to leave. I was treated like rubbish but my employer knew I had nowhere else to go.

I came to Canada to work and I was working hard but I wasn't getting paid. I was paid \$100 in cash per month even though my contract said I was to be paid much more. When my mother got sick and I needed to send money home to help pay for her medication, I asked my employer for more money but she said no. She told me I was earning more money than I would if I was working back home. She told me that I was never to tell anyone how much they were paying me. For two years of work, I was only paid a total of \$2,100. I often thought of my mother and my sister and wished I had the money for that ticket to go back home.

One day when I was at the public library, I was at the computer and started crying. A woman who worked at the library asked me what was wrong and I told her everything. She told me, "You are too young to be under slavery." She told me what caregivers are entitled to and she gave me the number for a shelter. After my employer got angry and told me to leave her house, I called the shelter. I stayed in a homeless shelter until I could find another job. When I left my employer's house, I hadn't been paid in three months. I came with nothing and I left with my things in garbage bags. I didn't even have enough to pay for the taxi to the shelter but the taxi driver gave me \$10 and told me to be strong. I worked full time for two years. I needed 24 months work to apply for permanent residence. But on my record of employment the employer showed that I had worked less. So this made it hard to apply for permanent residence. I found another position as a live-in caregiver for another employer until I could apply for permanent residence.

A. MAPPING IMMIGRATION PATHWAYS

1. Overview: Mapping Where Migrant Worker Programs Fit Within Canada's Immigration System

The Canadian *Constitution Act, 1867* gives the federal and provincial governments shared jurisdiction over immigration. The federal government has jurisdiction over immigration law that affects immigration into all provinces. The provinces have jurisdiction to address immigration into the specific province so long as provincial laws do not conflict with federal laws and policies.¹⁴

Under the federal *Immigration and Refugee Protection Act*¹⁵ (“IRPA”) and associated Regulations,¹⁶ Canada's immigration system provides foreign nationals with pathways to permanent residence through three broad streams: economic immigration, family reunification, and claims by Convention refugees and persons in need of protection.¹⁷ Each November, the federal government releases projected admissions ranges for immigration under each of these streams.¹⁸ Most immigrants arrive under the economic class. This stream accounts for almost two-thirds of total immigration.¹⁹ The analysis below of the regime for economic immigration/migration is conducted with reference to the foreign national who is the principal applicant in the process. It is beyond the

¹⁴ Section 95 of the *Constitution Act, 1867* states as follows with respect to immigration: “In each Province the Legislature may make Laws in relation ... to Immigration into the Province; and it is hereby declared that the Parliament of Canada may from Time to Time make Laws in relation ... to Immigration into all or any of the Provinces; and any Law of the Legislature of a Province relative ... to Immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada.”

¹⁵ S.C. 2001, c. 27.

¹⁶ *Immigration and Refugee Protection Regulations*, SOR/2002-227.

¹⁷ There is also a fourth discretionary stream, the main categories of which encompass cases in which the Minister may grant permanent resident status based on humanitarian and compassionate considerations and public policy considerations: see *IRPA*, s. 25, 25.1, and 25.2.

¹⁸ Citizenship and Immigration Canada, *Annual Report to Parliament on Immigration 2011*, available online at: <http://www.cic.gc.ca/english/pdf/pub/annual-report-2011.pdf>. In 2011, CIC also released more precise admissions targets within the broader ranges set for each immigration category: Citizenship and Immigration Canada, “Notice - Supplementary Information for the 2012 Immigration Levels Plan,” (4 November 2011), <http://www.cic.gc.ca/english/department/media/notices/notice-levels2012.asp> (accessed 13 March 2012).

¹⁹ In 2010, a total of 280,681 immigrants were granted permanent resident status. Of these, 186,913 were economic class immigrants (principal applicants along with spouses and dependants); 60,220 were family class immigrants under the family reunification stream; 24,696 were refugees and 8,845 were granted status under other categories including humanitarian and compassionate applications and public policy cases: *Canada Facts and Figures 2010*, above note 1 at p. 6. Preliminary figures for 2011 show a total of 248,660 immigrants of which 156,077 are economic immigrants; 56,419 family class; 27,852 refugees and 8,309 other categories: *Preliminary tables – Permanent and temporary residents 2011*, above note 1.

scope of this paper to address the circumstances of spouses and dependants of principal applicants although brief reference to these categories is made in Part C.

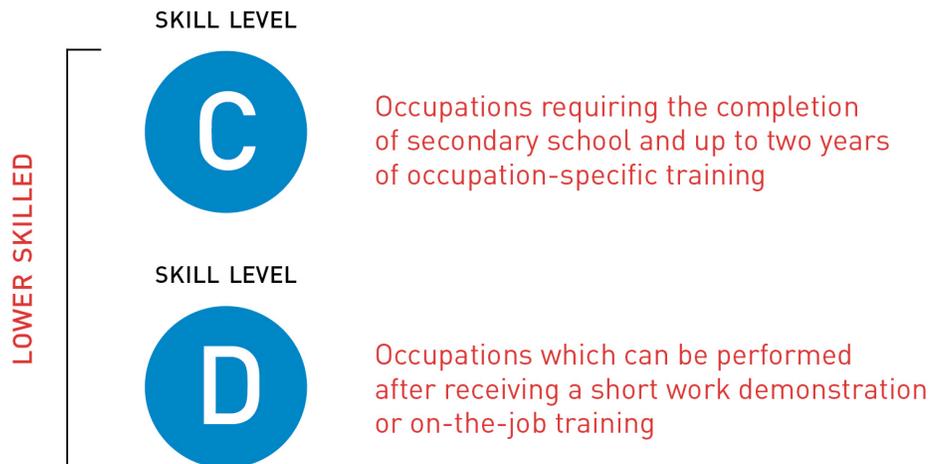
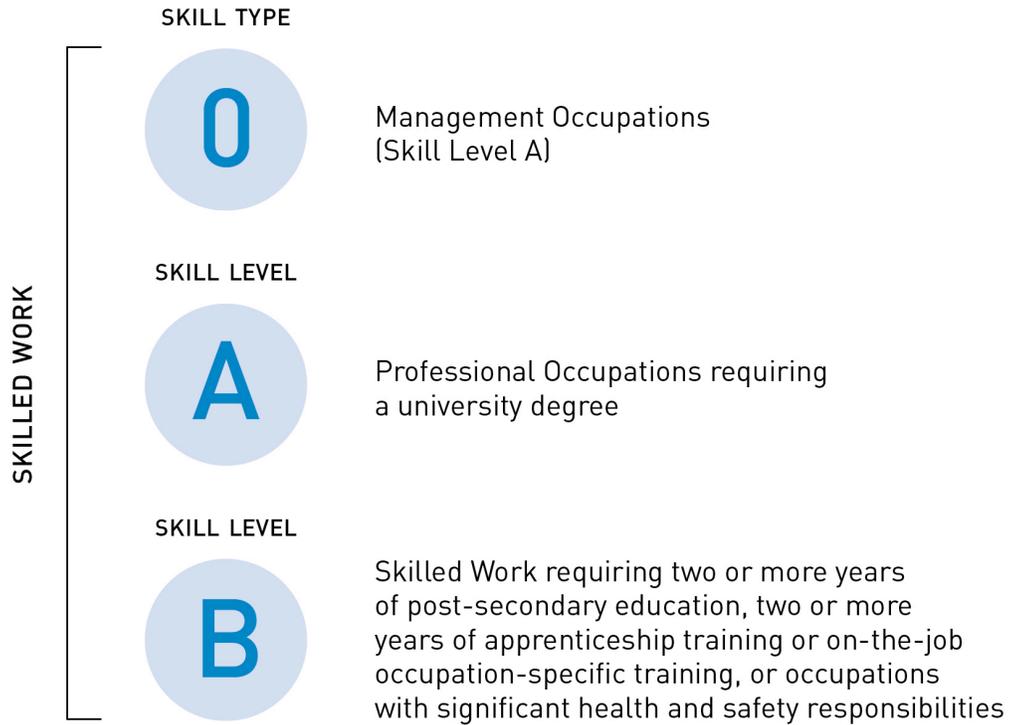
Before looking in more detail at Canada's economic immigration stream, it is necessary to understand how a foreign national's potential economic contribution is classified and treated. Canadian immigration law and policy use the National Occupational Classification ("NOC") matrix as a key factor that determines a potential applicant's eligibility to access different classes within Canada's economic immigration/migration system. The NOC system rates some 40,000 occupations on a matrix with ten different skill types (labelled 0 to 9) and four different skill levels (labelled A to D).²⁰ The categories that are most relevant to the immigration system can be summarized as follows, and in the graphic on page 21:

Skill Type 0	Management Occupations (Skill Level A).
Skill Level A	Professional Occupations requiring a university degree.
Skill Level B	Skilled Work requiring two or more years of post-secondary education (community college, technical institute, CÉGEP), two or more years of apprenticeship training or on-the-job occupation-specific training, or occupations with significant health and safety responsibilities.
Skill Level C	Occupations requiring the completion of secondary school and up to two years of occupation-specific training.
Skill Level D	Occupations which can be performed after receiving a short work demonstration or on-the-job training.

Canada's immigration system designates managerial, professional and skilled work in NOC categories 0, A and B as "skilled work." Foreign nationals who are primary applicants with these skills can be eligible for multiple pathways to permanent residence. By contrast, work in NOC categories C and D which require lower levels of formal training are designated "lower skilled" and, with limited exceptions, foreign nationals who are primary applicants with these skills are only eligible for temporary labour migration.

²⁰ Statistics Canada, National Occupational Classification (NOC) 2011. Statistics Canada Catalogue No. 12-583-X. (Ottawa: January 2012) at pp. 7-18; Human Resources and Skills Development Canada, National Occupational Classification Matrix 2011, available online at: <http://www5.hrsdc.gc.ca/noc/english/noc/2011/pdf/Matrix.pdf> (accessed 24 February 2012).

NATIONAL OCCUPATION CLASSIFICATION (NOC) MATRIX



The economic immigration stream that leads to permanent status is itself divided into five pathways to permanent residence:

- (a) The majority of economic immigrants arrive under the **Federal Skilled Worker** class which, effective 1 July 2011, is limited to managerial, professional, and skilled workers (NOC O, A and B) who either have an offer of arranged employment or have work experience in one of 29 listed occupations that are designated as being in demand.²¹ In addition to proving that they have sufficient funds to independently support themselves and their families upon arrival, skilled worker applicants must also meet a required threshold on a point system that assesses their skills with reference to education, proficiency in English and/or French, work experience, age, arranged employment and adaptability.²² Effective 1 July 2012, the government imposed a moratorium on new applications under this class pending regulatory changes.
- (b) In response to the significant backlog that has developed in the Federal Skilled Worker class,²³ in 2009 the federal government created the **Canadian Experience Class** which provides a two-step pathway to permanent residence for high-skilled workers. Under the Canadian Experience Class, high-skilled workers who initially came to Canada as temporary workers can apply for permanent residence in an expedited way that avoids the backlog. This immigration stream is open to managerial, professional and skilled workers who have the equivalent of at least 2 years full-time skilled employment in NOC categories O, A or B in Canada and to international students who have completed a post-secondary diploma or degree in Canada and have the equivalent of at

²¹ See Department of Citizenship and Immigration, *Updated Ministerial Instructions*, (25 June 2011) Canada Gazette Part I at pp. 1966-1969 which identifies the 29 occupations for which applications will be accepted. Pursuant to the *Ministerial Instructions*, there is an overall cap of 10,000 new Federal Skilled Worker applications per year and within that 10,000 there is a cap of 500 for any of the 29 listed occupations. The cap came into effect on 1 July 2011. For the purpose of calculating the annual cap, the cap year runs from 1 July to the following 30 June unless changed by future Ministerial Instructions. Effective 1 July 2012, a moratorium was imposed on new applications under this class pending regulatory changes. The moratorium is expected to continue until January 2013: Department of Citizenship and Immigration, *Updated Ministerial Instructions* (28 June 2012) Canada Gazette Part I, Vol. 146, No. 26.

²² *IRP Regulations*, s. 75-83. In the March 2012 Budget, the federal government announced that "the federal skilled worker point system will be reformed to reflect the importance of younger immigrants with Canadian work experience and better language skills:" *Economic Action Plan 2012*, above note 10 at p. 152.

²³ By 2008, there was a backlog of some 640,000 applications in the Federal Skilled Worker stream and it was taking up to seven years to process applications. The federal government reports that under its 2008 *Action Plan for Faster Immigration* this backlog was reduced to 300,000 by early 2012 and processing of new applications was closer to 18 months. In the March 2012 federal budget, the government announced a plan to eliminate a further 200,000 applications from the backlog in a proposal to "return applications and refund up to \$130 million in fees paid by certain federal skilled worker applicants who applied under previous criteria established prior to February 27, 2008:" *Economic Action Plan 2012*, above note 10 at p. 136.

least one year full-time skilled employment in NOC categories o, A or B in Canada. These applicants must also meet assessments for proficiency in either English or French.²⁴

- (c) Business immigrants who are either able to invest in the Canadian economy or who will own and/or manage businesses in Canada can apply for permanent residence under the **Investor, Entrepreneur or Self-employed** categories. Ministerial Instructions in 2011 and 2012 have imposed a moratorium on new applications under both the Investor and Entrepreneur categories.²⁵
- (d) The federal government has entered into separate agreements²⁶ with eleven provinces and territories²⁷ to allow each participating province or territory to nominate economic immigrants for permanent residence where they believe the nominees will meet particular provincial/territorial needs. The details of the **Provincial Nominee Programs** vary from jurisdiction to jurisdiction. Programs either enable provinces or territories to nominate foreign nationals who are outside Canada or provide a two-step process by which temporary migrant workers who are in Canada, have Canadian experience and a permanent job offer can apply for permanent residence status. While some provinces admit lower skilled workers through the Provincial Nominee Program, in most provinces – including Ontario – this pathway to permanent residence is only available to skilled workers with permanent job offers in NOC o, A or B occupations who have been nominated by employers.²⁸ The Provincial Nominee Program is addressed in more detail in Part C of this paper.

²⁴ *IRP Regulations*, s. 87.1. In the March 2012 budget, the federal government announced that it would “introduce a new stream to facilitate the entry of skilled tradespersons:” *Economic Action Plan 2012*, above note 10 at p. 152.

²⁵ *IRP Regulations*, s. 88-109. Under Ministerial Instructions effective 1 July 2011, the government imposed a temporary moratorium on Entrepreneur class applications which will remain in place until otherwise indicated in a future Ministerial Instruction. In that Ministerial Instruction, the Investor class was also capped at 700 applicants per year. Updated Ministerial Instructions effective 1 July 2012 imposed a moratorium on all new applications under the Investor class which will remain in place until further notice. See *Updated Ministerial Instructions* (25 June 2011), above note 21 at p. 1969 and *Updated Ministerial Instructions* (28 June 2012), above note 21.

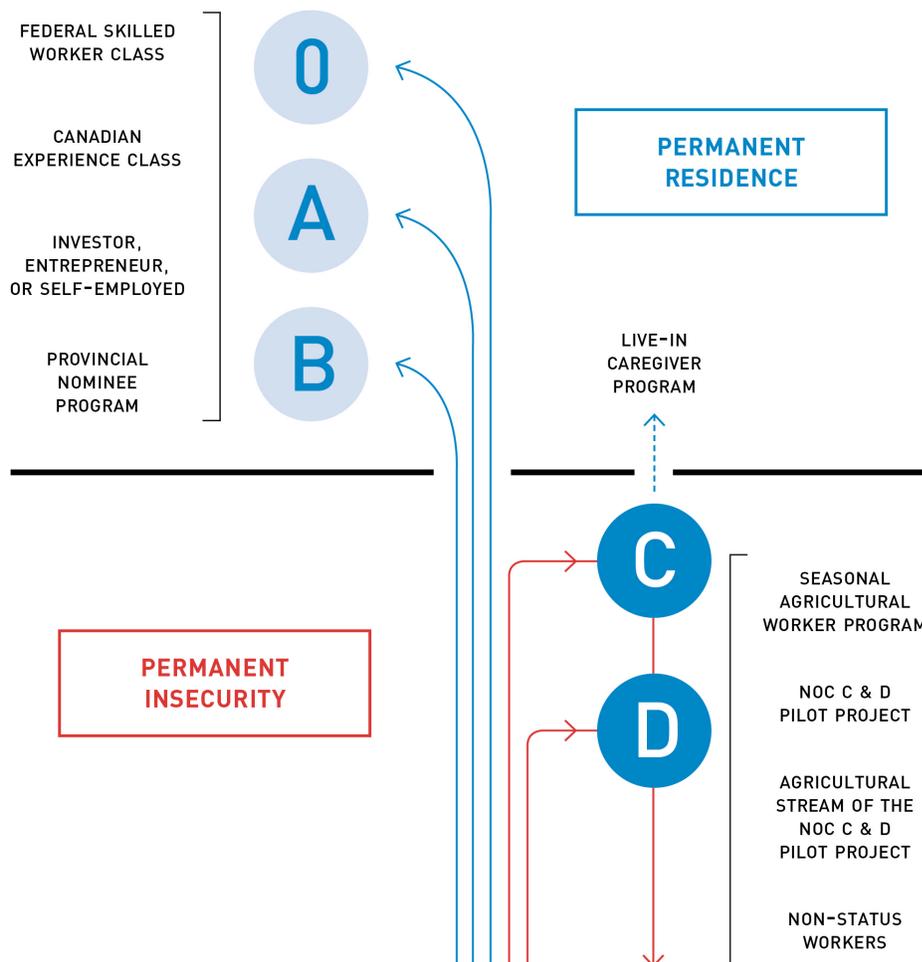
²⁶ These agreements are authorized under the *IRPA*, s. 8(1) and the *Department of Citizenship and Immigration Act*, S.C. 1994, c. 31, s. 5(1). The class of Provincial Nominee is created under the *IRP Regulations*, s. 87.

²⁷ The participating provinces and territories are British Columbia, Yukon, Alberta, Northwest Territories, Saskatchewan, Manitoba, Ontario, New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland and Labrador: see Citizenship and Immigration Canada, [Evaluation of the Provincial Nominee Program](http://www.cic.gc.ca/english/pdf/research-stats/evaluation-pnp2011.pdf) (September 2011), available online at: <http://www.cic.gc.ca/english/pdf/research-stats/evaluation-pnp2011.pdf> (accessed 13 March 2012)

²⁸ *Canada-Ontario Immigration Agreement*, Annex C, Pilot Provincial Nominee Program. See also Government of Ontario website, “Opportunities Ontario: Applying as a Foreign Worker,” online at: http://www.ontarioimmigration.ca/en/pnp/OI_PNPWORKERS_APPLY.html#_qualify (accessed 13 March 2012).

(e) Finally, the **Live-in Caregiver Program** provides a two-step immigration pathway for foreign nationals who come to Canada and work as live-in caregivers. They initially arrive as workers with temporary status on time-limited work permits. After completing the equivalent of two years of full-time work or 3900 hours as a live-in caregiver within four years of her or his entry to Canada, the migrant worker can apply for permanent resident status.²⁹

**PATHWAYS TO PERMANENT RESIDENCE
AND PATHWAYS TO PERMANENT INSECURITY**



²⁹ *IRP Regulations*, s. 110-115. For a critical analysis of the two-step immigration pathway under the Live-in Caregiver Program, see Salimah Valiani, "The Shift in Canadian Immigration Policy and Unheeded Lessons of the Live-in Caregiver Program" (3 March 2009), online at <http://mrzine.monthlyreview.org/2009/valiani030309.html> (accessed 3 February 2012).

As is clear from this overview, Canada's immigration system provides only very narrow circumstances in which lower skilled workers in NOC Skill Levels C and D can immigrate in their own right and secure permanent resident status. For lower skilled migrant workers in Ontario, the Live-in Caregiver Program is the sole pathway that provides any potential to access permanent resident status. All other lower skilled migrant workers in Ontario hold status in Canada only as temporary workers or workers without regular status. There are, then, four growing categories of migrant workers in the Toronto region who, despite lengthy tenures working in the province, are locked into a temporary status which precludes them from any pathway to permanent residence: seasonal agricultural workers, migrant workers under the NOC C & D Pilot Project, migrant workers under the NOC C & D Agricultural Stream, and non-status workers who provide labour without regularized immigration status.³⁰ All of these workers are "permanently temporary." This precarious immigration status forms a critical backdrop to migrant workers' entire experience in Canada. While live-in caregivers can eventually access a pathway to permanent residence, they must complete a lengthy period of labour with precarious temporary status. The legal structures of their work during this period of temporariness leads them to experience many of the same disadvantages and abuses that are shared by other lower skilled migrant workers who are permanently temporary. For all of these categories of workers, their precarious immigration status fundamentally affects virtually all aspects of their work/life experience.

2. Canada's Temporary Labour Migration Programs for Lower Skilled Workers

Canada has had a formal Temporary Foreign Worker Program ("TFWP") for nearly forty years. While formal international agreements to bring domestic workers³¹ and agricultural workers into Canada were in place as early as the 1950s and 1960s respectively, Canada introduced its first general program to admit temporary migrant workers into a broader range of occupations in 1973.³² The early iterations of this program were "targeted at specific groups such as academics, business executives and engineers – in other words, people with highly specialized skills that were not available in Canada."³³ The Temporary

³⁰ It is beyond the scope of this report to conduct a full analysis of the circumstances of non-status workers. This report does, however, identify some stages in the labour migration cycle which create insecurity that leads some migrant workers who arrive with valid status to fall out of status.

³¹ The history of organized efforts to bring foreign domestic workers to Canada has roots that date back to Confederation. For a review of this history and its evolution into the current Live-in Caregiver Program see Audrey Macklin, "Foreign Domestic Worker: Surrogate Housewife or Mail Order Servant?" (1992), 37 *McGill Law Journal* 681.

³² For a review of the evolution of Canada's temporary foreign worker programs see Fudge and MacPhail, "Temporary Foreign Worker Program in Canada," above note 4.

³³ Nakache and Kinoshita, "Canadian Temporary Foreign Worker Program", above note 4 at p. 4.

Foreign Worker Program continues to recruit and admit a wide range of high-skilled workers, including but not limited to academics, professionals, business visitors employed by foreign-owned companies, guest artists performing for time-limited engagements, information technology workers and occupations for which labour mobility is provided under international free trade agreements that Canada has signed.³⁴ However, beginning in the 1990s, and particularly since 2002, the Temporary Foreign Worker Program has evolved in response to employer demand to admit more workers and a much broader range of workers in lower skill occupations.

Four programs facilitate the temporary migration of lower skilled workers to Canada – the Live-in Caregiver Program, the Seasonal Agricultural Worker Program, the NOC C & D Pilot Project, and the Agricultural Stream of the NOC C & D Pilot Project. The specific terms and conditions of each program, their administrative structure, and the rights and protections available to workers under them vary. All four programs, though, share some critical features which lead the work done under them to be characterized as “unfree:” the work is done by workers who face legal restrictions on their right to be in Canada and who face legal restrictions on their ability to circulate in the labour market.³⁵ This section outlines the parallel processes that employers and employees generally follow as they enter into employment relationships under the temporary labour migration programs for lower skilled occupations. It then outlines the variations in the four specific programs.

a. General Requirements under the IRPA

Before a migrant worker can be employed in Canada, the employer must receive a Labour Market Opinion (“LMO”) which authorizes them to hire the migrant worker and the migrant worker must obtain a work permit.³⁶ In order to receive either an LMO or a work permit, the employer and employee must submit a signed employment contract covering prescribed terms. Three different federal bodies play a role in implementing these aspects of the Temporary Foreign Worker Program: Human Resources and Skills Development Canada/Service Canada (“HRSDC”), Citizenship and Immigration Canada (“CIC”), and Canada Border Services Agency (“CBSA”). These roles are outlined below.

³⁴ *IRP Regulations*, sections 186, 204, 205.

³⁵ See Victor Satzewich, *Racism and the Incorporation of Foreign Labour: Farm Labour Migration to Canada Since 1945* (London and New York: Routledge, 1991).

³⁶ A worker may also need to obtain a temporary resident visa: see, for example, *IRP Regulations*, s. 111 re live-in caregivers; *IRP Regulations*, Part 9 re temporary resident visas generally. The circumstances in which a person is exempt from requiring a temporary resident visa are set out in *IRP Regulations*, s. 190. See also <http://www.cic.gc.ca/english/visit/visas.asp>

i. *Labour Market Opinions*

Canada's Temporary Foreign Worker Program is an employer-driven program. As such, unlike the streams for permanent immigration outlined above, the federal government does not set ranges or targets for how many migrant workers may be admitted each year. The number admitted responds to employer demand. This has enabled the use of migrant workers to grow rapidly with little public debate or scrutiny. The number of migrant workers admitted to Canada dropped in 2009 following the economic crisis in 2008, but preliminary figures for 2011 suggest that migrant worker entries have returned to the peak that had been reached in 2008.³⁷ The number of migrant workers who are present in Canada on December 1 (including workers whose stay extends beyond a single year) has continued to rise throughout this period.³⁸

Table 2. Temporary Foreign Worker Entries and Present in Canada, Ontario and Toronto (All Skill Levels), 2000-2011

Year	Canada Entries	Canada Present	Ontario Entries	Ontario Present	Toronto Entries	Toronto Present
2000	116,491	89,746	59,196	46,465	22,061	16,984
2001	119,657	96,390	60,230	49,483	20,693	17,467
2002	110,861	101,099	55,038	50,466	19,331	18,176
2003	103,198	109,679	49,590	53,378	15,975	19,064
2004	112,508	125,034	52,039	58,816	16,471	21,116
2005	122,662	140,690	54,091	64,621	16,727	23,206
2006	139,000	160,854	59,052	71,821	19,207	27,115
2007	164,720	199,246	63,998	82,205	22,779	33,200
2008	192,180	249,796	66,718	90,885	26,463	40,143
2009	178,268	281,349	61,188	94,691	25,617	44,773
2010	182,276	282,771	66,016	99,597	30,367	49,949
2011	190,769	300,111	67,360	106,849	30,567	54,115

Source: Figures compiled from Citizenship and Immigration Canada, [Facts and Figures 2009](#), [Facts and Figures 2010](#), and Preliminary tables – Permanent and temporary residents 2011.

³⁷ *Preliminary tables – Permanent and temporary residents 2011*, above note 1. Ontario followed the same pattern, showing a one-year drop in 2009 before returning to prior levels in 2010 and continuing to rise in 2011. Toronto saw only a modest drop in 2009 followed by a significant increase in 2010 which was sustained in 2011.

³⁸ *Preliminary tables – Permanent and temporary residents 2011*, above note 1.

While no annual targets or caps are set on migrant worker admissions, Human Resources and Skills Development Canada (“HRSDC”) exercises oversight in determining what impact hiring a migrant worker may have on the Canadian labour market. Before an employer can hire a lower skilled migrant worker, the employer must apply for and receive a Labour Market Opinion from HRSDC which finds that the hiring will have either a positive or neutral impact on the Canadian labour market.³⁹ The LMO process serves two purposes. First, it ensures that an employer can only hire a foreign national on temporary status when the employer is unable to hire a Canadian citizen or permanent resident. Second, it ensures that foreign nationals are not hired on terms that undermine prevailing wages and working conditions in Canada.⁴⁰

The factors that HRSDC must consider in issuing its Labour Market Opinion include whether the employment of a migrant worker is likely to result in direct job creation or job retention for Canadian citizens or permanent residents, is likely to result in the creation of or transfer of skills and knowledge for the benefit of Canadian citizens or permanent residents, or is likely to fill a labour shortage.⁴¹ An LMO will not be granted if the employment of a foreign national would affect the settlement of any labour dispute or the employment of any

³⁹ *IRP Regulation*, s. 200(1)(c)(iii), s. 203, esp. s. 203(1)(b). There are a range of higher skilled occupations for which an employer is either not required to obtain an LMO or an employee is not required to obtain a permit: see, Fudge and MacPhail, “Temporary Foreign Worker Program in Canada,” above note 4 at pp. 11-15.

⁴⁰ On 25 April 2012, the federal government introduced an accelerated LMO application process for employers hiring high-skilled migrant workers. Instead of obtaining an LMO within 12 to 14 weeks as occurs under the regular process, the accelerated process enables eligible employers to obtain an LMO within ten business days. In addition, the government has introduced new rules which allow an employer to pay a high-skilled migrant worker up to 15% less than the prevailing wage for the occupation, provided that this lower wage is the same as what the particular employer pays to its Canadian or permanent resident employees in the same occupation: HRSDC, *Temporary Foreign Worker Program: Accelerated Labour Market Opinion Fact Sheet* (modified 1 May 2012), online at http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/almo/factsheet.shtml (accessed 2 May 2012). *The Globe and Mail* reports that “While the new national rules will apply only to high-skilled jobs at first, the government says it could be expanded to include other occupations:” Bill Curry and Josh Wingrove, “Alberta praises new foreign-worker rules” (25 April 2012), *The Globe and Mail*, online at <http://www.theglobeandmail.com/news/politics/alberta-praises-new-foreign-worker-rules/article2414392/> (accessed 26 April 2012). This development has come under criticism for creating a two-tiered wage system that will exert downward pressure on the labour market generally and that undercuts the principle reflected in the *IRPA* process that temporary labour migration should not undercut Canadian wages and working conditions: Armine Yalnizyan, “Changes to immigration policy could transform society” (3 May 2012) *The Globe and Mail* online at <http://www.theglobeandmail.com/report-on-business/economy/economy-lab/the-economists/changes-to-immigration-policy-could-transform-society/article2420367/> (accessed 3 May 2012); Bob Weber, “Labour groups say foreign worker changes attack Canadian wages,” *Winnipeg Free Press* online at <http://www.winnipegfreepress.com/business/labour-groups-say-foreign-worker-changes-attack-canadian-wages-149118005.html> (accessed 30 April 2012); “Two-tiered wage system announced by Tories” (28 April 2012) *Toronto Star* online at <http://www.thestar.com/opinion/editorials/article/1168905--two-tiered-wage-system-announced-by-tories> (accessed 28 April 2012); Canadian Labour Congress, “Pay less wage model unfair to migrant workers” (14 May 2012), online at <http://www.canadianlabour.ca/news-room/statements/pay-less-wage-model-unfair-migrant-workers> (accessed 14 May 2012).

⁴¹ *IRP Regulations*, s. 203(3)(a)-(c)

person involved in a labour dispute.⁴² HRSDC must also consider whether the wages offered to the foreign national are consistent with the prevailing wage rate for the occupation, whether the working conditions meet generally accepted Canadian standards and whether the employer has made reasonable efforts to hire or train Canadian citizens or permanent residents. While there are some variations for particular occupations, the minimum advertising effort generally requires that an employer advertise on the national Job Bank for a minimum of 14 days during the three months prior to seeking an LMO and conduct recruitment activities consistent with the practice of the occupation for a minimum of 14 days.⁴³

As employers' use of migrant workers increased dramatically in the last decade, concerns have been raised about whether sufficient scrutiny was being exercised by HRSDC at the LMO-granting stage.⁴⁴ This resulted in regulatory amendments effective 1 April 2011 which reinforced HRSDC's obligation to assess whether the job offer referred to in the LMO application is genuine. This assessment must be made with reference to whether the employer is actively engaged in the business in respect of which the offer is made; whether the offer is consistent with the reasonable employment needs of the employer; whether the employer can reasonably fulfil the terms of the offer; and whether the employer or recruiter has within the past two years complied with federal or provincial laws regulating migrant workers' employment.⁴⁵ Where an employer has previously failed to provide wages, working conditions or employment substantially the same as those offered, the employer is given an opportunity to justify that failure. The failure can be justified if it resulted from a change in federal or provincial law; a change to provisions of a collective agreement; a dramatic change in economic conditions that directly affected the employer's business provided that the measures are not disproportionately directed at foreign nationals; or errors made in good faith if compensation was

⁴² *IRP Regulations*, s. 203(3)(f).

⁴³ HRSDC, "Temporary Foreign Worker Program: Labour Market Opinion Assessment Criteria" (updated 26 August 2011), online at http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/temp_assessment.shtml (accessed 14 March 2012); HRSDC, "Temporary Foreign Worker Program: Variations to Minimum Advertising Requirements" (updated 27 February 2012), online at http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/lmodir/variation.shtml (accessed 14 March 2012).

⁴⁴ See, for example, *2009 Report of the Auditor General of Canada*, Chapter 2: Selecting Foreign Workers Under the Immigration Program (Ottawa: Office of the Auditor General of Canada, 2009) at 30-33; AFL, *Entrenching Exploitation*, above note 4 at pp. 19-20; UFCW Canada, *The Status of Migrant Farm Workers in Canada 2010-2011*, online at http://www.ufcw.ca/templates/ufcwcanada/images/awa/publications/UFCW-Status_of_MF_Workers_2010-2011_EN.pdf at p. 16; Fudge and MacPhail, "Temporary Foreign Worker Program in Canada," above note 4 at pp. 26-27. In addition, grassroots organizers report that sectors of agriculture that used to regularly employ Canadian citizens and permanent residents have, since the expansion of the NOC C & D Agricultural Stream, been increasingly staffed by migrant workers.

⁴⁵ *IRP Regulations*, s. 203(1)(a) and (e), s. 200(5).

subsequently provided to all foreign nationals who suffered a disadvantage.⁴⁶ An employer who cannot meet this justification is placed on a list of non-compliant employers and prohibited from hiring migrant workers for a period of 2 years.⁴⁷ While HRSDC reports that it has developed a method to identify employers for random and risk-based compliance review,⁴⁸ as of the date of writing, not a single employer is listed on the non-compliant employer list.⁴⁹

When a positive or neutral LMO is granted, HRSDC provides written confirmation of this opinion to the employer. The opinion is valid for the period set out on the LMO.⁵⁰ The employer must then send a copy of the LMO to the foreign national who must include it as part of their application for a work permit.

ii. Work Permits

A foreign national seeking to work in Canada must apply to Citizenship and Immigration Canada for a work permit. In most cases the worker must make this application from outside Canada although there are some circumstances where an application may be made at a port of entry.⁵¹ The worker must include a copy of the LMO and a copy of the signed employment contract with their application for a work permit. The application fee for a work permit is \$150.⁵² A CIC officer will issue a work permit if (a) there is a positive or neutral LMO; (b) the job offer is genuine and is not from a non-compliant employer who is listed as prohibited from hiring temporary foreign workers; (c) there are no reasonable grounds to believe that the foreign national is unable to perform the work sought; (d) the foreign national will leave Canada at the end of the work period that is authorized; and (e) the foreign national has passed a medical exam where this is required.⁵³ A medical exam is required when a foreign national is seeking to work in an occupation that involves protecting public health or is seeking to work for a period of more than six months and has spent six months or more in an area that the Minister determines has a higher incidence of serious

⁴⁶ *IRP Regulations*, s. 203(1)(e), s. 203(1.1).

⁴⁷ *IRP Regulations*, s. 203(1)(e), (1.1), (5), (6).

⁴⁸ Treasury Board of Canada Secretariat, *Temporary Foreign Worker Program: Horizontal Initiatives: Plans, Spending and Results 2010-2011*, online at <http://www.tbs-sct.gc.ca/hidb-bdih/plan-eng.aspx?Org=0&Hi=39&Pl=227> (accessed 30 March 2012).

⁴⁹ See Citizenship and Immigration Canada, *Temporary Foreign Worker Program – List of Ineligible Employers*, (last modified 3 May 2012), online at <http://www.cic.gc.ca/english/work/list.asp> (accessed 8 May 2012). The List states: "There are currently no employers listed."

⁵⁰ HRSDC notes that as of 2009-2010 it "established a validity period of a maximum of 6 months from date of issue for an LMO." Treasury Board of Canada, *Temporary Foreign Worker Program: Horizontal Initiatives: Plans, Spending and Results 2009-2010*, above note 48.

⁵¹ *IRP Regulations*, s. 197. The circumstances when an application for a work permit may be made at a port of entry are set out in s. 198. Circumstances when an application may be made from within Canada are set out in s.199.

⁵² *IRP Regulations*, s. 299

⁵³ *IRP Regulations*, s. 200.

communicable diseases than Canada.⁵⁴ A foreign national must also meet security requirements for entry to Canada. When a foreign national's application for a work permit has been approved, CIC provides a letter confirming that the person has been authorized to come to Canada for work. This letter is not, however, the work permit.

The foreign national does not finally receive the work permit until they are screened by the Canada Border Services Agency officer at the port of entry. After ensuring that the foreign national meets all criteria for entry into the country, including showing that they have the ability and willingness to leave Canada at the end of the period authorized for their stay, the CBSA officer prints off the work permit.⁵⁵

The work permits that are granted to workers in NOC Skill Levels C & D are tied permits. They limit the employee to performing the specific job that is listed on the permit, for the specific employer who is named on the permit, in the location that is identified on the permit, for the time period identified on the permit.⁵⁶ Engaging in work that is inconsistent with any of one these limitations amounts to unauthorized work. In addition, work permits for workers in NOC Skills Levels C & D typically also expressly prohibit the worker from enrolling in any course of study or training while working in Canada.⁵⁷

Effective 1 April 2011, regulations were introduced which will generally limit the total period that a migrant worker can work in Canada. A migrant worker can work on valid work permits (including initial permits and subsequent renewals) up to a maximum period of four years. After this, they will be required to leave the country for four years before being eligible to apply for another work permit.⁵⁸ Any work that was done by a migrant worker prior to 1 April 2011 is not affected by this regulation. The four-year limit only begins to run as of 1 April 2011. As a result, a CIC backgrounder notes that "the earliest date that a foreign worker could reach the four-year cumulative duration limit is April 1, 2015."⁵⁹

⁵⁴ *IRP Regulations*, s. 200(1)(e), s. 30.

⁵⁵ Citizenship and Immigration Canada, "Working Temporarily in Canada," online at <http://www.cic.gc.ca/english/work/arriving.asp>

⁵⁶ These restrictions are authorized under *IRP Regulations*, s. 185(a) and (b).

⁵⁷ This restriction is authorized under *IRP Regulations*, s. 185(c).

⁵⁸ *IRP Regulations*, s. 200(3)(g).

⁵⁹ CIC, "Backgrounder – Four-year limit for foreign nationals working in Canada" (24 March 2011), online at <http://www.cic.gc.ca/english/department/media/backgrounders/2011/2011-03-24.asp> (accessed 9 March 2012).

iii. *Employment Contracts*

As set out above, an employer must submit a signed employment contract to be reviewed as part of its application to receive an LMO and an employee must submit a signed copy of the same employment contract as part of his or her application for a work permit.

Migrant workers arriving under the Seasonal Agricultural Worker Program sign a standard contract that is negotiated between the Canadian government and the government of the sending country. These contracts are addressed in more detail in the section specifically concerning the Seasonal Agricultural Worker Program.

For the other three programs, HRSDC provides program-specific template employment contracts.⁶⁰ Employers and employees do not need to submit contracts in the precise form of the templates but all the information and clauses that appear in the template must be addressed in the signed contract before HRSDC will issue an LMO or CIC will issue a work permit. The template contracts all cover basic terms of employment including duration of contract, job duties, hours of work, wages, deductions from wages, and notice for resignation or termination. The template contracts also all contain provisions which address conditions uniquely relevant to transnational labour migration. These key provisions are:

- (a) a commitment that the employer shall not recoup from the employee, either through payroll deductions or by any other means, the fees they have paid to a third party recruiter or recruitment agency in relation to hiring and retaining the employee;
- (b) a commitment that the employer shall pay the employee's transportation costs for the one-way travel from the employee's country of permanent residence or country of current residence to the place of work in Canada. If the employee is currently working in Canada, the employer must agree to pay the costs of transportation to the new place of work in Canada. Under no circumstances can the employer recover the transportation costs from the employee.
- (c) a commitment that the employer shall provide health care insurance of equal coverage to the provincial health insurance plan at no cost to the employee until the employee is eligible for coverage under the provincial

⁶⁰ Service Canada, *Employment Contract Template Live-in Caregiver Employer/Employee Contract* (updated 21 September 2011), online at <http://www.cic.gc.ca/english/pdf/pub/LCP-contract-template-eng.pdf> (accessed 9 March 2012); HRSDC/Service Canada, *Sample Employment Contract* (for use in the NOC C & D Pilot Project), online at http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/forms/annex2-e.pdf (accessed 16 March 2012); Service Canada, *Employment Contract Agricultural Stream of the Pilot Project For Occupations Requiring Lower Levels of Formal Training (NOC C and D)*, online at <http://www.servicecanada.gc.ca/eforms/forms/hrsdcemp5510%282011-04-002%29e.pdf> (accessed 16 March 2012).

health insurance plan.⁶¹ The employer cannot make any deductions from the employee's wages for this coverage.

- (d) a commitment that the employer shall register the employee under the provincial workplace safety insurance plan. Again, the employer cannot deduct money from the employee's wages for this purpose.

All template contracts state that they must comply with provincial employment standards.

b. Specific Requirements under the Temporary Labour Migration Programs

Each of Canada's temporary labour migration programs includes some variations on the above requirements. The structures for each of these streams of temporary migration are set out below.

i. Live-in Caregiver Program

While Canada has made efforts and organized programs to recruit foreign caregivers for many years – from the Caribbean Domestic Scheme that began in 1955, through the Foreign Domestic Worker Movement that was established in 1981 – the current Live-in Caregiver Program (“LCP”) has been in place since 1992.⁶² The LCP is aimed at bringing workers to Canada to provide live-in care for children, disabled persons and elderly persons in private homes without supervision. Live-in caregivers are ranked at Skill Level C on the NOC matrix.

While employers and employees must follow the general process of applying for an LMO and work permit, additional requirements apply to both employers and employees under the LCP.

First, the template contract under the LCP is more detailed than the ones under the NOC C & D Pilot Project. The LCP contract includes the basic terms of employment and the key provisions regarding recruitment costs, transportation, health insurance and workplace safety insurance coverage. In addition, the contract includes provisions which set out the address and detailed description of the home where the employee will work; the identity and age of the persons for whom care will be provided; the duties and nature of care to be provided (child, elderly or disabled); and a description of the accommodations to be provided and the deductions that will be made for room and board. HRSDC posts regional prevailing wage rates and working conditions that must be provided for live-in caregivers. In Ontario, these terms for 2012 include wages

⁶¹ In general, a migrant worker who holds a work permit that is valid for at least six months and who has a formal agreement to work full-time for an employer in Ontario for no less than six consecutive months is eligible for coverage under the Ontario Health Insurance Plan after completing the three-month waiting period: *Health Insurance Act*, R.S.O. 1990, c. H-6, s. 11; *Health Insurance Act Regulations*, R.R.O. 1990, Reg. 552, s. 1.4, para. 6 and 12, s. 5(1) and s. 6-6.3.

⁶² For a history of the recruitment of foreign domestic workers, see Macklin, “Foreign Domestic Worker,” above note 31, and Fudge, “Global Care Chains,” above note 4 at 245.

of \$10.56 per hour; a maximum of 48 hours work per week; a maximum deduction of \$85.25 per week for room and board; and 2 uninterrupted weeks of vacation and vacation pay after 12 months employment.⁶³

Second, in applying for the LMO, the employer must show that the employee will work as a caregiver, residing in a private household, providing child care, senior home support care or care for a disabled person without supervision. Employers must submit proof of the age and/or disability of the persons who will receive the care. The employer must also give detailed information to show that they are able to provide adequate furnished and private accommodation for the caregiver in the household. And the employer must show that they have sufficient financial resources to pay the caregiver the wages that are offered.⁶⁴

Third, in addition to having a signed contract with their future employer, the foreign national applying for a work permit under the LCP must:

- (a) apply for the permit before entering Canada;
- (b) have completed a course of study that is equivalent to the successful completion of secondary school in Canada;
- (c) have completed six-months full-time classroom training or one-year full-time paid employment as a caregiver or in a related field, including at least six months' continuous employment with one employer; and
- (d) have the ability to speak, read and listen to English or French at a level sufficient to communicate effectively in an unsupervised setting.⁶⁵

A work permit under the LCP can be granted for a period of up to 4 years and three months.⁶⁶

Unlike the other NOC C & D level migrant worker categories, employees under the LCP have the opportunity to apply for permanent residence and can do so from within Canada. A temporary worker under the LCP can enter the Live-in Caregiver Class of the economic immigration stream and apply for permanent residence if, within four years of entering Canada, they have completed either two years full-time or 3900 hours of caregiving work without supervision while residing in the private household of the person for whom they have provided care.⁶⁷

⁶³ Human Resources and Skills Development Canada, *Temporary Foreign Worker Program: Regional Wages (2012), Working Conditions and Advertisement Requirements for the Live-in Caregiver Program (LCP)* (updated 5 March 2012), online at http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/caregiver/wages.shtml (accessed 27 June 2012).

⁶⁴ *IRP Regulations*, s. 203(1)(d).

⁶⁵ *IRP Regulations*, s. 112.

⁶⁶ Citizenship and Immigration Canada, *"The Live-in Caregiver Program: Who can apply"* (updated 19 January 2012), online at <http://www.cic.gc.ca/english/work/caregiver/apply-how.asp> (accessed 9 March 2012).

⁶⁷ *IRP Regulations*, s. 113. If calculating time worked based on hours, the 3900 hours must have been accumulated within no less than 22 months.

Ontario draws a disproportionate share of workers who enter Canada under the LCP.⁶⁸ Since 2001, between 48% and 59% of all live-in caregivers admitted to Canada on a yearly basis have come to Ontario. The number of live-in caregivers admitted to Ontario each year has risen from 2,101 in 2001 to 7,571 in 2008.⁶⁹ As caregivers' tenure of temporary work extends over several years, the number of live-in caregivers present in Ontario in any given year far exceeds the annual entries. Over the past decade, the number of live-in caregivers who are present in Ontario with temporary status has risen from 4,219 in 2001 to 21,047 in 2008. This represents an increase from 45% to 55% of all live-in caregivers present in Canada as a whole.

Toronto is the destination for most of the live-in caregivers who come to Ontario.⁷⁰ Of the 21,047 live-in caregivers present in Ontario under the LCP in 2008, 11,168 or 53% are recorded as working in Toronto. The urban centre in Ontario with the next largest concentration of these workers is Ottawa with 631. It can be assumed that the 53% figure vastly underrepresents the proportion of live-in caregivers who in fact work in Toronto as the CMA/urban area destination was not stated for 8,116 workers. Even working with this incomplete data, live-in caregivers account for nearly 30% of all migrant workers of all skill levels who are present in Toronto.

⁶⁸ The figures in this paragraph are calculated from various tables in Canada Facts and Figures 2010, above note 1 at pp. 62-64 and Government of Ontario, Research and Statistics: Temporary Residents 2008 (Information, Research & Evaluation Unit, Immigration Policy Branch, undated) at pp. 10-11, online at http://www.ontarioimmigration.ca/stdprodconsume/groups/csc/@oipp/documents/document/oi_stats_temps.pdf

⁶⁹ In 2010, HRSDC granted 10,070 LMOs to Ontario employers seeking to hire live-in caregivers under the LCP: see HRSDC, "Temporary Foreign Worker Program: Labour Market Opinion Statistics," online at http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/stats/index.shtml (accessed 7 March 2012). The figures compiled by HRSDC cannot be compared directly with the statistics that are compiled by CIC as the LMOs will relate to both new workers and workers who are already present in Ontario but are changing or renewing employment and LMOs granted in one year may not be filled in the same calendar year. The figures do, however, show a persistent demand for this work.

⁷⁰ The figures in this paragraph are calculated from various tables in Canada Facts and Figures 2010, above note 1 at pp. 74-76 and Ontario, Research and Statistics: Temporary Residents 2008, above note 68 at p. 23.

Table 3. Live-in Caregiver Entries and Present in Canada, Ontario and Toronto, 2001-2008

Year	Canada Entries	Canada Present	Ontario Entries (% of Canada)	Ontario Present (% of Canada)	Toronto Present
2001	4,369	9,458	2,101 (48%)	4,219 (45%)	2,923
2002	4,739	11,997	2,264 (48%)	5,673 (47%)	3,991
2003	5,085	13,878	2,483 (49%)	6,827 (49%)	4,096
2004	6,710	17,405	3,218 (48%)	8,583 (49%)	4,543
2005	7,203	20,393	3,637 (50%)	10,158 (50%)	5,217
2006	9,338	24,407	5,396 (58%)	12,841 (53%)	6,540
2007	13,773	33,664	7,849 (57%)	17,992 (53%)	9,161
2008	12,883	38,325	7,571 (59%)	21,047 (55%)	11,168

Source: Figures compiled and calculated from Citizenship and Immigration Canada, *Facts and Figures 2010* and Government of Ontario, Research and Statistics: Temporary Residents 2008 (Information, Research & Evaluation Unit, Immigration Policy Branch, undated) available online at http://www.ontarioimmigration.ca/stdprodconsume/groups/csc/@oipp/documents/document/oi_stats_temps.pdf

Live-in caregiving is a highly gendered and racialized occupation. The overwhelming majority of live-in caregivers – 95% – are women.⁷¹ As many as 95% of caregivers under the LCP are originally from the Philippines.⁷²

In 2009, CIC reported that after completing their prescribed two-years of work as live-in caregivers on temporary work permits, over 90% of participants in the LCP apply for permanent resident status and 98% of these applicants are successful.⁷³ The Philippines was the birth country of nearly 90% of LCP participants who were granted permanent residence in 2009.⁷⁴ While live-in

⁷¹ Ontario, *Research and Statistics: Temporary Residents 2008*, above note 68 at p. 22.

⁷² See Fudge, "Global Care Chains," above note 4 at p. 247. Statistics from CIC indicate that in 2008, the Philippines was the country of last permanent residence for 76% of all live-in caregivers in Ontario: see Ontario, *Research and Statistics: Temporary Residents 2008*, above note 68 at p. 11. See also figures reported in Valiani, "Unheeded Lessons of the Live-in Caregiver Program," above note 30. The discrepancy between this figure and the 95% figure reported elsewhere may arise because migrant Filipina caregivers are dispersed around the world and are recruited not just from the Philippines but from the various other countries where they work.

⁷³ Department of Citizenship and Immigration, "Regulations Amending the *Immigration and Refugee Protection Regulations: Regulatory Impact Analysis Statement*" (19 December 2009), 143:51 Canada Gazette 3781 at 3781. But see Valiani, "Unheeded Lessons of the Live-in Caregiver Program," above note 29 who raises questions about the frequency with which caregivers are unable to meet the 24-months of required work within the allotted time and so spend an extended period with temporary status.

⁷⁴ Philip Kelly, Stella Park, Conely de Leon and Jeff Priest, *TIEDI Analytical Report 18: Profile of Live-in Caregiver Immigrants to Canada, 1993-2009* (Toronto: Toronto Immigrant Employment Data

caregiving work is ranked at NOC Level C, in 2009 63% of caregivers who were granted permanent resident status had completed a bachelor's degree or higher at the time they immigrated. So while their work is classified as "lower skilled," the workers themselves have higher qualifications which may be more consistent with work at NOC Skill Levels A and B. This raises pressing concerns about worker deskilling in the course of migration. This issue is addressed in more detail in Part C.

ii. Seasonal Agricultural Worker Program

As with live-in caregiving work, Canada and Ontario have had chronic labour shortages for seasonal agricultural labour since at least the early 1900s and have, since that time, pursued various arrangements to import foreign labour.⁷⁵ In response to lobbying from Ontario fruit and vegetable growers, in 1966 the federal government implemented the Commonwealth Caribbean Seasonal Agricultural Worker Program ("SAWP") which admitted workers from Jamaica to enter Canada on a seasonal basis for agricultural work. Over the next ten years, the following countries also joined the SAWP: Barbados and Trinidad and Tobago in 1967, Mexico in 1974, and the Organization of Eastern Caribbean States (Antigua and Barbuda, Dominica, Grenada, Montserrat, Saint Christopher-Nevis, Saint Lucia, and Saint Vincent and the Grenadines) in 1976.

The SAWP facilitates the migration of workers into Canada for on-farm employment in primary agriculture in the following commodities: fruits, vegetables, flowers, apiary products, Christmas trees, pedigreed canola seed, sod, tobacco, bovine, dairy, duck, horse, mink, poultry, sheep and swine.⁷⁶

Unlike the LCP which is established by way of public regulations made under the *Immigration and Refugee Protection Act*, the SAWP is established through a series of bilateral Memoranda of Understanding ("MOU") that are signed by Canada and each of the participating sending countries. Unlike the LCP and the NOC C & D Pilot Project, there is a higher degree of government participation in the administration of the SAWP. The MOUs include operational guidelines that

Initiative, March 2011) at p. 10. The Philippines was the country of birth for 83% of all immigrants granted permanent residence under the LCP for the entire period from 1993 to 2009. India is the second largest source country.

⁷⁵ For a history of migrant farm labour in Canada and the evolution of the Seasonal Agricultural Worker Program, see Satzewich, *Racism and the Incorporation of Foreign Labour: Farm Labour Migration to Canada since 1945*, above note 35.

⁷⁶ HRSDC, "Temporary Foreign Worker Program: National List of Commodities for the Seasonal Agricultural Worker Program and the Agricultural Stream of the Pilot Project for Occupations Requiring Lower Levels of Formal Training," online at http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/commodities.shtml (accessed 2 February 2012); see also HRSDC, "Temporary Foreign Worker Program: Definition of Primary Agriculture," online at http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/Agricultural/primary.shtml.

outline the respective roles and duties for the sending government, the Canadian government, the Canadian employers and the migrant workers.⁷⁷

Under these guidelines, the Mexican and Caribbean governments are responsible for the recruitment, selection and documentation of workers who are able to perform the agricultural work and who meet the medical examination requirements. They maintain a pool of workers who are available to depart to Canada when requests are made by Canadian employers. The Mexican and Caribbean governments also post government agents in Canada to assist CIC and HRSDC staff in the administration of the program and to serve as a contact point for workers.⁷⁸

The Canadian government sets the immigration criteria for admission to Canada under the SAWP (including that the workers have experience in farming; be at least 18 years of age; be nationals of one of the participating countries; satisfy the immigration laws of Canada and the sending country; and accept and sign the designated employment contract). HRSDC issues LMOs to employers requesting foreign labour⁷⁹ and CIC processes work authorizations. Industry-based employer organizations are designated to administer employer applications for SAWP workers. In Ontario, the designated agency is the Foreign Agricultural Resource Management Services (“FARMS”). FARMS is a private-sector not-for-profit organization that was federally incorporated in 1987. It is governed by a Board of Directors appointed by the agricultural commodity groups that participate in the SAWP.⁸⁰ While the regular steps of obtaining an LMO and work permit must be followed under the SAWP, their processing is facilitated and coordinated in Ontario by FARMS which acts as the employer’s third-party representative. The employer submits the completed LMO application to FARMS along with a payment of \$150 to HRSDC for the worker’s work permit. This fee is later recovered from the worker.⁸¹

Participating employers must also pay an administrative fee to FARMS for each worker placed on their farm.⁸² When HRSDC provides authorization for an employer to hire a migrant worker, FARMS relays the request for workers to the government agent for the country from which the employer has requested

⁷⁷ See Veena Verma, *The Mexican and Caribbean Seasonal Agricultural Workers Program: Regulatory and Policy Framework, Farm Industry Level Employment Practices, and the Future of the Program Under Unionization* (Ottawa: North-South Institute, 2003) for a more detailed overview of the regulatory and policy framework of the SAWP.

⁷⁸ See HRSDC, “Seasonal Agricultural Worker Program,” online at http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/stats/annual/foreword_sawp.shtml (accessed 16 March 2012).

⁷⁹ Service Canada, *Application for a Labour Market Opinion (LMO) Seasonal Agricultural Worker Program (SAWP)*, online at <http://www.servicecanada.gc.ca/eforms/forms/sc-emp5389%282012-01-008%29e.pdf> (accessed 16 March 2012).

⁸⁰ See www.farmsontario.ca.

⁸¹ See Mexican and Caribbean SAWP contracts, below.

⁸² The administrative fee for 2012 is \$35 per worker arrival or worker transfer: www.farmsontario.ca.

workers and to CanAg Travel Services which under the MOUs is the sole travel agency authorized for the program.⁸³

Under the operational guidelines, employers and workers participating in the SAWP and the government agent of the sending country are all required to sign the specific employment contract that is attached to the relevant MOU and that is mandated for workers from the applicable source country.⁸⁴

The operational guidelines and employment contracts are subject to negotiation at annual meetings between the Canadian government, the specific sending government, and employer representatives from the Canadian Horticultural Council.⁸⁵ No independent employee groups or worker representatives participate in these negotiations.

The contracts that have been negotiated for Mexican workers and Caribbean workers vary in some respects. However, some of the key features that are common to both are as follows:

- (a) Under the SAWP, an employer agrees to provide a worker with a minimum of 240 hours work within 6 weeks. An individual worker can work for no more than a maximum of eight months between 1 January and 15 December of each year.
- (b) The employer agrees to pay the worker wages that are equal to the greatest of the provincial minimum wage, the rate that HRSDC determines is the prevailing wage for the type of agricultural work being performed,⁸⁶ or the rate being paid by the employer to Canadian workers performing the same type of agricultural work.⁸⁷
- (c) The employer agrees to pay CanAg Travel the cost of round-trip airfare from either Mexico City or Kingston, Jamaica to Canada and covers the costs of transportation from the point of arrival in Canada to the place of employment. Part of the cost of the worker's air travel is recovered from the employee through regular payroll deductions.⁸⁸ Where the worker is

⁸³ FARMS, "How to Apply" and "Program Details," online at www.farmsontario.ca (accessed 16 March 2012).

⁸⁴ See: *Agreement for the Employment in Canada of Seasonal Agricultural Workers from Mexico – 2012*, online at http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/forms/sawpmc2012.pdf ("*SAWP Contract - Mexico – 2012*") and *Agreement for the Employment in Canada of Commonwealth Caribbean Seasonal Agricultural Workers – 2012*, online at http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/forms/sawpcc2012.pdf ("*SAWP Contract – Caribbean – 2012*").

⁸⁵ See Preibisch, "Development as Remittances or Development as Freedom," above note 3; see also FARMS website, www.farmsontario.ca.

⁸⁶ The prevailing hourly wage rate for the year for each commodity, as determined by HRSDC, is posted on the HRSDC website: http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/commodities.shtml (accessed 2 February 2012).

⁸⁷ *SAWP Contract – Mexico – 2012*, Article III, para. 3; *SAWP Contract – Caribbean – 2012*, Article III, para. 1.

⁸⁸ Mexican workers must repay the employer up to a maximum of \$589 to cover the travel costs. This amount is recouped through regular payroll deductions at a rate of 10% of the worker's gross pay

repatriated before the end of the contract due to “non-compliance, refusal to work or any other sufficient reason,” the worker may be required to pay the full cost of the repatriation.⁸⁹

- (d) The employer agrees to provide accommodation for the worker without charge. The accommodation must meet an annual government inspection.⁹⁰ This inspection is typically done before workers arrive for the season.
- (e) The employer must either provide meals for the workers or provide facilities for workers to prepare their own meals. Where employers provide meals, they can deduct either \$6.50 (Mexican contract) or \$7.00 (Caribbean contract) per day from the worker’s wages.⁹¹
- (f) SAWP workers can only transfer from one employer to another with the prior written approval of the Canadian government, their home government, and both the transferring and receiving farms.⁹²

A unique aspect of the SAWP is that the employer has the power to request by name the employees they wish to rehire in a subsequent season. Where an employee has worked on a particular farm, the employer can “name” them to return the following year. Whether or not a worker is named lies within the sole discretion of the employer.⁹³ While this allows named workers to receive priority in immigration processing, the naming power also gives the employer considerable power in the employment relationship as the worker’s future employment is contingent on maintaining good relations with the employer.

From its modest beginnings with 263 workers from Jamaica in 1966, the SAWP has grown to regularly provide more than 20,000 migrant workers to Canada each year. In 2010, 23,930 workers entered Canada under the SAWP: 15,957 from Mexico and 7,973 from the Caribbean. The majority of those workers come to southern Ontario. Of the 23,930 workers entering Canada under the SAWP in 2010, 15,435 workers – 64% of the total – worked in Ontario.⁹⁴ Of these workers in Ontario, 8,182 came from Mexico and 7,253 from

from the first day of full employment until the maximum is reached: *SAWP Contract – Mexico – 2012*, Article VII, para 3. Workers from the Caribbean repay the employer up to a maximum of \$515 to cover travel costs. This amount is recouped through payroll deductions of \$4.29 per working day from the first day of full employment until the maximum is reached: *SAWP Contract – Caribbean – 2012*, Article VII, para. 3.

⁸⁹ *SAWP Contract – Mexico – 2012*, Article X; *SAWP Contract – Caribbean – 2012*, Article X.

⁹⁰ *SAWP Contract – Mexico – 2012*, Article II; *SAWP Contract – Caribbean – 2012*, Article II.

⁹¹ *SAWP Contract – Mexico – 2012*, Article IV; *SAWP Contract – Caribbean – 2012*, Article IV.

⁹² *SAWP Contract – Mexico – 2012*, Article IX, para. 5; *SAWP Contract – Caribbean – 2012*, Article IX, para. 6.

⁹³ Exceptions to this pattern have occurred in limited circumstances outside Ontario in situations where migrant farm workers have been able to unionize and to negotiate recall provisions in their collective agreements. These negotiated protections have not been secured in Ontario as farm workers do not have the right to unionize in this province.

⁹⁴ In 2010, 64% of all SAWP workers in Canada worked in Ontario. This figure is calculated using tables from *Canada Facts and Figures 2010*, above note 1 at 68 and *FARMS, Statistics: 2009/2010 2*

the Caribbean. They filled 17,766 positions, with workers transferring to a second or subsequent farm in 2,331 cases.⁹⁵

Just as the work under the LCP is both racialized and gendered, so too is the work under the SAWP, although this work is male-dominated. Consistently between 97% and 98% of workers under the SAWP are men.⁹⁶

Most workers under the SAWP engage in seasonal employment in Canada over many years. SAWP workers are expressly exempted from the four-year work/four-year absence rule that generally applies to migrant workers.⁹⁷ Between 70% and 80% of migrant workers under the SAWP are named workers who are rehired year after year by the same employer.⁹⁸ Jenna Hennebry reported recently that,

75 percent of all [Mexican] workers participating in the SAWP in 2010 had been participating in the program for 4 years or more, with 57 percent of workers participating for 6 years or more, and 22 percent participating for more than 10 years. ... Among the nearly 600 migrant farm workers surveyed in Ontario, workers participated in the SAWP for an average of 7 to 9 years; many returning to Canada for upwards of 25 years.⁹⁹

Despite the persistent need for farm labour and the long-term attachment of the workers, workers under the SAWP do not acquire any right to apply for permanent resident status. The work that they perform is ranked at NOC Skill Levels C and D and so they are ineligible for pathways to immigration under the Federal Skilled Worker Class, the Canadian Experience Class or Ontario's Provincial Nominee Program.

iii. NOC C & D Pilot Project – General Stream and Agricultural Stream

In 2002, in response in particular to employer demand in the oil and gas industry in Alberta and the construction sector in Toronto,¹⁰⁰ the federal government created a "Pilot Project" to facilitate the temporary migration of workers in occupations requiring lower levels of formal training. The Pilot Project is open generally to occupations at the NOC C and D Skill Levels as long as the employer is able to secure a neutral or positive LMO.

Year Activity Comparison, online at http://www.farmsontario.ca/pages.php?_ID=5 (accessed 21 September 2011).

⁹⁵ FARMS, *Statistics: 2009/2010 2 Year Activity Comparison*, above note 94.

⁹⁶ Ontario, *Research and Statistics: Temporary Residents 2008*, above note 68 at p. 22.

⁹⁷ *IRP Regulations*, s. 200(3) (g) (iii).

⁹⁸ Hennebry, *Permanently Temporary*, above note 4 at p. 5; North-South Institute Policy Brief, *Migrant Workers in Canada: A Review of the Canadian Seasonal Agricultural Workers Program* (Ottawa: North-South Institute, 2007) at p. 4.

⁹⁹ Hennebry, *Permanently Temporary*, above note 4 at p. 13.

¹⁰⁰ See Fudge and MacPhail, "Temporary Foreign Worker Program in Canada," above note 4 at p. 22.

Work permits under the Pilot Project were originally limited to 12 months. Since 2007, however, work permits have been issued for up to 24 months. While work permits can be renewed, workers in the NOC C & D Pilot Project will be subject to the new 4-year work/4-year absence rule.

Unlike the LCP, workers under the NOC C & D Pilot Project earn no right to apply for permanent residence. Unlike the SAWP, there are no government-to-government negotiations that give shape to or provide oversight of the program and governments are not involved in selecting employees. Recruiting happens privately, often through recruitment agencies based either in Canada or abroad. Accordingly, the evolution of these temporary migration programs shows a progressive stepping down in government's commitment to workers and government involvement and accountability in program administration. While government creates the conditions which allow the migrant work relationships to be formed, the governance of the relationship is increasingly privatized between employer and worker.

Again, HRSDC has posted a sample contract that employers should use when submitting an application for an LMO to hire workers under the NOC C & D Pilot Project. While the sample contract is intended to help ensure that employers provide terms and conditions that are consistent with provincial minimum standards, the federal government has no authority to ensure contract compliance. The instructions on the sample contract expressly warn that:

The Government of Canada is not a party to the contract. Human Resources and Skills Development Canada (HRSDC)/Service Canada has no authority to intervene in the employer-employee relationship or to enforce the terms and conditions of employment. It is the responsibility of the employer and worker to familiarize themselves with laws that apply to them and to look after their own interests.

The contract assists HRSDC/Service Canada officers in forming their Labour Market Opinions, pursuant to their role under the Immigration and Refugee Regulations.¹⁰¹

The sample contract under the NOC C & D Pilot Project sets out the standard clauses outlined above regarding terms of employment and the specific clauses on recruitment costs, transportation costs, health insurance and workplace safety insurance. It also includes a commitment that the employer will review wages after 12 continuous months of employment to ensure wages continue to meet the prevailing wage rate for the occupation in the region. What is different

¹⁰¹ HRSDC, *Instruction Sheet to Accompany Employment Contract*, online at http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/contracts-forms/annex2.shtml (accessed 16 March 2012). [emphasis added]

in this template contract is the clause dealing with housing for the worker. Unlike the LCP and SAWP, an employer under the NOC C & D Pilot Project is not required to provide housing for the worker. However, the employer must ensure that reasonable and proper accommodation is available for the employee. This responsibility can be met if the employer shows, for example, by way of newspaper clippings, that affordable housing is available where the employee is expected to work.¹⁰²

In expanding the NOC C & D Pilot Project, the federal government also introduced an Agricultural Stream that in effect competes with the SAWP. HRSDC notes that employers can use non-profit organizations to assist them in obtaining LMOs under the NOC C & D Agricultural Stream. FARMS posts information on its website about how to apply for permits under this program and notes that it administers employer requests for migrant workers from Guatemala and Honduras.¹⁰³

Under the NOC C & D Agricultural Stream, employers can hire workers on work permits of up to 24 months (rather than the 8 months under the SAWP). The SAWP and the NOC C & D Agricultural Stream cover the same occupations in primary agriculture in the same commodities. Employers who wish to hire agricultural workers for occupations that are outside primary agriculture or for occupations in other commodities, can hire those workers under the general stream of the NOC C & D Pilot Project.

Under the NOC C & D Agricultural Stream, there is no restriction on the source countries from which migrant farm workers can be recruited and HRSDC notes that employers “are free to choose between the SAWP and the Agricultural Stream of the NOC C and D Pilot Project.”¹⁰⁴ Unlike the SAWP, however, there is no government involvement in recruitment; recruitment is done privately by the employer.

Under guidelines to the NOC C & D Agricultural Stream, employers are expected to pay migrant workers the same prevailing wage that is set by HRSDC for SAWP workers.

¹⁰² HRSDC, “*Pilot Project for Occupations Requiring Lower Levels of Formal Training (NOC C and D): Assessment Criteria for Labour Market Opinion Applications*,” guideline re housing (updated 13 July 2011), online at http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/lsasse.shtml#hous (accessed 16 March 2012).

¹⁰³ HRSDC, “*Guidelines for Hiring Temporary Foreign Workers Under the Agricultural Stream of the NOC C and D Pilot Project*,” online at http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/Agricultural/directives.shtml (accessed 16 March 2012); FARMS, “*Other Foreign Worker Program*,” online at <http://www.farmsontario.ca/lowskill.php> (accessed 16 March 2012).

¹⁰⁴ HRSDC, “*Agricultural Stream of the Pilot Project for Occupations Requiring Lower Levels of Formal Training (NOC C and D)*,” online at http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/Agricultural/directives.shtml (accessed on 21 September 2011).

HRSDC provides a specific sample contract for the NOC C & D Agricultural Stream. This contract is very similar to the regular NOC C & D sample contract except with respect to housing for the worker. Unlike the regular NOC C & D sample contract, the Agricultural Stream contract requires that the employer must provide the migrant worker with either on-site or off-site accommodation that is inspected annually. Unlike the SAWP contract, though, under the Agricultural Stream the employer can recoup the cost of accommodation through payroll deductions at the level set under HRSDC guidelines or less if required by provincial employment standards legislation. The HRSDC guidelines currently provide that employers can deduct \$30 per week for accommodation and that this fee can increase by 1% per year effective on 1 January of each year.¹⁰⁵

Although it is still called a “Pilot Project,” the NOC C & D Pilot Project has been in place for nearly a decade. From an initial intake of 2,277 workers in 2002, this temporary migration program has grown to 14,893 entries in 2010.¹⁰⁶ The number of workers present in Canada under the NOC C & D Pilot Project in 2010 was 28,930.¹⁰⁷

While Alberta has been the destination for most migrant workers under the NOC C & D Pilot Project, in 2010 HRSDC issued 2,850 positive or neutral LMOs to Ontario employers under this stream.¹⁰⁸ Employers continue to recruit agricultural workers under the SAWP, but union and community organizers report that increasing numbers of migrant agricultural workers from other countries – including Guatemala, Thailand, Peru and the Philippines – are arriving in Ontario under the NOC C & D Agricultural Stream. In addition, Ontario employers are hiring NOC C & D migrant workers into occupations in diverse sectors such as restaurants, food processing, cleaning, construction, road building and tourism.¹⁰⁹

¹⁰⁵ HRSDC, “*Guidelines for Hiring Temporary Foreign Workers Under the Agricultural Stream of the NOC C and D Pilot Project*,” above note 103.

¹⁰⁶ This figure is down from the peak of 25,733 entries in 2008 before the economic crisis. See *Canada Facts and Figures 2010*, above note 1 at p. 66.

¹⁰⁷ *Canada Facts and Figures 2010*, above note 1 at p. 68. This figure is down from the 2008 figure of 37,193.

¹⁰⁸ HRSDC, “*Labour Market Opinion (LMO) Statistics*,” above note 69.

¹⁰⁹ See also Ontario, *Research and Statistics: Temporary Residents 2008*, above note 68 at pp. 20-21.

Table 4. NOC C & D Pilot Project Entries and Workers Present in Canada, 2002-2010

Year	Canada Entries	Canada Present
2002	2,277	1,304
2003	2,336	1,581
2004	2,796	1,869
2005	3,781	2,282
2006	6,554	4,314
2007	15,365	13,354
2008	25,733	29,570
2009	19,069	37,193
2010	14,893	28,930

Source: Figures compiled from Citizenship and Immigration Canada, [Facts and Figures 2010](#)

The above review of the categories of workers who are admitted under Canada's temporary labour migration programs underscores the fact that there have been long-term chronic labour shortages in particular sectors of the economy as well as emerging shortages. There has been a long-standing need for workers to provide live-in care to children, the elderly and persons with disabilities. There has been a long-standing need for workers in the agricultural sector. The jobs into which NOC C & D stream workers are recruited are jobs that are a regular part of the local labour market (construction, restaurants, hotels, cleaning). While the use of temporary foreign labour provides a short-term response to a particular employer's labour needs, it does not change the fact that at a sectoral level these needs are chronic. As noted at the outset, it is important to engage in a critical discussion about whether the nature of the work at issue is truly temporary, whether creating workers as temporary leaves them open to undue exploitation, and whether these chronic shortages may be better addressed through changes to the permanent immigration system that would allow for greater long-term sustainable economic and community development.

Senthil's Story

I came to Canada from India. I had a good job at a large restaurant in India and was recruited to work in a restaurant in Canada. I paid for my own flight to Canada but when I got here it was very different from what I was led to expect.

I worked for one restaurant where I was promised \$15 per hour plus time and a half for overtime. But I never got paid that. I worked 11 to 12 hours a day, 60 to 70 hours each week. I had only one day off but it was never on the weekend. Often I had my day off on Monday but I didn't have a consistent day off. I had no lunch break. If a customer came in while we were eating we had to stop eating and start working again. I had no vacation and no holidays. I didn't even get time off to go to the doctor. I was promised \$15 per hour but I was getting less than minimum wage. I was only paid \$8 per hour. I never got overtime pay. I was promised paid flights to go back home for the holidays but I didn't get that either. I lived in one room in a basement. The weather is very tough and the basement was cold. I had little salary but I needed to pay rent, pay phone bills, buy groceries. There was nothing luxurious.

If we are not earning the money that we were promised, what is the point of coming to Canada to work? As migrant workers, our human rights are being violated every day. If I knew that this is what it would be like, I would not have come. But when I came here, I lost my job in India so if I go back I have no job there. I am stuck in between.

As a migrant worker coming to Canada it is very hard. We have no connections, no family, no friends. Nobody knows us. We don't know anyone. Nobody is there to help us. We should get a welcome package when we arrive that tells us all the details we need to know. When we come here we don't know what our rights are. We don't know what the law is. We don't even know where to go to get that information. We don't know who can help us. The lack of information is a very big problem.

When we lose our jobs, it is very tough to survive in Canada. The work permit only lets us work for one employer. If we try to change jobs we need to get a new work permit. But it can take up to six months to get a new work permit and during that time we cannot work. What is the government going to do about that waiting time? What are we supposed to do during this time? We are losing experience, losing credit, losing everything. If we lose our job, we should be able to work somewhere else. We should be issued an open permit that doesn't tie us to one employer.

We should also be able to bring our spouses and families with us like skilled workers can.

B. A RIGHTS-BASED FRAMEWORK FOR ASSESSING MIGRANT WORKERS' PROTECTION

There are detailed legal and policy regimes that regulate migrant workers' employment and social rights while they are in Ontario. Critical questions arise, however, about whether those regimes are in fact able to provide migrant workers with a real experience of security and decent work: Do the existing legal regimes enable migrant workers to have a real experience of rights? Or is there a gap between the formal promise and the practical exercise of rights? Formal rights have limited meaning if workers are not able to experience the real protection of those rights and are not able to access effective enforcement of those rights.

Both Canadian and international law provide rights-based frameworks which articulate binding legal obligations and/or widely accepted principles against which migrant workers' lived experience can be compared. This section of the paper canvasses those legal sources to identify values and principles that provide meaningful standards against which to assess the treatment of migrant workers in Toronto.

1. *Canadian Charter of Rights and Freedoms*

The *Canadian Charter of Rights and Freedoms* establishes the fundamental rights that are guaranteed to individuals in Canada.¹¹⁰ All laws, all government policy, and all conduct by government bodies and officials must comply with the *Charter*. One significant limitation, however, is that the *Charter* only applies to government (laws, policies, conduct).¹¹¹ *Charter* rights generally cannot be asserted directly against private entities or persons.¹¹² What this means in practice, for example, is that while a *Charter* claim can challenge the constitutionality of legislation that regulates employment in the private sector,

¹¹⁰ The rights that are protected under the *Charter* are not absolute. Instead, section 1 of the *Charter* establishes a dynamic tension between the guarantee of rights and the recognition that rights may be subject to limitations imposed by law where this is demonstrably justified with reference to the fundamental values of a democratic society. Section 1 provides as follows: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

¹¹¹ *Charter*, s. 32.

¹¹² While this is generally the case, there are circumstances in which a non-government entity that is integrally involved in implementing or carrying out a government program or policy may be subject to the *Charter*: see, for example, *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624.

in most situations a *Charter* claim cannot be filed to challenge the conduct of or seek a remedy directly from a private sector employer.¹¹³

The rights that are most significant for migrant workers are found in sections 2, 6, 7 and 15 of the *Charter*:

- (a) Section 2 of the *Charter* guarantees that “everyone” is entitled to four fundamental freedoms: freedom of conscience and religion [s. 2(a)]; freedom of thought, belief, opinion and expression [s. 2(b)]; freedom of peaceful assembly [s. 2(c)]; and freedom of association [s. 2(d)]. The Supreme Court of Canada has recognized that under freedom of association the *Charter* protects employees’ right to collective representation, including the right to join a union, and the right to engage collectively to advance workplace goals, including the right to engage in a process of collective bargaining.¹¹⁴
- (b) Section 7 guarantees that “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”
- (c) Section 15 guarantees that “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

The right to equality under s. 15 prohibits discrimination based on the grounds that are expressly enumerated in the section and based on grounds that are “analogous” to these.¹¹⁵ Most significantly for migrant workers, the Supreme Court of Canada has recognized that discrimination based on citizenship can contravene the right to equality.¹¹⁶ The Court has not, to date, recognized “occupational status” as a prohibited ground of discrimination.¹¹⁷ In claims of discrimination

¹¹³ See, for example, *Dunmore v. Ontario (Attorney General)*, above note 7; *Ontario (Attorney General) v. Fraser*, 2011 SCC 20; [2011] 2 S.C.R. 3. However, see also the Statement of Claim (17 November 2011) in *Espinoza et al v. Tigchelaar Berry Farms Inc. et al*, Ontario Superior Court of Justice, Court File No. CV-11-439746 in which the plaintiffs allege that the private employer-respondent is subject to the *Charter* because, as discussed in the note above, it is exercising authority pursuant to SAWP’s statutory framework and is acting in pursuit of a specific objective of the Government of Canada.

¹¹⁴ *Health Services and Support - Facilities Subsector Bargaining Association v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391; *Ontario (Attorney General) v. Fraser*, above note 113.

¹¹⁵ There is extensive jurisprudence on when discrimination based on grounds beyond those enumerated in s. 15 will violate the *Charter*. For an analysis of how that jurisprudence can be understood and applied to protect migrant workers, see Fay Faraday, “Envisioning Equality: Analogous Grounds and Farm Workers’ Experience of Discrimination,” in *Constitutional Labour Rights in Canada*, above note 3 at pp. 111-138.

¹¹⁶ *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *Lavoie v. Canada*, 2002 SCC 23, [2002] 1 S.C.R. 769.

¹¹⁷ UFCW Canada has in several rounds of litigation argued that Ontario laws that exclude agricultural workers from the right to bargain collectively deprive them of the right to freedom of association and discriminate based on their “occupational status.” While Justice L’Heureux-Dubé in her concurring

under the *Charter* the key question is whether the effect of an impugned law “violate[s] of the norm of substantive equality.”¹¹⁸ Substantive equality is different from the narrow concept of formal equality (i.e. whether the law, on its face, “treats likes alike”). Rather, substantive equality is concerned with whether a law acknowledges and accommodates the real differences between people to ensure that the law secures equality in its effect.¹¹⁹ This assessment must be made contextually with reference to the social, political, economic and legal position of the claimant group in society so that the real impact of a law is brought to light, taking into account real and systemic experiences of disadvantage, marginalization or disempowerment faced by the claimant group.¹²⁰

Because the rights in sections 2, 7 and 15 of the *Charter* are guaranteed to “everyone” and “every individual,” migrant workers are entitled to protection under these provisions even though they have only temporary immigration status in the country. This, however, is not the case with the mobility rights that are guaranteed under s. 6 of the *Charter*. The rights to “enter, remain in and leave Canada” are guaranteed only to Canadian citizens. Meanwhile, the rights “to move to and take up residence in any province” and “to pursue the gaining of a livelihood in any province” are guaranteed only to Canadian citizens and permanent residents. As a result, laws and policies that restrict the province where migrant workers may live and work would not violate the *Charter*.

judgment in *Dunmore* accepted that discrimination with reference to occupational status could violate the *Charter*, the majority of the Court has declined to address this question in the context of agricultural workers: see *Dunmore v. Ontario (Attorney General of Canada)*, above note 7; *Ontario (Attorney General) v. Fraser*, above note 113. See also, Faraday, “Envisioning Equality,” above note 115.

¹¹⁸ *Withler v. Canada (Attorney General)*, 2011 SCC 12 at para. 2.

¹¹⁹ For an overview on substantive equality, see *Making Equality Rights Real: Securing Substantive Equality under the Charter*, Fay Faraday, Margaret Denike and M. Kate Stephenson, editors (Toronto: Irwin Law, 2006) at pp. 9-26. See also *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 165 where McIntyre J stated:

To approach the ideal of full equality before and under the law — and in human affairs an approach is all that can be expected — the main consideration must be the impact of the law on the individual or the group concerned. Recognizing that there will always be an infinite variety of personal characteristics, capacities, entitlements and merits among those subject to a law, there must be accorded, as nearly as may be possible, an equality of benefit and protection and no more of the restrictions, penalties or burdens imposed upon one than another. In other words, the admittedly unattainable ideal should be that a law expressed to bind all should not because of irrelevant personal differences have a more burdensome or less beneficial impact on one than another.

¹²⁰ *Andrews v. Law Society of British Columbia*, above note 116; *R. v. Turpin*, [1989] 1 S.C.R. 1296; *Eldridge v. British Columbia*, above note 112; *Law v. Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. 497; *Withler v. Canada*, above note 118. See also the essays in *Making Equality Rights Real*, above note 120.

2. Ontario Human Rights Code

The Ontario *Human Rights Code*¹²¹ also establishes fundamental principles that govern economic and social relationships in the province. The *Human Rights Code* is second in priority only to the *Charter*. It takes precedence over all other laws in the province unless the Legislature has expressly carved out an exception. Ontario laws and regulations must not require or authorize conduct that is inconsistent with the substantive rights to equal treatment that are set out in Part I of the *Code* unless the particular law or regulation expressly provides that it is to apply despite the *Code*.¹²² Most importantly, though, the *Code* establishes enforceable standards that govern the conduct of both public and private actors in a range of social contexts. As a result, individuals and groups can make claims against and seek remedies from both public and private actors (employers, service providers, etc.).

Part I of the *Code* protects every person's right to equal treatment without discrimination in the five social areas of (i) services, goods and facilities; (ii) accommodation; (iii) contracts; (iv) employment; and (v) vocational associations. The right to equal treatment is guaranteed without discrimination based only on the specific list of grounds that are enumerated in the *Code*. The grounds on which discrimination is prohibited vary slightly from one social area to another. However the protected grounds that are common to all five social areas are race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status and disability.¹²³

Some key elements of the human rights framework provide useful models for how to reinforce, in both practical and normative ways, the importance of the rights at stake, the importance of ensuring that rights enforcement is accessible, and the fact that there is a broader public interest in ensuring human rights compliance. Some of these elements are as follows:

- (a) The substantive rights themselves are defined broadly. For example, the right to equal treatment in employment applies to all aspects and all stages of the employment relationship from recruitment practices through hiring, treatment on the job, and termination.¹²⁴

¹²¹ R.S.O. 1990, c. H-19.

¹²² *Human Rights Code*, s. 47(2).

¹²³ *Human Rights Code*, sections 1, 2, 3, 5, and 6. In addition to the grounds set out above, discrimination based on "record of offences" is prohibited in the area of employment and discrimination based on "receipt of public assistance" is prohibited in the area of accommodation. For a discussion of the structure and enforcement of human rights in the province, see Mary Cornish, Fay Faraday and Jo-Anne Pickel, *Enforcing Human Rights in Ontario* (Toronto: Canada Law Book, 2009).

¹²⁴ *Human Rights Code*, s. 5(1). The *Code* also prohibits harassment in employment [s. 5(2)] and includes additional provisions making particular reference to harassment based on sex [s. 7(1) and (2)]. For a further discussion of these rights see, Cornish, Faraday and Pickel, *Enforcing Human Rights in Ontario*, above note 123 at pp. 42-57 (re employment at 45-51).

- (b) The *Code* provides anti-reprisal protection. It expressly protects every person's right to claim and enforce human rights, to initiate and participate in proceedings under the *Code*, and to refuse to infringe another person's rights under the *Code* without reprisal or threat of reprisal.¹²⁵
- (c) Jurisprudence under the *Code* recognizes that in each relationship there are both rights held and duties owed. In this respect it imposes proactive obligations on duty-holders such as employers to comply with human rights standards and to design workplace standards in a way that accommodates human diversity.¹²⁶ Treatment that may otherwise be discriminatory will only be considered a bona fide occupational requirement if the rights claimant cannot be accommodated without undue hardship on the employer with reference to cost, outside sources of funding, if any, and health and safety requirements.¹²⁷
- (d) The *Code* recognizes in very practical ways both the importance of human rights and the vulnerability of the population that is engaged in seeking human rights protection. In view of this, the *Code* expressly builds in multiple institutions and practices that can work separately or in conjunction to ensure that human rights are accessible in practice and to ensure that a broader societal culture of human rights compliance is promoted:
- (i) Persons seeking to enforce their rights under the *Code* can do so with the support of the publicly funded Human Rights Legal Support Centre which is established under the *Code*. The Centre provides legal information and assistance in human rights enforcement, including legal representation in mediations and hearings before the Human Rights Tribunal of Ontario.¹²⁸
- (ii) Applications seeking to enforce human rights can be made by an individual who is directly affected by discriminatory conduct or can be made jointly by multiple individuals.¹²⁹ Applications can also be made by a third party who has the consent of the person who is directly affected. Such third party applicants can include community organizations or trade unions. This process is significant because it enhances the capacity to make an application

¹²⁵ *Human Rights Code*, s. 8.

¹²⁶ *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*, [1999] 3 S.C.R. 3 ("Meiorin"). See Cornish, Faraday and Pickel, [Enforcing Human Rights in Ontario](#), above note 123 at pp. 38-41.

¹²⁷ *Human Rights Code*, s. 24(1)(b), (2) and (3).

¹²⁸ *Human Rights Code*, Part IV.1 (sections 45.11 to 45.18). See also Cornish, Faraday and Pickel, [Enforcing Human Rights in Ontario](#), above note 123 at pp. 137-141; Human Rights Legal Support Centre website at <http://www.hrlsc.on.ca/en/Default.aspx>.

¹²⁹ *Human Rights Code*, s. 34(1), (4).

in a representative or public interest capacity on behalf of groups who are precariously situated.¹³⁰

- (iii) The *Code* continues the operation of the Ontario Human Rights Commission which has a broad mandate to work in both a proactive and reactive way to protect human rights, to promote the public interest in human rights compliance, and to identify and eliminate discriminatory practices.¹³¹ This mandate is carried out by exercising a wide range of powers, including the power to make third-party applications to enforce rights at the Tribunal, particularly where systemic patterns of discrimination are at issue;¹³² the power to conduct public inquiries into incidents of tension or conflict or conditions which may lead to tension or conflict and make recommendations and encourage or coordinate plans, programs or activities to reduce or prevent such tensions or conflict;¹³³ and the power to undertake, direct and encourage research into discriminatory practices and make recommendations to prevent and eliminate such practices.¹³⁴

All of these elements illustrate how multiple modes of oversight, from multiple directions, can work in interweaving and mutually reinforcing ways to provide a more robust, supportive, and multi-dimensional framework for rights enforcement.

3. International Standards for Decent Work

Finally, there are many international law instruments that can inform a rights-based assessment of the treatment of migrant workers.

The International Labour Organization is the United Nations agency that brings together government, employer and labour representatives to jointly develop and oversee the implementation of international labour standards and to develop policies and programs aimed at promoting and securing “decent work” for all women and men. The objective of the Decent Work Agenda is not just to create income-producing employment, but to ensure that all workers have access to jobs of acceptable quality characterized by “conditions of freedom, equity, security and human dignity.” To this end, “the ILO’s Decent

¹³⁰ *Human Rights Code*, s. 34(5). See also s. 46 which defines a “person” to include, amongst others, an unincorporated association, a trade or occupational association, and a trade union.

¹³¹ *Human Rights Code*, Part III (sections 27-31.7). See also Ontario Human Rights Commission website at: <http://www.ohrc.on.ca/en>.

¹³² *Human Rights Code*, s. 35.

¹³³ *Human Rights Code*, s. 29(1)(e). The public inquiry-type powers that the Commission has in this respect are set out in s. 31 and s. 31.1 and include the power to enter a place (other than a dwelling) without a warrant; to request production of documents or things for inspection and examination; and to question a person on matters that are or may be relevant to the inquiry.

¹³⁴ *Human Rights Code*, s. 29(1)(c).

Work Agenda promotes access for all to freely chosen employment, the recognition of fundamental rights at work, an income to enable people to meet their basic economic, social and family needs and responsibilities, and an adequate level of social protection for the workers and family members.”¹³⁵ This goal is advanced through setting standards and developing programs and policies that promote substantive rights at work, employment, social protection and social dialogue. The substantive rights and values that are set out in the ILO’s various standard-setting conventions give important insight into what constitutes “decent work.”

In 1998 the ILO adopted the *Declaration of Fundamental Principles and Rights at Work*.¹³⁶ This *Declaration* is a not a legally-enforceable instrument but is a renewed, solemn political commitment by the ILO and its member States (including Canada), to respect, promote and realize the labour rights protected in the eight “Fundamental Conventions” of the ILO, including the rights to freedom of association, collective bargaining, and equality. The *Declaration* imposes on all member states the obligation to respect, promote and achieve the rights in the eight Fundamental Conventions¹³⁷ regardless of whether the state has ratified each of those particular Conventions. At paragraph 2, the *Declaration of Fundamental Principles and Rights at Work*

Declares that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, 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, namely:

- (a) freedom of association and the effective recognition of the right to collective bargaining;
- (b) the elimination of all forms of forced or compulsory labour;
- (c) the effective abolition of child labour; and
- (d) the elimination of discrimination in respect of employment and occupation.

¹³⁵ [Report of the Director-General: Decent Work](#) (Geneva: International Labour Office, 1999).

¹³⁶ ILO, *Declaration of Fundamental Principles and Rights at Work and its Follow-Up*, Adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998 (Annex revised 15 June 2010).

¹³⁷ The eight Fundamental Conventions are: Convention 87, *Freedom of Association and Protection of the Right to Organise Convention* (1948); Convention 98, *Right to Organise and Collective Bargaining Convention* (1949); Convention 29, *Forced Labour Convention* (1930); Convention 105, *Abolition of Forced Labour Convention* (1957); Convention 138, *Minimum Age Convention* (1973); Convention 182, *Worst Forms of Child Labour Convention* (1999); Convention 100, *Equal Remuneration Convention* (1951); and Convention 111, *Discrimination (Employment and Occupation) Convention* (1958).

The ILO's Constitution specifically identifies that it has a mandate to protect "the interests of workers when employed in countries other than their own."¹³⁸ To this end, the ILO has adopted two Conventions and two Recommendations that are specifically focused on the rights of migrant workers.¹³⁹ The ILO has also published numerous reports and policy documents advocating for and providing guidance on the development of decent working conditions for migrant workers.¹⁴⁰ Finally, the ILO has adopted conventions addressing labour standards for sectors of work that are characterized by particular precariousness. Most recently, in June 2011, the ILO adopted Convention 189 and Recommendation 201 *Concerning Decent Work for Domestic Workers*.¹⁴¹

In addition, the United Nations has adopted the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*.¹⁴²

Canada has not ratified the UN Convention, the ILO Conventions or Recommendations dealing with migrant workers, or the ILO Convention and Recommendation dealing with domestic workers. Nor has Canada incorporated any of them into Canadian law. As a result, the documents do not have the status of binding, enforceable law in Canada. Nevertheless, they provide important policy guidance because the rights, values and principles expressed in them represent a tripartite consensus on the part of the foremost international labour body.

¹³⁸ ILO Constitution, Preamble.

¹³⁹ Convention 97, *Migration for Employment Convention (Revised)* (1949) and Convention 143, *Migrant Workers (Supplementary Provisions) Convention* (1975).

¹⁴⁰ See, for example: *Towards a Fair Deal for Migrant Workers in the Global Economy*, Report no. VI at the International Labour Conference, 92nd Session, 2004, Sixth item on the agenda (ILO: Geneva, 2004); *ILO Multilateral Framework on Labour Migration: Non-binding principles and guidelines for a rights-based approach to labour migration* (Geneva: ILO, 2006) adopted by the Tripartite Meeting of Experts on the ILO Multilateral Framework on Labour Migration (Geneva, 31 October – 2 November 2005); *ILO Declaration on Social Justice for a Fair Globalization*, adopted by the International Labour Conference, 97th Session, Geneva (10 June 2008). The ILO website also has useful links to databases with statistics and research papers on international labour migration and a database of international good practices in labour migration: <http://www.ilo.org/public/english/protection/migrant/index.htm> (accessed 21 March 2012).

¹⁴¹ Convention 189, *Domestic Workers Convention* (2011), adopted 100th International Labour Conference session (16 June 2011); Recommendation 201, *Domestic Workers Recommendation* (2011), adopted 100th International Labour Conference session (16 June 2011). There are also detailed background reports and analyses addressing the need for international labour standards to protect decent work for domestic workers with particular attention to the needs of migrant domestic workers. See, for example, José Maria Ramirez-Machado, *Domestic work, conditions of work and employment: A legal perspective*, Conditions of Work and Employment Series Paper No. 7 (Geneva: ILO, 2003); Asha d'Souza, *Moving Toward Decent Work for Domestic Workers: An Overview of the ILO's Work*, Bureau for Gender Equality Working Paper No. 2 (Geneva: ILO, 2010); ILO, *Decent Work for Domestic Workers*, Report no. IV(1) at the International Labour Conference, 99th Session, 2010, Fourth item on the agenda (Geneva: ILO, 2010). See also the excellent collection of international and Canadian essays in the Canadian Journal of Women and the Law's Special Issue on Regulating Decent Work for Domestic Workers (2011), 23:1 *Canadian Journal of Women and the Law*.

¹⁴² Adopted by the UN General Assembly resolution 45/158 of 18 December 1990.

Each of the international instruments provides detailed statements on rights and protections that should be available to migrant workers. While the list below is only a partial list, some key principles that emerge from these instruments include the following:

- (a) The international instruments recognize that labour migration is a process that continues over an extended period with many identifiable stages. They stress that protections must be available throughout all of these stages including “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.”¹⁴³
- (b) Governments must ensure that migrant workers are provided with accurate information (and must combat misinformation) about the conditions which attach to the program of migration and migrants’ admission to the state in which they will work, the rights to which they are entitled in the jurisdiction in which they will work, and the conditions of life that can be expected. This information must be provided to migrant workers before departure from their country of residence.
- (c) Governments must regulate the process of recruitment, introduction and placement of migrant workers, including restricting and supervising who may act in the recruitment, introduction and placement of migrant workers. Where the number of migrant workers going from one state to another is significant, it is recommended that states enter into agreements to regulate this migration to address matters concerning the application of provisions in the conventions. Workers should not bear the cost of recruitment.¹⁴⁴
- (d) Migrant workers should have access to public employment placement services free of charge.
- (e) Governments must supervise the contracts between employers and employees. A written copy of the contract must be provided to the migrant worker before their departure from their country of residence and must include clear information on the terms and conditions of work, including wages. Written information must also be provided regarding the occupation in which the migrant worker will be engaged, conditions of work, in particular the minimum wages to which they are entitled.

¹⁴³ *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, above note 12 at Article 1.

¹⁴⁴ In this respect, see also ILO Convention 181, *Private Employment Agencies Convention* (1997).

- (f) Governments must provide information to migrant workers about the methods by which employment contracts shall be enforced and workers must have access to effective enforcement mechanisms.
- (g) Governments must ensure that local laws apply without discrimination to migrant workers in respect of remuneration, membership in trade unions and enjoyment of the benefits of collective bargaining, accommodation, social security (subject to regular contribution/eligibility requirements), employment taxes and legal proceedings.
- (h) Governments shall protect the human rights of migrant workers and ensure effective protection against all forms of abuse, harassment and violence. In particular, states should ensure there are effective penalties against human trafficking in migrant labour.¹⁴⁵
- (i) Governments must provide assistance to migrant workers during an initial period of settlement in the country where they are working.
- (j) Governments must ensure that appropriate medical services are available prior to departure and during employment.
- (k) Migrant workers have the right to security of their property, including the right that their identity, immigration and work documents (such as passports, work permits, visas) may not be confiscated or destroyed (except by a public official who is duly authorized by law).
- (l) Migrant workers should have the right to a hearing before being expelled from the country of work.
- (m) Migrant workers should enjoy access to educational institutions, vocational training/retraining, guidance and placement services, housing, social and health services.

The instruments all repeatedly recognize the importance of family relationships to migrant workers. They stress the importance of taking appropriate measures to ensure the unity of migrant workers' families, including facilitating the reunification of migrant workers with their spouses and dependent children, and ensuring the protection of rights for families of migrant workers. The UN Migrant Workers Convention provides that State Parties shall

¹⁴⁵ See also the UN *Convention Against Transnational Organized Crime*, UN General Assembly Resolution 55/252000, ratified by Canada May 2002; Annex II, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children ("Palermo Protocol")* which Canada has ratified. While this Convention and the Palermo Protocol are most frequently used to combat human trafficking for purposes of prostitution, they could be employed in relation to human trafficking of migrant workers generally.

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.” In particular, it notes that

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.¹⁴⁶

4. Summary: Measuring Migrant Workers’ Security

In summary, the principles outlined above underscore that labour is not a commodity and that migrant workers must be treated as whole human persons, who have a social context and who are members who contribute to both the communities in which they work and from which they have migrated. The principles and values outlined above in both Canadian and international law can be distilled so that, under a rights-based framework for analysis, migrant workers’ security can be measured with reference to their access to and experience of:

- (a) fundamental human rights,
- (b) rights at work,
- (c) voice,
- (d) social inclusion,
- (e) social security, and
- (f) effective rights enforcement.

All of these different elements can and must work together to reinforce a reality of decent work for migrant workers.¹⁴⁷ As one maps the laws that govern migrant workers through their migration experience, it becomes apparent that this rights-based framework has not adequately informed policy development with the result that the laws construct the migrant worker – and migrant work experience – in ways that predictably produce significant insecurity.

¹⁴⁶ *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, above note 12 at Article 64.

¹⁴⁷ Other researchers have also developed tools and matrices for assessing worker vulnerability. See, for example, Jenna Hennebry’s “Labour Migrant Integration Scale” in *Permanently Temporary*, above note 4 at pp.30-32; see also the criteria of “social minima, universality and fairness” employed in Leah Vosko, Eric Tucker, Mark P. Thomas and Mary Gellatly, *New Approaches to Enforcement and Compliance with Labour Regulatory Standards: The Case of Ontario, Canada*, Osgoode Hall Law School Comparative Research in Law & Political Economy Research Paper Series, Research Paper No. 31/2011 (November 2011), online at <http://www.lco-cdo.org/vulnerable-workers-commissioned-papers-vosko-tucker-thomas-gellatly.pdf>.

Juma's Story

I came to Canada from Tanzania in 2009. In Tanzania, during the hunting season I worked as a camp manager with a company that took tourists out to hunt game. The rest of the year I worked as a taxidermist. At the hunting camp, I met a hunter who was a taxidermist in Canada. He asked me to come to Canada to work for him. I have a family and he told me that if I worked for two years I could bring my family to Canada. He prepared all the immigration papers. In the contract he sent me, I was supposed to be paid \$16.08 per hour.

I arrived in Canada on a Saturday and started work the very next day on Sunday. For about the first ten months, I was the only employee. I worked seven days a week, 12 to 14 hours a day except for Sunday when I worked 7 to 8 hours. I was often asked to do work that was not related to my job, such as painting my employer's house.

My employer's business was in a rural farm house. It was very isolated. The two nearest towns were about 10 km and 15 km away. I was dependent on my employer or his relatives and friends to take me into town. One of the hardest parts for me was that I was without communication with the outside world.

I lived in a room in the taxidermy workshop. There was no lock on my room. My employer could come in anytime and he went through my stuff.

I was working very hard but I was not paid what my contract promised. After my first month, I hadn't been paid at all. I asked for money to send home. He gave me \$550 Canadian which is what I would have been paid back home. I received no other money for the month. When I asked about my salary, my employer said that he had expenses and I could either accept what I was being paid or I could go back home. But when I came to Canada I lost my jobs back home so I couldn't go back.

After a few months my employer raised my pay to \$700 and then \$800 per month. Each month, he would give me a cheque for \$3,168 but I was not allowed to keep it. We would go to the bank together. I would deposit the cheque and then I had to withdraw most of it to give back to him "for taxes." He only let me keep \$800 a month. He told me that if I paid the taxes I could bring my family over. I never got a record of what the deductions were for. I never got a receipt that showed that he paid my taxes. My employer didn't want me to apply for a SIN card. I kept asking to apply for one but he would say no, don't do it now. When he was out of town, I got a ride into town and applied for a SIN card and an OHIP card. I had them sent to another address because if something from the government was sent to my employer's address he would open it.

About 10 months after I started working, my employer hired a Canadian worker who told me that what I was being paid wasn't right and that I should have a day off. I was then able to get Sunday off but I still worked long hours the rest of the week.

After one year in Canada, my work permit was renewed for two more years. My work permit was tied to just this employer. If I left I couldn't work. I didn't have money to stay for 5 months without working while I waited for a new work permit. I started to look for work with another employer who would apply for a work permit for me. But I had to keep working with my first employer.

When my second year was almost over, I went to the bank with my employer. I deposited my monthly cheque but refused to withdraw money to give him. I asked him where is the tax that he paid? Where is the receipt for the taxes? I told him that when I got proof that he had paid my taxes I would withdraw the money. I told him that I was not comfortable to stay with him anymore. He threatened to cancel my work permit. He threatened to have Immigration come and deport me. He called the police. When they arrived he accused me of stealing things and asked them to escort me from the property. I met the police on the road and when I explained what happened, they gave me a ride in to town and I went to the Salvation Army.

Because my employer accused me of stealing, I had to leave one suitcase behind. I was told that an immigration officer would interview me and help me get my stuff back. The suitcase was full of things that can't be replaced. It had my wedding clothes, my wedding DVD, my only picture of my dead mother, an anniversary gift from my wife, birthday gifts from my cousins. It doesn't matter how much money you have. You can't buy these things. I really need my stuff back. I have tried for so many months to get my stuff back. But to this day I still don't have it.

It is hard to save up money and to be far from my family for so many years is very hard. If my wife was here, it would be much easier. She could work too and we could save money together. Our kids could go to school. It is hard for my family to be so far.

As a migrant worker, when I came I didn't know my rights. It is so hard to find out what your rights are. It is so hard to enforce your rights. I was sending all of my money home to my family so I didn't have money to pay for a lawyer. Even after I learned about my rights, it is still hard to enforce them because the legal process is too slow. If I try to enforce my rights in court or at the labour board, the legal process will not finish before my work permit expires.

C. MAPPING PROTECTION FOR SECURITY AND DECENT WORK THROUGH THE STAGES OF THE LABOUR MIGRATION CYCLE

Part C of this paper examines the laws that apply to migrant workers at the six stages of their labour migration cycle: recruitment; obtaining a work permit; information prior to and arrival in Ontario; living and working in Ontario; expiry/renewal of a work permit; and pathway to permanent residency/repatriation. The paper uses the rights-based framework developed in Part B to examine how the laws that govern each stage of migrant workers' experience in Ontario either promote or undermine security and decent work. Throughout Part C, references to practical experiences of migrant workers in Ontario are based in part on consultations that the author engaged in between December 2011 and March 2012 with migrant workers and community-based organizations supporting migrant workers in Toronto, including the Migrant Workers Alliance for Change, the Caregivers Action Centre and the Workers' Action Centre.

Undertaking a contextual analysis of migrant workers' experience under the law must begin with an acknowledgment of the power dynamic that is inherent in international labour migration of low-skilled/low-wage workers. Temporary labour migration programs depend upon and are sustained by the existence of structural inequalities (underdevelopment, unemployment, underemployment) and income inequalities between developed and developing economies. The reasons that any individual workers migrate vary, but a larger systemic pattern that reflects these disparities is clear. As the ILO has written:

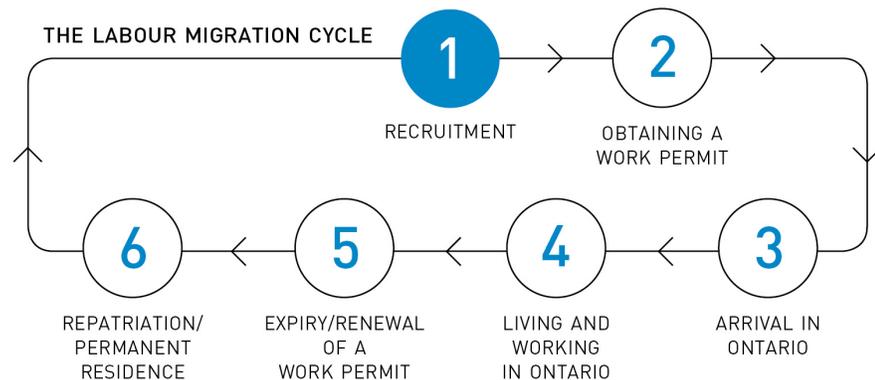
It is generally recognized ... that both increasing differences between countries and the lack of gainful employment, decent work, human security and individual freedoms help explain much contemporary international migration.¹⁴⁸

This underlying reality means that low-skill/low-wage migrant workers often come from relatively impoverished communities with relatively limited economic opportunities and that they and their families (and their local communities) depend greatly upon the income they receive through their migrant labour and the remittances they send home.¹⁴⁹ It also means that a large

¹⁴⁸ ILO, *Towards a Fair Deal for Migrant Workers in the Global Economy*, above note 140 at para. 24.

¹⁴⁹ See Hennebry, "Jurisdictional Fútbol", above note 6.

proportion of low-wage migrant workers are either motivated by or interested in the opportunity to immigrate to establish more personal and/or economic security.¹⁵⁰ Both of these dynamics create an enormous power imbalance between the migrant worker and employer. This imbalance establishes the baseline of precariousness and the potential for abuse as migrant workers reasonably fear that taking actions to enforce their rights may jeopardize either their job or their potential right to remain in Canada. This baseline of precariousness colours every stage of the labour migration cycle. While this is not a new observation, directly acknowledging this reality – and keeping it clearly in view – is critical to assessing whether Canadian laws are appropriately responsive to migrant workers’ real experiences and real capacity to resist unfair or abusive treatment.



1. Recruitment

The fact that exploitation arises in the recruitment and placement of migrant workers is well recognized internationally. As labour migration has increased, private recruiters have emerged to facilitate the flow of workers from one country to another. Exploitation in this relationship is able to flourish precisely because of the structural and income inequalities addressed above and migrant workers’ location in that power imbalance. In its worst forms, this exploitation takes the form of human trafficking in migrant labour. Canadian law enforcement agencies have raised concerns that human trafficking is on the rise and that it is occurring in low-skill, low-wage industries including construction, farm labour, child care, and the service sector.¹⁵¹

¹⁵⁰ As noted above in note 68 more than 90% of workers under the LCP apply for permanent resident status in Canada once they have completed the temporary work conditions. In addition, a recent study of workers in the Seasonal Agricultural Worker Program indicated that “Over half of the workers surveyed from Mexico and Jamaica (60 percent) indicated that they were interested in permanent residency.” Hennebry, *Permanently Temporary*, above note 4 at p. 13.

¹⁵¹ It is beyond the scope of this paper to address issues of human trafficking. However, it is important to note that Canada has ratified both of the key international conventions condemning

This section identifies some practices that migrant workers in Ontario face, relevant international rights-based standards, actions that have been taken by both Canada and Ontario, and recommendations for strengthening protection at the recruitment stage of the cycle.¹⁵² The recruitment stage is critical for all migrant workers because it both opens the opportunity to work but also establishes the initial conditions of security or insecurity that will shape the employment relationship and that will shape migrant workers' capacity to enforce rights at other stages of the labour migration cycle.

Nature of the Problem

Abuse of migrant workers in the recruitment phase of the labour migration cycle persists. There are myriad reports of migrant workers who have been charged exorbitant fees by private recruiters to be placed in jobs in Ontario. Workers themselves report that the practice is common. Recruiters have charged fees to workers arriving in Canada under the LCP, the NOC C & D Pilot Project and the NOC C & D Agricultural Stream. Recruiters have charged workers fees to be placed in jobs in a wide range of sectors including live-in caregiving, restaurants, farms, food processing, and hospitality. Workers have paid recruiters fees which may start around \$1,000 but more frequently range between \$4,000 and \$10,000 or even as high as \$15,000 each.¹⁵³ As reported by the United Food and Commercial Workers Union Canada ("UFCW Canada"), in the agricultural sector "fees to employment brokers ... can equal half the

human trafficking (see UN *Convention Against Transnational Organized Crime* and *Palermo Protocol* above at note 145) and that these practices are also prohibited under the *IRPA*, sections 118 to 120 and the *Criminal Code*, R.S.C. 1985, c. C-46, sections 279.01 to 279.04. As reported by the CBC, "In Canada, human trafficking is connected with a number of industries, including construction, farm labour, the sex trade, the service sector and child care, according to law enforcement agencies:" see Ian Johnson, "Human smuggling and trafficking big business in Canada," CBC News online (posted 29 March 2012), at <http://www.cbc.ca/news/canada/story/2012/03/28/f-human-smuggling-overview.html?cmp=rss> (accessed 29 March 2012). See also, Adrian Morrow, "Judge Hands Down Canada's toughest penalty for human trafficking," *The Globe and Mail* (29 March 2012), re conviction for human trafficking of Hungarian men to work in construction in GTA, online at <http://www.theglobeandmail.com/news/national/judge-hands-down-canadas-toughest-penalty-for-human-trafficking/article2386576/> (accessed 30 March 2012); Adrian Morrow, "Human-traffickers treated men on Ontario construction sites 'like slaves'", *The Globe and Mail* (1 March 2012), online at <http://www.theglobeandmail.com/news/national/human-traffickers-treated-men-on-ontario-construction-site-like-slaves/article2356170/> (accessed 30 March 2012); Adrian Morrow, "Human trafficking kingpin lived life of successful immigrant," *The Globe and Mail* (3 April 2012) online at <http://www.theglobeandmail.com/news/national/human-trafficking-kingpin-lived-life-of-successful-immigrant/article2390980/> (accessed 3 April 2012).

¹⁵² For an excellent analysis of the recruitment of live-in caregivers, with a focus on regulation of recruitment in the Philippines and in British Columbia, see Fudge, "Global Care Chains," above note 4.

¹⁵³ See also: Hansard, Legislative Assembly of Ontario, Standing Committee on the Legislative Assembly, 2 December 2009 re Bill 210, Employment Protection for Foreign Nationals Act (Live-in Caregivers and Others), 2009 available online at http://www.ontla.on.ca/committee-proceedings/transcripts/files_pdf/02-DEC-2009_M020.pdf; Standing Committee on Citizenship and Immigration, *Temporary Foreign Workers and Non-Status Workers*, (Ottawa: House of Commons Canada, May 2009) at 30-32.

worker's annual pay or more.¹⁵⁴ Often workers must borrow money (sometimes with loans arranged through the recruiter) or expend a family's savings to pay these fees to recruiters and so arrive in Ontario under the burden of this debt. This is a very real burden that ties the worker to both the recruiter and the employer as a worker earning at or near the minimum wage (or even below it) must labour for many months or years to simply repay the debt of the recruitment fees.

This problem is compounded by abuses which occur after workers arrive in Ontario. For example, after having paid a recruiter, some workers arrive to be told that there is no job for them, or the job is for a shorter period than originally promised, or the job they are given is different from the job they were told was waiting for them (and which is authorized on their work permit),¹⁵⁵ or the pay and conditions of the job are different from what was promised. In some cases, recruiters confiscate workers' passports and/or work permits.¹⁵⁶ UFCW Canada in its annual report on the status of migrant workers in Canada reports that unscrupulous offshore and domestic recruiters are integral to the operation of the NOC C & D program and that:

The workers they deliver essentially arrive as indentured labour whose income in Canada largely returns in fees to the recruiters.

Sometimes, TFW's [temporary foreign workers] discover when they arrive that the jobs they were recruited for don't exist; or the year of employment they expected turns into only months and they are terminated. Meanwhile, the debt they owe forces them into an illegal, under-the-table contractor system that feeds them back at a lower rate, sometimes to the same employers who let them go.¹⁵⁷

Other abusive recruitment practices may also arise later in the employment relationship. For example, community organizers report examples of recruiters who have approached migrant workers who are known to be working in abusive conditions and have charged the workers a recruiting fee in exchange for the promise to place them with a different employer. Workers and community organizers also report frequent situations in which recruiters charge migrant workers exorbitant fees to extend a work permit.¹⁵⁸

¹⁵⁴ UFCW Canada, *The Status of Migrant Farm Workers in Canada 2010-2011*, above note 44 at p.11.

¹⁵⁵ This is one of the ways in which migrant workers can fall out of regularized immigration status and find themselves trapped in particularly exploitative work arrangements.

¹⁵⁶ The withholding or destruction of travel documents for the purpose of committing or facilitating trafficking in persons is prohibited by s. 279.03 of the *Criminal Code*.

¹⁵⁷ UFCW Canada, *The Status of Migrant Farm Workers in Canada 2010-2011*, at pp. 16-17.

¹⁵⁸ All of the practices set out above have also been documented in various provinces. See, for example, Report of the Standing Committee on Citizenship and Immigration, *Temporary Foreign Workers and Non-Status Workers*, above note 153 at pp. 30-32; Fudge, "Global Care Chains", above note 4; Alberta Federation of Labour, *Alberta's Disposable Workforce*, above note 8 at pp. 10-11; Alberta Federation of Labour, *Entrenching Exploitation*, above note 4 at pp. 12-13; Caregivers' Action

International Standards

These kinds of practices are condemned by the ILO. Recruiting employees is a normal part of running a business and it is expected that employers must bear these costs. The ILO's *Private Employment Agencies Convention, 1997* expressly states: "Private employment agencies shall not charge directly or indirectly, in whole or in part, any fees or costs to workers."¹⁵⁹ The Convention further states that after consulting the most representative organizations of employers and workers, Member states shall:

adopt all necessary and appropriate measures, both within its jurisdiction and, where appropriate, in collaboration with other Members, to provide adequate protection for and prevent abuses of migrant workers recruited or placed in its territory by private employment agencies. These shall include laws or regulations which provide for penalties, including prohibition of those private employment agencies which engage in fraudulent practices and abuses.¹⁶⁰

The ILO's *Multilateral Framework on Labour Migration* also sets out detailed guidelines to help governments in both origin and destination countries regulate and supervise recruitment and placement services for migrant workers to ensure that workers are not subject to abusive or unethical practices. These guidelines include detailed practical recommendations such as:

- (a) developing standardized systems to licence or certify agencies that engage in recruitment and placement services;
- (b) developing systems to ensure that migrant workers receive understandable and enforceable employment contracts;
- (c) implementing legislation to prohibit unethical practices and providing for penalties in the case of violations;
- (d) "establishing a system of protection, such as insurance or bond, to be paid by the recruitment agencies, to compensate migrant workers for any monetary losses resulting from the failure of a recruitment or contracting agency to meet its obligations to them;" and

Centre, Workers' Action Centre, and Parkdale Community Legal Services, *Submission to the Ministry of Labour Consultation on Foreign and Resident Employment Recruitment in Ontario* (15 July 2009) at pp. 6, 12-13, available online at http://www.workersactioncentre.org/wp-content/uploads/2011/12/sb_Recruitment_eng.pdf.

¹⁵⁹ Convention 181, *Private Employment Agencies Convention, 1997*, Article 7(1). In Article 7(2) and 7(3) the Convention allows for some exceptions to this rule where the exception is "in the interest of the workers concerned" and is made following government consultations with the most representative organizations of employers and workers. In addition, the government must, in its annual reports under the ILO Constitution identify and provide reasons for the exception. Canada has not ratified Convention No. 181.

¹⁶⁰ *Private Employment Agencies Convention, 1997*, Article 8(1).

- (e) “providing that fees or other charges for recruitment and placement are not borne directly or indirectly by migrant workers.”¹⁶¹

Federal and Provincial Action

Canada and Ontario have taken some steps to address the problem of abuse in the recruitment phase of the labour migration cycle.

The template contracts that must be submitted to HRSDC by an employer in the process of obtaining an LMO contain clauses which prohibit an employer from recouping from an employee the recruitment costs that have been paid by the employer.¹⁶²

Effective April 2011 the Regulations under the *IRPA* were amended to require greater scrutiny at the LMO-granting stage over the genuineness of an employer’s job offer.

While it is too early to assess the impact of the amended Regulations, these forms of supervision are, from the perspective of the migrant worker, indirect and too remote in two respects.

- (a) A contract clause that prohibits employers from clawing back recruitment fees is positive in that it signals what should be appropriate employer conduct. However, it does not reach the actual practice in which workers are required to pay fees directly to private recruiters, often in their own country, prior to departure. An employer who uses a private recruiter, and particularly a private recruiter operating outside of Canada, is able to avoid the effect of this contract clause, except under the LCP where the clause specifically makes the employer liable for fees paid by a worker to a third-party recruiter.

¹⁶¹ ILO, *Multilateral Framework for Labour Migration*, above note 140 at pp. 24-25, Guidelines 13.1 to 13.8.

¹⁶² While this prohibition appears in the template contracts under the LCP, the NOC C & D Pilot Project, and the NOC C & D Agricultural Stream, the language varies under each of the three contracts. The broadest language appears in Article 6 of the LCP template contract as follows:

The EMPLOYER shall not recoup from the EMPLOYEE, through payroll deductions or any other means, the fees they have paid to a third party recruiter or recruitment agency, or their authorized representative(s) for services related to hiring and retaining the EMPLOYEE.

NOTE: Should the EMPLOYER’S third party recruiter or recruitment agency, or their authorized representative(s) charge the EMPLOYEE for any recruitment fees, the EMPLOYER must reimburse the EMPLOYEE in full for any such costs disclosed with proof by the EMPLOYEE.

By contrast, Article 11 of the NOC C & D Pilot Project template contract states:

The EMPLOYER shall not recoup from the EMPLOYEE, through payroll deductions or any other means, any costs incurred from recruiting the EMPLOYEE.

Article 4.3 of the template contract under the NOC C & D Agricultural Stream states:

The employer shall not recoup from the temporary foreign worker, through payroll deductions or any other means, any costs incurred in recruiting or retaining the temporary foreign worker. This includes, but is not limited to, any amount payable to a third-party representative/recruiter.

(b) While the federal government has set out these terms in the template contracts, it plays no role in monitoring or enforcing contract compliance. The terms of the contract must be enforced in the provincial jurisdiction and there are gaps in the provincial enforcement regime that allow the practice of paying recruitment fees to persist.

In 2009, Ontario passed legislation aimed at protecting migrant workers in the recruitment phase: the *Employment Protection for Foreign Nationals Act (Live-in Caregivers and Others)*, 2009,¹⁶³ commonly referred to as “Bill 210.” The legislation, however, has limited application. It applies only to foreign nationals who are employed as live-in caregivers or who are attempting to find employment as live-in caregivers; to employers of live-in caregivers; and to persons who act as recruiters in connection with the employment of live-in caregivers. While the legislation has the potential to apply to foreign nationals “in such other position or sector as may be prescribed” and to employers and recruiters “in other prescribed employment,” no regulations have been made to extend the Act’s protections beyond the circumstance of live-in caregivers.¹⁶⁴

Bill 210 prohibits a recruiter from charging a foreign national who is employed as a live-in caregiver a fee, directly or indirectly, for any service, good or benefit provided to the foreign national.¹⁶⁵ This blanket prohibition on fees is good because it pre-empts the practice by which some recruiters characterize some services as “settlement” services to skirt prohibitions on recruitment fees. Bill 210 also prohibits an employer from directly or indirectly recovering or attempting to recover any cost incurred by the employer in the course of arranging to employ the foreign national.¹⁶⁶ Parties are prohibited from contracting out of the Act so that even if a migrant worker has signed an employment or recruitment contract which permits the charging of these fees, it would be unenforceable.

A recruiter and an employer are both also prohibited from taking possession of or retaining property that belongs to the foreign national and in particular are prohibited from taking possession of or retaining the foreign national’s passport or work permit.¹⁶⁷

Foreign nationals covered by the Act are entitled to protection from reprisals by either employers or recruiters for seeking information about their rights under the Act, seeking to enforce their rights under the Act, giving information to an employment standards officer or testifying in proceedings under the Act.

¹⁶³ S.O. 2009, c. 32.

¹⁶⁴ Bill 210, s. 3.

¹⁶⁵ Bill 210, s. 7.

¹⁶⁶ Bill 210, s. 8.

¹⁶⁷ Bill 210, s. 9.

Where reprisal is alleged, there is a reverse onus on that person to prove that they did not contravene the anti-reprisal provision.¹⁶⁸

The legislation is enforced by Ministry of Labour employment standards officers. Employment standards officers have the power to conduct both reactive investigations in response to a complaint and proactive inspections.¹⁶⁹ The Ministry of Labour operates a toll-free line for live-in caregivers to leave a “tip” about possible violations of the Act.¹⁷⁰

The primary mechanism for enforcement, however, is reactive. A migrant worker can file a complaint with the Ministry of Labour alleging a breach of the Act. The complaint must be filed within three and a half years of the contravention occurring.¹⁷¹ The complaint is investigated by an employment standards officer. The employment standards officer has some capacity to expand an investigation or inspection beyond an initial complaint. If in the course of an investigation or inspection the employment standards officer finds that a person has contravened the Act in respect of another individual or individuals who have not complained, the employment standards officer may make an order to repay fees or costs but only if the contravention occurred less than three and a half years before the complaint was filed or the inspection commenced.¹⁷²

If a contravention of the Act is found, the employment standards officer has the authority to order recruiters to repay fees; to order employers to repay costs that were recouped; to order that compensation be paid to the foreign national for any loss incurred as a result of the contravention; to order that a foreign national be reinstated; and to make orders against directors of a corporation where the officer finds that a corporation is in contravention of the Act.¹⁷³ Related businesses or activities carried out by an employer or recruiter are treated as a single entity under the Act and are jointly and severally liable for any contravention of the Act.¹⁷⁴ The employment standards officer can also issue a notice of contravention which subjects the offending party to a penalty ranging from \$250 to \$1,000.¹⁷⁵ Persons or corporations who contravene the Act or fail to comply with an order made under the Act are guilty of an offence and are liable upon conviction of fines up to \$50,000 or imprisonment of not more than

¹⁶⁸ Bill 210, s. 10.

¹⁶⁹ Bill 210, s. 35, 22.

¹⁷⁰ Ontario, Ministry of Labour, “*Employment Protection for Foreign Nationals Act (Live-in Caregivers and Others), 2009: FAQs*,” online at <http://www.labour.gov.on.ca/english/es/faqs/epfna.php#enforce> (accessed 27 March 2012).

¹⁷¹ Bill 210, s. 20.

¹⁷² Bill 210, s. 25.

¹⁷³ Bill 210, s. 24.

¹⁷⁴ Bill 210, s. 4.

¹⁷⁵ Bill 210, s. 27, 28.

12 months (for an individual) or fines up to \$100,000 for a corporation, with fines escalating for a corporation on subsequent convictions.¹⁷⁶

There is much to commend in Bill 210. However further steps can be taken to ensure that this protection is effective, that it meets the best practices that have been adopted elsewhere in Canada, and that it enables the federal and provincial regulatory regimes to operate together, rather than in separate spheres, to provide more responsive protection to migrant workers.

First, the scope of Bill 210 must be addressed. Exploitation in the recruitment phase is not limited to those who recruit and employ live-in caregivers. Workers under both streams of the NOC C & D Pilot Project are similarly targeted for this kind of exploitation. To eradicate these practices, the legislation must be extended to protect all low-wage migrant workers, regardless of the sector of their employment and regardless of the TFWP under which they entered Canada. Extending protection incrementally, sector by sector, is inappropriate because it causes unnecessary delay, is inconsistent with international standards, and inappropriately and incorrectly perpetuates the narrative that these practices are isolated rather than systemic.

Second, even though Bill 210 has been in place since 2009, migrant workers and community organizations report that the practices continue and remain common for migrant workers, including live-in caregivers who are seeking both initial placements and subsequent placements in private homes.¹⁷⁷ The primary drawback is that Bill 210 depends largely upon migrant workers to come forward to make formal complaints. It is well known that for low-wage workers in general, even absent the precariousness added by temporary immigration status, complaints that their basic employment rights have been breached are typically not filed until after an employee has left the employment in question and secured work elsewhere. The economic vulnerability of low-wage workers is a well-known impediment to enforcing rights against a current employer.¹⁷⁸ This vulnerability is even greater where a migrant worker is living in the employer's home or is living in employer-provided accommodations.

The most significant shift in making protection in this phase of the labour migration cycle effective for workers must come by leveraging the federal and provincial governments' capacity to engage in proactive regulation and

¹⁷⁶ Bill 210, s. 41.

¹⁷⁷ Bill 210 only prohibits fees that were charged or costs recovered *after* the Bill came into effect.

¹⁷⁸ At the time Bill 210 was passed, live-in caregivers had three years to complete the work necessary to apply for permanent residence. The 36-month time limit for filing a complaint under Bill 210 was developed to "allow a live-in caregiver to make a complaint after she or he has obtained permanent residency status" so that the worker would not be vulnerable to deportation: see Hon. Peter Fonseca in Legislative Assembly of Ontario, *Hansards* (21 October 2009). Since the Bill was passed, though, the federal LCP was amended to give live-in caregivers a total of four years to complete the work needed to apply for permanent residence. The limitation period under Bill 210 should be similarly extended by one year so that the limitation period continues to accommodate the initial concern about precariousness.

supervision of recruiters and employers. The goal should be to eradicate the practices to ensure that the worker begins an employment relationship in a position of security rather than insecurity. Manitoba has already established a best practices model in this regard which has incorporated many of the recommendations from international standards.

a. A Best Practices Model: Manitoba's Worker Recruitment and Protection Act

Manitoba's *Worker Recruitment and Protection Act* ("WRAPA")¹⁷⁹ was passed in 2008 and detailed regulations under the Act were made in early 2009.¹⁸⁰ Like Bill 210, *WRAPA* prohibits recruiters from charging fees to migrant workers and prohibits employers from recovering costs of recruitment.¹⁸¹ The enforcement body has the power to recover fees that are improperly charged and costs that are improperly recovered.¹⁸² Manitoba's regime, however, more closely tracks best practices because it builds in significant government oversight and recruiter/employer accountability at the front end of the recruitment process and provides greater security to ensure migrant workers can recover improperly charged fees.¹⁸³ In this way, *WRAPA* directly targets the behaviour that creates the insecurity to prevent the insecurity from arising. This is a more powerful and transformative approach than one that relies primarily on a reactive tool to help a precariously situated worker secure after-the-fact redress for the harm.

i. Employer Registration

Under *WRAPA*, no employer can recruit a "foreign worker"¹⁸⁴ without first registering with the provincial Director of Employment Standards and no employer can use a recruiter who is not licensed by the Director of Employment Standards.

¹⁷⁹ C.C.S.M., c. W197.

¹⁸⁰ *Worker Recruitment and Protection Regulation*, Regulation 21/2009 ("*WRAP Regulations*").

¹⁸¹ The scope of the no fee/no cost recovery prohibition is broader under Bill 210 than under *WRAPA*. *WRAPA* prohibits recruiters from charging fees to a foreign worker "for finding or attempting to find employment" and allows an employer to recover expenses in some circumstances: see *WRAPA* s. 15(4), 16, 17.

¹⁸² *WRAPA*, s. 20.

¹⁸³ Other provinces also have legislative schemes which regulate and license employment agencies and/or prohibit agencies from charging employees fees for recruitment: see, for example, *Employment Standards Act*, R.S.B.C. 1996, c. 113 and *Employment Standards Regulation*, B.C. Reg. 396/95, s. 2-12; *Fair Trade Act*, R.S.A. 2000, c. F-2, *Employment Agency Business Licensing Regulation*, Alta. Reg. 189/1999. However, the Manitoba legislation provides the model in Canada that is most directly and comprehensively constructed to address best practices in the circumstance of transnational migrant workers.

¹⁸⁴ *WRAPA*, s. 1 defines a "foreign worker" as "a foreign national who, pursuant to an immigration or foreign temporary worker program, is recruited to become employed in Manitoba." The term foreign worker is, accordingly, used in this section of the paper when referring to the provisions of the Manitoba legislation.

When applying to register, the employer must provide detailed information about the employer's business; the name and address of every person who will be engaged directly or indirectly in foreign worker recruitment for the employer; information about the position to be filled by the foreign worker; and any other information requested by the Director.¹⁸⁵ The employer must provide information about the main duties of the position the foreign worker will fulfil and the corresponding NOC code; the reasonable efforts taken to hire a Canadian citizen or permanent resident; the screening process to be used to determine if the worker can perform the duties; the anticipated starting date and duration of employment; and the location where the worker is to be recruited.¹⁸⁶

The Director can refuse to register an employer or can cancel or suspend an employer's registration if the employer provides incomplete, false, misleading or inaccurate information in support of the application; if there are reasonable grounds to believe that the employer will not act in accordance with the law or with undertakings given in respect of employing a foreign worker; if an individual engaged in foreign worker recruitment is not licensed as required under the legislation; or if there are reasonable grounds to believe that an employee engaged in recruitment will not act in accordance with the law, or with integrity, honesty or in the public interest.¹⁸⁷

Where an employer is registered to hire a foreign worker, the registration is valid for one year only¹⁸⁸ which means that there is ongoing supervision of the employer's conduct and the need to recruit foreign labour.

This provincial government oversight enables the provincial and federal jurisdictions to work together in a more integrated way to provide front-end protection against migrant worker abuse. The provincial registration is significant because a Manitoba employer's application to HRSDC for an LMO will not be processed without provincial registration. In addition, the LMO will only be processed if there is consistency between the LMO requested and the employer's provincial certificate of registration.¹⁸⁹ This is an example of how the federal and provincial systems can work together to reinforce worker security. This collaboration suggests that the federal government could establish national standards for recruitment as a precondition for employer participation in the temporary labour migration programs.¹⁹⁰

¹⁸⁵ WRAPA, s. 11.

¹⁸⁶ WRAP Regulations, s. 12.

¹⁸⁷ WRAPA, s. 12 [emphasis added].

¹⁸⁸ WRAP Regulations, s. 14(2).

¹⁸⁹ See, Fudge, "Global Care Chains," above note 4 at 261.

¹⁹⁰ The setting of national standards on recruitment is recommended by UFCW Canada in *The Status of Migrant Farm Workers in Canada 2010-2011*, above note 44 at p. 17.

ii. *Recruiter Licensing*

At the same time that employers seeking foreign workers must register with the provincial government, *WRAPA* also requires that all persons involved in recruiting foreign nationals to work in Manitoba be licensed by the Manitoba government.¹⁹¹ Recruitment is defined broadly to encompass “finding one or more foreign workers for employment in Manitoba” and “finding employment in Manitoba for one or more foreign workers.”¹⁹²

WRAPA restricts the pool of people who are eligible to be licensed as recruiters. The only persons who can be licensed recruiters are members in good standing of the Law Society of Manitoba, a bar of another province or the Chambre des notaires du Québec; or members in good standing of the Immigration Consultants of Canada Regulatory Council.¹⁹³ This brings the worker recruitment practices in line with the protections provided under the *IRPA*. The federal law provides that the only persons who may directly or indirectly be paid to advise a person in connection with applications or proceedings under the *IRPA* are lawyers, paralegals, Québec notaries, and immigration consultants all of whom must be in good standing with their respective regulatory bodies.¹⁹⁴ This is another example of a best practice that improves security by building in multi-directional oversight and public interest in compliance as those eligible to apply for recruiting licenses are subject not just to supervision under *WRAPA* but also to professional standards oversight by their professional governing bodies. As a result, this strict licensing requirement can serve an important role to curtail the use of unregulated private recruiters operating abroad. The Director of Employment Standards has the power to investigate the character, history and key business relationships of the person applying to be licensed as a recruiter to evaluate their eligibility.¹⁹⁵ As with employer registration, the Director can refuse to issue a license to a recruiter or can cancel or suspend a license if the applicant provides incomplete, false, misleading or inaccurate information in support of an application; fails to meet the qualifications required in the Act and regulations; there are reasonable grounds to believe the applicant will not act in accordance with the law, or with

¹⁹¹ *WRAPA*, s. 2(4). The only persons or entities exempt from the licensing requirement are individuals who, on behalf of their employer, engage in activities to find employees, including employees who may be foreign workers (i.e. this would cover, for example, the employer’s own human resources employees); a person who, without a fee, finds employment for a foreign worker who is a family member; an agency of the government or municipality (for example, this would exempt the sending governments which recruit workers for the SAWP); or other person or class of persons exempted under the regulations: see *WRAPA*, s. 2(5).

¹⁹² *WRAPA*, s. 1.

¹⁹³ *WRAP Regulations*, s. 6.

¹⁹⁴ *IRPA*, s. 91(1) and (2). Under s. 91(5), effective 30 June 2011, the Immigration Consultants of Canada Regulatory Council was designated as the relevant regulatory body with respect to immigration consultants.

¹⁹⁵ *WRAPA*, s. 6.

integrity, honesty or in the public interest; or the applicant is carrying out activities in contravention of the Act, regulations or terms of the license.¹⁹⁶

Before the Manitoba government licenses an individual to engage in foreign worker recruitment, the individual must provide an irrevocable letter of credit or a deposit of cash or securities in the amount of \$10,000. If a recruiter contravenes the Act, the letter of credit/deposit is forfeited and the proceeds can be used to pay back any fees that are owed to a migrant worker.¹⁹⁷ This practice is consistent with the ILO's recommendation to create effective protection to ensure migrant workers can recover improperly charged fees.

When a person is licensed as a recruiter, the license is valid for one year. The license is personal to that individual and is not transferrable or assignable.¹⁹⁸ Once licensed, the licensee's name is placed on a public registry.¹⁹⁹ Only recruiters listed on the public registry may engage in foreign worker recruitment. If there is a change in business entity, the licensee cannot continue to engage in foreign worker recruitment without the Director's consent in writing.²⁰⁰

iii. Proactive Supervision

The third proactive structure of *WRAPA* that builds greater security for migrant workers involves the formal collection of data once migrant workers have been authorized to work in the province.

Once a migrant worker is employed in Manitoba, the employer must file information with the Director of Employment Standards providing each worker's name, address, telephone number; the worker's job title; and the location where he or she performs the majority of his or her employment duties. Upon request, the employer must also provide the Director with complete and accurate records regarding expenses incurred by the employer in recruiting the worker; any contract or agreement under which the employer retains or directs an individual to recruit foreign workers; and any contract or agreement the employer has entered into with the migrant worker.²⁰¹

At the same time, the recruiter must maintain records of every agreement they have entered into regarding the recruitment of a foreign worker and a list of every foreign worker they have recruited for employment in the province.²⁰² While these records are not filed with the Director, they must be made available for inspection on request.

¹⁹⁶ *WRAPA*, s. 9, 10.

¹⁹⁷ *WRAPA*, s. 5 and 20(4); *WRAP Regulations*, s. 9.

¹⁹⁸ *WRAPA*, s. 7(2) and (3).

¹⁹⁹ *WRAPA*, s. 27.

²⁰⁰ *WRAPA*, s. 8.

²⁰¹ *WRAP Regulations*, s. 14(2).

²⁰² *WRAP Regulations*, s. 15(1)(c).

The Director is expressly given proactive powers to oversee compliance with the Act. Under s. 19, the Director, or an officer authorized in writing by the Director

may on his or her own initiative make any inspection or investigation that he or she considers necessary or advisable to determine whether this Act, the regulations or a term or condition imposed under this Act is being complied with.

In addition, the legislation expressly allows for information sharing between the Director and a department or agency of the government of Manitoba, government of Canada or of another province.²⁰³

Adopting the *WRAPA* model then would represent an advance on providing security for migrant workers in a number of respects:

- (a) The *WRAPA* model allows for more communication and coordination between the federal immigration system and the provincial employment standards system and allows each system to act in a more active supervisory role to ensure employer and recruiter compliance with the law.
- (b) The *WRAPA* model places responsibility for supervising legal compliance with an agency that has greater capacity to do so. Proactive enforcement by the Director of Employment Standards is an improvement over reliance on reactive investigations in response to complaints from precariously situated workers. It also builds a culture of public responsibility for the treatment of migrant workers and a culture in which there is an expectation of compliance with standards for decent work.
- (c) The requirement to file information with the Director of Employment Standards provides the data that is necessary to engage in meaningful proactive monitoring. The data should facilitate identification of trends in particular sectors that are hiring migrant workers, particular employers that are hiring over an extended period of time, particular jobs in which migrant workers are being placed, locations from which migrant workers are being recruited and so on. Apart from facilitating monitoring and enforcement, collecting such data can support evidence-based research and policy development and could be used to build in other systems of support at other stages in the labour migration cycle.

²⁰³ *WRAPA*, s. 23(1).

Seasonal Agricultural Worker Program

Workers who arrive under the SAWP are not subject to the same form of insecurity at the recruitment stage as workers arriving under the other labour migration programs. Under the SAWP, the transfer of workers is regulated in Canada, Mexico and the Caribbean by the designated government and non-governmental agencies (i.e. FARMS) in accordance with the MOUs and operational guidelines. The workers' home governments are responsible for recruiting and selecting employees who will participate in the SAWP. This model of bilateral government-to-government agreements that regulate the migration of temporary workers is considered a best practice by the ILO specifically because it provides for organized migration of workers and prevents exploitation by private recruiters.²⁰⁴

This model of bilateral agreements is one that could be extended to other temporary labour migration streams that bring workers to Ontario. The four western provinces have in fact entered into memoranda of understanding with the Philippines government to provide guidelines for recruiting workers coming into those provinces under the NOC C & D Pilot Project.²⁰⁵

While the bilateral agreements under the SAWP are an example of a best practice, they do not eliminate the insecurity and possibility of unfair treatment in the recruitment process. For example, contrary to ILO standards, SAWP workers do bear some of the costs of recruitment under these agreements. Workers from the Caribbean are subject to a 25% holdback on each payroll which is submitted to the government agent of their home country. Under the terms of the contract and a "supplementary agreement between the WORKER and his/her government," "a specified percentage of the 25% remittance to the government agent shall be retained by the GOVERNMENT to defray administrative costs associated with the delivery of the program."²⁰⁶

More significantly, workers under the SAWP face particular precariousness because they are caught in a cycle of perpetual recruitment. Apart from a few bargaining units of migrant workers that have been unionized outside of Ontario, workers under the SAWP have no job security regardless of how long they have been in the program. They do not know from year to year if they will be hired back. For this reason they are tremendously dependent upon the good will of their employer who has the power to name them to return the following year. The capacity to name a worker could provide a worker with a degree of job security, but the power to name is exercised unilaterally by and at the discretion of the employer. As a result, it is qualitatively very different from a right to

²⁰⁴ See, for example, ILO Convention 97, *Migration for Employment Convention*, above note 139 at Article 10 and Annex II.

²⁰⁵ See the discussion of the MOU between British Columbia and the Philippines in Fudge, "Global Care Chains," above note 4 at 251-253. That MOU expressly does not apply to workers under the LCP.

²⁰⁶ *SAWP Contract – Caribbean – 2012*, Article IV(1).

recall based on seniority. It has been repeatedly reported that this dependence on their employer to name them to return (and to provide good reports back to their home government) makes workers under the SAWP reluctant to criticize working or living conditions on the farm or complain about rights violations for fear of jeopardizing their chance to return for another season.²⁰⁷

The precariousness in this cycle of perpetual recruitment is exacerbated by the institutionalized competition between Mexico and the Caribbean countries that is built into the structure of the SAWP. Employers can, and at times do, strategically change the source countries from which they recruit workers which serves to dampen workers' resistance to poor treatment and to dampen pressure from sending countries to improve conditions. This competition has intensified over the past decade with the introduction and expansion of the NOC C & D Pilot Project and, in particular, the NOC C & D Agricultural Stream.²⁰⁸ As promoted on the HRSDC website, employers are now "free to choose" between the SAWP and the NOC C & D Pilot Project. Workers from countries beyond the SAWP participants – such as Guatemala, Thailand, Peru and the Philippines – are in fact being brought in to work in Ontario.

Finally, the precariousness of the perpetual recruitment cycle and the lack of seniority and recall rights is being highlighted in legal proceedings that are ongoing in British Columbia. In British Columbia, migrant workers under the SAWP have unionized in bargaining units represented by the United Food and Commercial Workers Union Canada ("UFCW Canada"). However, workers have been denied the right to return to their workplace in BC and have filed complaints at the BC labour relations board alleging that the Mexican government and its Vancouver consulate have colluded with employers to blacklist migrant workers who were union supporters.²⁰⁹ The insecurity created through perpetual recruitment then is a direct impediment to workers' capacity to exercise their fundamental human rights, including their freedom of association.

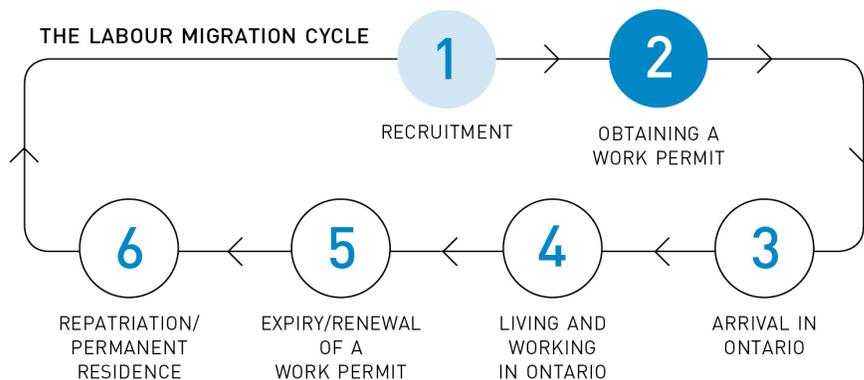
While the problems that are faced by the workers under the SAWP are structurally different from those faced by workers under the LCP and NOC C & D streams, the recruitment dynamics create a similar experience of

²⁰⁷ See, for example, North-South Institute, *Migrant Workers in Canada*, above note 98 at 4.

²⁰⁸ The nature of this competition is apparent in an advertisement posted by the Government of Honduras in an agricultural production magazine in 2011. The advertisement provides both a 1-800 number and a website through which employers are invited to "report problems with workers" and promises that "in case of contract default by worker, replacement costs covered in Honduras 2011 budget." See discussion of this advertisement in Preibisch, "Development as Remittances or Development as Freedom?", above note 3 at 98-99.

²⁰⁹ The legal proceedings in this matter are ongoing at the time of writing. For detailed information about the case, including copies of the complaints that have been filed at the labour board, evidence, legal submissions and media reports, see UFCW Canada, "Stop the Blacklisting of Migrant Workers," online at http://www.ufcw.ca/index.php?option=com_content&view=article&id=2564&Itemid=342&lang=en

precariousness that leaves all of the workers hesitant to speak out against unfair and illegal treatment for fear that their chance to work and stay in Canada will be jeopardized. This precariousness stays with them as they move through the other phases of the labour migration cycle.



2. Work Permits

The second phase of the labour migration cycle involves obtaining a work permit. This section addresses issues in relation to work permits: (a) the restriction on who the migrant can work for; and (b) the restriction in occupation, which will be addressed in conjunction with the restrictions on training and education.

a. Tied Work Permits

Workers in all four of the lower skilled labour migration programs are employed on “tied” work permits. They are authorized only to work for the specific employer named on the work permit, doing the particular occupation that is authorized on the work permit.

Tied work permits decrease migrant workers’ security and undermine their capacity to advocate for fair treatment if an employer is failing to comply with an employment contract or employment standards.²¹⁰ Workers with permanent status who are being treated unfairly on the job can quit and seek employment elsewhere. While a migrant worker could, technically, exercise this self-help, the real capacity to do so is extremely limited. A migrant worker is lawfully allowed

²¹⁰ Both the UN and the ILO Conventions contemplate that migrant workers can be subject to restrictions on their employment and mobility for a period of up to two years: UN, *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, above note 12 at Article 52; ILO Convention 143, above note 139 at Article 14. The practice of tying a migrant worker to a single employer, however, creates considerable insecurity and potential for abuse. For this and other reasons, the federal Standing Committee on Citizenship and Immigration has recommended that the Government of Canada discontinue the practice of making work permits employer-specific and instead issue sector- or province-specific permits: see note 216 below.

to be in Ontario for the full period authorized on their work permit and the worker can seek other authorized work if they quit or are terminated before the end of the promised contract. However, the process for changing employment is lengthy and fraught with uncertainty and insecurity. The insecurity is compounded when unscrupulous employers and recruiters exert pressure on migrant workers by insisting that they can be deported if they leave their employment.

A migrant worker cannot change jobs unless they can find another employer who is willing to go through the lengthy process to apply for and receive an LMO to hire them and who is then willing to wait again until the migrant worker is able to apply for and receive an amended work permit.²¹¹ This process can take months during which a migrant worker is unable to pursue authorized work even though they are available and willing to work. A worker who engages in work prior to receiving an amended permit falls out of compliance with the *IRPA* and becomes a worker without regular status. Sometimes these procedural delays, combined with workers' need to support themselves while waiting for an amended work permit, lead migrant workers to engage in unauthorized work. As a result, some migrant workers end up moving back and forth across the status/non-status divide during their time in Canada.²¹² This heightened precariousness around their immigration status leaves these workers even more vulnerable to abuse.

It should be noted that, like Canadian citizens and permanent residents, migrant workers have employment insurance premiums deducted from their pay. As a result, they are entitled to receive regular employment insurance benefits and sickness benefits under the *Employment Insurance Act* while they are in Canada as long as they meet all the same eligibility requirements that Canadian citizens and permanent residents must meet. In this sense, the law formally treats migrant workers the same as Canadian citizens and permanent residents. This position of formal equality is reiterated by HRSDC which, on its website, advises that "Temporary foreign workers are eligible to receive regular and sickness Employment Insurance benefits if they are unemployed, have a valid work permit and meet eligibility criteria, including having worked a sufficient number of hours."²¹³ However, in practice, formal equality does not

²¹¹ Under the SAWP, a migrant worker can only change jobs with the written consent of the current employer, the employer to whom they wish to transfer, HRSDC and the government agent of the migrant workers' home country.

²¹² It is not known how many people are working without status in Ontario or across Canada. Estimates of the number of non-status workers across Canada range from 80,000 to 500,000: Standing Committee on Citizenship and Immigration, *Temporary Foreign Workers and Non-Status Workers*, above note 153 at pp. 47-53.

²¹³ HRSDC, "Eligibility for Canadian Employment Insurance," online at

translate into equal access to benefits. For many years, advocates and researchers have reported that this formal law and policy is not always applied consistently with the effect that workers often have difficulty claiming benefits.²¹⁴ The practical difficulty in access centres on the legal requirement that a worker must be “available for work” in order to receive regular benefits. The point that leads to confusion and inconsistent application is whether a work permit that is tied to the former employer is valid so as to consider the worker available for work. The Alberta Federation of Labour expressed the problem thus: “a temporary foreign worker cannot apply for EI benefits until he or she gets a new work permit which means they have a new job and no longer need EI benefits!”²¹⁵ While workers are actually entitled to these employment insurance benefits, it is necessary to ensure they have accurate information to avoid or address the above confusion and that the policy is applied consistently. If migrant workers are paying employment insurance premiums, principles of fairness and substantive equality require that they have realistic and effective access to benefits.

Because of the problems and delays associated with tied permits, workers, worker advocates, and numerous researchers have recommended that migrant workers receive permits that are at least sector-specific or province-specific, if not open. The federal Standing Committee on Citizenship and Immigration in 2009 also recommended that work permits be made sector-specific or province-specific. This paper also adopts that position. The Standing Committee Report observed that employer concerns about costs expended to recruit a worker who subsequently transfers could be addressed by allowing for cost-recovery from the second employer on a pro-rated basis.²¹⁶

As noted earlier, under the current system, LMOs and work permits are processed by different federal government departments (HRSDC and CIC respectively). The federal government does not cross-reference these separate processes to offer a service to match employers who are seeking LMOs with migrant workers who are already in Canada seeking work.

http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/ei_tfw/ceie_tfw.shtml (accessed 9 March 2012). Migrant workers can also claim maternity and parental benefits and compassionate care benefits, again, on condition that they meet the normal eligibility criteria.

²¹⁴ See, for example, Alberta Federation of Labour, *Entrenching Exploitation*, above note 4 at pp. 23-24; Standing Committee on Citizenship and Immigration, *Temporary Foreign Workers and Non-Status Workers*, above note 153 at pp. 41-42; Barbara MacLaren and Luc Lapointe, *Making a Case for Reform: Non-Access to Social Security Measure for Migrant Workers* (Ottawa: FOCAL, October 2009); Nakache and Kinoshita, “Canadian Temporary Foreign Worker Program,” above note 4 at 19-21; *Making It Work: Final Recommendations of the Mowat Centre Employment Insurance Task Force* (Toronto: Mowat Centre, 2011) at 50-51.

²¹⁵ Alberta Federation of Labour, *Entrenching Exploitation*, above note 4 at pp. 23-24.

²¹⁶ Standing Committee on Citizenship and Immigration, *Temporary Foreign Workers and Non-Status Workers*, above note 153 at p. 26.

One of the best practices recommended by the ILO is for a state to provide public employment services to facilitate migrant worker placement. A government-operated employment service that is able to facilitate matching employers seeking LMOs with migrant workers presently in-country has the potential to both enhance worker security by allowing workers to find alternate employment in the event of poor treatment and to facilitate timely filling of positions for employers.²¹⁷ This is another circumstance in which federal and provincial jurisdictions, rather than operating in isolation, could reinforce employer-worker matching. For example, a provincial system in which employers must register with a public body before seeking to hire foreign nationals could provide a database from which to facilitate such matching. The availability of such services could deter exploitation of migrant workers by making the option to quit in search of alternate work feasible. It would also increase migrant workers' capacity to secure further work if a promised initial placement fails to materialize upon their arrival or finishes early.

b. Restrictions on Authorized Occupation and on Education and Training

Under the current work permits, migrant workers are limited to working in the particular position which is authorized on their work permit. It is recommended that occupational restrictions be framed in a way that ensures that if a worker is injured at work, the permit will still allow them to carry out alternate work or modified duties as part of the accommodation required under the *Human Rights Code* or as part of a return to work under the *Workplace Safety and Insurance Act*.

Work permits for workers at the NOC C & D level also include express prohibitions against undertaking or enrolling in any formal education or training programs while in Ontario. Workers can only enrol in such programs if they are able to apply for and receive a separate study permit. These restrictions that are built into their work permits undermine social inclusion and social security. They act as an impediment to future integration and drive a deskilling of the migrant labour force both by preventing workers from developing skills and by preventing them from maintaining the currency of their existing skills.

It must be remembered that migrant workers are present in Canada for a period that extends over years, and SAWP workers can return seasonally for a period that extends over decades. The restriction to a particular position does not allow migrant workers to develop skills and access more skilled work even within the same workplace so they remain in the lower skilled positions despite

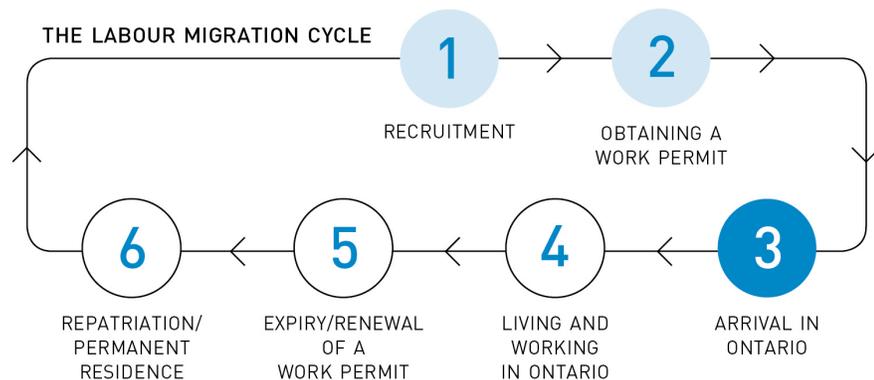
²¹⁷ The creation of such a facilitation service was also endorsed by the Standing Committee on Citizenship and Immigration, *Temporary Foreign Workers and Non-status Workers*, above note 153 at p. 26.

their capacity to learn. Migrant farm workers report that this inability to build up skills leaves them with little security if they are unable to continue farming.

The problem of deskilling is particularly acute for live-in caregivers, many of whom are trained as nurses or other health care workers in the Philippines. As their work permits also prohibit enrollment in formal education or training programs, they cannot, even in their off-work hours, pursue the continuing education that would allow them to keep their skills current and establish connections in their trained professions so that they can resume their professional career once they have received permanent resident status. The result is that even after receiving permanent resident status, many former caregivers end up working in jobs that are below their actual professional qualifications.²¹⁸ This systematic deskilling of workers who in fact have the right to seek permanent resident status does not serve the interests of either the workers or the community.

It is recommended therefore that the restriction on enrollment in training or educational programs outside their work hours be lifted. The capacity to participate in such programs, including official languages training, supports not only the maintenance and development of job skills, but it recognizes migrant workers as whole persons (not just economic units) and provides an important element of social integration that is important for migrant workers' quality of life.

²¹⁸ See, for example, Philip F. Kelly, Mila Astorga-Garcia, Enrico F. Esguerra, and the Community Alliance for Social Justice, *“Explaining the Deprofessionalized Filipino: Why Filipino Immigrants Get Low-Paying Jobs in Toronto,”* CERIS Working Paper No. 75 (Toronto: CERIS – The Ontario Metropolis Centre, October 2009).



3. Information Prior To and On Arrival in Ontario

The first two phases of the labour migration cycle – recruitment and obtaining a work permit – typically take place outside of Canada. The third phase spans the actual process of transnational migration and is concerned with the information that is provided to workers in the course of that migration.

It is critical that migrant workers have full and accurate information about their rights in the labour migration process. The ILO Conventions on migrant workers begin by emphasizing government’s obligations to ensure that workers are provided with accurate information and that active steps are taken to combat “misleading propaganda” about the process.²¹⁹ It is vital that full and accurate information is available from the first stage of creating a migrant work relationship. Migrant workers must be provided with accurate information about the rights and limitations to the programs under which they are migrating – including accurate information about whether the program will give them access or entitlement to apply for permanent residence. Misinformation provided to migrant workers by unscrupulous recruiters often holds out a false hope that the migrant worker can eventually apply for permanent residence. Misinformation like this at the outset can draw workers into and keep them in exploitative relationships.

While government agents from sending countries under the SAWP may be in a position to provide some information to workers migrating under that program, migrant workers arriving under the other three lower skilled migration programs report that they receive little information, if any, about their rights before they arrive in Ontario. This makes them particularly vulnerable to exploitation. Because migrant worker recruitment takes place through multiple different – and mostly private – mechanisms in many different countries, it is important to ensure that workers are provided with accurate and consistent information that will enable them to make informed choices about whether to

²¹⁹ ILO Convention 97, *Migration for Employment Convention*, above note 139 at Articles 1, 2 and 3.

migrate for work and about how to protect their rights in that migration process. This is a responsibility that should be borne by the Canadian government. In practical terms, contact with a Canadian government official (both overseas and on arrival) is a consistent step in the migration process for all migrant workers. As a result, this is the point in the system at which consistent delivery of information can be ensured. In legal terms, the Canadian government should take on this responsibility as part of its obligation to proactively consider and address the vulnerability of those individuals who are the subject of the temporary labour migration programs.

Systematic, proactive measures need to be put in place to ensure that migrant workers are given accurate information about:

- (a) their rights in the temporary labour migration stream they have entered;
- (b) their employment, social and human rights while in Ontario, including clear and accurate information about what kinds of deductions will lawfully be made from their pay (i.e. taxes, employment insurance premiums, Canada Pension Plan contributions, room and board and so on);
- (c) mechanisms for enforcing their rights while in Ontario; and
- (d) government and community organizations and services that are available to assist them throughout their labour migration cycle.

The federal and provincial governments should ensure that this information is provided by Canadian government officials to migrant workers before they leave their country of residence and should be reiterated by government officials upon arrival in Ontario.

While some information is available on the federal Citizenship and Immigration website, and on the provincial Ministry of Labour website, providing information in this format assumes that workers have readily available internet access (both in their countries of origin and while in Ontario) as well as a high degree of literacy. The websites are complex to navigate and all the information that workers need is not easily accessible in a single place in plain language or in a language that the worker speaks or reads.

One exception is that the federal Citizenship and Immigration website provides a link to a comprehensive plain language guide, in English, for migrant workers intending to work in Alberta.²²⁰ The guide includes easy to read information about:

- (a) the roles of the different federal government agencies involved in the migration process;

²²⁰ Government of Alberta, *Temporary Foreign Workers: A Guide for Employees* (March 2010). This document is available on the Citizenship and Immigration Canada website at <http://www.cic.gc.ca/english/work/index.asp> as well as on the Government of Alberta website at <http://employment.alberta.ca/documents/WIA/WIA-IM-tfw-employee.pdf> (accessed 13 January 2012).

- (b) information and contact numbers for changing the terms and conditions on a work permit, accessing employment insurance, finding new employment and reporting violations in respect of work permits;
- (c) information about employment standards, health and safety, employment agencies, housing, workers compensation, and privacy rights including identifying the government agencies responsible for enforcement along with toll free numbers for making complaints and seeking more information;
- (d) information and contacts for government agencies available to assist migrant workers;
- (e) information and contacts for community-based agencies and settlement services available to assist migrant workers; and
- (f) information about the provincial nominee program, the streams of potential migration, the application process and contact information.

This guide is prepared by the Government of Alberta and so the information contained in it is relevant only to that province. But the fact that it is prominently placed on and accessible through the federal website provides a simple example of how federal and provincial jurisdictions can operate together to build more security for migrant workers. Similar province-specific plain language guides should be developed and made available at the front end to migrant workers intending to work in Ontario and other provinces.

Information should not, however, simply be made available passively (i.e. through documents that are posted on websites). Information should also be communicated in person, in a language the worker understands, both before departure from a migrant worker's country of residence and on arrival in Ontario. To this end, the Standing Committee on Citizenship and Immigration in 2009 recommended that "the Government of Canada require each temporary foreign worker candidate to attend an in-person orientation session in his or her country of origin prior to the work permit being issued," and also that "temporary foreign workers be required, within three months of their arrival, to meet with an accredited NGO to follow up on labour legislation compliance."²²¹ These recommendations should be implemented.

While migrant workers do not have access to the comprehensive information outlined above, migrant workers in Ontario do have access to some information prior to and upon their arrival in Ontario.

First, migrant workers under all four lower skilled migration programs must be provided with signed employment contracts before arrival during the LMO/work permit application process. Those prescribed contracts set out key terms of employment including hours and wages. However, the contracts do not

²²¹ Standing Committee on Citizenship and Immigration, *Temporary Foreign Workers and Non-Status Workers*, above note 153 at pp. 27-30.

meet best practices because they do not provide information on how and through what agency the contracts are to be enforced or even contacts which could assist the worker to find information about the enforcement process. In addition, it must be noted that migrant workers do not have voice, individually or collectively, in negotiating these contracts. These are all standard form contracts prepared by HRSDC. While the federal government posts prevailing wage rates for different occupations, unions and worker advocates have for many years raised concerns about the lack of transparency and accountability in the process by which the prevailing wage rates are set. In addition, they have raised concerns about whether workers receiving piece rates are in practice able to earn the minimum wage.²²²

Second, under Bill 210, employers and recruiters are required to give live-in caregivers copies of information sheets prepared by the Director of Employment Standards which set out the caregivers' rights under Bill 210 and under the *Employment Standards Act, 2000*.²²³ For no other migrant workers is this mandatory. These information sheets are available in English, French, Tagalog, Spanish and Hindi.²²⁴ While this duty to provide information is good, its effectiveness depends on employer compliance. Reliance on private information delivery is less effective than a model that systematically requires that critical information be delivered proactively in advance by neutral government officials who are separate from the employer on whom a worker is dependent.

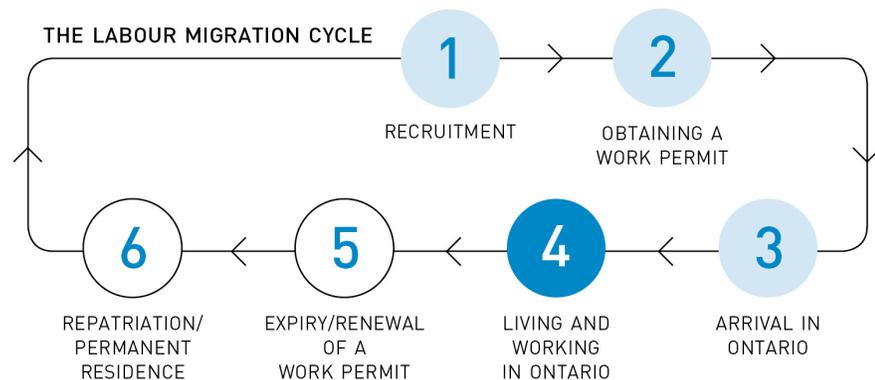
The critical piece of information that migrant workers lack is information about recognized labour organizations, community-based organizations and worker advocates who are able to assist them throughout their labour migration cycle. Providing migrant workers with this information and contact details prior to or upon arrival in the province (as is done in the Alberta guide), would play an important role in enhancing workers' individual and collective voice. It would acknowledge the important public role that labour, worker advocate and community organizations play, and their significant contributions to building security for workers and to monitoring compliance under the labour migration programs. It would underscore the legitimacy of this community organizing as an exercise of fundamental human rights and would facilitate workers' capacity to exercise their fundamental human rights and labour rights.²²⁵

²²² See, for example, UFCW Canada, *The Status of Migrant Farm Workers in Canada 2010-2011* and earlier annual reports, available online at www.ufcw.ca.

²²³ Bill 210, s. 11-13.

²²⁴ These information sheets are available on the Ontario Ministry of Labour website at http://www.labour.gov.on.ca/english/es/pubs/is_fn_epfn.php and http://www.labour.gov.on.ca/english/es/pubs/is_fn_esa.php (accessed 27 March 2012).

²²⁵ UFCW Canada has developed an innovative transnational model for information exchange by developing formal partnerships, joint advocacy agreements and mutual co-operation pacts with state governments and advocacy groups representing workers' rights in the Mexican states that are primary



4. Working and Living in Ontario

The portrait that emerges to this point in the labour migration cycle reveals that a high degree of precariousness is the norm for migrant workers in Ontario even before they begin their first day on the job. Coming from positions of relative economic, political, social and/or environmental insecurity, it is common for migrant workers to arrive in Ontario through private recruitment mechanisms after paying significant fees. They arrive on work permits that tie them to a single employer. They arrive with little information about the nature of their rights or how to enforce them. At each stage of the labour migration cycle, a further layer of insecurity is added which the laws have either actively created or failed to adequately acknowledge or alleviate. This insecurity is compounded by further experiences which are, in some cases, embedded in the applicable legal and regulatory regimes.

Throughout their period of work in Ontario, almost all migrant workers are and remain non-unionized. The two largest contingents of migrant workers – live-in caregivers and agricultural workers under both the SAWP and NOC C & D Agricultural Stream – are, by law, expressly denied the right to unionize and engage in collective bargaining under the *Labour Relations Act*.²²⁶ The

sources for workers under the SAWP. See UFCW Canada, *The Status of Migrant Farm Workers in Canada 2010-2011*, above note 44 at pp. 18-20.

²²⁶ *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A, s. 3 provides that

3. This Act does not apply

1. to a domestic employed in a private home;

(b.1) to an employee within the meaning of the *Agricultural Employees Protection Act, 2002*.

The *Agricultural Employees Protection Act, 2002* provides that agricultural workers can form an employees' association and make representations to employers, which the employers have an obligation to either listen to or read, and which the Supreme Court of Canada has said the employer must "consider" in good faith: *Ontario (Attorney General) v. Fraser*, above note 117. But the legislation provides no mechanism to ensure the authenticity of or support for employee associations and permits multiple competing associations. It also provides no institutional support for collective bargaining, no mechanisms such as conciliation or mediation and no access to a dispute resolution mechanism in the event of bargaining impasse, no right to an enforceable collective agreement, no right to grievance arbitration and no access to a regulatory and adjudicative tribunal that has experience with and expertise in labour relations. Despite being in place for a decade, there is no

remaining workers – those arriving under the NOC C & D Pilot Project – are employed in industries that are mostly non-unionized.²²⁷ Migrant workers are overwhelmingly from racialized communities and experience racial discrimination on the job and in the communities in which they live. Beyond the LCP which has requirements for English-language proficiency, workers recruited from countries where English is not the dominant language often have limited English-language skills and, by the terms of their work permits, are precluded from enrolling in language-training (or other) courses. Because they are temporary workers, they are not eligible for federally-funded settlement services which are provided only to permanent residents.

Adding further to this precariousness is the fact that most migrant workers in Ontario are required by the terms of their particular labour migration program to either live in their employer's homes (live-in caregivers) or live in housing provided by the employer (SAWP workers and NOC C & D Agricultural Stream workers). Accordingly, their dependence on their employer is heightened and speaking out about poor working or living conditions jeopardizes not only their job but their housing.

From this starting point, the key question in this section is how to ensure that migrant workers are, in reality, able to gain access to workplace rights. This paper addresses some of the experiences that migrant workers face in respect of key rights. It then addresses recommendations to strengthen worker security.

record of any employee associations in the province that have succeeded in negotiating any agreements with employers under this legislation. The ILO Committee on Freedom of Association has repeatedly found that this legislation fails to comply with ILO standards on freedom of association: see ILO, Committee on Freedom of Association, Report 330 (March 2003), Case No. 1900; ILO, Report of the Committee of Experts on the Application of Conventions and Recommendations, 91st Session, Report III (Part 1A) (Geneva, June 2003); ILO, Report of the Committee on Freedom of Association, Interim Report, Case No. 2704 (November 2010); ILO, 363rd Report of the Committee on Freedom of Association, 313th Session, Ninth Item on the Agenda, (Geneva, March 2012), Case 2704 at pp. 100-104. For a detailed analysis of the *Agricultural Employees Protection Act, 2002* see the full collection of essays in Faraday, Fudge and Tucker, *Constitutional Labour Rights in Canada*, above note 3.

²²⁷ See above at note 104. For a situation involving unionized migrant workers see *National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada, Local 444) v. Presteve Foods Ltd.* 2008 CanLII 22523 (Ontario Labour Relations Board). In that case the employer of a unionized food processing plant hired temporary foreign workers from Thailand but excluded them from the bargaining unit. The union filed an unfair labour practice complaint which was settled on terms that required that the migrant workers be included in the bargaining unit and that they "will be paid wages and benefits which constitute a likeable amount of compensation to that paid to the other members of the bargaining unit." It was also agreed that hiring of temporary foreign workers could not result in the displacement of workers in the bargaining unit: see paragraph 13 of the settlement agreement. These outcomes should be the starting point of the employment relationship under the migration stream. The requirements that citizens and permanent residents not be displaced by migrant workers and that migrant workers receive the prevailing wages (including wages under a collective agreement where it exists) are the formal prerequisites for an employer's eligibility for an LMO under the *IRPA*.

a. *Workers Experience the Erosion of Their Rights*

Employment Standards

Because migrant workers are largely non-unionized, their primary workplace protections are found in the *Employment Standards Act, 2000*.²²⁸ They are also protected under the *Human Rights Code*, the *Occupational Health and Safety Act*,²²⁹ the *Pay Equity Act*²³⁰ and the *Workplace Safety and Insurance Act*.²³¹ On paper, migrant workers are entitled to the same employment rights as other workers in the province. The rights they have may vary from industry to industry,²³² but these industry-specific variations apply equally to migrant workers, non-status workers, Canadian citizens and permanent residents doing the same kind of work.²³³ Each of the template contracts under the temporary labour migration programs expressly states that the contracts are subject to the laws in the province in which the migrant worker is employed and that the contracts must comply with provincial employment standards legislation. In this respect, the formal laws and contracts comply with best practices on the equal application of the law.

Migrant workers, though, experience a significant substantive gap between their rights on paper and their treatment in reality.²³⁴ Researchers and organizers who work with migrant workers report that there are serious systemic gaps in contract compliance. This experience is shared with low-wage workers generally. In 2011, the Workers' Action Centre conducted a survey of 520 low-wage workers in Toronto, the GTA and Windsor. The survey was designed specifically to involve participation by recent immigrants, non-status workers,

²²⁸ S.O. 2000, c. 41.

²²⁹ R.S.O. 1990, c. O-1.

²³⁰ R.S.O. 1990, c. P-7.

²³¹ S.O. 1997, c. 16, Sch. A.

²³² For example, migrant and domestic agricultural workers are equally excluded from a range of minimum standards protections that are available to workers generally under the *Employment Standards Act*. Agricultural workers are generally excluded from protections for minimum wages, overtime, vacation pay, public holiday pay, maximum hours worked in a day, maximum hours worked in a week, minimum prescribed rest periods between shifts, minimum rest periods in a week or two-week period, and minimum rest periods for meals: *Employment Standards Act 2000*, Parts VII, VIII, IX, X, XI; O Reg 285/01 made under the *Employment Standards Act 2000*, sections 2(2), 4(3), 8, 9, 24-27. Fruit, vegetable, and tobacco harvesters are entitled to annual vacation and public holidays only if they have been employed as harvesters for 13 weeks: O Reg 285/01 made under the *Employment Standards Act 2000*, s 2(2), 8, 9 and 24-27. Workers, unions and worker advocates have long decried these enormous gaps in protection and have argued that employment standards protection should be extended for agricultural workers.

²³³ While it is very important to critically examine and challenge why particular rights have been withheld from different groups of workers, that inquiry is beyond the scope of this paper. Instead, the focus in this section is on whether workers have the real capacity to enforce those rights which they do have.

²³⁴ See the patterns identified in Standing Committee on Citizenship and Immigration, *Temporary Foreign Workers and Non-Status Workers*, above note 153 at pp. 37-38.

migrant workers under the LCP, SAWP and NOC C & D Pilot Project, and racialized low-wage workers. The survey revealed significant systemic violations of core employment standards, including the following:²³⁵

- 22% were paid less than minimum wage;
- 33% were owed wages by their employer;
- 31% reported that their pay was late;
- 17% received paycheques that bounced;
- 25% were paid in cash;
- 25% did not receive pay information that showed a record of deductions or hours worked;
- 39% who worked overtime hours never received overtime pay; a further 32% who worked overtime only received overtime pay “rarely” or “sometimes;”
- 34% had problems receiving vacation pay;
- 36% were terminated or laid off without termination pay or notice;
- 37% did not get public holidays off with pay; 57% who worked on public holidays did not receive the required premium pay; and
- 17% were charged a fee for temporary work.

Comprehensive figures are not publicly available to track contract/employment standards compliance across all employers of migrant workers in Ontario. In Alberta, though, where the government assigned eight employment standards officers with the specific task of auditing employers with LMOs, the government found that 60% of restaurant employers with LMOs were in breach of employment standards and also experienced significant health and safety shortcomings.²³⁶ Alberta government inspection reports for all 407 employers of migrant workers who were inspected in 2009 showed that 74% had violated employment standards.²³⁷

There are also reports of migrant workers facing patterns of discrimination on the job such as being paid less than Canadian workers doing the same work and employers assigning migrant workers to do the most dangerous jobs. Litigation in other provinces has confirmed that employers are engaging in these kinds of practices.²³⁸

²³⁵ Workers' Action Centre, *Unpaid Wages, Unprotected Workers: A Survey of Employment Standards Violations* (Toronto: Workers' Action Centre, 2011).

²³⁶ Alberta Federation of Labour, *Entrenching Exploitation*, above note 4 at pp. 15-16.

²³⁷ These figures were released by the NDP in Alberta and were based on government documents that were produced following a *Freedom of Information* request by the NDP: “Temporary foreign workers treated badly, NDP charges,” CBC online (17 March 2010), available at <http://www.cbc.ca/news/canada/edmonton/story/2010/03/17/edmonton-temporary-foreign-workers-ndp-reports.html> (accessed 29 March 2012).

²³⁸ See, for example, *C.S.W.U. Local 1611 v. SELI Canada et al* (No. 8), 2008 BCHRT 436 in which the BC Human Rights Tribunal found that the respondent construction companies had discriminated against racialized migrant workers from Central and South America based on race, colour, ancestry and place of origin by providing them with lower pay, inferior accommodations, adverse meal

Migrant workers also face significant logistical problems seeking to enforce their rights.²³⁹ While a worker can file a complaint alleging a breach of employment standards up to two years after the violation occurred,²⁴⁰ the employment standards officer can only order recovery of wages that became due in the six months prior to the complaint.²⁴¹ Even then, orders to repay wages are capped at \$10,000 per employee.²⁴² Amendments to the *Employment Standards Act* made in 2010 generally require that an employee contact their employer and attempt to resolve the dispute themselves before an employment standards officer will be assigned to investigate a complaint.²⁴³ There are exceptions, though, where an employee will be exempted from this requirement, including if they are afraid, if they are or were a live-in caregiver, or if they have difficulty communicating in the language spoken by the employer.²⁴⁴

Apart from employment standards violations, migrant workers also report other systemic rights abuses. The key ones that are highlighted here relate to housing, health and safety, and terminations.

Housing

As noted above, all migrant workers in Ontario under the LCP, SAWP and NOC C & D Agricultural Stream are required to live on their employer's property or in off-site employer-provided housing. Many migrant workers under the general NOC C & D stream, in practice, also live in accommodations owned and provided by their employers. These arrangements mean that they are always "available" for work. This gives rise to various forms of abuse including the following:

- (a) Because they live in their employer's home, with responsibility for vulnerable persons who require their care, live-in caregivers are particularly subject to being exploited to work hours well beyond the maximum 8 hours per day set out in their contracts. These extra hours are not always recorded and workers are not always paid appropriately for their overtime. The failure to record these hours is particularly damaging as accurate employment records are required in order for live-in caregivers to establish that they have completed the mandatory hours

arrangements and lower reimbursement for expenses than they provided to migrant workers from Europe.

²³⁹ For an excellent analysis of how to enhance enforcement of employment standards, see Vosko, Tucker, Thomas and Gellatly, *New Approaches to Enforcement and Compliance with Labour Regulatory Standards*, above note 147. See also, Workers' Action Centre, *Taking Action Against Wage Theft: Recommendations for Change* (Toronto: Workers' Action Centre, May 2011).

²⁴⁰ *Employment Standards Act, 2000*, s. 96(3).

²⁴¹ *Employment Standards Act, 2000*, s. 111(1).

²⁴² *Employment Standards Act, 2000*, s. 103(4).

²⁴³ *Employment Standards Act, 2000*, s. 96.1.

²⁴⁴ Employment Standards Claim Form, MOL-ES-0002, Section A3, available online at http://www.labour.gov.on.ca/english/es/pdf/mol_es_002.pdf.

needed to apply for permanent residence. Some live-in caregivers end up being effectively on-call 24-hours per day on every day except for the one day per week which they are required to be given as a day off.²⁴⁵ This exploitation is exacerbated when it is extracted through the manipulative narrative of being told that they are “one of the family.” This narrative denies the nature of their labour as work while taking advantage of the professional ethic of care and emotional bond needed to provide good care. ILO Convention 189 recognizes the extent to which living in the employer’s home increases precariousness for caregivers, and provides that governments should take measures to ensure that caregivers “are free to reach agreement with their employer or potential employer on whether to reside in the household.” Where they do live in, they should be entitled to conditions that respect their privacy, should not be obliged to remain in the household or with household members during their time off, and all periods when they are expected to remain at the disposal of the household to respond to possible calls must be recognized as working hours for which they must be paid.²⁴⁶

- (b) Because live-in caregivers and SAWP workers live on the property of their employer, they can be subject to control over their personal lives in their off-work hours (i.e. through supervision and restriction of who may visit or when they can leave the farm property).
- (c) Migrant workers under the NOC C & D streams often live in space that is owned by their employer. Often the space is connected to or near the place of employment (i.e. apartment above a restaurant, in a bunk house on the employer’s property, a rural house near the employer’s farm). Community organizers and unions report that employers of migrant workers fill these properties with numerous migrant workers, either in dorm-style living, or with multiple employees living in an overcrowded house in shared bedrooms, and the workers are charged rents at levels well above room and board permitted under the *Employment Standards Act* or under HRSDC guidelines for NOC C & D agricultural workers.

²⁴⁵ See the stories of live-in caregivers Lilliane Namukasa and Vivian de Jesus who have sued their former employers for over \$200,000 in unpaid wages: Laurie Monsebraaten, “Caring for two children for two years to earn \$2,000: ‘She told me to never tell how much I was making’”. *Toronto Star* (30 May 2011), p. A1; Workers’ Action Centre video, “Wage Theft: Outdated Laws, No Enforcement are Failing Ontario’s Workers”, online at <http://www.youtube.com/watch?v=SkgkFwuuIFE&context=C4a44644ADvjVQa1PpcFN8-PWylJV813R9OZOZOFufq0cNlMHRZ6jdQ=> (accessed 29 March 2012).

²⁴⁶ ILO Convention 189, Articles 6, 9, 10.

- (d) There is a perpetual concern that because housing inspections typically take place before the migrant workers arrive, that inspectors do not see what the conditions are like when the full complement of workers are actually housed.

Health and Safety

Migrant workers have for years raised concerns that employers fail to provide them with appropriate health and safety training and/or fail to provide them with appropriate health and safety equipment. In addition, workers repeatedly report that workers who are injured on the job are promptly dismissed and returned to their country of origin. They are effectively denied access to workplace safety insurance benefits and the opportunity to be accommodated in their jobs with modified duties until they are able to return to full capacity. The persistence of this pattern reinforces workers' fears of reporting workplace injuries.

While these problems are not unique to workers under the SAWP, that is the population of migrant workers for whom the most extensive statistical information has been collected and analysed. A 2010 report on health status, risks and needs of migrant farm workers surveyed 600 workers in Ontario under the SAWP.²⁴⁷ The report revealed that:

- 20% did not have a health card;
- 45% reported that their colleagues worked while sick or injured for fear of telling their employers;
- 55% reported that they personally had worked while sick or injured to avoid losing paid hours;
- nearly half of workers who were required to work with chemicals and pesticides were not supplied with the necessary protective gear such as gloves, masks and goggles;
- most workers had received no health and safety training;
- 93% did not know how to make a claim for workplace safety insurance benefits;
- 83% did not know how to make a health insurance claim; and
- only 24% of workers injured on the job made claims to workers compensation. Workers who were injured but did not make claims cited fear of losing hours/days of work, fear of losing their job, and fear of

²⁴⁷ See Hennebry, *Permanently Temporary*, above note 4 at pp. 16-19; Jenna Hennebry, Kerry Preibisch and Janet McLaughlin, *Health Across Borders – Health Status, Risks and Care Among Transnational Migrant Farm Workers in Ontario* (Toronto, CERIS Ontario Metropolis Centre, 2010); UFCW Canada, *The Status of Migrant Farm Workers in Canada 2010-2011*, above note 44 at pp. 14-15.

being excluded from the SAWP in the current season and future seasons as a result of raising a complaint.²⁴⁸

UFCW Canada further noted that migrant workers are unable to effectively exercise their rights under health and safety legislation: “Until the threat of arbitrary repatriation is alleviated, many migrant agricultural workers will fail to take advantage of their right to refuse unsafe or hazardous work.”²⁴⁹

In 2010, the Ontario Ministry of Labour appointed an Expert Advisory Panel on Occupational Health and Safety to undertake a comprehensive review of Ontario’s occupational health and safety system. The Expert Advisory Panel’s December 2010 report also highlighted the insecurity faced by migrant and non-status workers.²⁵⁰ The Panel identified that two areas that raise particular concerns are employer non-compliance in the underground economy and the growing numbers of “vulnerable workers” who lack the security to effectively enforce their rights. Moreover, the Panel noted that there is overlap between the two as vulnerable workers are frequently employed in precarious sectors.²⁵¹ The Panel found that:

Certain employers do engage in wilful non-compliance. They know that they are required to provide proper training, supervision and safety equipment to workers and to inform them of workplace hazards, but they actively avoid doing this. It is not unusual to find these employers operating in the underground economy.²⁵²

The Panel further found that “the underground economy remains a serious challenge” that “compromises the health and safety of workers and the public, and it undermines employment standards.”²⁵³

The Panel also identified that focused attention and reform were needed to address the experience of vulnerable workers. In addition to young workers, recent immigrants, new workers, low-wage workers in part-time jobs and workers in the temporary staffing industry, the Panel specifically addressed the vulnerability of “foreign workers hired to address temporary or seasonal labour shortages, and employed primarily in agriculture, the hotel/hospitality and construction sectors.”²⁵⁴ In particular, the Panel identified the connection

²⁴⁸ See also, UFCW Canada, *The Status of Migrant Farm Workers in Canada 2010-2011*, above note 44 at pp. 14-15.

²⁴⁹ UFCW Canada, *The Status of Migrant Farm Workers in Canada 2010-2011*, above note 44 at p. 15.

²⁵⁰ Tony Dean, *Expert Advisory Panel on Occupational Health and Safety: Report and Recommendations to the Minister of Labour* (Toronto: Ministry of Labour, December 2010) [“*Dean Report*”], online at http://www.labour.gov.on.ca/english/hs/pdf/eap_report.pdf.

²⁵¹ *Dean Report*, above note 250 at p. 7.

²⁵² *Dean Report*, above note 250 at p. 7.

²⁵³ *Dean Report*, above note 250 at p. 33.

²⁵⁴ *Dean Report*, above note 250 at p. 46.

between migrant workers' circumstances of recruitment and their barriers to enforcing health and safety rights:

Some of these workers start their journey to Canada by paying offshore employment brokers and consultants and often start working in Canada without appropriate documentation. They tend to work in the underground economy, in seasonal agricultural work or the construction industry and are highly vulnerable.²⁵⁵

These groups of vulnerable workers faced various barriers to enforcing their rights including: lack of knowledge about their rights, including the right to refuse unsafe work; lack of training; and in particular "being unable to exercise rights or raise health and safety concerns for fear of losing one's job, or in some cases, being deported."²⁵⁶ The Panel recommended a multi-pronged approach to rectifying this precariousness including: mandatory health and safety awareness training for all workers; increased proactive inspections and proactive enforcement campaigns in sectors where vulnerable workers are concentrated; outreach to vulnerable workers; greater access to information about rights in multiple languages; coordination with the federal government in the context of the Temporary Foreign Worker Program; investigation of employment brokers who recruit non-status workers; quicker remedies for workers who face reprisals; information sharing across regulatory bodies to help identify and deter underground operations; and developing regulations to control key hazards in farm work.²⁵⁷

Termination

Migrant workers are particularly vulnerable in the context of termination. They are entitled to termination notice and termination pay but, as set out above, there is widespread lack of compliance with these minimum employment standards in low-wage sectors.

Even more significantly, migrant workers do not have access to an effective adjudicative forum in which to challenge their termination as unjust. Being almost entirely non-unionized, they do not have access to grievance arbitration. The merits of dismissal cannot be adjudicated under the employment standards

²⁵⁵ *Dean Report*, above note 250 at p. 7.

²⁵⁶ *Dean Report*, above note 250 at p.46.

²⁵⁷ *Dean Report*, above note 250 at pp. 7, 36-48. For additional analysis and recommendations on improving health and safety for migrant and vulnerable workers see Vosko, Tucker, Thomas and Gellatly, *New Approaches to Enforcement and Compliance with Labour Regulatory Standards*, above note 147; Malcolm Sargeant and Eric Tucker, "Layers of Vulnerability in Occupational Health and Safety for Migrant Workers: Case Studies from Canada and the United Kingdom," *Comparative Research in Law & Political Economy Research Paper 08/2009*, Vol. 05, No. 02 (2009), online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1415371.

regime. As a result, the only avenue for redress is to file a claim in court for wrongful dismissal. While non-unionized workers in most Canadian jurisdictions also lack access to statutory protection against unjust dismissal and access to an expedited adjudicative process to resolve such disputes,²⁵⁸ this burden is exacerbated for migrant workers due to their lack of information about the Canadian justice system, their lack of resources, and most importantly, their temporary immigration status. Even assuming a worker had access to the appropriate information and guidance, in practical terms this option is neither financially accessible nor quick enough to serve a worker on a time-limited work authorization and visa. It must be remembered in all of this that migrant workers living on their employer's property who are terminated have no security of tenure in their accommodations, and so lose access to their housing along with their job.

This has been a persistent problem for workers under the SAWP. Under the SAWP contracts, an employer has broad power to terminate a worker “for non-compliance, refusal to work, or any other sufficient reason.”²⁵⁹ There is no requirement for the employer to provide a worker with the opportunity to know or respond to the reasons for their termination and no mandated process through which the merits of the termination can be adjudicated. Travel for workers under the SAWP is arranged centrally through a single travel agency in accordance with the SAWP operating guidelines. As a result, when an employer terminates a SAWP worker, this process facilitates the rapid repatriation of the worker, who is usually removed from the country within 24-48 hours of termination. A legal claim filed in Ontario in 2011 challenges this rapid termination and repatriation process as both a breach of contract and a violation of *Charter* rights.²⁶⁰

b. How to Support Workers' Security

A rights-enforcement system will only be effective to the extent that it is designed in a way that is properly responsive to the population it is intended to serve. On this score, the legislative system that is intended to protect migrant workers' rights at work fails to take into account and accommodate the economic, legal and social location of disempowerment and dependence that migrant workers experience. It is not responsive to their actual capacity to self-advocate. Because the system cannot be effectively accessed by migrant

²⁵⁸ Non-unionized workers in the federal jurisdiction can adjudicate claims for unjust dismissal under the *Canada Labour Code*, R.S.C. 1985, c. L-2, Part III, Division XIV. In Québec, statutory protection and recourse in the case of dismissal without good and sufficient cause is provided under *An Act Respecting Labour Standards*, R.S.Q., c. N1.1, Chapter V, Division III.

²⁵⁹ *SAWP Contract – Mexico – 2012*, Article X(1); *SAWP Contract – Caribbean – 2012*, Article X(1).

²⁶⁰ See *Espinoza v. Tigchelaar Berry Farms Inc.*, above note 113.

workers, employers remain largely unsupervised and violations of rights remain systemic.

In order to provide the effective enforcement and access to rights that is required under ILO standards, human rights and *Charter* standards, reforms are needed that would

- (a) enhance accountability and transparency in the system,
- (b) ensure effective representation and support for migrant workers,
- (c) enhance the capacity for collective representation and voice for migrant workers,
- (d) place an emphasis on proactive inspection and investigation of employers with LMOs,
- (e) ensure the right to a hearing in a single accessible forum, and
- (f) ensure effective remedies and penalties.

Accountability and Transparency

The *WRAPA* model outlined above in the section dealing with recruitment provides a good model to build accountability and transparency into the enforcement system.²⁶¹ In addition to strengthening the monitoring of recruitment, mandatory registration of employers who hire migrant workers and mandatory filing of information about migrant workers who have been hired (including nature and location of work and copies of contracts) facilitates proactive inspection of contract compliance and employment standards compliance. It can also facilitate the development of employment services to match seeking employers with migrant workers who are currently in Ontario and looking for work.

Emphasizing Proactive Inspection and Investigation

The fundamental problem with all of the rights-enforcement schemes from the perspective of migrant workers is that the regimes are reactive. They are primarily complaint-driven. Within the system, migrant workers do not have effective voice.

It is recommended that there be a shift of resources towards proactive enforcement, particularly in the area of employment standards. The ILO recommends “extending labour inspection to all workplaces where migrant workers are employed, in order to effectively monitor their working conditions and supervise compliance with employment contracts” and recommends a

²⁶¹ Another model of registration exists in British Columbia. Under BC’s *Employment Standards Act*, RSBC 1996, c. 113, s. 15 and *Employment Standards Regulations*, BC Reg. 396/95, s. 13, employers of live-in caregivers are required to provide information about the employer to be kept in a registry of employees working in private homes. This model has been ineffective, however, as it is not followed and enforced in practice.

mechanism for registering migrant worker contracts.²⁶² Alberta has taken some steps in the direction of proactive enforcement by assigning employment standards officers specifically to audit compliance of employers with LMOs. Adequate resources must be committed to this kind of proactive enforcement²⁶³ and these efforts must be supplemented by practices such as collaboration with community organizations, inspections targeted at sectors at risk for non-compliance, the ability to expand reactive investigations beyond the initial complaint when evidence demonstrates a broader pattern of violations, and monitoring after a hearing to ensure remedies are implemented.²⁶⁴ Proactive enforcement can ensure that the provincial and federal systems complement each other. Proactive enforcement of employment standards at the provincial level can ensure that the *IRPA* provisions can be activated to prohibit employers from hiring more migrant workers when they have a history of violating worker rights. Provincial enforcement of laws, and effective communication of those breaches, is necessary to give teeth to the *IRPA* provisions.

While labour standards are a matter within provincial jurisdiction, the federal government does have authority to monitor compliance with LMOs. Rigorous proactive monitoring and investigation of LMO compliance would supplement provincial standards enforcement.²⁶⁵

Enhancing Effective Representation and Support for Migrant Workers

Migrant workers face significant barriers to enforcing their workplace rights because they lack adequate information about their rights and about legal processes and lack effective voice. Both of these deficits must be addressed in order for rights to be realized in practice.

First, it is recommended that an independent agency – the Office of the Migrant Worker Advocate – be established to provide information and advice to migrant workers free of charge, including information about rights and how to enforce them; legal support in making claims to enforce rights; outreach to migrant worker communities; and coordination with community groups, advocates and legal clinics who are supporting migrant workers. It could also support a hotline to provide information and receive reports of violations. Public funding should be provided for the agency although it could also be funded in part through levies on employers who hire migrant workers. Models for such

²⁶² ILO, *Multilateral Framework on Labour Migration*, above note 140 at Guidelines 10.1 to 10.3.

²⁶³ As the Alberta Federation of Labour notes, “eight enforcement officers cannot be expected to reach the tens of thousands of employers who have LMOs.” See, Alberta Federation of Labour, *Entrenching Exploitation*, above note 4 at pp. 15-16.

²⁶⁴ See also, Vosko, Tucker, Thomas and Gellatly, *New Approaches to Enforcement and Compliance with Labour Regulatory Standards*, above note 147.

²⁶⁵ Such proactive monitoring is recommended by the Standing Committee on Citizenship and Immigration, *Temporary Foreign Workers and Non-Status Workers*, above note 153 at pp. 38-40.

publicly funded supports for rights enforcement exist in Ontario through agencies such as the Human Rights Legal Support Centre, the Office of the Worker Advisor and the Industrial Accident Victims' Group of Ontario. The ILO *Multilateral Framework on Labour Migration* recommends that states protect migrant workers by “offering legal services ... to migrant workers involved in legal proceedings related to employment and migration.”²⁶⁶ Because of the uniquely complex position of migrant workers at the intersection of immigration and employment law and because of their particular forms of marginalization, an office that is specifically dedicated to supporting migrant workers is required in order to provide the appropriate expertise (including diversity of languages) needed to support their rights and to effectively develop relationships to collaborate with the existing grassroots organizations and legal clinics. The Office of the Migrant Worker Advocate could also serve as a first point of contact for migrant workers on arrival in Ontario and for mandatory follow up.

Alberta established a Temporary Foreign Worker Advisory Office in 2007 as well as a temporary foreign worker hotline. The Advisory Office, however, does not provide direct advocacy services on behalf of migrant workers. Instead it provides information about rights and acts as a “referral service.” For this reason, the Alberta Federation of Labour reported that “community agencies may now be better placed to more adequately provide services to foreign workers, if only they received the proper funding to do so.”²⁶⁷

Second, significant efforts must be made to enhance migrant workers' voice. Workers in all sectors must have the right to collective representation. In particular, legislation must be amended so that agricultural workers are granted effective rights to unionize and bargain collectively. Live-in caregivers who typically work in isolation must also be provided with an effective means of collective voice, for example, through sectoral representation.

Third, the rights enforcement mechanisms must recognize the important role that community organizations, worker advocates and unions play in protecting the well-being of migrant workers. The Ministry of Labour should develop innovative partnerships (including funding arrangements) with established community organizations who are working with migrant workers to collaborate in identifying rights violations. These kinds of collaborations can strengthen rights enforcement through proactive inspection.²⁶⁸

²⁶⁶ ILO, *Multilateral Framework on Labour Migration*, above note 140 at Guideline 10.11.

²⁶⁷ Alberta Federation of Labour, *Entrenching Exploitation*, above note 4 at p. 15. Information about the Temporary Foreign Worker Advisory Office is available on the Alberta government website at <http://employment.alberta.ca/Immigration/4548.html> (accessed 30 March 2012).

²⁶⁸ See the models for best practices discussed in Vosko, Tucker, Thomas and Gellatly, *New Approaches to Enforcement and Compliance with Labour Regulatory Standards*, above note 147 at pp. 60-80.

Fourth, employee voice in the complaints process could be enhanced by permitting anonymous complaints to trigger investigations and by permitting complaints to be filed by third-parties such as community/public interest groups.

Fifth, employee voice could be enhanced at the front end by facilitating collective worker representation and consultation in developing the contracts that apply to migrant workers. Independent employee voice is absent from the annual meetings under the SAWP which develop those contracts and it is absent from the HRSDC process that develops the template contracts under the other temporary labour migration programs.

Right to a Hearing

Migrant workers must be able to access effective adjudicative mechanisms to enforce their rights. At present their rights must be enforced in a number of different arenas. For example, employment standards officers cannot enforce contract terms that are not addressed under the *Employment Standards Act* so some contract terms are enforceable before an administrative tribunal and others are enforceable in court as breach of contract. Legislative amendments should be made to ensure that all terms of migrant workers contracts and the right to a hearing on termination are enforceable in a timely manner before a single administrative body, with appropriate expert knowledge, in an expedited process. This would not require the creation of a new administrative tribunal but instead could be achieved by training a designated pool of employment standards officers and members of the Ontario Labour Relations Board.

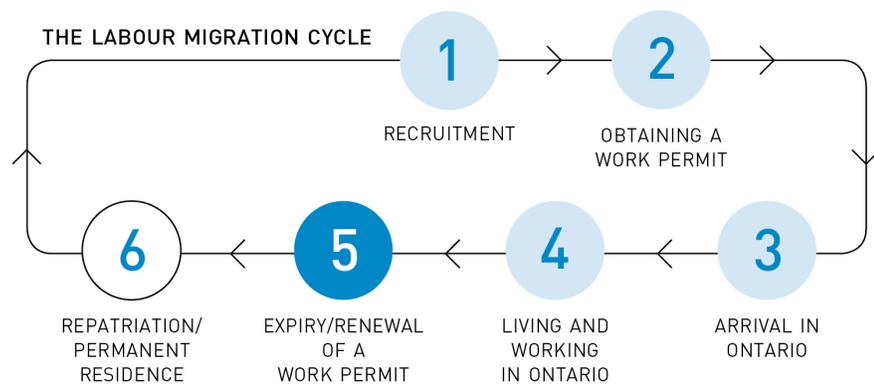
The effective exercise of these rights requires that migrant workers retain security of status and security of housing while the employment dispute is ongoing. In addition, they should have security in the ability to continue working while the dispute is ongoing and for this purpose should be provided with either an open work permit or sector-specific permit to facilitate this work.

The limitation period for filing complaints about employment standards violations should be extended for migrant workers so that it parallels the limitation period for filing complaints about improper recruiting fees.

Living in Ontario

While this paper has focused on ways to enhance workers' capacity to enforce their rights at work, it is important to recognize that steps must be taken to enhance workers' experience of *living* as well as working in Ontario. The recommendations to lift prohibitions on enrollment for education and training aim to address one aspect of this concern. Another very serious element of workers' quality of life is the extended separation from their families. Migrant workers who come to Ontario at the NOC o, A and B levels are entitled to bring

their spouses and dependents with them for the period of their work authorization. Their spouses are able to receive open work permits for the same time period. Migrant workers who come to Ontario at the NOC C & D levels, however, are unable to bring their spouses with them unless their spouses also independently qualify for and receive a NOC C & D work permit.²⁶⁹ The result is that migrant workers are separated from their families for years at a time. Apart from the damaging mental health impacts of this separation, the negative impacts continue as family reunification and reintegration are very difficult after prolonged separation.²⁷⁰



5. Renewal and Expiry of Work Permits

A migrant worker’s work permit is, as outlined above, time limited. Workers under the LCP can be granted a work permit for up to four years and three months which will cover the period during which they must complete the work that will make them eligible to apply for permanent resident status.

Workers under the SAWP can have a seasonal permit for no longer than eight months in any given year. They must leave the country at the end of the season and cannot return until the next year, again for a period of no longer than eight months.

A work permit under the two NOC C & D streams is typically granted for up to two years. A worker can apply to renew or extend an existing work permit before it has expired.²⁷¹ However, before a worker can do this, the employer must first apply for a new LMO in order to extend the job offer and must sign a

²⁶⁹ See Nakache and Kinoshita, “Canadian Temporary Foreign Worker Program,” above note 4 at pp. 33-35.

²⁷⁰ Geraldine Pratt and Philippine Women’s Centre, “From Migrant to Immigrant: Domestic Workers Settle in Vancouver, Canada,” Metropolis Working Paper No. 03-18 (Vancouver: Metropolis, November 2003) at pp. 20-21; Geraldine Pratt and Philippine Women’s Centre, “Deskilling Across the Generations: Reunification Among Transnational Filipino Families in Vancouver,” Metropolis Working Paper No. 08-06 (Vancouver: Metropolis, September 2008).

²⁷¹ *IRP Regulations*, s. 201.

new employment contract.²⁷² Because of the time it takes to process the LMO and the work permit renewal, the process should be started three months before the end of the work permit. If a worker's work permit has expired, the worker can still apply to restore their temporary resident status and renew their work permit as long as they do so within 90 days of the expiry of the earlier work permit.²⁷³ If the worker's work permit has been expired for more than 90 days, they cannot apply for a new work permit.

Workers under the two NOC C & D streams can have successive permits up to a cumulative total of four years. Once they reach the four year limit, they must leave the country and are not eligible to apply for another temporary work permit until they have been absent from Canada for a further four years.²⁷⁴

These worker dislocations – whether seasonally for SAWP workers or after four years for NOC C & D stream workers – speak more to disrupting the workers' connection to Canada than to the permanence or temporariness of the work they are doing. These mandatory dislocations are unrelated to the question of whether there is or is not a chronic or ongoing labour shortage that the particular worker could fill. There is no doubt that agricultural work persists season after season and that labour shortages in this sector are chronic. The programs to import seasonal agricultural labour have increased steadily over the decades. Similarly, the use of temporary migration to fill NOC C & D occupations persists. These patterns raise very serious questions about whether the real labour shortages are in permanent jobs and whether the temporary migration programs serve to create an infinitely flexible and infinitely vulnerable pool of workers who can be shifted from one industry to the next as needs arise. The legally mandated worker dislocations create the ultimate insecurity for workers by mandating their removal from the country. The mandatory dislocation also places the full burden of insecurity on the worker as the employer is not denied access to hiring migrant workers to immediately replace those who are repatriated.

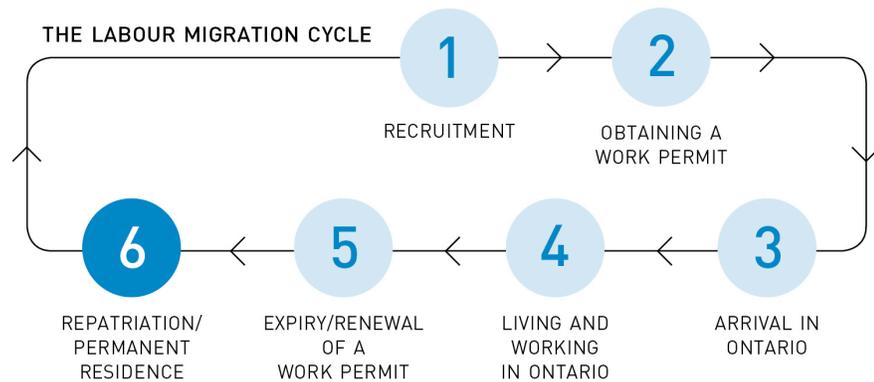
By facilitating the cycling of vulnerable migrant workers in and out of the country, this regulatory scheme removes the incentive for employers to address wages, working conditions, training, or other factors and practices that contribute to chronic labour shortages. This cycling effectively creates a permanently temporary working class that is unable to organize, unable to enforce its rights, and, as non-citizens, is unable to participate in the democratic process to change the terms of their disempowerment. This is not a model for building a sustainable economy, for building sustainable, secure communities or

²⁷² CIC, "Changes to the Temporary Foreign Worker Program – Pilot Project for Occupations Requiring Lower Levels of Formal Training (NOC C and D)," online at <http://www.cic.gc.ca/english/work/low-skill.asp> (accessed 30 March 2012).

²⁷³ *IRP Regulations*, s. 182.

²⁷⁴ *IRP Regulations*, s. 200(3)(g).

for building a nation. The real question that arises, then, is why migrant workers in the NOC C & D skill levels are not provided with pathways to permanent residence.



6. Pathways to Permanent Residence

As outlined at the beginning, the only migrant workers in the NOC C & D skill levels in Ontario who are able to access permanent residence are live-in caregivers under the LCP. But even for this group, the pathway to permanent residence is not smooth. As outlined above, these workers share the common experiences of insecurity at the earlier stages in their labour migration cycle. They also face specific insecurities because in many situations, they are, for reasons beyond their control, required to complete multiple placements before they can meet the 2 years/3900 hours threshold that enables them to apply for permanent residence. They are vulnerable to employers who under-report their hours worked and to employers who terminate them because they are “not a good fit” with the person for whom they must provide care. Those who provide care to the very elderly in the last stages of life also need to seek multiple placements because their employers die. In all of these situations and many others where caregivers must seek multiple placements, delays occur with each transition as a new LMO and a new work permit must be obtained. And through this, the 4-year timeline to accumulate their hours ticks down, placing heavy pressure on caregivers to put up with abusive and exploitative treatment so they can complete their hours and apply for permanent residence. Many caregivers also report that it takes several years after they have applied for permanent residence before that status is actually granted. After they apply for permanent residence, it may also take several months before they receive an open work permit. And in situations where the processing of their permanent resident application extends over years, they may need to renew their open work permit before their status is finalized.

The other immigration streams have been designed so that NOC C & D skill level workers are not eligible for immigration under the Skilled Worker Class, the Canadian Experience Class or under Ontario's Provincial Nominee Program.

Ontario's Provincial Nominee Program ("PNP") was established under the *Canada-Ontario Immigration Agreement*²⁷⁵ which was originally signed in November 2005. Ontario was one of the last provinces to implement a PNP as its pilot project took effect in 2007. Provinces such as Manitoba, Saskatchewan, PEI and New Brunswick use the PNP as the primary vehicle for economic immigration. In Manitoba and PEI over 90% of economic immigrants arrive through the PNP. In Saskatchewan the PNP accounts for nearly 80% of immigration and in New Brunswick it accounts for 74%. In Ontario, however, only 1,000 immigrants per year are admitted under the PNP, representing only 1.2% of total economic immigration to the province.²⁷⁶

Ontario's PNP is only open to workers in NOC skill levels O, A and B who have a permanent, full-time job offer in a managerial, professional or skilled trade occupation from an Ontario employer. Employers must first submit a pre-screening application to the Ontario Ministry of Citizenship and Immigration. If approved, the employer can recruit for the position or positions approved. The employer nominates the desired employee who must then submit a nominee application. If successful, the nominee is issued a Provincial Nomination Certificate and must then apply to CIC for permanent residence. Ontario will support the nominee's request for a temporary work permit while processing of their permanent resident application is completed. The entire process from employer application, through nominee application, through application for permanent residence can take 18 months.²⁷⁷

Some other provinces permit employers to nominate NOC C & D skill level employees for permanent residence. In all such cases, the migrant workers must have worked as a temporary migrant worker for a minimum period of time, usually six to nine months, and they must have a permanent job offer from the employer. In addition, employers may also be required to undertake specific other commitments in the way of settlement support for these lower skilled workers such as support in finding housing and being responsible for providing

²⁷⁵ Above note 28.

²⁷⁶ CIC, *Evaluation of the Provincial Nominee Program*, above note 27 at p. 21. As part of the program to reduce the Federal Skilled Worker backlog announced on 29 March 2012, Ontario has agreed to nominate an additional 600 skilled workers from the backlog in 2012. However, the cap of 1,000 continues for new nominees under the PNP: see Government of Ontario, *Opportunities Ontario: Provincial Nominee Program*, online at http://www.ontarioimmigration.ca/en/pnp/OI_PNPNEW.html (accessed 30 March 2012).

²⁷⁷ Ontario, *Opportunities Ontario: Provincial Nominee Program*, above note 276 (accessed 13 January 2012).

English or French language training.²⁷⁸ This has the effect of privatizing responsibility for immigration and settlement at the same time that it ties the employee into deeper dependence on the employer.²⁷⁹

Simply opening up some spots in a PNP for NOC C & D workers, then, will not be sufficient. Given the very small scale of Ontario's PNP, this would not offer a realistic chance for NOC C & D workers to access permanent residence. Instead, the scarcity of spots – and the worker's dependence on being nominated by a particular employer – could pressure workers to put up with abusive treatment during their period of temporary work in the hope for a chance at permanent residence and during the period it takes to process an application for permanent residence. As currently designed, the provincial programs do not lift the burden of insecurity.

The inability of NOC C & D skill migrant workers in Ontario to access pathways to permanent residence again calls for a more critical examination of the legal construction of these workers as temporary, a critical examination of how their work is valued, and a critical examination of the assumptions about their unfitness for permanent residence. If they are good enough to work here, why are they not good enough to stay? The jobs that migrant workers do are valuable and necessary parts of the local labour market. There is an enduring need for workers to care for children, the elderly and persons with disabilities. There is an enduring need for workers to work on farms, to process food, to clean office buildings and hotels, to staff restaurants, to engage in construction and do the many other jobs that migrant workers do. These jobs, by their nature, are local and cannot be moved offshore. As Canada's population ages, retirements will affect labour needs at all skill levels, not just at the level of "skilled" work. It is necessary therefore to re-examine fundamental immigration policy to ensure that workers classified at NOC C & D skill levels have a strong and accessible pathway to permanent residence and citizenship that recognizes their real capacity to contribute to building communities. A wide range of community and labour organizations advocate for reforms that will enable migrant workers in NOC C & D occupations to acquire permanent resident status on arrival.²⁸⁰ After a decade which has seen dramatic increase in the use

²⁷⁸ Jamie Baxter, *Precarious Pathways: Evaluating the Provincial Nominee Programs in Canada* (July 2010), research paper for the Law Commission of Ontario online at <http://www.lco-cdo.org/baxter.pdf>.

²⁷⁹ See Baxter, *Precarious Pathways*, above note 278; Alberta Federation of Labour, *Entrenching Exploitation*, above note 4; Naomi Alboim and Maytree, *Adjusting the Balance: Fixing Canada's Economic Immigration Policies* (Toronto: Maytree, July 2009), online at <http://www.maytree.com/wp-content/uploads/2009/07/adjustingthebalance-final.pdf> (accessed 25 May 2011).

²⁸⁰ See, Migrant Workers Alliance for Change, online at <http://www.migrantworkersalliance.org/demands>; UFCW Canada, *Report on the Status of Migrant Workers in Canada 2011* at pp. 33 and 43, available online at <http://ufcw.ca/templates/ufcwcanada/images/Report-on-The-Status-of-Migrant-Workers-in-Canada-2011.pdf> (accessed 14 May 2012); AFL, *Entrenching Exploitation*, above note 4 at p. 3. While it has not

of temporary migrant workers, it is time to address the fundamental inequity and insecurity that is created by legal structures that keep these workers permanently temporary. Failure to address the question of status and failure to address the long-standing concerns about mistreatment of migrant workers with temporary status facilitates the entrenchment of a second-tier guest worker program that normalizes low-wage/low-rights work. As stated at the outset of this report, it is critical to ensure that migrant workers of all skill levels can access permanent residence and that Canada's immigration system promotes nation building in a fair and equitable way.

to date endorsed the position of status on arrival, the federal Standing Committee on Citizenship and Immigration has recommended that live-in caregivers be granted "permanent resident status with conditions on arrival," recognizing that permanent status protects against employer abuses while also enabling social inclusion, including the rights to "mobility, the right to go to school, to live where they wish, to bring their family members or to change employers." See Standing Committee on Citizenship and Immigration, *Migrant Workers and Ghost Consultants* (Ottawa: House of Commons Canada, June 2009) at p. 7. Under the Committee's recommendation, the migrant worker would be granted permanent resident status on arrival but, in order to retain that permanent resident status, would be required to complete 24 months of live-in caregiving work within the first three years in Canada.

D. CONCLUSIONS AND SUMMARY OF RECOMMENDATIONS

Canadian constitutional law has long recognized that “vulnerability” is not a condition that is inherent in any person or group. Instead, Canadian law recognizes that disempowerment is a product of the active choices that are made by government in erecting the regulatory and policy framework that governs a particular relationship.²⁸¹ The Supreme Court of Canada has expressly recognized that there is a correlation between the state’s legislative choices and the material and normative effects of those laws. Moreover, it has recognized that those effects can combine to create and perpetuate material disadvantage and disempowerment. As I have summarized elsewhere,

One can draw out of [the Court’s] reasoning the following patterns by which law operates in practice to shape relationships:

- (a) There is a “profound connection” between the law and a group’s practical capacity to act in society.
- (b) The law shapes a group’s sense of its social location.
- (c) The law influences, in a material way, how a marginalized group is treated by others.
- (d) The law has didactic effects which shape society’s normative sense of a group’s appropriate social location.²⁸²

The detailed guidelines provided in the UN Migrant Workers Convention, the numerous ILO Conventions and the ILO *Multilateral Framework on Labour Migration* also all speak to the multitude of ways in which the legal regulation of the work relationship can either create conditions of security and decent work, or alternatively, insecurity and exploitation.

To the extent that laws construct particular work and workers as “temporary” and “unskilled,” this obscures the ways in which the work itself is integral to the functioning of our communities and creates a normative framework in which the work is devalued. To the extent that laws construct workers as “temporary,”

²⁸¹ The social construction of disadvantage is well recognized in Canadian law: see, for example, *Eldridge v. British Columbia*, above note 112; *Dunmore v. Ontario*, above note 7; Faraday, “Envisioning Equality”, above note 116, especially at pp. 122-126.

²⁸² Faraday, “Envisioning Equality”, above note 115 at pp. 125-126 and footnotes 59-62 in that text; *Dunmore v. Ontario*, above note 7 at para. 22, 26, 35, 44-46. I use the term “social location” in this context to refer to a group’s sense of its own entitlements, its sense of inclusion within/exclusion from society, and its capacity to exercise power in society.

“foreign” and “unskilled,” they likewise devalue the real contributions of these workers to the functioning of our economy and communities and construct the workers as “other,” as “not us,” as persons outside the community to whom we need not be accountable. To the extent that laws fail to respond to known practices which systemically marginalize and disempower migrant workers, they sustain those conditions and practices which produce insecurity and undermine the possibility of decent work.

As has been mapped in Part C, throughout the labour migration cycle, existing laws have failed to adequately take into account migrant workers’ perspective and experiences. Law and policy development have not been adequately rooted in and accountable to the rights-based framework. Instead, exploitation that arises at the recruitment stage is compounded by limitations that arise at each of the successive stages of the labour migration cycle. As has been recognized in international guidelines for best practices and in domestic human rights law, a multi-dimensional approach is needed to build effective protection for decent work. This multi-dimensional approach must weave together

- (a) strong, proactive government oversight and enforcement;
- (b) protection for the effective and meaningful exercise of fundamental rights, including collective representation;
- (c) substantive workplace and social rights that are responsive to migrant workers’ real circumstances;
- (d) effective and accessible mechanisms for enforcing rights; and
- (e) active involvement of community organizations to support migrant workers’ voice.

To this end, this report makes the following recommendations that correspond with each stage of the labour migration cycle:

Recruitment

1. Legislation must be extended to ensure that all migrant workers have effective protection against the charging of recruitment fees and to ensure that employers will be jointly and severally liable for recruitment fees that have been collected by private recruiters.
2. Ontario should adopt a proactive system of employer registration, recruiter licensing (including the mandatory provision of an irrevocable letter of credit or deposit), mandatory filing of information about recruitment and employment contracts, and proactive government inspection and investigation in line with the best practices adopted under Manitoba’s *Worker Recruitment and Protection Act* and Regulations.

3. The limitation period for filing complaints about improper recruitment fees should be extended to reflect the current four-year period which live-in caregivers have to complete their qualifying work to apply for permanent residence.
4. Workers under the SAWP should be entitled to job security, including seniority and a right to recall.

Work Permits

5. Work permits should be sector-specific or province-specific and must be framed in a way that allows a worker to engage in alternate work or modified duties in the event of injury or illness.
6. Work permits should not prohibit migrant workers from enrolling in educational or training programs outside of working hours.
7. Public employment services should be developed to facilitate the matching of employers seeking LMOs with migrant workers presently in Ontario.
8. Employment insurance benefits must be made accessible in practice to migrant workers.

Information Prior To and On Arrival in Ontario

9. Canadian government officials should provide migrant workers with information about their rights in the applicable labour migration program; their employment, social and human rights in Ontario; mechanisms for enforcing their rights; and government and community organizations and services that are available to assist them in Ontario. This information should be provided both in person and in writing, in the language spoken by the migrant worker, before a migrant worker departs their country of origin and again upon arrival in Ontario.
10. A comprehensive plain language guide for migrant workers should be developed and made readily accessible outlining their rights through each stage of the labour migration cycle; identifying the relevant enforcement mechanisms and contact information for enforcement agencies; and providing contact information for established and recognized community organizations and worker advocates who can assist migrant workers through their labour migration cycle.
11. Migrant workers and worker advocates should be provided with transparent information about how prevailing wage rates are determined. Migrant workers must not be paid less than the prevailing wage.

Working and Living in Ontario

12. Provincial legislation should be amended to ensure that migrant workers in all sectors – including agriculture and caregiving – have access to effective and meaningful legal protection for the right to unionize and bargain collectively.
13. Resources should be devoted to emphasize proactive enforcement of employment standards in sectors and workplaces employing migrant workers. Proactive enforcement should be supplemented by collaboration with community organizations, inspections targeted at sectors at risk for non-compliance, the ability to expand reactive investigations beyond the initial complaint when evidence demonstrates a broader pattern of violations, and monitoring after a hearing to ensure remedies are implemented.
14. Ontario should establish an independent publicly funded Office of the Migrant Worker Advocate to provide information and advice to migrant workers free of charge, including information about rights, how to enforce them, legal support in making claims to enforce rights, a hotline, outreach to migrant worker communities, and coordination with community groups, advocates and legal clinics supporting migrant workers.
15. The Ontario Ministry of Labour should develop innovative partnerships, including funding arrangements, with established community organizations who are working with migrant workers to collaborate on identifying rights violations.
16. Provincial legislation, including the *Employment Standards Act, 2000*, should be amended to ensure that anonymous complaints can trigger investigations and to permit complaints to be filed by third-parties such as community organizations and public interest groups.
17. Employee voice should be enhanced by facilitating worker representation and consultation in developing the contracts that apply to migrant workers, including workers under the SAWP.
18. Provincial legislation, including the *Employment Standards Act, 2000*, should be amended to ensure that all terms of migrant workers' contracts – including disputes about unjust termination – can be heard before a single expert administrative body (i.e. employment standards officers and Ontario Labour Relations Board) in an expedited process.
19. Where terminated, SAWP workers must be provided with the right to a hearing prior to repatriation.

20. Workers should be provided with protection for their security of status, security of housing, and security of employment under open or sector-specific work permits while a legal dispute about their employment is ongoing.

Renewal/Expiry of Work Permits

21. Rather than being excluded from Canada after four years of work with temporary status, migrant workers should have a right to apply for permanent residence.

Pathways to Permanent Residence

22. NOC C & D skill level migrant workers – including workers in the SAWP and NOC C & D Pilot Project – must be provided with pathways to permanent residence.

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