

SUMMARY REPORT

# MADE IN CANADA

How the Law Constructs  
Migrant Workers' Insecurity

Fay Faraday  
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## Introduction

**O**VER THE PAST DECADE, Canada's labour market has shifted in a significant way to rely increasingly on transnational migrant workers who hold precarious temporary immigration status in Canada. Migrant workers come to Canada from around the globe on time-limited work permits. They work in an expanding range of industries. Since 2000, the number of migrant workers employed in Canada has more than tripled.<sup>1</sup> Canada's immigration system has also undergone a profound shift. A new trend emerged in 2006 – and it continues – as the number of migrant workers with temporary status who enter Canada each year now exceeds the number of economic immigrants who are granted permanent resident status.<sup>2</sup> The greatest proportionate growth has been among low-skill, low-wage migrant workers primarily from the global south who are employed in sectors such as caregiving, agriculture, hospitality, food services, construction and tourism.

This report focuses on the legal regulation of this most precarious segment of the migrant worker population. It looks at the experience of low-wage workers who migrate to Ontario 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.

Canada's temporary labour migration programs have expanded with relatively little public debate. While the work itself persists, the workers are legally constructed as “temporary.” They have fewer effective legal protections than Canadian workers. They are vulnerable to abuse by recruiters, immigration consultants and employers. Because of their legally, economically and socially marginalized position, they face tremendous barriers to enforcing the rights they do have.

Worker advocates, unions, community organizations and academics have for years documented widespread exploitation and abuse of these migrant workers.<sup>3</sup> The exploitation is not isolated and anecdotal. It is endemic. It is systemic. And the depths of the violations are degrading. There is a deepening concern that Canada's temporary labour migration programs are entrenching and normalizing a low-wage, low-rights “guest” workforce on terms that are incompatible with Canada's fundamental *Charter* rights and freedoms, human rights, and labour rights. It is time to take this problem seriously and act to protect fundamental rights and decent work.

### Migrant Workers Present in Canada

2000: **89,746**  
2011: **300,111**

### Migrant Workers Outnumber Economic Immigrants

In 2011, Canada admitted:

**156,077**  
economic immigrants  
as permanent residents

**190,769**  
temporary migrant workers

### Lower Skilled Migrant Workers Present in Canada

2000: **24,139**  
2010: **87,866**

#### TERMINOLOGY: Migrant Workers

While Canadian temporary labour migration programs use the term “temporary foreign workers,” this report uses the term “migrant workers.” This term better reflects the perspective of the workers themselves and is consistent with the framing in international law. It is also more conducive to critical thinking about the existing programs. As Kerry Preibisch has written:

*“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.”<sup>6</sup>*

The vulnerability to exploitation that migrant workers experience is not inevitable. It is, instead, **Made in Canada**. Migrant workers’ insecurity is a product of choices that federal and provincial governments have made in developing the legal and policy systems that govern these workers’ labour migration journey. Their insecurity is an entirely foreseeable outcome of those choices.

Laws fundamentally shape the nature and quality of relationships and interactions between members of society. Laws encourage and facilitate certain kinds of relationships and discourage others. Laws can work together to create conditions of security. But 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 society.<sup>4</sup>

This report looks at how current federal and provincial laws create and facilitate conditions of insecurity that produce an ever more precarious, contingent, and “disposable”<sup>5</sup> migrant workforce. It proposes a rights-based framework to assess migrant workers’ treatment in law. And it proposes options for systemic change to increase migrant workers’ security.

To move forward on building security for migrant workers, it is necessary to break out of the various silos that have constrained law and policy in this area and to address the problem at a systemic level. To this end, this report raises the following themes:

1. While Canada has four distinct temporary labour migration programs for lower skill occupations, **migrant workers under all four programs share very similar experiences of insecurity and exploitation**. These common experiences and concerns can provide a focus for sustainable systemic reform.
2. Immigration and employment law and policy are often developed in isolation, by different levels of government, but in practice these legal systems intersect to create unique forms of precariousness for low-wage migrant workers. To identify the roots of insecurity and guard against them, **the immigration and employment systems must be examined in an integrated way through the perspective of a low-wage migrant worker’s labour migration cycle**. Tracking how the law operates at each stage in the migration cycle reveals how laws individually and cumulatively either actively create conditions of insecurity or fail to address or alleviate known insecurity. Examining the system *as a system* also reveals how reforms at one point in the labour migration cycle can have positive impacts that resonate and build security throughout the cycle and throughout the system.

3. **Enhanced coordination and information sharing between federal and provincial jurisdictions is needed to improve security and support for decent work throughout the labour migration cycle.** Best practices models already exist in Canada that can be adopted in Ontario to promote transparency and proactive monitoring and enforcement to prevent exploitation.
4. It is time to rethink which workers are eligible for permanent residence. **Canada's immigration policy must promote nation building and sustainable communities.** Temporary labour migration schemes have an instrumental, short-term focus and the exploitation of workers through these schemes is corrosive at an individual and community level. **A forward-looking strategy must ensure that workers at all skill levels – including NOC C & D level workers – have strong and accessible pathways to permanent residence and citizenship that recognize their real capacity to contribute to building our communities.**

The factor that most strongly drives migrant workers' insecurity in Canada is their temporary immigration status. This baseline of precariousness colours every stage of the labour migration cycle and undercuts workers' capacity to enforce rights to decent work. It is past time to engage in a critical and public debate about why particular work – and particular workers – are, through law, constructed as “temporary.” Does constructing the work and workers as temporary deflect employers and government from addressing the substantive working conditions that produce chronic labour shortages? Why are broad classes of workers – workers who have historically arrived with status and played a significant role in building Canada – now, in law, denied access to permanent residence and citizenship? The fundamental recommendation of this report is that workers of all skill levels must have access to apply to immigrate and to arrive with full status as permanent residents.

In the interim, as long as Canada and Ontario rely on temporary migration to supply labour for domestic businesses, they have an obligation to ensure that the laws and policies that 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 institutionalize a second-tier low-wage/low-rights labour force. Migrant workers must have 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 made 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 of this paper outlines the general immigration framework and the specific streams of temporary labour migration. Part B reviews legal principles and standards that provide a rights-based framework by which to assess if the laws support security and decent work for migrant workers. Part C is the heart of this report. It examines the federal and Ontario laws that apply throughout the six stages of a low-wage migrant worker's “labour migration cycle” – recruitment, obtaining a work permit, arrival in Ontario, living and working in Ontario, expiry/renewal of work permit and pathway to permanent residence/repatriation. Part D provides concluding analysis and summarizes the recommendations for reform.

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.

## PART A

# Mapping Immigration Pathways

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

Under the federal *Immigration and Refugee Protection Act* (“IRPA”), foreign nationals can apply for permanent residence through three broad streams: economic immigration, family reunification, and claims by Convention refugees and persons in need of protection. The Minister of Citizenship and Immigration also has discretion to grant permanent residence based on humanitarian/compassionate and public policy considerations. Each November, the federal government projects how many immigrants will be admitted under each of these streams. Almost two-thirds of immigrants arrive under the economic class. While low-wage migrant workers contribute to Canada's economic development, they are excluded from the economic immigration class.

A worker's “skill level” determines if and how they can apply for permanent residence under the economic immigration stream. Skill level is defined using the **National Occupational Classification** (“NOC”) matrix. 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).<sup>7</sup> The categories that are most relevant to the immigration system can be summarized as follows:

#### 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.

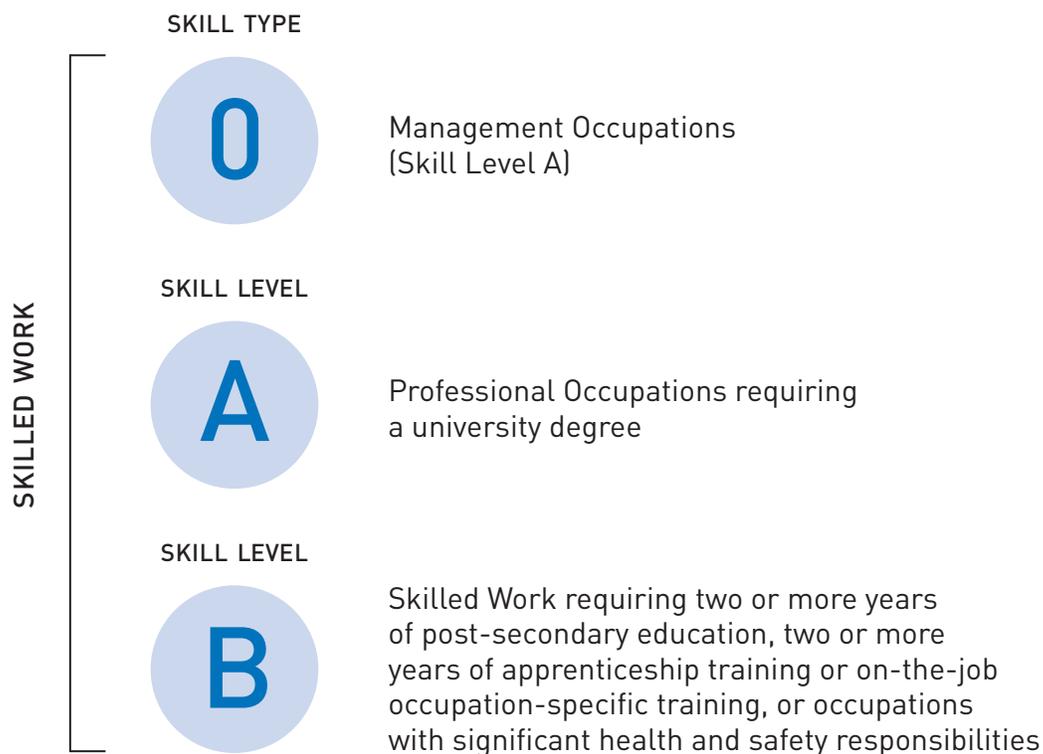
Canada's immigration system designates managerial, professional and skilled work in NOC categories 0, A and B as “skilled work.” Canada offers workers at these skill levels multiple ways to secure permanent residence. By contrast, work in NOC categories C and D is designated as “lower skilled.” With limited exceptions, workers with these skills cannot apply for permanent residence; they are granted only temporary migrant status. The contrast between these pathways to permanent residence and pathways to permanent insecurity is illustrated on page 12.

The economic immigration stream is itself divided into five pathways to permanent residence:<sup>8</sup>

#### i. FEDERAL SKILLED WORKER CLASS

Most economic immigrants arrive under the Skilled Worker class. This class is limited to managerial,

## NATIONAL OCCUPATION CLASSIFICATION (NOC) MATRIX



professional and skilled workers (NOC 0, A and B) with an offer of arranged employment or work experience in one of 29 occupations that are designated as in demand. Effective 1 July 2012, a moratorium, expected to last until January 2013, was imposed on new applications pending regulatory changes.

#### ii. **CANADIAN EXPERIENCE CLASS**

This class provides a two-step pathway to permanent residence for high-skilled workers who have worked for a period as temporary migrants. Managerial, professional and skilled workers who have worked at least 2 years full-time in Canada in NOC categories 0, A or B and international students who have completed a post-secondary diploma or degree in Canada and worked at least one year full-time in NOC categories 0, A or B in Canada can apply under this class.

iii. Business immigrants have been able to apply under the **INVESTOR, ENTREPRENEUR** or **SELF-EMPLOYED** categories. Ministerial Instructions in 2011 and 2012 have imposed an indefinite moratorium on new applications in the Investor and Entrepreneur classes.

#### iv. **PROVINCIAL NOMINEE PROGRAMS**

Under eleven separate agreements with the federal government, participating provinces and territories can nominate economic immigrants for permanent residence to meet their particular provincial/territorial needs. The terms of each provincial nominee program differ. Some provide a direct path to permanent residence. Most provide a two-step path after the applicant has worked for a period as a temporary migrant. Some provinces admit lower skilled workers in specific occupations. But in most provinces – including Ontario – this pathway is open only to skilled workers with permanent job offers in NOC 0, A or B occupations who have been nominated by employers.

#### v. **LIVE-IN CAREGIVER PROGRAM**

This program provides a two-step pathway to permanent residence for migrant workers who arrive with temporary status and work as live-in caregivers. After completing 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 residence.

In Ontario, the Live-in Caregiver Program is the only program through which lower skilled workers can access permanent residence. All other NOC C and D level migrant workers in Ontario are “permanently temporary” or working without regular status. While live-in caregivers can eventually apply for permanent residence, during the years that they work with precarious temporary status they experience many of the same abuses shared by other lower skilled migrant workers who are permanently temporary.

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

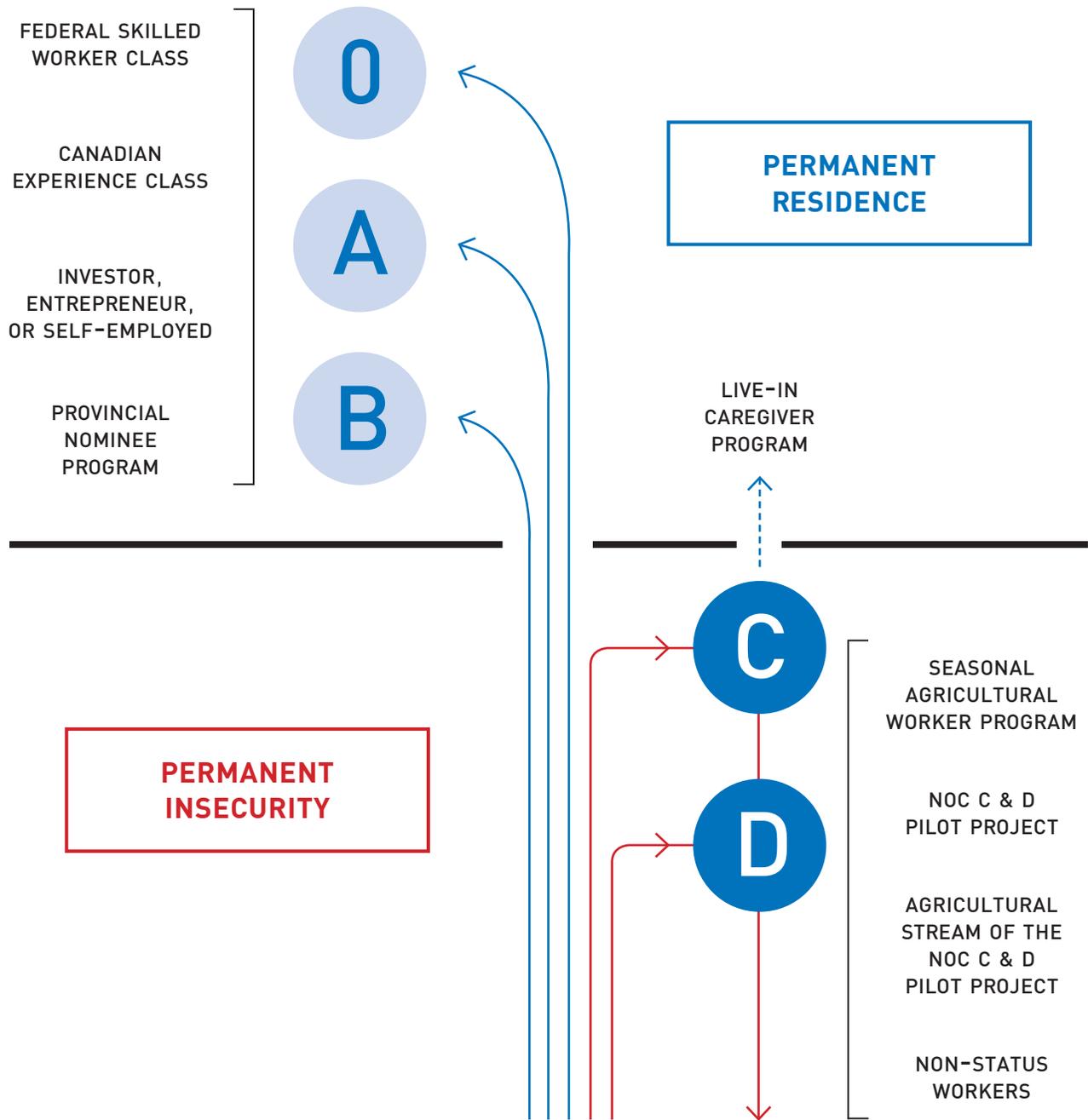
Canada operates four programs that deliver temporary migrant labour to fill jobs in lower skill occupations:

1. **Live-In Caregiver Program**
2. **Seasonal Agricultural Worker Program**
3. **NOC C & D Pilot Project**
4. **Agricultural Stream of the NOC C & D Pilot Project**

Under all four programs the conditions of work can be characterized as “unfree:”<sup>9</sup> the work is done by workers who face legal restrictions on their right to be in Canada and who face legal restrictions on their right to circulate in the labour market. These workers all come to Canada on work permits that tie them to a single employer. The permits restrict the employee to performing the specific job listed on the permit, for the specific employer named on the permit, in the location identified on the permit, for the time period authorized on the permit. If a worker deviates from any of these restrictions, the worker falls out of status.

There are no annual caps on how many migrant workers can be admitted under these programs. Instead, the number of workers admitted responds to employer demand. Since 2000, the number of migrant workers of all skill levels present in Canada, Ontario and Toronto have risen year after year.<sup>10</sup>

## PATHWAYS TO PERMANENT RESIDENCE AND PATHWAYS TO PERMANENT INSECURITY



### a. General Requirements Under the IRPA

Before a lower skilled migrant worker can work in Canada, employers and workers under all four programs must follow some common preliminary steps. Three different federal bodies play a role in implementing these steps.

First, the employer must apply to Human Resources Skills and Development Canada (“HRSDC”) to receive a **Labour Market Opinion** (“LMO”). In the LMO, HRSDC must find that hiring a migrant worker will have either a positive or neutral impact on the Canadian labour market. The LMO process is also intended to serve two other explicit goals. First, it is intended to ensure that an employer can only hire a foreign national on temporary status if the employer is unable to hire a Canadian citizen or permanent resident after having made reasonable efforts to hire or train Canadian citizens or permanent residents. Second, it is intended to ensure that foreign nationals are not hired on terms that undermine prevailing wages and working conditions in Canada.<sup>11</sup> For years concerns have been raised about whether sufficient scrutiny is exercised at the LMO-granting stage to fairly serve these goals.<sup>12</sup> New initiatives were introduced in April 2012 to accelerate LMO processing and, in some circumstances, to allow skilled workers to be paid up to 15% less than the prevailing wage, with suggestions these practices may be extended to other workers.<sup>13</sup> These developments continue to fuel concern among worker advocates.

Second, after a positive or neutral LMO is granted, the migrant worker must apply to Citizenship and Immigration Canada (“CIC”) for a **work permit**. As part of this process, the worker must show that there are no reasonable grounds to believe that the worker is unable to perform the work sought; that the worker will leave Canada at the end of the authorized work period; and that the worker has passed a medical exam where this is required.

Third, the Canada Border Services Agency (“CBSA”) screens the worker for compliance with general criteria for admissibility to Canada, including security requirements. While CIC approves the work permit, CBSA is the agency that ultimately delivers the work permit to the migrant worker at the port of entry.

When an employer applies for an LMO and when an employee applies for a work permit, they must submit a **signed employment contract** with their applications. Migrant workers under the Seasonal Agricultural Worker Program sign a standard contract that is negotiated between the Canadian government and the government of the sending country. For the other three programs, HRSDC provides program-specific template employment contracts. In addition to the basic contract terms (such as wages, benefits, contract duration, hours of work, deductions from wages), each contract requires that the employer must:

- bear its costs for recruitment through a third-party recruiter;
- pay for the employee’s transportation to their destination in Canada;
- provide health care insurance at no cost until the employee is eligible for provincial health care coverage; and
- register the employee under the provincial workplace safety insurance plan.

As is outlined in Part C, there is widespread non-compliance with these contracts and employees face real barriers to enforcing these terms.

### b. Specific Requirements under the Temporary Labour Migration Programs

In addition to the general requirements outlined above, each of Canada’s temporary labour migration programs includes additional terms that structure workers’ rights while in Canada.

#### i. LIVE-IN CAREGIVER PROGRAM

Formal programs to recruit foreign caregivers to Canada have existed since the 1950s. The current Live-in Caregiver Program (“LCP”) has been in place since 1992. Under the LCP migrant workers provide live-in care for children, disabled persons and elderly persons in private homes without supervision. This is the only program that allows NOC C and D level migrant workers to apply for permanent residence. To apply for permanent residence, a migrant worker must, within a four year period, complete two years of full-time work or 3900 hours

### Live-in Caregivers Present in Ontario

2001:

4,219

2008:

21,047

Nearly 30% of all migrant workers who are present in Toronto are live-in caregivers.

of caregiving work while residing in the employer's private home. A work permit under the LCP can be granted for up to 4 years and three months. The LCP employment contract requires the employer to provide a private furnished room for the caregiver in the employer's house. The employer can deduct a maximum of \$85.25 per week for room and board.

More than half of all live-in caregivers admitted to Canada each year work in Ontario and more than half of these work in Toronto. The number of live-in caregivers admitted to Ontario each year has more than tripled in less than a decade, rising from 2,101 in 2001 to 7,571 in 2008. The number present in Ontario has increased by almost 400% from 4,219 in 2001 to 21,047 in 2008. At a minimum, live-in caregivers account for nearly 30% of all migrant workers of all skill levels who are present in Toronto.<sup>14</sup>

The overwhelming majority of live-in caregivers – 95% – are women. Over 90% of participants in the LCP apply for permanent residence and 98% of these applicants are successful.<sup>15</sup> The Philippines was the birth country of nearly 90% of LCP participants who were granted permanent residence in 2009. While live-in caregiving work is ranked at NOC Level C, in 2009 63% of caregivers who were granted permanent residence had completed a bachelor's degree or higher at the time they immigrated.<sup>16</sup> So while their work is classified as “lower skilled” at NOC Skill Level C, most of the workers in fact have higher qualifications consistent with NOC Skill Levels A and B. This raises pressing concerns

about worker deskilling in the course of migration.

### ii. SEASONAL AGRICULTURAL WORKER PROGRAM

As with live-in caregiving work, Canada and Ontario have had chronic shortages for seasonal agricultural labour since the early 1900s. The Seasonal Agricultural Worker Program (“SAWP”) began in 1966 with 263 workers from Jamaica. Over the next ten years, Barbados and Trinidad and Tobago (1967), Mexico (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) (1976) joined the program.

SAWP workers are the backbone of Canada's seasonal agricultural work force. They work on-farm 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. The SAWP now regularly brings more than 20,000 migrant workers to Canada each year (23,900 in 2010). Almost two-thirds of these workers work in Ontario. At least 97% of these workers are men.<sup>17</sup>

Unlike the LCP which is established through public regulations made under the *IRPA*, the SAWP is established through bilateral Memoranda of Understanding (“MOU”) signed by Canada and each of the participating sending countries. Government participation in the administration of the SAWP is high. The Mexican and Caribbean governments recruit, select and document workers

and maintain a pool of workers who are available to depart to Canada when requests are made by Canadian employers. They also post government agents in Canada to assist CIC and HRSDC staff in the administration of the program and to serve as a contact for workers.<sup>18</sup> In Ontario, the Foreign Agricultural Resource Management Services (“FARMS”), a private-sector not-for-profit organization governed by the agricultural commodity groups that participate in the SAWP, coordinates and facilitates the processing of employer requests for workers.

Employers, workers and the government agent of the sending country must all sign a standard work contract that is mandated for workers from the particular source country. The operational guidelines for the SAWP and the 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. No independent employee groups or worker representatives are invited or permitted to participate in these negotiations.

Under the SAWP contracts, workers work for a minimum of 6 weeks and a maximum of 8 months between 1 January and 15 December of each year. The employer must pay the prevailing wage for the particular kind of agricultural work. The employer must pay the cost of round-trip airfare to and from Canada although part of this cost is recovered from the employee through regular payroll deductions. The employer must provide accommodation for the worker free of charge. 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.

There is no limit to how many years a SAWP worker can return to work in Canada. Between 70% and 80% of SAWP workers return year after year to the same farms. A 2010 survey of 600 Mexican workers revealed that on average they participate in the SAWP for 7 to 9 years. Nearly a quarter return to Canada for more than 10 years, with many returning for more than 25 years. More than half of SAWP workers would like to immigrate to Canada.<sup>19</sup> Despite their long-term attachment to the Canadian labour market, they do not acquire any right to apply for permanent residence.

### iii. NOC C & D PILOT PROJECT – GENERAL STREAM AND AGRICULTURAL STREAM

The federal government created the NOC C & D “Pilot Project” in 2002 in response to employer demand to hire temporary migrant workers in occupations with lower skill levels (particularly in the oil and gas industry and construction). The Pilot Project is open to any occupations at the NOC C and D levels as long as an employer can obtain a neutral or positive LMO. In Ontario, employers are hiring NOC C & D migrant workers into many occupations in diverse sectors such as agriculture, restaurants, food processing, cleaning, construction, road building and tourism.

NOC C & D work permits were originally limited to 12 months. Since 2007 they have been issued for

The instruction sheet for the template employment contract provided by HRSDC under the NOC C & D Pilot Project states:

*“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.”<sup>21</sup>*

### NOC C & D Migrant Workers Present in Canada

2002:

1,304

2010:

28,930

24 months and can be renewed for a further 24 months. Effective April 2011, these migrant workers can work in Canada for a maximum of four years and must then leave the country for four years before they can apply for another work permit.<sup>20</sup>

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. Recruiting happens privately, often through recruitment agencies based in Canada or abroad. 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 supervision of the relationship is increasingly privatized between employer and worker.

Unlike the LCP and the SAWP, an employer under the general stream of the NOC C & D Pilot Project is not required to provide housing for the migrant worker although the employer is required to show (for example, through newspaper clippings) that affordable housing is available in the community where the employee is expected to work.

The federal government also introduced a separate Agricultural Stream to the NOC C & D Pilot Project that in effect competes with the SAWP. Employers can hire workers into the same commodities as the SAWP on permits of up to

24 months rather than the 8 months under the SAWP. They can hire workers from any country. There is no government involvement in recruiting. Employers are expected to pay the same prevailing wages as under the SAWP. Like the SAWP, employers are required to provide housing to workers. But unlike the SAWP, employers can deduct \$30 per week in rent which is recouped through payroll deductions.

Although it is still called a "Pilot Project," the NOC C & D Pilot Project has been in place for a decade. From an initial intake of 2,277 workers in 2002, this temporary migration program has grown to 14,893 entries in 2010. The number of workers present in Canada under the NOC C & D Pilot Project has grown from 1,304 in 2002 to 28,930 in 2010.<sup>22</sup>

The above review underscores 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 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 a regular part of the local labour market (construction, restaurants, hotels, cleaning). While temporary migrant labour provides a short-term response to a particular employer's needs, it does not change the fact that at a sectoral level these needs are chronic. New approaches are needed to protect against worker exploitation and to build 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.

## PART B

# A Rights-Based Framework for Assessing Migrant Worker Protection

**P**OLICY DEVELOPMENT affecting migrant workers cannot happen in a legal vacuum. Instead, it must develop in compliance with binding constitutional and human rights laws that establish fundamental legal guarantees. Although migrant workers have temporary status in Canada, Canada and Ontario must both ensure that these workers have a real experience of security and decent work while they are here. Canadian and international law provide rights-based frameworks against which to measure whether the laws in fact deliver this security.

The *Canadian Charter of Rights and Freedoms*, with which all laws must comply, guarantees fundamental freedoms, including freedom of expression, peaceful assembly and association. Freedom of association protects workers' rights to join a union, to have collective representation, to engage collectively to advance workplace goals and to engage in a process of collective bargaining. The *Charter* also protects the rights to life, liberty and security of the person and the right to equality, including equality without discrimination based on race, national or ethnic origin and citizenship. These *Charter* rights are guaranteed to "everyone" and "every individual" so migrant workers are entitled to their protection despite their temporary immigration status.

The *Ontario Human Rights Code* also protects every person's right to equal treatment without discrimination in various social areas including services, goods and facilities; housing; and employment. Discrimination is prohibited on a wide range of

grounds, including race, place of origin, ethnic origin and citizenship.

Both the *Charter* and the *Human Rights Code* protect substantive equality. They are concerned with securing outcomes that produce real equality in practice. In developing laws and workplace practices, governments and employers cannot ignore or exploit the precarious status of the people who will be subject to those laws. Instead the *Charter* requires government to take into account and accommodate the systemic disadvantage and marginalization of those who will be subject to the law and design the law so that it secures equality in its effect.<sup>23</sup> Meanwhile, employers have a proactive legal obligation to acknowledge and accommodate these differences to ensure that workplace practices also secure equality in their effect.<sup>24</sup>

Meanwhile, international law provides extensive non-binding guidance on standards to protect migrant workers. The International Labour Organization is the United Nations agency that brings together government, employer and labour representatives to jointly develop and oversee implementation of international labour standards. The ILO's programs aim to promote and secure "decent work" characterized by "conditions of freedom, equity, security and human dignity."<sup>25</sup> Canada has not ratified the specific UN and ILO Conventions that address migrant workers. Nevertheless, these instruments, along with ILO policy documents such as the *Multilateral Framework on Labour Migration*, provide important policy guidance

because they identify well known systemic abuses that undermine decent work for migrant workers and identify international tripartite consensus on concrete practices to eliminate these abuses.<sup>26</sup>

These instruments recognize that migrant workers need accurate information about their rights, must know how to enforce them, and must have accessible and effective mechanisms to enforce their rights, including proactive monitoring and investigation of employers and access to legal support. They recognize that governments must regulate the recruitment process to prevent exploitation and human trafficking and to protect workers from recruitment fees. Migrant workers must have security of their property including their identity, immigration and work documents. Migrant workers must have assistance during an initial period of settlement and must enjoy access to education/training, guidance and placement services, housing, social and health services. Governments must take appropriate measures to ensure the unity of migrant worker families and facilitate family reunification. Finally, they recognize that migrant workers must have a right to a hearing before being expelled from the country of work.

The principles and values outlined above can be distilled so that, under a rights-based framework, migrant workers' security can be measured with reference to the extent to which they can access and experience

- (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. 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 Canada's and Ontario's policy development. As a result, the laws construct the migrant worker – and migrant work experience – in ways that predictably leave them insecure and erode their rights.

### Measuring Migrant Workers' Security

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Migrant workers' security can be measured with reference to the extent to which they can access and experience

fundamental human rights,  
rights at work,  
voice,  
social inclusion,  
social security, and  
effective rights enforcement.

## 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.

## PART C

# Mapping Protection for Security and Decent Work Through the Labour Migration Cycle

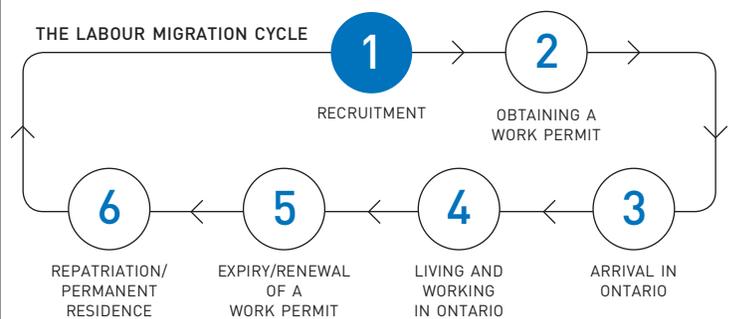
**T**HIS PART OF THE REPORT examines the laws that apply to migrant workers at six stages of their labour migration cycle:

1. **Recruitment**
2. **Obtaining a Work Permit**
3. **Information Prior to and on Arrival in Ontario**
4. **Living and Working in Ontario**
5. **Expiry/Renewal of a Work Permit**
6. **Repatriation/Permanent Residence**

In recording migrant workers' experience in Ontario, the report draws in part on consultations held from December 2011 to 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.

While each stage of the labour migration cycle poses specific challenges to migrant workers, one reality runs through all six stages – the power imbalance between worker and employer. Migrant workers in lower skill jobs generally migrate from relatively impoverished communities, with relatively fewer economic opportunities and greater social and environmental insecurity. They, their families, and their local communities depend greatly on the remittances they send home. Many low-wage migrant workers who come to Canada are motivated by the chance to immigrate. This creates an enormous power imbalance between migrant workers

and their employers or recruiters. This power imbalance is the breeding ground for abuse. Migrant workers reasonably fear that taking action to resist unfair treatment or enforce their rights will jeopardize not only their job but also their right to remain in Canada. Canada's and Ontario's laws will only be able to provide security if they acknowledge and are responsive to this power imbalance that shapes migrant workers' real experiences and real capacity to resist unfair or abusive treatment.



### 1. Recruitment

Abuse in the recruitment phase is systemic. In the worst cases it takes the form of human trafficking.<sup>27</sup> More often, migrant workers are charged exorbitant fees by private recruiters to be placed in jobs. This practice is widespread and affects workers under the LCP and

under both streams of the NOC C & D Pilot Project.

Recruitment fees may start around \$1,000 but more often range from \$4,000 to \$10,000 and even as high as \$15,000. Often workers must borrow money (sometimes with loans arranged through the recruiter) and so arrive in Ontario under the burden of this debt. These fees tie the worker to both the recruiter and the employer. Earning at or near minimum wage, these workers must labour for many months or years just to repay the debt of the recruitment fees.

This problem is compounded by abuses that occur after workers arrive in Ontario. After paying a recruiter, some workers arrive in Ontario to be told that there is no job for them, or the job is for a shorter period than originally promised, or the job is different from the one they were promised (and which is authorized on their work permit), or the pay and work conditions are different from what was promised. In some cases, recruiters confiscate workers' passports and/or work permits.

These kinds of practices are condemned by the ILO. Recruiting employees is a normal part of running a business. Employers should bear these costs. Ontario needs strong legislation that directly targets and outlaws these practices and that provides strong, proactive government enforcement to ensure compliance.

While the template contracts under the LCP and NOC C & D programs prohibit employers from recouping recruitment fees paid by an employer, this does not reach the actual practice in which workers pay fees directly to private recruiters, often in their own country, prior to departure. And while

the federal government sets out these terms in the template contract, it plays no role in enforcing contract compliance.

In 2009, Ontario passed the *Employment Protection for Foreign Nationals Act (Live-in Caregivers and Others)*, 2009, commonly referred to as Bill 210. This law prohibits recruiters from charging any direct or indirect fees to live-in caregivers and prohibits employers from directly or indirectly recovering recruitment costs from caregivers. Recruiters and employers are prohibited from taking possession of a migrant workers' property, including passports and work permits. The law is enforced by Ministry of Labour employment standards officers who can, among other remedies, order employers and recruiters to repay workers, order reinstatement, and issue penalties from \$250 to \$1,000. Individuals who violate Bill 210 can be liable upon conviction of fees up to \$50,000 or one year imprisonment and corporations can be liable for fines up to \$100,000.

While there is much to commend in Bill 210, its coverage and impact is limited.

First, Bill 210 applies only to live-in caregivers even though recruitment abuses happen in all sectors. Bill 210's protection must be extended to all migrant workers, regardless of the sector in which they work or the program under which they have entered Canada. Ontario's failure to extend this protection perpetuates the insecurity and feeds the myth that these recruitment abuses are isolated rather than systemic.

Second, Bill 210's impact is limited because, while the Act allows for proactive inspections, enforcement relies largely on migrant workers to come

United Food and Commercial Workers 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:

*"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."*<sup>28</sup>

forward to make formal complaints or leave tips on a hotline. This puts the onus on the most vulnerable actor in the system to police compliance with the law.

Instead, Ontario should adopt the best practices model represented by Manitoba's *Worker Recruitment and Protection Act* ("WRAPA"). Like Bill 210, WRAPA prohibits recruiters from charging fees to migrant workers and prohibits employers from recovering recruitment costs. WRAPA provides greater protection though because it applies to all migrant workers, puts the onus on employers and recruiters to be accountable at the front end, and involves both federal and provincial governments in proactive oversight and enforcement.

Under WRAPA no employer can recruit a foreign worker without first registering with the provincial Ministry of Labour's Director of Employment Standards and providing detailed information about the employer's business, attempts to hire Canadian citizens or permanent residents, and details of the duties, location and time period of the migrant worker's employment. HRSDC will not process the employer's application for an LMO if the employer does not hold a valid provincial certificate of registration. Similarly no recruiter can recruit foreign workers to work in Manitoba without a provincial licence and no employer can use a recruiter who is not licensed in Manitoba. Only lawyers, Quebec notaries and immigration consultants in good standing with their respective professional governing bodies are eligible to apply as recruiters. The list of licensed recruiters is posted prominently on the Ministry website. Before they can operate, each recruiter must provide the Director of Employment Standards with an irrevocable letter of credit for \$10,000. In the event the Act is breached, these funds are used to pay back fees owed to a migrant worker. The Director of Employment Standards has broad powers to investigate both employers and recruiters before and after registration/licensing. Employers' registration and recruiters' licenses are only valid for one year so they are both subject to ongoing monitoring.

WRAPA is also focused on proactive enforcement by government. WRAPA requires both employers and recruiters to compile data about all migrant workers employed in and recruited to the province. It is

mandatory for employers to file information with the Director of Employment Standards providing each worker's name, address, telephone number, job title, and location of work. The Director of Employment Standards can also request and the employer must submit complete records on recruitment, contracts with recruiters, and contracts with the migrant worker. Recruiters must also on request submit a list of every agreement they have entered into regarding foreign worker recruitment and a list of every foreign worker they have recruited to work in the province. This data enables the Director of Employment Standards to know exactly what sectors and workplaces employ migrant workers and the terms of their recruitment and employment. This data then provides the basis upon which the Director of Employment Standards can exercise the broad proactive powers to monitor and enforce compliance with the Act.

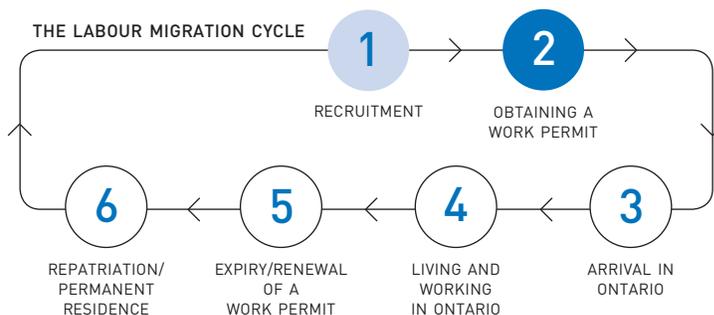
WRAPA's proactive model can provide real security for migrant workers because it directly targets the behaviour that creates insecurity to prevent that insecurity from arising. It demands enhanced communication and coordination between federal and provincial governments so they can work together to ensure compliance. WRAPA also places responsibility for supervising compliance on the actor with the greatest power in the system – the government. This provides more meaningful protection than Ontario's reactive model that relies on individual precarious workers with temporary status to seek a remedy after their rights have been violated in a way that deepens their insecurity.

Workers who arrive under the SAWP are not subject to exploitation by private recruiters like workers under the LCP and NOC C & D programs because worker recruitment under the SAWP is done by the government in the worker's home country. But SAWP workers still experience real insecurity in the recruitment phase because they are caught in a cycle of **perpetual recruitment**. Apart from a few bargaining units that have unionized outside 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. They are dependent on the good will of the employer who

has the power to request them by name (to “name” them) to return. Workers do not acquire any right to be recalled the next season based on seniority. The power to name is exercised unilaterally by the employer at the employer’s discretion. This dependence on their employer to name them and to provide good reports to their home government makes SAWP workers very reluctant to criticize working and living conditions or complain about rights violations for fear it will jeopardize their chance to continue in the SAWP. The precariousness caused by lack of seniority and recall rights is highlighted in legal proceedings ongoing in British Columbia. SAWP workers there filed complaints with the B.C. Labour Relations Board alleging that the Mexican government and its Vancouver consulate colluded with employers to blacklist migrant workers who were exercising their fundamental human right to support a union.<sup>29</sup>

The precariousness of this perpetual recruitment is heightened by institutionalized competition between Mexico and the Caribbean countries that is built into the SAWP structure. Employers can and at time 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 as employers are now, as promoted on the HRSDC website, “free to choose” between hiring workers under the SAWP and the NOC C & D Agricultural Stream.

The specifics of their treatment differ but the insecurity experienced by workers in the recruitment phase under the SAWP, LCP and NOC C & D Pilot Projects is similar. It leaves workers under all four programs reluctant 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. Obtaining a Work Permit

Workers under all four lower skilled labour migration programs are employed on “tied” work permits. They can only work for the specific employer named on the permit, doing the job authorized on the permit, at the location authorized on the permit, for the time period authorized on the permit.

Tied work permits undermine migrant workers’ capacity to resist unfair treatment because their status to be in Canada is intertwined with the terms of their permit. Workers with permanent status who are treated unfairly can quit and seek another job. Migrant workers could technically do this, but in reality their capacity to do so is extremely limited. Migrant workers face three big hurdles.

First, many migrant workers do not know that they can stay in Ontario for the full period authorized on their work permit and can seek other authorized work if they quit or are terminated before the authorized time period is up. This lack of information leaves them very vulnerable to unscrupulous employers and recruiters who threaten workers that they will be deported if they complain about or leave their job.

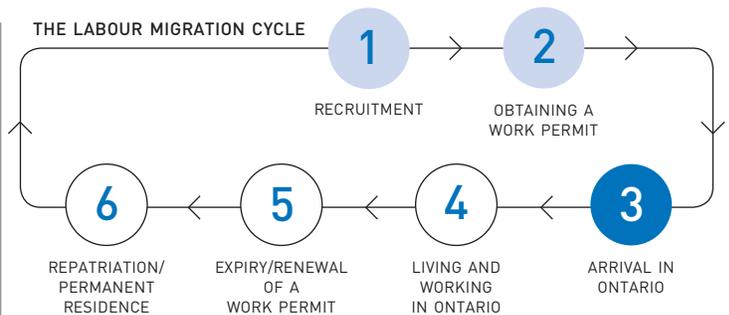
Second, even if a migrant worker can find another employer who is willing to go through the process to hire them, it takes many months for the employer to apply for and receive an LMO and for the worker to then apply for and receive an amended work permit. During these months a migrant worker is prohibited from working. If they do, they fall out of status and are subject to even more exploitation.

Third, migrant workers pay contributions under the *Employment Insurance Act* and are entitled to receive

regular and sickness benefits while in Canada as long as they meet the regular eligibility requirements. In practice they face inconsistent access because a worker must be “available to work” in order to receive regular benefits. If their work permit is tied to their former employer they may not be considered “available to work” until they receive a new work permit at which point they have a new job and are not entitled to benefits.

The insecurity that arises from tied work permits is well known. The federal Standing Committee on Citizenship and Immigration in 2009 recommended that work permits must be opened up to be either sector-specific or province-specific. Those recommendations must be implemented. Permits must also allow injured workers to carry out alternate work or modified duties as part of the accommodation required under the *Human Rights Code* and the return to work under the *Workplace Safety and Insurance Act*. In addition, federal and provincial governments should share information and establish placement services so that employers seeking LMOs can be matched with migrant workers presently in Ontario who are seeking new positions. Such practices would increase worker security and discourage poor treatment of migrant workers by making their right to quit effective.

Finally, work permits for NOC C and D level workers expressly prohibit workers from enrolling in any formal education or training programs while in Ontario. Workers can only do so if they are able to apply for and receive a separate study permit. These restrictions undermine social inclusion and social security. They impede 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. This problem is particularly acute for live-in caregivers many of whom have professional qualifications but, after immigrating, end up working in jobs that are below those qualifications.<sup>30</sup> The restriction on enrollment in training or educational programs outside work hours must be eliminated.

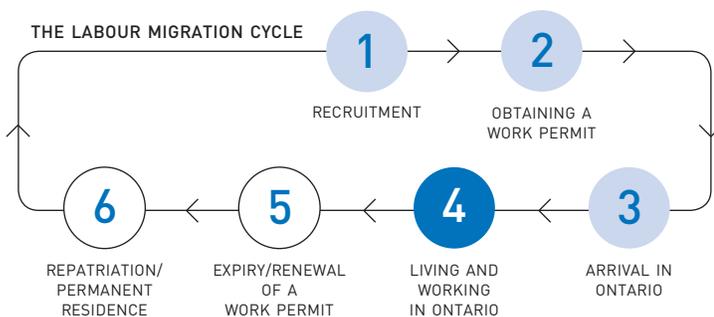


### 3. Information Prior to and on Arrival in Ontario

Among the most common complaints that migrant workers raise are that they do not know what their rights are when they arrive in Ontario; they do not know how to find out what their rights are; and they do not know what organizations are available to assist them. They are provided with very little information, if any, about their rights before they depart for Canada and receive very little, if any, information about their rights and available support services when they arrive. Lack of information – and in some cases active misinformation by recruiters – draws workers into and keeps them in exploitative relationships. For this reason, the ILO Conventions emphasize government’s proactive obligation to ensure that migrant workers are provided with accurate information.<sup>31</sup> Providing such information is also consistent with government’s proactive obligation under Canadian law to acknowledge and address the vulnerability of those subject to the labour migration programs.

Systematic, proactive measures need to be put in place to ensure that migrant workers are given accurate information about their rights in the temporary labour migration stream they have entered; their employment, social and human rights while in Ontario; and how to enforce their rights. In addition, migrant workers should be provided with information about and contacts for recognized community organizations, unions, worker advocates and legal clinics that are able to support them throughout their labour migration cycle. This would play an important role in enhancing workers’ individual security and their collective voice.

The Canadian government should bear primary responsibility to ensure that accurate information is provided to migrant workers. 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, these are the two points in the cycle at which consistent delivery of information can be ensured. Information should be provided in person in the language the migrant worker speaks. Again federal and provincial governments should coordinate so that workers are provided with accurate, comprehensive, plain language guides to their rights and available support in the province in which they will work.<sup>32</sup>



#### 4. Living and Working in Ontario

The portrait that emerges to this point in the labour migration cycle reveals that a high degree of insecurity is the norm for migrant workers in Ontario before they even begin their first day on the job. Coming from positions of relative economic, political, social and/or environmental insecurity, many arrive after paying significant fees to private recruiters. They arrive on work permits that tie them to a single employer. They arrive with little information about 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 the fact that almost all migrant workers are and remain non-unionized. The two largest groups of migrant workers –

live-in caregivers and farm workers – are, by law, expressly denied the right to unionize and engage in collective bargaining under the *Labour Relations Act*.<sup>33</sup> The remaining workers – those arriving under the NOC C & D Pilot Project – are employed in industries that are mostly non-unionized. Migrant workers are overwhelmingly from racialized communities and experience racial discrimination on the job and in the communities in which they live. 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 insecurity 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 (LCP) or live in housing provided by their employer (SAWP and NOC C & D agricultural workers). This heightens their dependence on their employer because if they speak out about poor working or living conditions they risk both losing their job and becoming homeless.

##### a. Erosion of Migrant Workers' Rights

From this starting point, migrant workers experience a deep erosion of their rights. There is a significant and systemic gap between their rights on paper and their treatment in reality. This report highlights only some of those abuses in relation to employment standards, housing, health and safety and termination.

##### EMPLOYMENT STANDARDS

Because migrant workers are overwhelmingly non-unionized, their primary workplace protections are found under the *Employment Standards Act*. Comprehensive figures are not publicly available to track contract/employment standards compliance across all employers of migrant workers in Ontario. But a 2011 study by the Workers' Action Centre, which surveyed 520 low-wage workers in Toronto, the GTA and Windsor provides some insight.<sup>34</sup> The survey was specifically designed to cover migrant workers under the LCP, SAWP and NOC C & D Pilot Projects, non-status workers, recent immigrants and racialized low-wage workers. The study revealed:

- 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.

There are also reports of migrant workers facing patterns of discrimination such as being paid less than Canadian workers doing the same work and being assigned the most dangerous jobs in the workplace.<sup>35</sup>

### HOUSING

As set out above, living on their employer’s property undermines migrant workers’ ability to resist unfair treatment generally. They also experience exploitation specific to their housing situation. Living on their employer’s property means they are always “available” for work and are frequently pressured to work excessive (often unpaid and unrecorded) overtime hours. This is a particular problem for live-in caregivers because if their employer inaccurately identifies the hours worked, they risk missing the threshold number of hours needed to apply for permanent residence. Living on their employer’s property also leaves workers subject to control over their personal lives in their off-work hours (i.e. through restrictions on when they can leave the property and who can visit). Many migrant workers under the SAWP and NOC C & D streams live in very overcrowded, unsuitable accommodations. There is a persistent concern that because housing inspections take place before migrant workers arrive, inspectors do not see what conditions are

like when the full complement of workers is present. Finally, workers under the NOC C & D Agricultural Stream are often charged rent at levels above what is permitted under the *Employment Standards Act* and the HRSDC guidelines.

### 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. Workers repeatedly report that workers who are injured on the job are promptly dismissed and repatriated to their country of origin. As a result, they are effectively denied access to workplace safety insurance benefits, treatment in Canada, and the opportunity to be accommodated in their jobs with modified duties as required under Canadian law. In its comprehensive review of Ontario’s occupational health and safety system, Ontario’s Expert Advisory Panel on Occupational Health and Safety reported in December 2010 that migrant workers – particularly in agriculture, construction and the hotel/hospitality sectors – face particular insecurity and inability to enforce their health and safety rights. The Expert Advisory Panel expressly links this erosion of their health and safety rights to the systemic insecurity that begins with paying recruitment fees to offshore brokers and consultants, continues with their lack of information, and is underscored by fears of losing their jobs should they complain. In addition, the Expert Advisory Panel highlighted that a serious challenge is posed by employers operating in the underground economy who engage in wilful non-compliance. Migrant workers in agriculture and construction are particularly vulnerable to being employed by such employers.<sup>36</sup>

A 2010 report that surveyed 600 SAWP workers in Ontario<sup>37</sup> 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 being excluded from the SAWP in the current season and future seasons as a result of raising a complaint.

#### TERMINATION

Migrant workers who are terminated are particularly vulnerable especially because losing their job may also mean they are evicted from their employer's property and become homeless. They do not have access to an effective forum to challenge their termination as unjust. Being almost entirely non-unionized, they lack access to grievance arbitration. They can in theory file a claim in court for wrongful dismissal but this is virtually impossible in practice because they lack information about the Canadian justice system, lack resources, lack access to legal assistance, and have temporary immigration status. Court procedures can take many years and will not be resolved in a timely way before a worker's work permit and visa expire.

Repatriation on termination is a persistent problem for workers under the SAWP where employers have broad power under their contracts to terminate a worker "for non-compliance, refusal to work, or any other sufficient reason." 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 with the result that

when an employer terminates a SAWP worker, the worker 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.<sup>38</sup>

#### b. How to Support Migrant Workers' Security

A rights-enforcement system will only be effective to the extent that it is designed to be responsive to the population it serves. On this score, the existing laws fail to protect migrant workers because they are reactive systems that do not acknowledge migrant workers' precarious status and do not reflect migrant workers' capacity to self-advocate. Because the system cannot be effectively accessed by migrant workers, employers remain largely unsupervised and rights violations 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

- enhance accountability and transparency in the system;
- ensure effective representation and support for migrant workers;
- enhance the capacity for collective representation and voice for migrant workers;
- emphasize proactive inspection and investigation of employers with LMOs;
- ensure the right to a hearing in a single accessible forum; and
- ensure effective remedies and penalties.

Proactive employer registration and recruiter licensing, as mandated under *WRAPA*, would help build accountability and transparency in enforcement. It would facilitate proactive inspection of contract compliance and compliance with provincial employment standards and health and safety laws. Enforcement agencies need to shift their emphasis towards increased proactive inspection and investigation. Adequate resources must be committed to this proactive enforcement. The Ministry of Labour should also develop innovative partnerships and funding arrangements with

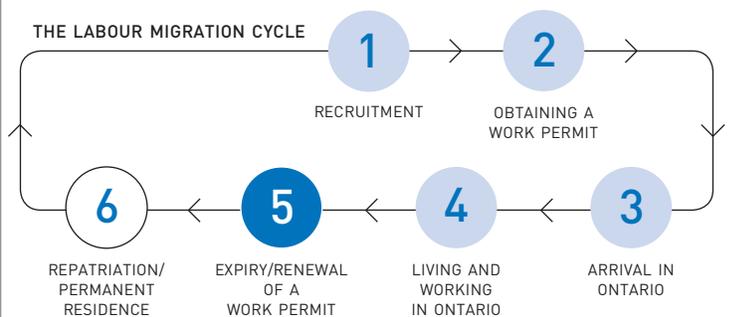
community organizations to collaborate in identifying rights violations. In reactive complaints, employee voice can also be enhanced by permitting anonymous and third-party complaints.

Migrant workers lack effective voice and lack adequate information about their rights and legal processes. To redress this, a publicly funded independent agency – the Office of the Migrant Worker Advocate – should 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. In addition, provincial legislation must be amended to guarantee that agricultural workers have effective rights to unionize and bargain collectively and to guarantee that live-in caregivers also have effective means of collective representation and voice, for example, through sectoral representation.

At present migrant workers must apply to numerous different tribunals and courts to enforce their rights. Some contract terms are enforceable under the *Employment Standards Act* but others need to be enforced in court. Legislation must be amended to ensure that all terms of migrant workers' contracts are enforceable in a speedy manner before a single tribunal with appropriate expert knowledge. Legislation should also be amended to grant migrant workers the statutory right to challenge unjust termination in a hearing before this same tribunal. This would not require the creation of a new tribunal but instead could be achieved by training a designated pool of employment standards officers and members of the Ontario Labour Relations Board. Migrant workers must be granted security of status and security of housing while employment disputes are ongoing and to this end should be granted open work permits while seeking to enforce their rights.

While this report has focused on ways to enhance workers' capacity to enforce their rights at work, steps must also be taken to enhance workers' experience of *living* in Ontario. Lifting the prohibition on enrollment for education and training would address one aspect of this concern. Reforms must also be made to address migrant workers' extended separation from

their families. This is a serious concern with devastating personal costs to workers. Migrant workers who come to Ontario at the NOC 0, 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. The result is that migrant workers are separated for their families for many years at a time. Apart from the damaging mental health impacts of this separation, the negative impacts continue into the next generation as family reunification and reintegration are very difficult after prolonged separation.



## 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 is intended to 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.

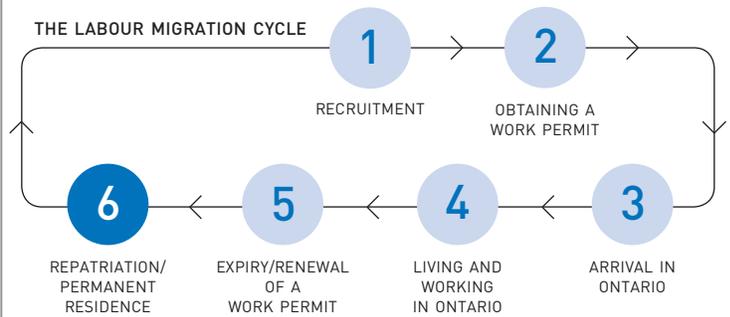
- A work permit under the two NOC C & D streams can be granted for up to two years. Workers under the two NOC C & D streams can have successive permits up to a cumulative total of four years. Once they reach the four year limit, they must leave the country and are not eligible to apply for another temporary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

These worker dislocations – whether seasonally for SAWP workers or after four years for NOC C & D stream workers – serve to disrupt the workers’ connection to Canada rather than to reflect the temporariness of the work they are doing. These mandatory dislocations are unrelated to the question of whether there is a chronic or ongoing labour shortage that the particular worker could fill. There is no doubt that agricultural work persists season after season, that labour shortages in this sector are chronic and that programs to import seasonal farm 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 temporary migration programs serve to create an infinitely flexible and infinitely vulnerable pool of workers that can be shifted from one industry to the next as needs arise. These legal 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. The employer can in fact immediately hire new migrant workers with temporary status to replace the workers who are repatriated.

By cycling vulnerable migrant workers in and out of the country in this way, the existing legal regime 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 for building a nation. The real question that must be confronted, then, is why migrant workers in the NOC C & D skill levels are, in law, denied access to permanent residence.



## 6. Pathways to Permanent Residence

The only migrant workers at the NOC C and 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 complete the 2 years/3900 hours threshold. They are vulnerable to employers who underreport 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 these situations and many others where caregivers must seek multiple placements, delays occur with each transition as a new LMO and 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.

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 ("PNP").

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 with the PNP accounting for over 90% of economic immigration in Manitoba and PEI, over 80% in Saskatchewan and 74% in New Brunswick. By contrast, only 1,000 immigrants per year are admitted under Ontario's PNP, representing only 1.2% of total economic immigration to the province.<sup>39</sup> Ontario's PNP is only open to workers in NOC skill levels 0, A and B who have a permanent, full-time job offer in a managerial, professional or skilled trade occupation from an Ontario employer.

Some other provinces permit employers to nominate NOC C & D skill level workers 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 English or French language training. 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.<sup>40</sup>

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 secure permanent status again calls for a critical examination of why these workers are legally constructed as temporary, a critical examination of how their work is valued, and a critical examination of the assumptions about their unfitness to stay in Canada despite years of productive labour. 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. Temporary migration cannot solve this labour shortage.

As stated at the outset, it is time to rethink which workers are eligible for permanent residence. Reform is needed 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. After a decade which has seen dramatic increase in the use of temporary migrant workers, it is time to address the fundamental inequity and insecurity that is created by laws and policies that keep these workers permanently temporary. Only by ensuring that workers of all skill levels have access to apply to immigrate and arrive with status, can Canada's immigration system promote nation building in a fair and equitable way.

## PART 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 building the laws and policies that govern a particular relationship.<sup>41</sup> The detailed guidelines provided in the *UN Convention on the Protection of All Migrant Workers and Members of Their Families*, the numerous ILO Conventions, and the *ILO Multilateral Framework on Labour Migration* also all speak to the multitude of ways in which 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. It devalues the work. To the extent that laws construct workers as “temporary,” “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.

The fundamental recommendation of this report is that Canadian immigration policy must be reframed to ensure that workers of all skill levels can apply to immigrate to Canada with permanent resident status. In the interim, as long as Canada and Ontario operate temporary labour migration programs to deliver migrant workers to Ontario workplaces, they must

make significant reforms to ensure that these workers have real security, real access to their rights, and real access to decent work. To this end, this report makes the following recommendations that correspond with each stage of the labour migration cycle:

### Recruitment

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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 joint 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

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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

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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, unions, worker advocates and legal clinics that 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

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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

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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

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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.

## Endnotes

<sup>1</sup> 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*, [www.cic.gc.ca/english/resources/statistics/facts2011-preliminary/index.asp](http://www.cic.gc.ca/english/resources/statistics/facts2011-preliminary/index.asp). 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.

<sup>2</sup> 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.

<sup>3</sup> For just a sample of these studies, see: Alberta Federation of Labour, *Temporary Foreign Workers: Alberta's Disposable Workforce* (Edmonton, Alberta Federation of Labour, November 2007); Alberta Federation of Labour, *Entrenching Exploitation: The Second Report of the Alberta Federation of Labour Temporary Foreign Worker Advocate* (Edmonton: Alberta Federation of Labour, April 2009); UFCW Canada, *Report on the Status of Migrant Workers in Canada 2011*, <http://ufcw.ca/templates/ufcwcanada/images/Report-on-The-Status-of-Migrant-Workers-in-Canada-2011.pdf>; UFCW Canada, *The Status of Migrant Farm Workers in Canada 2010-2011*, [http://www.ufcw.ca/templates/ufcwcanada/images/awa/publications/UFCW-Status\\_of\\_MF\\_Workers\\_2010-2011\\_EN.pdf](http://www.ufcw.ca/templates/ufcwcanada/images/awa/publications/UFCW-Status_of_MF_Workers_2010-2011_EN.pdf); Jenna Hennebry, "Permanently Temporary? Agricultural Workers and Their Integration in Canada" (February 2012), IRPP Study, No. 26; 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); 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; 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; 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.

<sup>4</sup> *Dunmore v. Ontario* (Attorney General), [2001] 3 S.C.R. 1016 at para. 22 and 26.

<sup>5</sup> Alberta Federation of Labour, *Temporary Foreign Workers: Alberta's Disposable Workforce*, above note 3.

<sup>6</sup> 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 p. 86.

<sup>7</sup> Statistics Canada, National Occupational Classification (NOC) 2011. Statistics Canada Catalogue No. 12-583-X. (Ottawa: January 2012).

<sup>8</sup> At the time of writing, the federal government is making changes to eligibility criteria within these pathways and more changes are anticipated in 2013. However the categories still provide a useful point of reference.

<sup>9</sup> See Vic Satzewich, *Racism and the Incorporation of Foreign Labour: Farm Labour Migration to Canada Since 1945* (London and New York: Routledge, 1991).

<sup>10</sup> See above, note 1.

<sup>11</sup> *Immigration and Refugee Protection Regulations*, SOR/2002-227, s. 203(3)(d) and (e).

<sup>12</sup> 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 3 at pp. 19-20; UFCW Canada, *The Status of Migrant Farm Workers in Canada 2010-2011*, above note 3 at p. 16; Fudge and MacPhail, "Temporary Foreign Worker Program in Canada," above note 3 at pp. 26-27.

<sup>13</sup> 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](http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/almo/factsheet.shtml) (accessed 2 May 2012); 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) in which it was reported: "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."

<sup>14</sup> The figures in this paragraph are calculated from various tables in Canada Facts and Figures 2010, above note 1 at pp. 62-64 and 74-76, and Government of Ontario, Research and Statistics: Temporary Residents 2008 (Information, Research & Evaluation Unit, Immigration Policy Branch, undated) at pp. 10-11 and 23 online at [http://www.ontarioimmigration.ca/stdprodconsume/groups/csc/@oipp/documents/document/oi\\_stats\\_temps.pdf](http://www.ontarioimmigration.ca/stdprodconsume/groups/csc/@oipp/documents/document/oi_stats_temps.pdf).

<sup>15</sup> 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.

<sup>16</sup> 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 Initiative, March 2011) at pp. 10 and 12.

<sup>17</sup> Ontario, Research and Statistics: Temporary Residents 2008, above note 14 at p. 22.

<sup>18</sup> See HRSDC, “*Seasonal Agricultural Worker Program*,” online at [http://www.hrsdc.gc.ca/eng/workplaceskills/foreign\\_workers/stats/annual/foreword\\_sawp.shtml](http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/stats/annual/foreword_sawp.shtml) (accessed 16 March 2012).

<sup>19</sup> Hennebry, *Permanently Temporary*, above note 3 at p. 13.

<sup>20</sup> *IRP Regulations*, s. 200(3)(g).

<sup>21</sup> HRSDC, *Instruction Sheet to Accompany Employment Contract*, online at [http://www.hrsdc.gc.ca/eng/workplaceskills/foreign\\_workers/contracts-forms/annex2.shtml](http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/contracts-forms/annex2.shtml) (accessed 16 March 2012). [emphasis added]

<sup>22</sup> Canada Facts and Figures 2010, above note 1 at p. 68.

<sup>23</sup> *Eldridge v. British Columbia* (Attorney General), [1997] 3 S.C.R. 624; *Dunmore v. Ontario* (Attorney General), above note 4.

<sup>24</sup> *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*, [1999] 3 S.C.R. 3 (“*Meiorin*”).

<sup>25</sup> Report of the Director-General: Decent Work (Geneva: International Labour Office, 1999).

<sup>26</sup> See, for example, United Nations, *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, adopted by the UN General Assembly resolution 45/158 of 18 December 1990; ILO Convention 97, *Migration for Employment Convention (Revised)* (1949); ILO Convention 143, *Migrant Workers (Supplementary Provisions) Convention* (1975); ILO Convention 189, *Domestic Workers Convention* (2011); ILO Recommendation 201, *Domestic Workers Recommendation* (2011); ILO, *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).

<sup>27</sup> 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).

<sup>28</sup> UFCW Canada, *The Status of Migrant Farm Workers in Canada 2010-2011*, above note 3 at pp. 16-17.

<sup>29</sup> 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](http://www.ufcw.ca/index.php?option=com_content&view=article&id=2564&Itemid=342&lang=en).

<sup>30</sup> 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).

<sup>31</sup> ILO Convention 97, *Migration for Employment Convention*, above note 26 at Articles 1, 2 and 3.

<sup>32</sup> For example, the Government of Alberta has prepared a guide that sets out information applicable to migrant workers employed in that province: 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).

<sup>33</sup> *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A, by operation of s. 3(a) and (b.1) does not apply to either “a domestic employed in a private home” or “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*, 2011 SCC 20, [2011] 2 S.C.R. 3. Despite being in place for a decade, there is no 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. 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 6.

<sup>34</sup> Workers’ Action Centre, *Unpaid Wages, Unprotected Workers: A Survey of Employment Standards Violations* (Toronto: Workers’ Action Centre, 2011).

<sup>35</sup> Litigation in other provinces has confirmed that employers are engaging in these kinds of practices. See, for example, *C.S.W.U. Local 1611 v. SELI Canada et al* (No. 8), 2008 BCHRT 436.

<sup>36</sup> 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](http://www.labour.gov.on.ca/english/hs/pdf/eap_report.pdf).

<sup>37</sup> See Hennebry, *Permanently Temporary*, above note 3 at pp. 16-19; Hennebry, Preibisch and McLaughlin, *Health Across Borders*, above note 3; and UFCW Canada, *The Status of Migrant Farm Workers in Canada 2010-2011*, above note 3 at pp. 14-15.

<sup>38</sup> See the Statement of Claim in *Espinoza et al v. Tigchelaar Berry Farms Inc. et al*, Ontario Superior Court of Justice, Court File No. CV-11-439746.

<sup>39</sup> Citizenship and Immigration Canada, Evaluation of the Provincial Nominee Program (September 2011), available online at: <http://www.cic.gc.ca/english/pdf/research-stats/evaluation-pnp2011.pdf> (accessed 13 March 2012).

<sup>40</sup> 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>; Alberta Federation of Labour, *Entrenching Exploitation*, above note 3; 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).

<sup>41</sup> The social construction of disadvantage is well recognized in Canadian law: see, for example, *Eldridge v. British Columbia*, above note 23; *Dunmore v. Ontario*, above note 4.



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