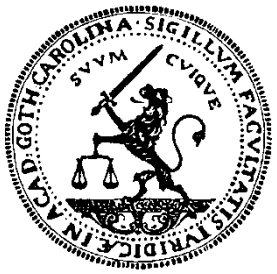

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Seeking the Land of Milk and Honey:

The International Labour and Human Rights of Temporary Foreign Workers in Canada

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Abstract

This paper explores the extent to which international labour and human rights law places obligations on States to protect the interests of migrant workers in countries of employment. The purpose of this paper is to examine Canada's temporary foreign worker programs and work-related regulations, and determine whether Canada lives up to the international norms with respect to the rights of migrant workers. The research questions posed include: What are the international labour and human rights applicable to migrant workers? Does Canadian domestic law and practice fulfil these international norms in respect of migrant workers in the TFWPs in Canada? If not, what changes does Canada need to make to comply with these international standards? The conclusion is that while international labour and human rights law does not prohibit States from admitting workers on a temporary basis and with restrictions, when States do confer only temporary status on foreign workers, the international standards require States to take extra and special steps to provide migrant workers with work-related protections. The extent to which Canada fails to live up these standards is examined, and recommendations provided. This paper concludes with some questions on the limitations of international labour and human rights law for the situation of migrant workers.

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Erin Murphy Fries
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Abbreviations

AEPA	Agricultural Employees' Protection Act
A-LMO	Accelerated Labour Market Opinion
B.C.	British Columbia
BCESA	British Columbia *Employment Standards Act*
BCEST	British Columbia Employment Standards Tribunal
BCHRC	British Columbia *Human Rights Code*
BCHRT	British Columbia Human Rights Tribunal
BCLRB	British Columbia Labour Relations Board
BCLRC	British Columbia *Labour Relations Code*
BCSC	British Columbia Supreme Court
C81	*Convention concerning Labour Inspection in Industry and Commerce, 1947*
C87	*Convention concerning Freedom of Association and Protection of the Right to Organize, 1948*
C97	*Convention concerning Migration for Employment, Revised 1949*
C98	*Convention concerning the Application of Principles of the Right to Organise and Bargain Collectively, 1949*
C111	*Convention concerning Discrimination in Respect of Employment and Occupation, 1958*
C129	*Convention concerning Labour Inspection in Agriculture, 1969*
C143	*Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, 1975*

C155	*Convention concerning Occupational Health and Safety and the Working Environment, 1981*
C181	*Convention concerning Private Employment Agencies Convention, 1997*
C187	*Convention concerning the Promotional Framework for Occupational Health and Safety, 2006*
C189	*Convention concern Decent Work for Domestic Workers, 2011*
CAW-Canada	National Automobile, Aerospace, Transportation and General Workers of Canada
CEACR	Committee of Experts on the Application of Conventions and Recommendations
CEDAW	*International Convention on the Elimination of All Forms of Discrimination Against Women*
CERD	*International Convention on the Elimination of All Forms of Racial Discrimination*
CFA	Committee on Freedom of Association
CIC	Citizenship and Immigration Canada
CESCR	Committee on Economic, Social and Cultural Rights
CMW	*International Convention on the Elimination of All Forms of Racial Discrimination*
CSWU	Construction and Specialized Workers' Union, Local 1611
HRC	United Nations Human Rights Committee
HRSDC	Human Resources and Skills Development Canada
HRTO	Human Rights Tribunal of Ontario
ICCPR	*International Covenant on Civil and Political Rights*
ICESCR	*International Covenant on Economic, Social and Cultural Rights*

ILC	International Labour Conference
ILO	International Labour Organization
IRPA	Immigration and Refugee Protection Act
J4MW	Justicia For Migrant Workers
LCP	Live-In Caregiver Program
LMO	Labour Market Opinion
LSPP	Low-Skill Pilot Project
NOC	National Occupational Classification
OESA	Ontario *Employment Standards Act*
OHRC	Ontario *Human Rights Code*
OLRA	Ontario *Labour Relations Act*
PNP	Provincial Nominee Program
PR	Permanent Resident
SCC	Supreme Court of Canada
TFW	Temporary Foreign Worker
TFWP	Temporary Foreign Worker Program
UFCW 1518	United Food and Commercial Workers' Union, Local 1518
UDHR	*Universal Declaration of Human Rights*
UN	United Nations

1 Introduction

"Canada is a country built by immigrants, not by migrant workers…migrant workers have no capacity to put down roots in their community. Most can't bring their families and build neighbourhoods and communities. Because their status is precarious they're open to abuse"[1].

-Olivia Chow, Member of Parliament

"We look at Canada as the land of milk and honey…Everyone wants to come to Canada – until they're here"[2]

-Mel, Temporary Foreign Worker

Research Problem and Questions

Canada is a country that has a history and reputation for accepting migrants on a permanent basis, and has historically relied on permanent immigration to build and sustain the nation. However, Canada is now admitting more and more people on a temporary, rather than permanent, basis. In 2001, there were 96,390 temporary foreign workers ("TFW") present in Canada on December 1, and 250,638 permanent residence permits were issued in that year[3]. In 2007, there were 199,246 TFWs present on December 1 and 236,754 permanent residents ("PR") admitted[4]. This trend towards a greater number of temporary migrants has continued, and in 2011 there were 300,111 TFWs present on December 1, and 248,660 new PRs in Canada[5]. TFW status does not provide a very secure or

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[1] Joe Friesen, "Leap in temporary foreign workers will hurt Canada in the long-term critics say", *Hans and Tamar Oppenheimer Chair in Public International Law* (13 May 2010). Online: http://oppenheimer.mcgill.ca/Leap-in-temporary-foreign-workers?lang=en (Date of Access: March 16, 2012).

[2] Dale Brazao and Robert Cribb, "Nannies trapped in bogus jobs" *The Toronto Star* (14 March 2009) Online: www.thestar.com, quoting Mel, a Filipina migrant worker who left her employment in Canada as a live-in caregiver after being verbally abused and mistreated by her employer ["Brazao and Cribb"].

[3] CIC, "Canada – Permanent residents by gender and category, 1986 to 2010". Online: http://www.cic.gc.ca/english/resources/statistics/facts2010/permanent/01.asp (Date of Access: July 16, 2012); CIC, "Canada - Temporary residents present on December 1st by yearly sub-status". Online: http://www.cic.gc.ca/english/resources/statistics/facts2010/temporary/04.asp (Date of Access: July 16, 2012). CIC uses temporary residents present on December 1st as the measure to report the size of the temporary resident population generally in Canada in a given year.

[4] *Ibid.*

[5] CIC, "Canada – Permanent residents by category, 2007-2011". Online: http://www.cic.gc.ca/english/resources/statistics/facts2011-preliminary/01.asp (Date of Access: July 16, 2012); CIC, "Canada – Total entries of temporary foreign workers by province or

even probable path to permanent residency. In 2007, 19,936 TFWs became PRs, and in 2010 this number only increased to 32,877[6]. This represents around only 10% of TFWs present in Canada on December 1 of each of those years. The emphasis on temporary status is significant for newcomers to Canada, as permanent residency in Canada provides foreign-born individuals with many of the same rights as citizenship[7], while as will be seen, TFWs do not enjoy the same rights in Canada as PRs.

This shift towards temporary, rather than permanent, immigration is troubling as most of Canada's Temporary Foreign Worker Programs ("TFWP") do not offer a path to permanent residency, although many workers who come to Canada under the TFWP do so with hopes of eventually obtaining permanent status. The reality is that very few of these workers will ever become permanent residents or Canadian citizens[8]. It has been argued that the TFWP is designed to prevent permanent settlement, as visas are granted to single applicants and family reunification and PR status are not contemplated[9]. As will be seen, this temporary status, and the associated restrictions placed on TFWs, acts as a barrier to TFWs workers effectively accessing legal protections in their employment.

There is a growing body of literature on the role of international migration as the new tool to regulate the labour market[10]. Employers often hire TFWs for the very reason that they are not able to access legal protections and rights at work to the same extent possible as citizens and PRs. If immigration law is the new regulator of labour and employment in Canada, then the question of the extent to which workers with only temporary immigration status are able to effectively access employment-related rights is a relevant and timely question.

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territory and urban area**,** 2007-2011". Online: http://www.cic.gc.ca/english/resources/statistics/facts2011-preliminary/03.asp (Date of Access: July 16, 2012).

[6] CIC, "Canada – Transition of foreign workers to permanent resident status by category" Online: http://www.cic.gc.ca/english/resources/statistics/facts2010/temporary/33.asp (Date of Access: Jan. 18, 2012).

[7] Catherine Dauvergne, "Citizenship with a Vengeance" (2007) 8 Theor. Inq. L. 489 at 492.

[8] Olivia Chow, "Canada's growing temporary workforce: a worrying trend", *The Canadian Foundation for the Americas* (2011) ["Chow"]. Online: http://www.focal.ca/publications/focalpoint/458-june-2011-olivia-chow (Date of Access: Feb. 11, 2012).

[9] Kerry Preibisch, "Pick-Your-Own-Labour: Migrant Workers and Flexibility in Canadian Agriculture" (2010) 44:2 Int. Migr. Rev. 404 ["Preibisch"].

[10] See, for example, Preibisch, *supra* note 8; Bridget Anderson, "Migrations, immigration controls and the fashioning of precarious workers" (2010) 24 Work Employ. Soc. 300; Judy Fudge and Fiona MacPhail, "The Temporary Foreign Worker Program in Canada: Low-skilled Workers as an Extreme Form of Flexible Labour" (2009) 31(1) Comp. Lab. L. & Pol. J. 101 ["Fudge and MacPhail, Flexible Labour"]; Martin Ruhs, "Temporary foreign worker programmes: Policies, adverse consequences, and the need to make them work" in *Perspectives on Labour Migration, Social Protection Sector* (ILO, Geneva, 2003).

The purpose of this thesis is to examine Canada's TFWPs and legal protections available to workers, and determine whether Canada lives up to the international norms with respect to the rights of migrant workers. The research questions asked in this thesis include: What are the international labour and human rights applicable to migrant workers? Does Canadian domestic law and practice fulfil these international norms in respect of migrant workers in the TFWPs in Canada? If not, what changes would Canada need to make to comply with these international standards?

My research has led to the finding that while international labour and human rights law does not prohibit States from admitting workers on a temporary basis and with restrictions, when a State does admit workers on a temporary basis only, there is an obligation on States to take extra and special steps to provide migrant workers with work-related protections. This is because of the vulnerable or precarious immigration and employment status conferred on these workers by the State. I will demonstrate in this thesis that aspects of the TFWP would not be in compliance with international labour and human rights law, and there are extra and special measures that should be taken to allow TFWs to more enjoy rights at work, recognizing the particular situation of vulnerability of these workers.

Structure of the Thesis

This introduction will provide background and context to the stated research problem. Chapter Two explains immigration in Canada and the TFWPs. Chapter Three sets out the international labour rights and international human rights standards applicable to migrant workers. Chapter Four examines the extent to which TFWs are included and contemplated in employment-related legislation and able to effectively access those protections. Chapter Five provides an analysis of the extent to which the international labour and human rights of migrant workers under the TFWP in Canada are respected, and recommendations for improvement in this regard. In Chapter Six I will provide concluding thoughts on the rights of migrant workers under international and Canadian law.

Background and Context

Theoretically, TFWPs provide economic gains to receiving countries from the increased supply of labour, and the benefit of an increase in wages for the migrant worker[11]. For many people from developing countries, their only viable option to secure an income for their family is to leave home and travel to another country to work[12]. However, temporary employment in a country other than their own can and often does result in precarious and vulnerable

[11] Ruhs, *supra* note 10, p. 3.
[12] Chow, *supra* note 8.

employment situations for migrant workers. Exploitative and abusive practices are known to occur even before a worker commences employment in Canada. Due to inadequate regulation of immigration and recruitment agencies, there have been reports of recruiters engaging in conduct such as charging a fee to bring the worker to Canada for a job that never existed and providing misinformation about the wages the worker will earn or about their chances for achieving permanent residency status once in Canada[13]. In Ontario and British Columbia ("B.C.") it is illegal to charge a fee for finding a person employment, however, recruiters can easily get around this by demanding payment for related activities, such as "immigration settlement services".

The temporary nature of the work permits under the TFWPs place TFWs in a more precarious work situation than citizens and PRs of Canada. Temporary work permits most often only allow migrants to work for a single employer, in a specific location, industry, and job. These time and place restrictions on the employment opportunities of TFWs can lead to abusive working conditions, as these workers have no other legal options for work in Canada. Just some of the abusive working conditions faced by TFWs in Canada have been reported to include: withholding of passports; threats of repatriation; non-payment or under payment of wages; excessive working hours; unsafe and unsanitary living and working conditions, restrictions on freedom of movement; verbal and physical abuse; inadequate housing conditions; and interference with the freedom of association and the right to collective bargaining[14]. Agricultural workers, who are mostly migrant workers, work up to 14 to16 hours per day during harvest, six days a week plus half a day on Sundays[15]. Domestic migrant workers also report long working hours with days of 12 to 15 hours of work without overtime or days off, and have reported being isolated, lacking in nutritious

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[13] 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* ["Nakache and Kinoshita"]. Online: www.irpp.org/IRPP_Study_no5.pdf (Date of Access: Feb. 4, 2012); Report of the Standing Committee of Citizenship and Immigration, "Temporary Foreign Workers and Non-Status Workers" (House of Commons, 40th Parliament, 2nd Sess., May 2009) ["Report of the Standing Committee"].

[14] See for example, Report of the Standing Committee, *supra* note 12, pp. 37-38, "Ministry investigates Presteve Foods" *The Windsor Star* (18 Sept. 2008) ["Ministry investigates Presteve"]; *Herminia Vergara Dominguez v. Northland Properties Corporation,* Notice of Civil Claim dated 7 Jan. 2011 ["Dominguez Notice of Civil Claim"]; *Director of Employment Standards and Northland Properties Corporation and Dencan Restaurants Inc., carrying on business as Denny's,* ER#067-767 (June 17, 2011) ["ER#067-767"]; Andrea Woo, "West Vancouver woman charged with human trafficking" *Vancouver Sun* (17 May 2011); Brazao and Cribb, *supra* note 2; *Sidhu & Sons Nursery Ltd. v. U.F.C.W., Loc. 1518* (BCLRB No. B154/2010) ["*Sidhu & Sons*"]; *Presteve Foods Ltd. v. CAW-Canada, Local 444,* [2007] O.L.A.A. No. 231 ["*Presteve Foods,* OLAA*"*]; *CAW-Canada on behalf of a group of Employees v. Presteve Foods*, 2010 HRTO 796 ["*Presteve Foods*, HRTO"].

[15] *Michael J. Fraser and Attorney General of Canada,* Factum of the Appellants, Court of Appeal of Ontario, Court File No. C44886 (18 Oct. 2007) [*Fraser* Factum of the Appellants"], p. 11.

food and other mistreatment by employers[16]. Workers in the LCP have reported going without pay, as enforcing this right could mean getting fired and losing the opportunity for permanent residency[17]. In the service sector, it has been alleged that an employer has failed to live up to its employment contract with temporary foreign workers, by failing to pay overtime and reimburse the workers for their travel costs[18].

Discrimination against migrant workers on the basis of race, colour, language, country of origin, or socio-economic status is an experience of many TFWs. In Canada, some employers have allegedly paid migrant workers less than Canadian workers even though they perform exactly the same job in the same workplace, and are covered by the same collective agreement terms[19]. A 2004 study showed that foreign nursery and harvesting workers were earning $0.96 less per hour than Canadian workers[20]. At least one employer in Canada has been found to have discriminated against certain groups of migrants (from Latin America) as compared to other groups of migrants (from Europe) on the basis of race, colour, ancestry and place of origin[21]. Women migrants are at greater risk than men of discrimination, and are more vulnerable to harassment, abuse and violence in their work[22]. For example, migrant women in Canada may be paid less than migrant men for work of comparable skill levels, and may have different conditions imposed on them, such as tighter control by the employer of the women's movements and stricter curfews[23]. In more extreme situations, women have reported being sent back to their country of origin for engaging in romantic relationships or becoming pregnant[24]. Other migrant women have reported being sexually assaulted by their employer[25]. Domestic migrant

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[16] Brazao and Cribb, *supra* note 2.
[17] Report of the Standing Committee, *supra* note 13, p. 11.
[18] Dominguez Notice of Civil Claim, *supra* note 14, p. 2.
[19] *Presteve Foods*, OLAA, *supra* note 14.
[20] Preibisch, *supra* note 9, p. 414.
[21] *C.S.W.U. Loc. 1611 v. SELI Canada and others (No. 8),* 2008 BCHRT 436 (CanLII) ["*SELI*, BCHRT"].
[22] UN Economic and Social Council, *Report of the Special Rapporteur on the Human Rights of Migrants, Gabriela Rodriguez Pizarro: Racism, racial discrimination and xenophobia/Migrant women and unaccompanied children,* UN Doc. E/CN.4/2005/85 (27 Dec. 2004) ["Special Rapporteur Migrants 2004"]; UN GA, *Reports of the Special Rapporteur on the Human Rights of Migrants,* UN Doc. A/61/324 (2006), para. 13.
[23] ILO, *International Labour Migration: A Rights-Based Approach* (International Labour Office, Geneva, 2010), ["*International Labour Migration"*] p. 148; Evelyn Encalada Grez, "Vulnerabilities of female migrant farm workers from Latin America and the Caribbean in Canada" FOCAL Policy Brief (Apr. 2011) ["Encalada Grez"]. Online: http://www.justicia4migrantworkers.org/ontario/pdf/Labour_Mobility_Encalada_Vulnerabilities_of_female_migrant_farm_workers_from_Latin_America_and_the_Caribbean_in_Canada_April_2011_e.pdf (Date of Access: Feb. 11, 2012).
[24] Encalada Grez, *ibid.*
[25] *R. v. Jose Augusta Pratas*, Proceedings at Guilty Plea, March 1, 2010 (Ont. Ct. Jus.) ["Pratas Proceedings"].

workers, the vast majority of whom are women[26], perform work in isolated environments and are often very dependent on their employer, creating conditions for potential abuse and exploitation.

These are just a few examples of the abuse and exploitation that TFWs have been faced in their work in Canada. This problem is allowed to occur in large part because of the precarious immigration status of TFWs, and the associated restrictions in their legal employment options and inability to meaningfully access labour and employment law protections. This thesis attempts to address what international labour and human rights have to offer to remedy this situation.

Next, Canada's immigration system and TFWPs will be explained.

[26]Sabaa Khan, "From Labour of Love to Decent Work: Protecting the Human Rights of Migrant Caregivers in Canada" (2009) 24 Can. J.L. & Soc. 23 ["Khan"]; Audrey Macklin, "Foreign Domestic Worker: Surrogate Housewife or Mail Order Servant?" (1992) 37:3 McGill L.J. 495.

2. Canada's Temporary Foreign Worker Programs

2.1 Introduction to Canada's immigration system

Economic interests, particularly the interests of the business community and employers, have always been a driving force behind Canadian immigration policy. Historically, these economic interests meant the pursuance of long-term economic development and population growth, through the permanent settlement of newcomers to the country. At the end of the 19th century and early in the 20th century, immigrants were viewed as essential in promoting economic expansion in the country, through their labour and their consumption[27]. Indeed, the very survival of the new nation of Canada was dependent on immigration. This was a time period of significant economic expansion, development in western Canada, industrialization in central Canada, and a large demand for Canadian export products abroad[28]. This economic development was dependent on immigration, and during this time period, a relatively open immigration policy for permanent settlement was in place.

This is not in any way to suggest that all newcomers have always been welcomed to Canada on an equal basis. During the era of primarily western European settlement in Canada in the late 19th and early 20th centuries, immigrants were admitted into Canada with full citizenship[29]. As these demographics changed, so too did the conditions on which migrants were allowed into Canada, shifting from permanent residency and citizenship, to temporary and precarious immigration status. Canada's history of immigration is marked by both explicit and subtler racist immigration policies favouring certain kinds of immigrants over others.

In the early 20th century, immigration was relatively open for permanent immigration, although there were racist elements to the immigration scheme, with legislation focusing on the country of origin of migrants. Permanent immigration was very open for people from Britain, the United States, Ireland, Newfoundland, Australia, New Zealand and South Africa[30]. Meanwhile, the admission of immigrants from other countries came with a variety of conditions. For instance, immigrants from outside Europe were only admitted during this time period if sponsored by a relative already legally admitted to

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[27] Ninette Kelley and Michael J. Trebilcock, *The Making of the Mosaic: A History of Canadian Immigration Policy,* 2nd ed. (Toronto: University of Toronto Press, 2010) ["Kelley and Trebilcock"], p. 13.
[28] *Ibid,* p. 13.
[29] Khan, *supra* note 26, p. 26.
[30] Alan G. Green and David Green, "The Goals of Canada's Immigration Policy: A Historical Perspective" (2005) 13:1 Can. J. Urban Res. 102 ["Green and Green"], p. 108.

Canada[31]. Legislation enacted in 1923 prohibited the immigration of people from Asian countries[32].

During the Great Depression, immigration was essentially closed to all except British and U.S. citizens[33]. After World War II, restrictions on immigration from Asian countries continued[34]. While the policy of the government in the late 1940s was to foster the growth of Canada through permanent immigration, this was to be done through "careful selection" so that mass immigration would not "make a fundamental alteration of the character of our population"[35].

In the early 1960s, references to country of origin were removed[36]. The potential economic contribution of immigrants was emphasised over the person's race or country of origin[37]. In 1967, the "point system" for permanent residency was introduced, and this system still exists today[38]. Under the points system, immigrants qualify for permanent residency if they are awarded a certain number of points, based on their education, age, language, and other factors.

For a large portion of the history of Canadian immigration policy, permanent and relatively open immigration was seen as crucial to Canada's economic success. The interests of businesses and employers have always been able to influence government policy[39]. These economic considerations still shape immigration policy, but more recently, a greater emphasis has been placed on meeting short-term labour demands of employers, supplying businesses with cheap and "flexible" labour, through more immigration of temporary labour. Starting in the early 1970s, a formal program for temporary migration was introduced. The *Non-Immigrant Employment and Authorization Program* of 1973 was put in place to address a perceived temporary labour shortage at the time[40]. Under this program, workers were admitted for a specified time period and were required to work for a single employer[41]. It was with this program that immigration in Canada became linked with the immediate, short-term labour demands of employers[42].

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[31] *Ibid*, p. 108.
[32] *Ibid*, p. 108.
[33] *Ibid*, p. 111.
[34] *Ibid*, p. 113.
[35] Kelley and Trebilcock, *supra* note 27, p. 317.
[36] Green and Green, *supra* note 30, p. 116.
[37] Kelley and Trebilcock, *supra* note 27, p. 350.
[38] Green and Green, *supra* note 30, p. 116.
[39] Kelley and Trebilcock, *supra* note 27, p. 18 and 463.
[40] Sarah Marsden, "Assessing the Regulation of Temporary Foreign Workers in Canada" (2011) 49 Osgoode Hall L.J. 39 ["Marsden"], p. 45.
[41] *Ibid*, p. 44.
[42] Green and Green, *supra* note 30, p. 116.

In 2002, the introduction of the *Immigration and Refugee Protection Act*[43], allowed employers to more easily access the labour of TFWs. The greater emphasis on the admittance of workers on a temporary basis was welcomed by business and employers, but criticized by labour and human rights activists for creating conditions in which migrant workers could be exploited and abused at work[44].

The TFWP created a formal division between permanent and temporary groups of migrants, and skilled and unskilled migrants[45]. Skilled migrants are more often admitted as permanent residents[46]. Even among workers in the TFWP, those with in-demand skills have the possibility of attaining permanent residency after working for a specified period of time, while the hope of permanent residence status is virtually non-existent for "low-skill" TFWs.

The change in immigration policy from permanent residency to temporary status has been accompanied by a shift to more precarious conditions of work as well. The time, location, employer and occupation restrictions on TFWs exposes these workers to potential abuse in the workplace that a permanent resident can more easily avoid. Low-skill TFWs do not have a very good chance of ever being granted permanent residency, and so these already vulnerable workers are made more vulnerable. Women and migrants from less economically developed countries are significantly over-represented in the low-skill category[47], and they may have very little prospects of employment back in their country of origin.

Increasingly, economic immigration to Canada is on a temporary basis, with a primary motivator of immigration policy being short-term economic interests rather than longer term nation-building. While the Canadian government may no longer have an explicitly racist immigration policy, discriminatory views of workers from other countries persists in the operation of the TFWPs. Inherent in the demand of business for cheap and flexible labour in the form of TFWs, is the assumption that workers from other countries are willing to work for lower wages and in poorer conditions than PRs and citizens. While this issue of discrimination against TFWs is only beginning to be addressed in the legal realm in Canada, at least one administrative body in Canada has found that making distinctions between TFWs on the basis of their country of origin constitutes discrimination[48].

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[43] SC 2001, c. 27 ["IRPA"].
[44] Kelley and Trebilcock, *supra* note 27, p. 20.
[45] Marsden, *supra* note 40, p. 44.
[46] *Ibid,* p. 45.
[47] *Ibid,* p. 45.
[48] *SELI, BCHRT supra* note 21.

When examining the difficulties that TFWs have in Canada in accessing work-related legal protections, it is important to bear in mind that the TFWP was designed with business and employers' interests in mind. By denying these workers a clear path to permanent residency, and imposing restrictions that make their lives and future totally dependent on their employer, the TFW worker regime has provided employers with access to relatively cheap and exploitable workers. As will be seen, the current focus in Canadian immigration policy on meeting short-term labour market desires of employers through temporary migration, has been at the expense of the rights of the workers that Canada now so heavily depends on for the economic success of this country.

2.2. Immigration Law and Policy in Canada

Canada has a federal structure, with the Parliament of Canada having control over immigration, and the provinces having the primary responsibility over labour and employment law, and most other areas of law relevant to the lives of workers. Immigration in Canada is governed by the federal IRPA, and its 12 regulations, the main regulation being the *Immigration and Refugee Protection Act Regulation*[49]. Among the many objectives of IRPA are:

- to permit Canada to pursue the maximum social, cultural and economic benefits of immigration;
- to support the development of a strong and prosperous Canadian economy;
- to promote the successful integration of permanent residents into Canada, while recognizing that integration involves mutual obligations for new immigrants and Canadian society;
- to facilitate the entry of visitors, students and temporary workers for purposes such as trade, commerce, tourism, international understanding and cultural, educational and scientific activities;
- to promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks[50].

The introductory provisions of IRPA state that the legislation is to be applied in such a way that ensures decisions are consistent with the *Canadian Charter of Rights and Freedoms*[51], including its principles of equality and freedom from discrimination, and complies with international human rights instruments to which Canada is signatory[52].

[49] SOR 2002/227 ["IRPA Reg."].
[50] IRPA, s. 3(1).
[51] *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 [the *"Charter"*].
[52] IRPA, s. 3(3).

IRPA and the IRPA Regulation provide for two classes of immigrants: PRs and temporary residents, both of which contain sub-divisions of classes. PRs are selected in the following classes: family, economic, refugees[53]. Temporary residents are divided into visitors, students, and workers[54]. The worker class of temporary residents obtain their work permit through a number of different programs including the general TFWP, the Seasonal Agricultural Workers Program ("SAWP"), the Live-In Caregiver Program ("LCP"), the Project for Occupations Requiring Lower Levels of Formal Training, also called the Low-skill Pilot Project ("LSPP"), and Provincial Nominee Programs ("PNP"). Under this latter program, the provinces are able to select desired immigrants, even though the federal government in Canada is responsible for immigration law and policy.

TFWs may become PRs through the economic class of immigration. Within the economic class, the possible routes to permanent residency for TFWs are the Canadian Experience Class, Federal Skilled Worker, and the PNPs. Under the Canadian Experience Class, after two years of employment, TFWs that have "skilled work experience" can apply for permanent residence. Skill level is set out in the National Occupation Classification ("NOC") for labour skills in Canada, determined by Human Resources and Skills Development Canada ("HRSDC"). There are five levels of skills: Skill Type 0 (managerial occupations), Skill Level A (professional occupations), Skill Level B (technical occupations and skilled trades), Skill Level C (intermediate and clerical workers) and Skill Level D (elemental workers and labourers). "Skilled work experience" for the purposes of the Canadian Experience Class means work in Type 0, or Levels A and B. Many TFWs perform work in Skill Levels C and D, and they will not be eligible to apply for permanent residency through the Canadian Experience Class.

The Federal Skilled Worker program is a points-based system. A worker must currently achieve 67 points total in the areas of education, language skills, skilled work experience, age, arranged employment, and adaptability, to be granted permanent residency. A worker that has pre-arranged employment is granted 10 points to be counted towards this goal. Many TFWs will not have the education or skilled work experience required to achieve the 67 points required for permanent residency under this class.

The PNPs are also a potential option for permanent residency for limited numbers of TFWs. Under the province of B.C.'s program, the worker must have a job offer from an employer in B.C. with an accompanying Labour Market Opinion ("LMO"). As well, the worker must be either a skilled worker in an eligible occupation in Skill Type 0, Levels A or B, or be a health care

[53] IRPA, s. 12.
[54] IRPA Reg., Parts 9-12.

professional, graduate of a recognized Canadian post-secondary institution, or a semi-skilled work in selected tourism and hospitality, long-haul trucking, and food processing occupations.

The common theme to these permanent residence categories is that skilled work experience is often required. As many of the TFWPs are aimed at recruiting "low-skilled" workers, many participants in these programs will not qualify for permanent residency. The exception is certain limited categories of employment under the PNPs.

There are a number of public bodies involved in the regulation of temporary foreign workers. On the immigration side, Citizenship and Immigration Canada ("CIC") and HRSDC have authority in the immigration process for TFWs. Before a person can even obtain a work permit, their proposed employer in Canada must obtain an authorization, the LMO, from HRSDC. The purpose of the LMO is to ensure the employer has first made efforts to fill the position with Canadian workers[55]. The LMO is also required to ensure that the employer will offer the TFW the prevailing wage rate and acceptable conditions of work; the employment of the TFW will fill a labour shortage; and that the entry of the TFW will have a neutral or positive effect on the Canada labour market[56]. Migrant workers can work in Canada without an LMO in certain limited situations, including under an international agreement or PNPs.

Immigration officers with CIC determine who can immigrate to Canada, issue visas and work permits, and determine residency. The Immigration and Refugee Board, independent of CIC, hears appeals on certain limited immigration matters. Canada Border Services Agency is also involved in the fate of TFWs, as officers of this agency have the power to deny entry to a foreigner at the border, and also to enforce the removal or deportation of someone who has overstayed or violated the conditions of their visa or work permit.

In addition to these administrative bodies involved in the immigration process, officials with employment standards agencies, labour relations boards, human rights tribunals, workers' compensation boards, and employment insurance all have decision-making powers relevant to the lives of TFWs in Canada. As will be seen, if work related claims are not resolved by these agencies, a TFW's immigration status can be put in jeopardy.

Next, the different types of TFWPs will be discussed.

2.3 Temporary Foreign Worker Program

[55] IRPA Reg., s. 203(3).
[56] *Ibid.*

The vast majority of temporary work permits are issued for no specific TFWP, but under the general TFWP[57]. Under the TFWP, foreign workers must first have a job offer from a Canadian employer before they will be issued a work permit. The first step, however, is for the potential employer to receive a LMO that supports the need for a foreign worker in that specific job with that specific employer. If the employer has previously hired TFWs in the previous two years, the employer must demonstrate that it provided the wages and conditions of work to that TFW as set out in the job offer[58]. For certain higher skilled jobs, there is now an accelerated process for employers to obtain LMOs ("A-"LMO"). Under this accelerated system, an LMO will be issued within 10 business days, while under the regular system LMOs can take a few months. Further, under the A-LMO, employers are permitted to pay TFWs up to 15% less than the posted wage, or current prevailing average wage rate, for the occupation, provided the employer pays the TFW the same wage rate paid to citizens and PR employees in the same occupation[59].

LMOs are issued more often to certain occupations and skill levels than others under the general TFWP. In 2010 in Canada, the most popular occupation category by far was "Babysitters, Nannies and Parents' Helpers", followed by "Food Counter Attendants, Kitchen Helpers and Related Occupations", "Cooks", and "Harvesting Labourers"[60]. The LMO sets out the wages, conditions of work, and occupation and skill level the TFW must perform. HRSDC requires an employment contract between the employer and the TFW in order for an LMO to be confirmed[61].

The HRSDC Guidelines for Hiring Foreign Workers states that employers are not entitled to recoup the following costs from employees: those relating to retaining or training the employee, including any amounts payable to a third-party recruiter; the cost of two-way transportation between the employee's country of residence and place of work; and the cost of health insurance until the employee is eligible for provincial health insurance[62]. However, HRSDC is

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[57] Sandra Elgersma, "Temporary Foreign Workers", *Library of Parliament* (7 Sept. 2007), at p. 3. Online: http://www2.parl.gc.ca/content/lop/researchpublications/prb0711-c.pdf

[58] IRPA Reg. s. 200(1)(c)(B).

[59] HRSDC, "Accelerated Labour Market Opinion Fact Sheet". Online: http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/almo/factsheet.shtml (Date of Access: 2 May 2012).

[60] HRSDC, "Top occupational groups according to the number of temporary foreign worker positions on labour market opinion confirmations (excluding the Seasonal Agricultural Worker Program), by province/territory". Online: http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/stats/annual/table6a.shtml (Date of Access: Jan. 18, 2012).

[61] Judy Fudge and Fiona MacPhail, "Temporary migration and precarious employment in Canada: illustrations from the restaurant sector". Online: *rdw.law.unimelb.edu.au* (Date of Access: Mar. 10, 2012) ["Fudge and MacPhail, Restaurant Sector"], p. 14.

[62] *Ibid*, p. 15.

not a party to the employment contract, and is not responsible for enforcing the employment contract. This is left up to the provincial employment standards agencies, and the courts.

Once the employer has received an LMO and the worker has a job offer, the foreign worker can then apply to CIC for a permit to work temporarily in Canada. The work permit will set out the authorized period of residence; the type of work the foreign worker is permitted to engage in or are prohibited from engaging in; the employer, the location of the work, and the times and periods of the work; any studies the worker is permitted or prohibited from engaging in; and the area within which they are permitted or prohibited from travelling in within Canada[63].

Work permits are issued for a maximum of two years. The work permit can be extended up to a total of four cumulative years. After working for four years in Canada under the TFWP, the worker cannot obtain a new temporary work permit for a minimum of four years following the last day of work in Canada[64].

As stated, under the TFWP the work permit sets out the specific employer and occupation in which the TFW is permitted to work. If the TFW wishes to change jobs or employers, they must obtain a new work permit. However, this first requires the new employer to obtain an LMO and provide the TFW with a job offer[65]. It can take many weeks or months to obtain a new LMO and work permit when applying from within Canada[66], and many employers are not prepared to wait that long for an individual to commence work[67].

Note that some limited categories of foreign workers do not require a work permit, for example, business visitors, officers of a foreign government, performing artists, participants in sports events[68]. These categories do not represent the majority of TFWs, and this thesis is concerned with the TFWs who are required to obtain a work permit.

2.4 Seasonal Agricultural Worker Program

After the general TFWP, the greatest number of work permits are issued for the SAWP[69]. The agricultural industry in Canada relies heavily on TFWs who are legally restricted to working only in agriculture and for one employer[70]. The agricultural industry has the longest history of any industry in Canada in

[63] IRPA Reg., s. 185.
[64] IRPA Reg., d. 200(3)(g).
[65] Fudge and MacPhail, Restaurant Sector, *supra* note 61, p. 14.
[66] Nakache and Kinoshita, *supra* note 13.
[67] Report of the Standing Committee, *supra* note 13, p. 25.
[68] IRPA Reg., s. 186.
[69] Elgersma, *supra* note 57, p. 3.
[70] *Fraser* Factum of the Appellants, *supra* note 15, p. 8.

utilizing foreign labour, dating back to at least 1868, when the government participated in settling British orphans to work on Canadian farms[71].

In 1978, less than 5,000 workers participated in SAWP[72] while in 2010, 23,375 workers came to Canada under the SAWP[73]. This program admits workers from Mexico and certain Caribbean countries, including Jamaica, Trinidad & Tobago, and Barbados, on temporary work permits to work in the agricultural industry. As with the general TFWP, the employer must first make efforts to hire Canadian workers, offer the prevailing wage rate, and obtain an LMO[74].

Under the SAWP, the work permit is issued for a specific employer and job, and for a minimum period of six weeks, up to a maximum of eight months per calendar year[75]. Employers are required to provide free housing to workers (except in B.C., where workers pay part of the cost). Employers are required to cover other certain costs, including partial round trip airfare (except B.C., where employers pay the full airfare), and health insurance and workers' compensation[76], and must sign an employment contract[77]. The employment contract differs for workers from Mexico and workers from the Caribbean, and also depending on whether the worker is working in B.C. or another province.

At the end of the eight month period, the worker must leave Canada for a period of at least four months. Each time the employer seeks to re-hire the worker under the SAWP, the employer must obtain a new LMO. Unlike the general TFWP, workers under the SAWP are not barred from obtaining a new work permit after four cumulative years of employment in Canada. A worker under the SAWP could obtain temporary work permits of up to eight months indefinitely, making them perpetual TFWs.

Although women only make up four percent of workers under the SAWP, this number has been steadily growing since 1989 when females first started to participate in SAWP[78].

2.5 Low-Skill Pilot Project

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[71] Preibisch, *supra* note 9, p. 405.
[72] *Ibid*, p. 410.
[73] Chow, *supra* note 8.
[74] HRSDC, "Hiring Foreign Agricultural Workers in Canada". Online: http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/sawp.shtml (Date of Access: Mar. 3, 2012).
[75] HRSDC, "Seasonal Agricultural Worker Program (SAWP)" Online: http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/stats/annual/foreword_sawp.shtml (Date of Access: Jan. 18, 2012).
[76] *Ibid.*
[77] Elgersma, *supra* note 57, p. 3.
[78] Ofelia Becerril Quintana, "A new era of seasonal Mexican migration to Canada", FOCAL, Online: http://www.focal.ca/en/publications/focalpoint/467-june-2011-ofelia-becerril-quintana-en (Date of Access: Feb. 4, 2012) ["Becerril Quintana"].

The LSPP was first introduced in 2002 and the number of workers admitted to work in Canada through this program has dramatically increased since then[79]. The LSPP allows employers to hire workers with so-called "lower level skills" for up to 24 months, where there is a demonstrable shortage of Canadian workers. As with the other categories of TFWPs, the employer must obtain an LMO first, and make minimum efforts to recruit Canadian workers. Again, the wage rate must be the "prevailing wage rate". The employer is required to cover all recruitment and transportation costs involved in hiring the TFW, and sign an employment contract addressing wages, duties and conditions of work relating to transportation, accommodation, and health and safety[80].

Although the occupations in this category are considered low-skill, workers must have at least a high school diploma or two years of job-specific training. There are a total of 33 occupations covered by the LSPP, including agriculture, food and beverage services, and residential cleaning and support workers[81]. Workers in the LSPP are often hired to work in the service sector, in particular the restaurant sector[82]. The agricultural industry also hires workers through this program from a broader range of countries, as the SAWP only applies to workers from Mexico and the Caribbean. Unlike the SAWP, after four years of cumulative employment on a work permit in Canada, the worker must leave Canada for a minimum of four years before obtaining a new temporary work permit[83]. As well, employers are not required to provide housing for the workers, as they are under SAWP[84].

The work that TFWs are hired to perform under the LSPP is unlikely to provide the worker with the experience they need to obtain permanent residence status in Canada. For example, the Canadian Experience Class stream of permanent residency requires Canadian work experience in "skilled" occupation classifications of NOC 0, A or B, and under the LSPP workers perform occupations in the lower skill levels of the NOC C and D classifications.

2.6 Live-In Caregiver Program

Various incarnations of the LCP have existed in Canada throughout the history of immigration in the country. Prior to World War I, British women were recruited to work as domestics in Canada, with the promise of full citizenship. After World War II, this demographic changed with women from eastern Europe arriving to work as domestics, and then in the 1950s, more women from

[79] Fudge and MacPhail, Restaurant Sector, *supra* note 61, p. 2; Fudge and MacPhail, Flexible Labour, *supra* note 10, p. 22.
[80] Elgersma, *supra* note 57, p. 4.
[81] Fudge and MacPhail, Restaurant Sector, *supra* note 61, p. 11.
[82] *Ibid*, p. 12.
[83] *Ibid*, p. 12.
[84] Becerril Quintana, *supra* note 78.

Caribbean countries. Less favourable conditions were placed on these domestic workers from non-Western European countries. In 1955 Canada put in an agreement with Jamaica and Barbados called the Caribbean Domestic Scheme[85]. The requirements placed on domestic workers under this agreement were more onerous than previously required of domestic workers. The women admitted under this agreement were required to be between the ages of 18 and 40, with no dependants, and have at least an eighth grade education[86]. Many of these women were actually highly skilled, as nurses, teachers and civil servants in their country of origin[87]. They were required to undergo gynecological exams testing for venereal disease, and had to perform live-in service for at least one year[88]. Under this program, domestic workers were provided with landed immigrant status. This agreement ended in 1973, which is when domestic workers were no longer admitted to Canada with immediate landed immigrant status[89].

From the time period of 1973 until 1981, domestic workers could only work in Canada on renewable temporary work permits, and could only remain in Canada as long as they continued to work as domestics[90]. After a 1981 task force report finding that foreign domestic workers were vulnerable to abuse and exploitation, a program entitled the Foreign Domestic Movement was introduced that made it possible for foreign domestic workers to apply for permanent residence after two-years of live-in domestic work[91]. While there have been changes to the programs for foreign domestic workers since 1981, this is essentially the system that continues to exist today.

Currently, under the *IRPA* Regulations, a 'live-in caregiver' is defined as a person who resides in a private household and "provides child care, senior home support care or care of the disabled in that household without supervision" private household in Canada in which the persons resides"[92]. A distinguishing feature of the LCP is that it is one of the few TFWPs in Canada that provides a clear path to permanent residency. As well, the LCP also provides for longer work permits than other TFWPs, for up to three years and three months[93]. After the worker has completed 24 months of service or 3,900 hours within 36 months for one employer, she or he can apply for PR status. Prior to attaining PR status, live-in caregivers are required to live in the employer's home, and if they want to change employers, the must apply for a new work permit and start the process anew. Once the worker has fulfilled the

[85] Khan, *supra* note 26, p. 26.
[86] Macklin, *supra* note 26, p. 503.
[87] *Ibid*, p. 504.
[88] Khan, *supra* note 26, p. 26; Macklin, *supra* note 26, p. 503.
[89] Khan, *supra* note 26, p. 26.
[90] *Ibid*, p. 26-27; Macklin, *supra* note 26, p. 505.
[91] Khan, *supra* note 26, p. 27.
[92] *IRPA* Reg., s. 113.
[93] Elgersma, *supra* note 57, p. 4.

24 month service requirement and applied for permanent residency, they are issued an "open" work permit, allowing the worker to move out of the employer's home and to work for any employer, in any occupation[94]. In 2005, 95% of workers in the LCP were women[95]. Currently, the vast majority of workers in the LCP are women from the Philippines. Filipinas make up nearly 80% of workers in the LCP[96].

The admission requirements for workers in the LCP are quite high, as compared to other streams of the TFWP. The worker must have at least a secondary school education, English or French language skills, at least six months of full-time training and one year of work experience in this occupation, and a signed employment contract with the employer in Canada[97].

2.7 Provincial Nominee Programs

After the LCP, the PNPs provide the most viable option for TFWs to eventually obtain permanent residence status in Canada. In the province of B.C., the worker must first have a job offer from an employer in B.C. that cannot be filled by a Canadian citizen or PR, and be either:

- A skilled worker, according to skill type 0, A or B of the NOC matrix;
- A health care professional, specifically physicians, registered nurses, registered psychiatric nurses, and midwives;
- An international graduate of a recognized Canadian post-secondary institution;
- A recent masters or doctorate graduate from a B.C. post-secondary institution in the natural, applied or health sciences (no job offer is required for this category); or
- A semi-skilled worker in select tourism/hospitality, long-haul trucking, or food processing occupations[98].

Four of these five categories require an employer to nominate a TFW for permanent status. This gives employers significant power over the worker, as they can control the worker's access to permanent residency in Canada[99].

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[94] CIC, "News Release – Minister Kenney announces important change for live-in caregivers". Online: http://www.cic.gc.ca/english/department/media/releases/2011/2011-12-15.asp (Date of Access: Jan. 7, 2012).
[95] Elgersma, *supra* note 57, p. 4.
[96] Maria Deanna P. Santos, *Human Rights and Migrant Domestic Workers: A Comparative Analysis of the Socio-Legal Status of Filipina Migrant Domestic Workers in Canada and Hong Kong* (Leiden: Martinius Nijhoff Publishers, 2005) ["Santos"], p. 85.
[97] IRPA Reg., s. 112.
[98] Welcome BC, "The British Columbia Provincial Nominee Program". Online: http://www.welcomebc.ca/wbc/immigration/come/work/about/index.page (Date of Access: Mar. 10, 2012).
[99] Fudge and MacPhail, Restaurant Sector, *supra* note 61, p. 20.

2.8 Summary of the TFWPs

To summarize, the TFWPs do not offer a very secure path to permanent residency, although many of the workers who come to Canada under these programs do so with the intention of eventually applying for permanent residence status. Workers in these programs are tied to a single employer, and it is very difficult for the worker to change their work permit and work for a different employer. In some cases, workers are required to live with the employer or in housing provided by the employer. Employers therefore have significant control over these workers' lives and futures, and abuses and illegal practices have been known to occur. As will be seen, there are significant barriers to TFWs improving working and living situation in Canada when this occurs.

3. International Labour Rights and International Human Rights

3.1 Fundamental Principles of International Labour Rights and International Human Rights

The international labour rights and human rights standards applicable to migrant workers can be found in a variety of sources. In this chapter, I will set out the international labour and human rights treaties that Canada has ratified, as well as those not ratified by Canada, but which provide guidance on the ideals that Canada should still aspire to fulfil. Statements and principles made by the ("ILO"), United Nations ("UN") Special Rapporteurs, and UN Committees further help define the nature of the rights of people working in a country other than their own. While many of the international rights that will be discussed are not necessarily enforceable in Canada, these standards provide a framework from which to assess how migrant workers are treated under Canada's TFWPs.

As will be seen, a common theme in these international norms is the recognition of the particular vulnerability of migrant workers as compared to nationals of the country of employment, and the corresponding obligation on States to take extra and special steps to ensure that the rights of these workers are adequately protected.

3.1.1 International Labour Organization Constitution

As this thesis is primarily concerned with the rights of migrants as workers, an appropriate starting point is the ILO Constitution. In the aftermath of World War I, the ILO and its Constitution were established in 1919. One of the main purposes in establishing the ILO was to combat the lowering of wages of working conditions, or "social dumping" or "race to the bottom", associated with more open and unregulated trade across borders[100]. The purpose was to prevent States that do not comply with these standards from gaining an unfair competitive advantage[101]. The setting of international standards and clear rules would ensure that economic progress and social justice would be pursued simultaneously[102].

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[100] Werner Sengenberger, "International labour standards in the globalized economy: obstacles and opportunities for achieving progress" in John D.R. Craig and Michael Lynk, eds., *Globalization and the Future of Labour Law* (New York: Cambridge University Press, 2006), p. 331.
[101] *Ibid,* p. 331.
[102] ILO, *Rules of the Game: A brief introduction to international labour standards* (International Labour Office, Geneva, 2009), p. 9.

It is recognized in the preamble to the ILO Constitution that "conditions of labour exist involving such injustice hardship and privation to large numbers of people so as to produce unrest so great that the peace and harmony of the world are imperilled". An improvement to those conditions, and avoiding social unrest, were also main goals in establishing the ILO. Among the improvement in workers' lives that was seen as urgently required was the "protection of the interests of workers when employed in countries other than their own" (ILO Constitution, preamble). From the beginning, the ILO has recognized that migrant workers are a particularly vulnerable group of workers. The preamble to the Constitution also affirmed the principle of equal remuneration for work of equal value, and the principle of freedom of association, among other fundamental principles. It is important to note that the obligations contained in the Constitution apply to all Member States by virtue of their membership. According to the 1998 *Declaration on Fundamental Principles and Rights at Work*[103], even those States that do not ratify ILO Conventions, still have international labour obligations arising as a result of their membership in the ILO.

The Annex to the Constitution, the *Declaration of Philadelphia*, was adopted in 1944, sets out the aims and purposes of the ILO and the principles "which should inspire the policy of its Members"[104]. Here, the fundamental principles of the ILO are re-affirmed. These fundamental principles state that "labour is not a commodity"[105], an important principle to the rights of migrant workers, as they are often recruited by employers for the specific reason that their labour is cheap and flexible compared to that of workers who are citizens or permanent residents. Another fundamental principle is that "freedom of expression and of association are essential to sustained progress"[106]. The principle of freedom of association is also important to the rights of migrant workers, and the ILO has elaborated on this principle, as will be seen below.

The principle of non-discrimination is also contained in the *Declaration of Philadelphia*, where it is affirmed that "all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity"[107]. The extent to which the grounds of "race" or "creed" prohibits discrimination against migrant workers will depend on the context (i.e. are the migrant workers of a different race than nationals?).

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[103] *Declaration on Fundamental Principles and Rights at Work* (ILC, 88th Sess., Geneva, 1998) ["*Declaration on Fundamental Principles"*].

[104] *Annex to the Constitution, Declaration concerning the aims and purposes of the International Labour Organisation (Declaration of Philadelphia)* (ILC, 26th Sess., Philadelphia, 1944) ["*Declaration of Philadelphia"*], preamble.

[105] *Ibid,* Art. I(a).

[106] *Ibid,* Art. I(b).

[107] *Ibid,* Art. II(a).

3.1.2 ILO Declaration on Fundamental Principles and Rights at Work

The *Declaration on Fundamental Principles* was adopted in 1998, with the purpose of emphasising certain fundamental or "core" principles of the ILO. As with the ILO Constitution and the *Declaration of Philadelphia*, the *Declaration on Fundamental Principles* reaffirms the obligations on Member States by virtue of their membership, whether or not they have ratified the conventions associated with the core or fundamental rights. The *Declaration on Fundamental Principles* recognizes that while economic growth is essential, it is not sufficient to ensure equity, social progress and the eradication of poverty[108]. While a link between social progress and economic growth is recognized, at the same time there must be a guarantee of fundamental principles and rights at work to enable persons to "claim freely and on the basis of equality of opportunity their fair share of the wealth which they have helped to generate"[109]. Again in this instrument, it was recognized that the ILO should give special attention to the problems of persons with special social needs, particularly "migrant workers" and mobilize and encourage international, regional and national efforts aimed at resolving their problems[110].

The *Declaration on Fundamental Principles* reiterates the obligations on all Member States of the ILO to respect, promote and realize the principles concerning the following fundamental rights: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation. There are 8 "core" ILO conventions containing the principles associated with these fundamental rights. Three of these core conventions will be discussed here.

In addition to these fundamental principles and goals of the ILO, there are principles of international human rights law that may be considered as fundamental rights of workers.

3.1.3 ILO Declaration on Social Justice for a Fair Globalization

The *Declaration on Social Justice for a Fair Globalization*[111], adopted by the ILO in 2008, is the third and most recent major statement of principles adopted by the ILO, the previous two being the *Declaration of Philadelphia* and *Declaration on Fundamental Principles.* The purpose of the *Declaration on*

[108] *Declaration on Fundamental Principles, supra* note 103, preamble.
[109] *Ibid,* preamble.
[110] *Ibid,* preamble.
[111] ILO, *Declaration on Social Justice for a Fair Globalization* (ILC, 97th Sess., Geneva, 2008) ["*Declaration on Social Justice"*].

Social Justice is to build on ILO principles, while recognizing the realities of globalization in the 21st century[112].

While the *Declaration on Social Justice* does not specifically mention migrant workers, as the document is designed to address the challenges of global economic integration, it contains principles relevant for people working in countries other than their own. This *Declaration on Social Justice* promotes a fair globalization that is based on "decent work" for all, and aiming to place employment at the heart of economic policies[113]. This emphasis on decent work in the context of globalization is important to the rights of migrant workers in Canada, as often the economic needs of employers to be able to compete globally by having access to cheap and flexible labour, have been emphasized over the conditions of work of the migrant workers participating in in the TFWPs.

3.1.4 Universal Declaration of Human Rights

The non-binding *Universal Declaration of Human Rights*[114], adopted in 1948 after World War II, contains statements on rights applicable to "everyone", which are not just limited to citizens of the State concerned. Art. 7 provides for the right to equal protection of the law and equal protection against any discrimination, and Art. 8 provides that everyone has the right to "an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law". The UDHR thus encourages States to ensure that no one, including migrant workers, is excluded from accessing the protection of the law and competent tribunals.

The UDHR also contains a number of statements on the content of work-related rights. Art. 23(1) states that "Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment". Art. 23(2) contains the principle of the right to equal pay for equal work. The principle of non-discrimination at work is also seen in the ILO documents, although even as far back as 1919 when the ILO Constitution was drafted, the ILO went much further than the principle of "equal pay for equal work" and required States to ensure "equal remuneration for work of equal value" for all workers.

Art. 24 and 25 of the UDHR contain rights relevant to work, with Art. 24 stating "Everyone has the right to rest and leisure, including reasonable limitation of working hours". Art. 25 states that "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family".

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[112] *Ibid*, preface.
[113] *Ibid*, preface.
[114] GA Res. 217(III), UN Doc. A/810 (1948) ["UDHR"].

3.1.5 International Covenant on Civil and Political Rights

The binding *International Covenant on Civil and Political Rights*[115], to which Canada has acceded, also provides in Art. 14, that "All persons shall be equal before the court and tribunals". As with the UDHR, the ICCPR also stipulates, in Art. 26, that "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law…". The UN Human Rights Committee ("HRC"), which monitors the implementation of the ICCPR, has commented on these rights in its General Comment No. 32, "Right to equality before courts and tribunals and right to a fair trial". The HRC has said that the first sentence in paragraph 1 of Art. 14 sets out a general guarantee of equality before courts and tribunals, that applies regardless of the nature of the proceedings before such bodies[116]. Art. 14 is therefore not just limited to criminal law proceedings, but applies to other proceedings as well, such as employment-related claims.

This right of equality in legal proceedings includes "equal access and equality of arms", meaning that each party to a proceeding should have the resources to equally defend themselves in the proceedings and can equally access the proceedings in a "meaningful" way[117]. According to the HRC, this applies not only to criminal proceedings, but to civil proceedings as well[118]. The HRC has said that the availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way, and encourages States to provide free legal aid, not only in criminal law matters, but other proceedings as well[119]. Further, the notion of "equality of arms" may, in exceptional cases, require the free assistance of an interpreter where a party could not otherwise participate in the proceeding on equal terms[120].

The HRC has expressly addressed the equality of migrant workers in legal proceedings. The HRC has stated, "The right of access to courts and tribunals and equality before them is not limited to citizens of States parties..."[121], and that legal proceedings on an equal basis must be available to all individuals, including migrant workers, when they are in the territory or subject to the jurisdiction of the State party. While this statement is fairly general, other international instruments assist in determining the obligation States have

[115] 999 U.N.T.S. 171 (1966) ["ICCPR"].
[116] Human Rights Committee, *General Comment No. 32 Right to equality before courts and tribunals and right to a fair trial,* UN Doc. CCPR/C/GC/32 (2007) ["General Comment No. 32"], para. 3.
[117] *Ibid,* para. 8.
[118] *Ibid,* para. 13.
[119] *Ibid,* para. 10.
[120] *Ibid,* para. 13.
[121] *Ibid,* para. 9.

towards migrant workers to ensure they have the opportunity to access legal proceedings on an equal basis.

3.1.6 International Covenant on Economic, Social and Cultural Rights

The *International Covenant on Economic, Social and Cultural Rights*[122], to which Canada has acceded, contains a number of workers' rights. Art. 6 provides for the "right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts". Art. 7 of the ICESCR expands on the rights of all workers. This article states that everyone has the right to "fair wages and equal remuneration for work of equal value without distinction of any kind"; "a decent living for themselves and their families"; safe and healthy working conditions; equal opportunity for everyone to be promoted in his employment; and rest, leisure and reasonable limitation of working hours. Art. 8 provides for the right of everyone to form and join a trade union or his or her choice.

The UN Committee on Economic, Social and Cultural Rights ("CESCR") has issued a General Comment on the right to work, in which the scope of Arts. 6, 7, and 8 are discussed. First, the CESCR has recognized that the "right to work is essential for realizing other human rights and forms and inseparable and inherent part of human dignity"[123]. The CESCR specified that work under Art. 6 must be *decent work*[124]. "Decent work" has been described by the CESCR as work that respects the fundamental rights of the human person as well as the rights of workers in terms of conditions of work safety and remuneration[125]. It also includes an income that allows workers to support themselves and their families.

The right to work includes having the right of access to a system of protection guaranteeing each worker access to employment[126]. This includes providing specialized services to assist individuals in finding employment. The CESCR stated that States must respect the right to work by refraining from denying or limiting equal access to decent work for all persons, especially disadvantaged and marginalized individuals and groups[127]. According to the CESCR, States must take measures to combat discrimination and promote equal access and opportunities. The obligation of States to protect the right to work requires States parties to take measures that prevent third parties from interfering with the enjoyment of the right to work[128]. Importantly for migrant workers, the

[122] 9993 U.N.T.S. 3 (1966) ["ICESCR"].
[123] Committee on Economic, Social and Cultural Rights, *The Right to Work, General Comment No. 18*, UN Doc. E/C.12/GC/18 (2006) ["General Comment No. 18"], para. 1.
[124] *Ibid*, para. 7.
[125] *Ibid*, para. 7.
[126] *Ibid*, para. 6.
[127] *Ibid*, para. 23.
[128] *Ibid*, para. 22.

CESCR stated that measures that increase the flexibility of labour must not make work less stable or reduce the social protection of the worker[129].

The CESCR specifically addressed the right to work of migrant workers in General Comment No. 18. The CESCR stated that the labour market in a State must be open to everyone under the jurisdiction of the State party[130]. The CESCR stated that the principle of non-discrimination should apply in relation to employment opportunities for migrant workers and their families[131]. What exactly constitutes these appropriate measures with respect to employment opportunities of migrant workers will be explored later in this paper.

With respect to effective legal remedies involving employment matters, the CESCR has required that any person or group who is a victim of a violation of the right to work should have access to effective judicial or other appropriate remedies at the national level[132]. The CESCR noted that trade unions and human rights commissions have an important role in defending the right to work. The CESCR further specified that all victims of violations are entitled to adequate reparation, which may take the form of restitution, compensation, satisfaction or a guarantee of non-repetition[133]. The CESCR recommended that States incorporate international instruments recognizing the right to work into the domestic legal order, as the direct applicability of such instruments would significantly enhance the scope and effectiveness of remedial measures and allow courts to adjudicate violations of international standards on the right to work[134].

While many all ILO standards and many UN standards are applicable to the rights of migrant workers, I will now turn to discuss the areas of international standards which greatly impacts their ability to access justice in their work. The areas of international labour and human rights that I will now set out are: freedom of association, discrimination, standards specifically addressing migrant workers and domestic workers, and labour inspection and other regulation of conditions of work.

3.2 Freedom of Association

3.2.1 ILO Freedom of Association and Protection of the Right to Organize Convention, C87

The right of freedom of association and to form and join a trade union is contained in many international instruments, including the UDHR, ICCPR, and

[129] *Ibid,* para. 25.
[130] *Ibid,* para. 12.
[131] *Ibid,* para. 18.
[132] *Ibid,* para. 48.
[133] *Ibid,* para. 48.
[134] *Ibid,* para. 49.

ICESCR. However, this right was set out in the ILO Constitution in 1919, and was more fully developed in two of the "core" ILO conventions, adopted in 1948 and 1949 respectively. The ILO Committee on Freedom of Association ("CFA") and the ILO Committee of Experts on the Application of Conventions and Recommendations ("CEACR") have commented on the scope of this right and there have been many decisions by the CFA involving freedom of association and the right to collectively bargain in Canada. As will be seen, the right to form a union and engage in collective bargaining have been crucial to the scope of rights of TFWs in Canada.

The first ILO Convention on the associational rights of workers and employers, ILO *Convention concerning Freedom of Association and Protection of the Right to Organize, 1948 (No. 87)*[135], has been ratified by Canada. Part I of C87 protects the rights of workers, without distinction whatsoever, to establish and join organizations of their own choosing. This right "without distinction" has been interpreted to mean without discrimination on any basis, and that all workers, including migrant workers, are covered by C87[136]. The ILO has said that distinctions among workers must be seen as contradicting the principle that all workers should have the right to organize[137]. Part II of C87 requires States to take "all necessary and appropriate" measures to ensure that workers may exercise freely the right to organize. The CFA has stated that the ultimate responsibility for respecting freedom of association lies with the government and a State cannot use its other commitments as a reason to justify the non-application of ratified ILO Conventions[138].

Also of significance to the freedom of association of migrant workers is ILO *Convention concerning the Rights of Association and Combination of Agricultural Workers, 1921 (No. 11)*[139], which requires Member States to secure to all those engaged in agriculture the same rights of association and combination as to industrial workers, and to repeal any statutory or other provisions restricting such rights of those engaged in agriculture. Canada has not ratified this Convention, a likely reason being that in many jurisdictions in Canada, agricultural workers, many of whom are migrant workers, do not have the same rights of association and combination as other workers.

3.2.2 ILO Right to Organize and Collective Bargaining Convention, C98

[135] ILC, 31st Sess., San Francisco, 1948 ["C87].
[136] ILO, *Digest of Decisions and Principles of the Committee on Freedom of Association of the Governing Body of the ILO, 5th ed.,* (International Labour Office, Geneva, 2006) ["Digest of Decisions"], para. 214.
[137] ILO, *Your Voice at Work* (International Labour Office, Geneva, 2000), at para. 73 ["*Your Voice at Work"*].
[138] Digest of Decisions, *supra* note 136, paras. 17, 18, 21.
[139] ILC, 3rd Sess., Geneva, 1921 ["C11"].

ILO *Convention (No. 98) concerning the application of principles of the right to organise and to bargain collectively*[140], is part of the fundamental right to freedom of association. While Canada has not ratified this Convention, unions or employers' organizations may still file a complaint with the CFA against any Member of the ILO, whether or not the Member has ratified the conventions concerning freedom of association. As will be discussed later, unions in Canada have made ample use of the CFA and have obtain declarations that Canada (or its provinces) have violated principles of freedom of association.

Art. 1 of C98 provides that "Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment". Anti-union discrimination could include, for instance, firing a person for organizing workers to form a trade union. Art. 2 provides for protection against interference with a union by an employer (and vice versa), for instance, acts which are designed to promote the establishment of an employer-dominated union by financial or other means, for the purpose of putting the union under the control of the employer.

The primary obligations on States in C98 are found in Arts. 3 and 4, requiring States to provide "machinery" to ensure respect for the right to organise[141] and for the voluntary negotiation by employers' and workers' organisations with a view to reaching collective agreements[142]. This requires the State to refrain from any interference which would restrict or impede the lawful exercise of this right[143]. The CFA has stated that Art. 4 does not require the State to enforce collective bargaining, but rather the public authorities should refrain from any undue interference in the negotiation process[144]. While certain rules and practices may assist the parties in negotiations and promote collective bargaining, legislation covering procedures for arbitration and conciliation in collective bargaining must respect the autonomy of the parties[145].

The ILO has recognized that increasing labour mobility in a globalized context has given rise to challenges with respect to migrant workers, including organizing these workers and collective bargaining[146]. The ILO has recently stated that freedom of association is often not protected by law or working in practice for migrant workers[147]. As well, The ILO *Multilateral Framework on*

[140] ILC, 32nd Sess., Geneva, 1949 ["C98"].
[141] *Ibid,* Art. 3.
[142] *Ibid,* Art. 4.
[143] Digest of Decisions, *supra* note 136, para. 881.
[144] *Ibid,* at para. 928.
[145] *Ibid,* at para. 933.
[146] Report of the Director-General, *Freedom of Association in practice: Lessons learned* : *Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work* (ILC, 97th Sess., Geneva, 2008), para. 228.
[147] *Ibid,* para. 232.

Labour Migration[148] calls for respect of the freedom of association for migrant workers.

With respect to agricultural workers, an industry in which many TFWs in Canada work, the CFA has found that the absence of statutory machinery for the promotion of collective bargaining for agricultural workers constituted "an impediment to one of the principle objectives of the guarantee of freedom of association"[149]. With respect to a Canadian jurisdiction, the CFA recommended that the government of Ontario take measures to ensure that agricultural workers enjoy the protection necessary to establish and join organizations of their choosing and to ensure that those workers have access to procedures which facilitate collective bargaining[150].

The ILO has also noted the exclusion of female-dominated sectors from the legal protection of freedom of association, and other problems hindering women from enjoying freedom of association[151]. Domestic workers are often excluded from freedom of association protections, and this occupation is dominated by women and migrant workers. The ILO has said that not only should women take their place at the negotiation table, but gender issues also must be made more explicit during the collective bargaining process[152].

3.3 Discrimination

3.3.1 ILO Discrimination Convention, C111

ILO *Convention concerning Discrimination in Respect of Employment and Occupation, 1958 (No. 111)*[153] is also one of the eight core ILO conventions, and has been ratified by Canada. The prohibition against discrimination is one of the fundamental rights emphasised throughout ILO and UN instruments. The prohibition against discrimination contained in C111 expanded from the categories contained in the ILO Constitution, which only contained the right to be free from discrimination on the grounds of "race, creed or sex".

Art. 1 of C111 states that the term discrimination includes any "distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation".

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[148] ILO, *Multilateral Framework on Labour Migration: Non-binding principles and guidelines for a rights-based approach to labour migration* (International Labour Office, Geneva, 2006) ["*Multilateral Framework"*].
[149] CFA Report, "Canada (Case No. 1900)" in *Report No. 308* (International Labour Office, Geneva, 1997) ["Canada (Case No. 1900)"], para. 182.
[150] *Ibid*, at para. 187.
[151] *Your Voice at Work, supra* note 137, para. 33.
[152] *Ibid*, at para. 33.
[153] ILC, 42nd Sess., Geneva, 1958 ["C111"].

Art. 1(2) provides that discrimination includes other distinctions which have the effect of impairing the equality of opportunity or treatment in employment or occupation, as may be determined by the Member State. C111 is aimed at remedying the effects of discrimination, and is not concerned with whether or not someone has a discriminatory intent. This includes "indirect" discrimination, which refers to apparently neutral situations which in fact result in unequal treatment of or has a disproportionately harsh impact on persons with certain characteristics, such as a particular sex, race or religious belief[154]. The ILO has stated that any discrimination, either in law or in practice, falls within the scope of C111[155].

The main obligation on States in C111 is to undertake a national policy designed to promote equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination[156]. States are required to seek the cooperation of employers' and workers' organizations in this regard, to enact legislation to promote such policies, and to repeal any statutory provisions inconsistent with the policy[157]. C111 notes that "special measures of protection" provided for in other Conventions or Recommendations of the ILO shall not be deemed to be discrimination[158]. This is an important stipulation in advancing the equality of groups recognized by the ILO to be particularly vulnerable to discrimination, because it allows special measures to be taken with respect to these groups, and this will not violate the principle of non-discrimination found in C111. For instance, Recommendation No. 111, which is the non-binding Recommendation accompanying and elaborating upon the obligations contained in C111, states that application of a State policy under C111 should not adversely affect special measures designed to meet the particular requirements of persons who are generally recognized to require special protection, for reasons such as sex, age, or social or cultural status[159].

Note that unlike C87, which protects the right to organize "without distinction whatsoever", C111 does not prohibit all distinctions, exclusions or preferences in employment and occupation[160]. Specifically, C111 does not require States to repeal statutory provisions making a distinction between migrant workers and nationals. The ILO has specifically stated that the concept of "national extraction" does not refer to distinction that are made between citizens of

[154] Report of the CEACR, *General Survey 1996, Equality in Employment and Occupation* (ILC, 83rd Sess., Geneva, 1996) ["General Survey 1996"], para. 26.
[155] *Ibid*, para. 25.
[156] C111, Art. 2.
[157] *Ibid*, Art. 3.
[158] *Ibid*, Art. 5.
[159] *Recommendation concerning Discrimination in Respect of Employment and Occupation, 1958 (No. 111)* (ILC, 42nd Sess., Geneva, 1958) ["R111"], Art. 6.
[160] General Survey 1996, *supra* note 154, para. 18

different countries, but between the citizens of the same country on the basis of the person's place of birth, ancestry or foreign origin[161].

However, R111 does address "immigrant workers of foreign nationality and the members of their families", and directs States to have regard to the ILO convention on migration for employment of 1949, relating to the lifting of restrictions on access to employment[162]. Other than this statement, C111 and its Recommendation do not directly prohibit discrimination against foreign workers in employment or occupation. In discussing the scope of C111, the ILO has emphasised this article of R111, and stated that the conventions on migrant workers require equality of treatment and should benefit from a national policy designed to promote equality of opportunity[163]. The conventions designed specifically to address the rights of migrant workers will be discussed below.

3.3.2 UN Convention on the Elimination of All Forms of Racial Discrimination

The *International Convention on the Elimination of All Forms of Racial Discrimination*[164] has been ratified by Canada. A broad definition is given to the term "racial discrimination", which means "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing of human rights and fundamental freedoms in the political, economic, social cultural or any other field of public life". Again, "special measures" whose purpose is to advance the equality of certain racial or ethnic groups "requiring such protection" shall not be seen as racial discrimination[165]. However, such measures must be temporary until such time as the equality is attained, and these special measures must not have as a consequence the maintenance of separate rights for different racial groups, after this equality is achieved[166].

Again, the prohibition on discrimination is qualified to exclude distinctions made between citizens and non-citizens. Art. 1(3) states that "Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality". The CERD Committee has clarified that States must still avoid undermining the

[161] *Ibid*, para. 33.
[162] R111, Art. 8.
[163] General Survey 1996, *supra* note 127, para. 20-21.
[164] 660 U.N.T.S. 195 (1966) ["CERD"].
[165] *Ibid*, Art. 1(4).
[166] *Ibid*, Art. 2(2).

basic prohibition of discrimination[167]. While States may confine certain rights, such as the right to vote, to citizens, the CERD Committee has stated that "human rights are, in principle, to be enjoyed by all persons. States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law"[168]. The CERD Committee stated that where differential treatment based on citizenship or immigration status exists, it will constitute discrimination under CERD if the differential treatment is not applied to pursue a legitimate aim, or if the treatment is not proportional to the achievement of the aim[169]. This statement is particularly relevant for migrant workers, because if the differential treatment accorded to them is too extreme, such treatment may be prohibited by CERD. Further, the CERD Committee has recommended that States ensure that immigration policies do not have the effect of discriminating against persons on the basis of race, colour, descent, or national or ethnic origin[170].

The CERD Committee has also pronounced on the work-related rights of non-citizens. The CERD Committee has recommended that States Parties take measures to eliminate discrimination against non-citizens in relation to working conditions[171]. The CERD Committee has recognized the particular difficulties of non-citizen domestic workers, and has recommended that States Parties take measures to prevent serious problems commonly faced by these workers, including debt bondage, passport retention, illegal confinement, rape and physical assault[172]. Further, while it is recognized that States Parties can refuse jobs to non-citizens who do not have a work permit, States Parties are recommended to recognize that "all individuals are entitled to the enjoyment of labour and employment rights, including the freedom of assembly and association, once an employment relationship has been initiated"[173].

As seen in the ICCPR and ICESCR, the preamble to CERD states that "all human beings are equal before the law and are entitled to equal protection of the law against any discrimination". Art. 6 of CERD requires that States Parties assure everyone within their jurisdiction effective protection and remedies, through State institutions, against any acts of racial discrimination, including the right to seek "adequate reparation or satisfaction" for damage suffered as a result of the racial discrimination. Art. 7 requires further measures, such as teaching and education to combat prejudices would lead to racial discrimination.

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[167] CERD Committee, *General Recommendation No. 30: Discrimination against non-citizens,* UN Doc. HRI/GEN/1/Rev. 9 (Vol. II) (2004), para. 2.
[168] *Ibid,* para. 3.
[169] *Ibid,* para. 4.
[170] *Ibid,* para. 9.
[171] *Ibid,* para. 33.
[172] *Ibid,* para. 34.
[173] *Ibid,* para. 35.

CERD specifies that States should eliminate racial discrimination and guarantee the right of everyone, without distinction as to race, a number of rights, including: the right to equal treatment before tribunals administering justice; the right to freedom of association; the rights to work, to free choice of employment to just and favourable conditions of work; and the right to form and join trade unions, among others[174].

Similar to C111, CERD places obligations on States Parties to ensure legislation and policy does not "have the effect of creating or perpetuating racial discrimination wherever it exists"[175]. This may place further obligations on States than C111, which requires States to repeal statutory provisions that are not consistent with a policy of equality of opportunity and treatment. The obligations contained in CERD appear to require States to look further at the effects of legislation and policy, not just to ensure that legislation is not inconsistent with equality of opportunity and treatment, but also that legislation does nothing to perpetuate any form of racial discrimination, wherever it exists.

States Parties to CERD are also required to bring an end to racial discrimination caused by private persons[176]. States Parties are also "encouraged" to support "multiracial organizations" and eliminate barriers between races, and to discourage anything which tends to strengthen racial division[177].

3.3.3 UN Convention on the Elimination of All Forms of Discrimination Against Women

The protections provided for in the *Convention on the Elimination of All Forms of Discrimination Against Women*[178] are also relevant to this discussion on the extent of the rights of migrant workers under international law. Art. 2(e) of CEDAW requires that States Parties "take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise". CEDAW also contains provisions concerning the elimination of discrimination against women in employment to ensure that men and women enjoy, on a basis of equality, the rights of choice of employment opportunities, remuneration, social security, and working conditions.

The CEDAW Committee has issued a General Recommendation which specifically addresses the elimination of discrimination against women migrant workers. The CEDAW Committee recognizes that gendered notions of work mean that job opportunities for women "reflect familial and service functions

[174] CERD, Art. 5.
[175] *Ibid*, Art. 2(1)(c).
[176] *Ibid*, Art. 2(1)(d).
[177] *Ibid*, Art. 2(1)(e).
[178] 1249 U.N.T.S. 13 (1980) ["CEDAW"].

ascribed to women"[179]. For instance, as discussed, women predominate in the domestic work and sex industries. The CEDAW Committee has stated that in countries of destination, these female-dominated jobs are often excluded from legal definition of work, thereby depriving women of a variety of legal protections[180]. The CEDAW Committee states that countries of destination have a responsibility to provide legal protection for the rights of women migrant workers, including ensuring that constitutional and civil law and labour codes apply to women migrant workers and provide them with the same rights and protections as all workers in the country[181]. This includes the right to organize and freely associate, which should be extended to occupations dominated by migrant women that have been traditionally excluded from labour and employment protection laws.

The CEDAW Committee also states that the laws should include mechanisms for monitoring workplace conditions of migrant women, especially in the kinds of jobs where they dominate[182]. As well, States must ensure that women migrant workers have the ability to access remedies, and this might require the provision of free legal aid and temporary shelters. These steps are all part of fulfilling the rights contained in Arts. 2 and 11 of CEDAW[183].

3.4 Migrant Workers

3.4.1 ILO Migration for Employment Convention, C97

There are three international conventions in force that specifically address the rights of migrant workers, none of which have been ratified by Canada. The two ILO conventions have as their aim the protection of workers from discrimination and exploitation while working in countries other than their own, which is one of the main purposes of the ILO as stated in the Constitution[184].

The ILO conventions that specifically address the rights of migrant workers are *Convention concerning Migration for Employment, Revised 1949 (No. 97)*[185], and *Convention No. 143 concerning migrations in abusive conditions and the promotion of equality of opportunity and treatment of migrant workers*[186]. C97 was principally concerned with facilitating the flow of labour across borders and taking steps against misleading propaganda relating to immigration. The

[179] CEDAW Committee, *General recommendation No. 26 on women migrant workers*, UN Doc. CEDAW/C/2009/WP.1/R (2008) ["General recommendation No. 26"], para. 13.
[180] *Ibid*, para. 14.
[181] *Ibid*, para. 26.
[182] *Ibid*, para. 26.
[183] *Ibid*, para. 26.
[184] Report of the CEACR, *General Survey 1999 Migrant Workers* (ILC, 87th Sess. Geneva, 1999) ["General Survey 1999"], para. 83.
[185] ILC, 32nd Sess., Geneva, 1949 ["C97"].
[186] ILC, 60th Sess., Geneva, 1975 ["C143"].

focus in this Convention is on migrants who are lawfully within the territory of the Member State. The main obligations of Member States under C97 include maintaining adequate and free services to assist migrants for employment, and to provide them with accurate information[187]. Other obligations include taking steps against "misleading propaganda"[188]; facilitating the departure, journey and reception of migrants for employment[189]; maintain appropriate medical services for migrant workers[190]. Art. 6 contains the principle of non-discrimination and requires each Member State to apply "without discrimination in respect of nationality, race, religion or sex, to immigrants lawfully within its territory, treatment no less favourable than that which it applies to its own nationals" in respect of a number of matters, including legal proceedings related to matters contained in C97. The matters set out include remuneration, membership of trade unions, accommodation, and social security.

3.4.2 ILO Migrant Workers (Supplementary Provisions) Convention, C143

C143 was adopted 26 years after the first ILO convention aimed specifically at migrant workers. With this Convention, there was greater concern with "the existence of illicit and clandestine trafficking in labour" and for "further standards aimed at eliminating these abuses"[191]. This Convention recognized that the term "discrimination" in C111 did not prohibit distinctions on the basis of nationality. Another aim of this Convention was to widen the scope of equality between migrant workers in a regular situation and nationals. Part I of C143 therefore addresses "migrations in abusive conditions", and Part II elaborates on the "equality of opportunity and treatment of migrant workers".

Part I, dealing with migrations in abusive conditions, applies to all migrant workers, whether lawfully resident in the Member State or not, unlike C97. As will be seen in other instruments, a target here is those who traffic migrants and organize "illicit or clandestine movements of migrants' and those who employ workers who have immigrated in illegal conditions[192]. Art. 4 encourages cooperation between States, and representative organizations of employer and workers, to combat the illicit movement of migrants.

Importantly to the situation of migrant workers in Canada, Art. 8 of C143 places an obligation on States not to regard a migrant worker who has resided legally in the country for employment as illegal or irregular if she loses her job. This Article also prohibits the State from withdrawing the migrant worker's residence or work permit. Art. 8(2) clarifies that this means that such a migrant

[187] C97, Art. 2.
[188] *Ibid,* Art. 3.
[189] *Ibid,* Art. 4.
[190] *Ibid,* Art. 5.
[191] C143, preamble.
[192] *Ibid,* Art. 3(b).

worker "shall enjoy equality of treatment with nationals in respect in particular of guarantees of security of employment, the provision of alternative employment, relief work and retraining". Art. 9(3) specifies that where a migrant worker or his family is expelled from the State, the cost of the expulsion shall not be borne by them.

In Part II of C143, Art. 10 requires each Member State to pursue a national policy designed to promote and guarantee equality of opportunity and treatment in respect of employment and occupation for lawfully resident migrant workers. Art. 11 specifies that this does not include self-employed migrant workers, and other categories of workers including frontier workers, "artistes" and members of the liberal professions who have entered the country on a short-term basis (e.g. touring musicians); seamen, students; and employees of undertakings who are admitted temporarily "for a limited a defined period of time, and who are required to leave that country on the completion of their duties or assignments". Note that this does not mean that seasonal migrant workers are excluded from the scope of C143[193].

Art. 12 requires that Members shall formulate a social policy that takes account of "such special needs" migrant workers may have until they are adapted to the society of the country of employment. States are also obligated to take measures including education and other activities aimed at acquainting migrant workers with their rights and obligations, and to give effective assistance to migrant workers in the exercise of their rights and for their protection[194]. Art. 12(g) requires States to guarantee equality of treatment with respect to working conditions, to all migrant workers, "whatever might be the particular conditions of their employment". Art. 12 recognizes the challenges that migrant workers face, which are not experienced by nationals, and places an obligation on destination countries to take extra steps to protect the rights of migrant workers.

Art. 14 addresses the extent of the "free choice of employment" of migrant workers. Under Art. 14(a), Member States may place conditions on the free choice of employment of migrant workers for a period of up to two years, or the term of the worker's first contract, whichever is less. So for the first two years of employment, or the first contract, Member States may limit a migrant worker's choice of employment. This provision is troubling because the equality of opportunity for new migrant workers in the State is not protected. These new migrants will not have the same opportunities as nationals and migrants who have worked in the Member State for some time. This is problematic because employers may choose to hire and exploit "new" migrants and those who have never worked in the Member State before instead of renewing the contracts of more established migrants, because the choices of these new migrants will much more limited. Art. 14(b) and (c) place further

[193] General Survey 1999, *supra* note 184, para. 115.
[194] C143, Art. 12(c).

limitations on the equality of opportunity and treatment of migrant workers. Art. 14(b) allows States to make regulations concerning the occupational qualifications acquired outside its territory, and Art. 14(c) allows States to restrict access to limited categories of employment or functions "where this is necessary in the interests of the State".

3.4.3 UN Convention on Migrant Workers

The UN *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*[195], addresses the rights of both documented and undocumented migrant workers and is therefore broader than the ILO Conventions on migrant workers. This Convention contains the broadest definition of migrant worker, and applies to self-employed migrant workers, families of migrant workers, and irregular status migrant workers. "Seasonal workers" are entitled to the rights provided for in the CMW, to the extent that the rights are compatible with their status as seasonal workers, taking into account that they are present in the State for only part of the year[196].

Unlike the two ILO conventions on migrant workers, the CMW applies to the whole migration process, starting before the migrant worker even leaves their country of origin. Members of migrant workers' families are also brought under international standards with the CMW. The two ILO conventions meanwhile, apply once the migrant worker is in the country of employment. However, the CMW largely contains rights already existing in international law, and does not create new rights or expand the scope of equality of migrant workers with nationals. Further, Art. 79 clarifies that "Nothing in the present Convention shall affect the right of each State Party to establish the criteria governing admission of migrant workers…".

The preamble to the CMW recognizes the "situation of vulnerability in which migrant workers and members of their families frequently find themselves". Here, the need to suppress clandestine movements of migrants is recognized while at the same time States must assure the protection of the fundamental human rights of irregular migrants. It is expressly recognized in the CMW that employers might be induced to seek the labour of irregular migrants to "reap the benefits of unfair competition", as irregular migrants are frequently employed under less favourable conditions of work than other workers, due to their irregular status and lack of other options[197]. The CMW states that if the rights of all migrant workers are more widely recognized, then there will be less incentive for employers to resort to the employment of migrant workers in an irregular situation[198].

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[195] 2220 U.N.T.S. 2 (1990) ["CMW"].
[196] *Ibid,* Art. 59(1).
[197] *Ibid,* preamble.
[198] *Ibid,* preamble.

Art. 1 stipulates that the CMW applies to all migrant workers and members of their families without distinction of any kind, including "race", "colour, "national, ethnic or social origin" and importantly, "nationality", and "other status" (among other grounds).

Part III of the CMW applies to "all" migrant workers and members of their families. This Part largely contains a list of rights already existing in other international human rights instruments. Similar to Part II of C143, Art. 25 of the CMW provides that migrant workers shall enjoy treatment not less favourable than that which applies to nationals in respect of remuneration and other terms and conditions of work, such as overtime, hours of work, holiday pay, health and safety, and termination of employment. Art. 26 recognizes the right of migrant workers to "join freely any trade union".

Of note for the purposes of this thesis is Art. 16, which sets out the legal protections that must be provided to migrant workers. Art. 16 provides that "Migrant workers and members of their families shall be entitled to effective protection by the State against violence, physical injury, threats and intimidation, whether by public officials or by private individuals, groups or institutions". Not only must the State protect migrant workers against injuries from State officials such as border guards or immigration officials, but States must also ensure that migrant workers are provided with effective protection against certain wrongs committed by employers, private employment agencies, and others such as landlords. This article, taken together with the recognition in the preamble of the "vulnerability" of migrant workers, could require States to take special and extra steps to ensure that the legal rights of migrant workers are effectively protected.

Art. 20 provides that no migrant worker shall be deprived of his or her authorization of residence or work permit or expelled merely because of a failure to fulfil an obligation arising out of a work contract. A similar provision is found in Art. 8 of C143. However, the right contained in the CMW is qualified by the words "unless fulfilment of that obligation constitutes a condition for such authorization or permit". Therefore, if the work permit stipulates that certain obligations must be performed or the work permit will be revoked, then the right of the migrant worker will not be breached under the CMW. Meanwhile, such a stipulation in a work permit would not comply with a State's obligation under C143.

Art. 21 states that it is unlawful for anyone, other than a public official authorized by law, to confiscate, destroy, or attempt to destroy identity documents or residence or work permits. Art. 22 provides that where migrant workers are expelled from a territory in accordance with the law, the decision to expel must be communicated to them in a language they understand, and in writing if requested by the migrant worker.

Part IV of the CMW applies only to migrant workers and their families who are "documented or in a regular situation". Art. 37 gives migrant workers the right to be fully informed of the conditions applicable to their admission and their stay, and of the remunerated activities that they may engage in. Art. 39 provides for the right of "liberty of movement" and "freedom to choose their residence" in the State of employment.

The special needs of migrant workers are recognized in Part IV of the CMW. Art. 42 requires States to at least consider establishing procedures or institutions through which the special needs, aspirations and obligations of migrant workers will be accounted for, and the possibility of having migrant workers to have their chosen representatives in those institutions. Art. 43 provides that migrant workers shall enjoy equality of treatment with nationals in the areas of access to education, vocational guidance and training, housing, and social and health services.

The limits of the rights of migrant workers is seen in Art. 52. As in C143, this article allows States to restrict access to limited categories of employment, where necessary in the interests of the State, and to restrict the free choice of remunerated activity "in accordance with its legislation concerning recognition of occupational qualifications". Again similar to C143, the free choice of remunerated activity may be subject to the condition that the migrant worker has first resided lawfully in the territory of the State for the purpose of remunerated activity for a period not exceeding two years[199].

3.5 Domestic Workers

3.5.1 ILO Domestic Workers Convention, C189

The ILO's *Convention No. 189 concerning Decent Work for Domestic Workers*[200] is also very important to the topic of the rights of migrant workers, as most domestic work is performed by women and girls, many of whom are migrants. This Convention was adopted by the ILO in 2011, and came into force in August 2012 with the ratification by Uruguay and the Philippines[201]. C189 recognizes that "domestic work continues to be undervalued and invisible" and many domestic workers are "migrants or members of disadvantaged communities and who are particularly vulnerable to discrimination in respect of conditions of employment and of work, and to other abuses of human rights…"[202]. As a result, C189 places an obligation on

[199] *Ibid*, Art. 52(3).
[200] ILC, Geneva, 100th Sess., 2011 ["C189"].
[201] International Trade Union Confederation, "Domestic Workers Convention comes into force after ratification by the Philippines". Online: http://www.ituc-csi.org/domestic-workers-convention-comes.html (Date of Access: August 6, 2012).
[202] C189, preamble.

ratifying States to develop measures for labour inspection and enforcement that takes "due regard for the special characteristics of domestic work"[203]. Given the special nature of domestic work, there is an emphasis in C189 on providing effective protection against all forms of abuse, harassment and violence[204]. C189 requires States ensure effective and accessible complaint mechanisms are in place[205]. The non-binding ILO *Recommendation 201 concerning Decent Work for Domestic Workers*[206] elaborates further and suggests that Member States should consider mechanisms to protect domestic workers from abuse, harassment and violence, such as establishing a hotline with interpretation services, developing emergency housing, and providing public outreach to inform domestic workers in languages they understand of their rights[207].

3.6 Labour Inspection including Health and Safety

3.6.1 ILO Labour Inspection Convention in industry and commerce Convention, C81

The ILO has stated that effective labour administration and inspection systems are essential in making decent work a reality in the workplace, and that labour inspection is at the core of effective labour law[208]. The 2011 Resolution of the ILC recalls that labour administration and inspection have been ILO priorities since the founding of the ILO[209]. The first ILO convention on labour inspection, *Convention No. 81 concerning labour inspection in industry and commerce*[210], requires that ratifying States maintain a system of labour inspection in industrial workplaces and in commerce. While a majority of ILO Member States have ratified C81, Canada has not done so.

C81 does not require a particular model of labour inspection, or set out the substantive issues on which labour inspection must occur (e.g. hours of work, wages, etc.) but does require a system of labour inspection to apply to "all workplaces in respect of which legal provisions relating to conditions of work and the protection of workers while engaged in their work are enforceable by labour inspectors"[211]. In the areas in which the State has enacted labour laws, C81 requires a corresponding system of labour inspection to enforce those laws. C81 suggests that the legal provisions to be enforced through a system of labour

[203] *Ibid,* Art. 17(2).
[204] *Ibid,* Art. 5.
[205] *Ibid,* Art. 17(1).
[206] ILC, Geneva, 100th Sess., 2011 ["R201"].
[207] *Ibid,* Art. 21.
[208] ILO, "Conclusions on labour administration and labour inspection" in *Report of the Committee on Labour Administration* (ILC, Geneva, 100th Sess., 2011), paras. 2 and 12.
[209] ILO, "Resolution concerning labour administration and labour inspection" in *Report of the Committee on Labour Administration* (ILC, Geneva, 100th Sess., 2011), preamble.
[210] ILC, 30th Sess., Geneva, 1947 ["C81"].
[211] *Ibid,* Art. 2(1).

inspection should include hours, wages, safety, health and welfare, the employment of children and young persons, and other connected matters[212]. Another function of labour inspectors is to supply information and advice to employers and workers on how to comply with the legal provisions[213].

Inspection staff must be public officials, and independent of any changes in government[214]. The State must also provide a sufficient number of labour inspectors to secure the effective discharges of their duties[215]. Labour inspectors must have the power to enter freely any workplace without notice; to carry examinations of the employer or staff; to require production of documents and the taking of samples from the workplace; and be empowered to remedy defects in the workplace[216]. The inspection authority is required to publish annual reports, including information on the laws and regulations in place, statistics on the number of inspections conducted and number of violations and penalties imposed[217].

3.6.2 ILO Labour Inspection (Agriculture) Convention, C129

C81 on labour inspection did not apply to all sectors, and subsequently, the ILO adopted *Convention No. 129 Labour Inspection (Agriculture) Convention*[218]. This Convention simply extended the requirement of a system of labour inspection to agriculture, which had previously been excluded. The substantive provisions of C129 are similar to C81, and states that the functions of the system of labour inspection in agriculture shall be to secure the enforcement of legal provisions relating to conditions of work, and to provide information to employers and workers on how to comply with the law[219]. C129 has not been ratified by Canada, but the principle that the agricultural industry should be subject to labour inspection is important for migrant workers in Canada as many TFWs work in agriculture, and there is even a specific program for foreign agricultural workers, the SAWP, described earlier.

3.6.3 ILO Occupational Health and Safety Convention C155

The preamble of the ILO Constitution recognizes the importance of "the protection of the worker against sickness, disease and injury". ILO *Convention No. 155 concerning Occupational Health and Safety and the Working Environment*[220] has not been ratified by Canada. C155 applies to "all branches

[212] *Ibid,* Art. 3(1)(a).
[213] *Ibid,* Art. 3(1)(b).
[214] *Ibid,* Art. 6.
[215] *Ibid,* Art. 10.
[216] *Ibid,* Arts. 12 and 13.
[217] *Ibid,* Arts. 20 and 21.
[218] ILC, 53rd Sess., Geneva, 1969 ["C129"].
[219] *Ibid,* Art. 6(1).
[220] ILC, 67th Sess., Geneva, 1981 ["C155"].

of economic activity", but States may exclude "limited categories of workers in respect of which there are particular difficulties"[221]. The main obligation in C155 is that ratifying States are to implement a coherent national policy on occupation safety, occupational health, and the working environment[222]. The aim of the national policy shall be to prevent accidents and injury to health linked to or occurring in the course of work[223]. This Convention recognizes that perhaps not all injuries and accidents can be avoided, and so the obligation on States is to minimize hazards inherent in the working environment[224]. The policy should include protections for workers against disciplinary actions when they comply with the national policy[225]. Where workers hold a reasonable belief that the work situation poses an imminent danger to their life or health, they should have protection to remove themselves from the situation without undue consequences[226]. C155 requires that the enforcement of laws in relation to occupational health and safety be secured by an adequate system of labour inspection, including provisions for penalties for violations[227].

C155 sets out expectations of employers as well. Employers should ensure that workplaces, equipment, and substances under their control and more are safe and without risk to health[228]. Employers are also required to provide, where necessary, adequate protective clothing and equipment to prevent risk of accidents or adverse effects on health[229].

3.6.4 ILO Convention concerning the promotional framework for occupational health and safety, C187

The 2006 *Convention No. 187 concerning the promotional framework for occupational safety and health*[230] also deserves mention, as Canada recently ratified this convention, in June 2011. C187 notes the previous conventions, and stresses "the importance of the continuous promotion of a national preventive safety and health culture". This Convention provides for a right of workers to a safe and healthy working environment, where government, employers and workers participate in securing a safety and healthy working environment[231]. C187 does not exclude any particular kind of worker or occupation. The central obligation on States is to "promote the continuous improvement of occupational safety and health to prevent occupational injuries,

[221] *Ibid,* Art. 2.
[222] *Ibid,* Art. 4(1).
[223] *Ibid,* Art. 4(2).
[224] *Ibid,* Art. 4(2).
[225] *Ibid,* Art. 5(e).
[226] *Ibid,* Art. 13.
[227] *Ibid,* Art. 9.
[228] *Ibid,* Art. 16.
[229] *Ibid,* Art. 16.
[230] ILC, Geneva, 95th Sess., 2005 ["C187"].
[231] *Ibid,* Art. 1(d).

diseases and deaths" by the development of a national policy, system and programme[232]. The policy should include provisions for ensuring compliance, including systems of inspection[233].

3.6.5 ILO Private Employment Agencies Convention, C181

ILO *Convention No. 181 concerning Private Employment Agencies*[234] is particularly relevant to migrant workers because many are recruited to work in Canada through private employment or recruitment agencies. Although note, again, that Canada has not ratified this convention. An identified problem exists in Canada that migrant workers sometimes pay thousands of dollars for a promised job that either does not exist, or is different from the job promised, upon arrival[235]. C181 recognizes the need to prevent workers from abuses by private employment agencies[236], and to ensure workers are not denied the right to freedom of association and the right to bargain collectively by these agencies[237]. Member States should also ensure that private employment agencies treat workers without discrimination[238]. Importantly to the situation of migrant workers in Canada, C181 prohibits private employment agencies from charging, "directly or indirectly, in whole or in part", any fees or costs to workers[239]. However, after consultation with workers' and employers' organizations, States may exempt some private employment agencies from the prohibition against charging fees to workers[240]. C181 also requires Members to determine a system of licensing or certification of private employment agencies, unless otherwise regulated by law[241].

C181 specifically addresses the situation of migrant workers. Art. 8 requires Members to adopt measures both within its jurisdiction and in collaboration with other Members, to provide adequate protection for migrant workers against abuses by private employment agencies. This should include laws providing for penalties where private employment agencies engage in fraudulent practices and abuses. Member States are encouraged to conclude bilateral agreements with other Member States from which migrant workers are recruited, to prevent abuses and fraudulent practices in the recruitment, placement and employment[242].

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[232] *Ibid,* Art. 2(1).
[233] *Ibid,* Art. 4(2).
[234] ILC, Geneva, 85th Sess., 1997 ["C181"].
[235] Nakache and Kinoshita, *supra* note 13, p. 13-14; Report of the Standing Committee, *supra* note 12, p. 31.
[236] C181, preamble.
[237] *Ibid,* Art. 4.
[238] *Ibid,* Art. 5.
[239] *Ibid,* Art. 7(1).
[240] *Ibid,* Art. 7(2).
[241] *Ibid,* Art. 3(2).
[242] *Ibid,* Art. 8(2).

4. Rights of Temporary Foreign Workers in Canada

4.1 Introduction

This chapter will review the extent to which TFWs in Canada are included in and can effectively access work-related legal protections. I will set out the labour, employment, anti-discrimination, and health and safety legislation that applies to migrant workers and the extent to which these workers are excluded from these protections. I will discuss the caselaw involving claims of TFWs to illustrate the extent to which migrant workers have been able to effectively access legal protections available in Canada with respect to their employment. The cases that will be discussed illuminate some of the barriers faced by TFWs in asserting their rights in the workplace. The temporary immigration status of TFWs often prevents these workers from effectively accessing legal remedies in their employment-related claims as compared to nationals of Canada, even when formal protective legislation is applicable.

4.2 Freedom of Association and the Right Organize

TFWs in Canada are not expressly excluded from rights relating to freedom of association as migrant workers. The associational rights in Canadian labour legislation, which formally apply to TFWs include: the right to join and form a union; protection against employer interference with the formation or administration of a union; protection from anti-union discrimination such as being fired for being a member of a trade union; and the right to collective bargaining.

However, in several jurisdictions in Canada, certain categories of workers are excluded from statutory protections of freedom of association. The two sectors that are mostly commonly excluded from labour law protections are domestic work and agricultural work. These are also among the most common industries for TFWs to work in in Canada.

In Ontario, the *Labour Relations Act, 1995*[243] does not apply to "a domestic employed in a private home" or "to an employee within the meaning of the *Agricultural Employees Protection Act, 2002".* While agricultural employees are covered by separate legislation (although with less extensive protections than for workers covered by the OLRA), there is no separate legislation protecting the labour rights of domestic workers. Therefore, domestic workers in Ontario do not enjoy freedom of association and related rights such as

[243] S.O. 1995, c. 1. Sched. A ["OLRA"], s. 3.

forming a trade union and protection against employer interference with union membership.

The OLRA provides "Every person is free to join a trade union of the person's own choice and to participate in its lawful activities"[244]. The legislation provides for certification procedures for a trade union to represent a bargaining unit of employees[245], and protections against employer interference with the formation, selection or administration of a trade union[246]. The OLRA protects employees against discrimination such as dismissal from employment, because the person was or is a member of a trade union, or exercised rights under the OLRA[247]. As well, the OLRA provides for mechanisms for the negotiating of a collective agreement by employers and trade unions, including an obligation on employers and unions to meet to bargain "in good faith and make every reasonable effort to make a collective agreement"[248]. The legislation contains remedies where one of the parties fails to do so.

The *Agricultural Employees Protection Act, 2002*[249] addresses the extent to which the labour rights of agricultural employees exist in Ontario. "Agriculture" under the AEPA includes farming "in all its branches" including dairy, livestock, harvesting eggs, maple products, mushrooms and tobacco, just to name a few agricultural operations[250]. According to the AEPA, the purpose of having separate labour legislation for agricultural employees is to have regard to "the unique characteristics of agriculture, including, but not limited to, its seasonal nature, its sensitivity to time and climate, the perishability of agricultural products and the need to protect animal and plant life"[251]. It has been recognized elsewhere the agricultural industry relies on cheap and vulnerable foreign workers, who are legally restricted to working in agriculture and for one employer[252]. The AEPA does not recognize that agricultural employees as a group have been historically exploited workers who may be in need of additional, rather than less, protection than other workers. Rather, the vulnerability of agricultural workers is perpetuated by the AEPA, by providing lesser labour standards to agricultural workers than that enjoyed by other kinds of workers in Ontario.

Unlike the OLRA, the AEPA does not provide for the right to form a "trade union", but instead the right to form or join an "employees' association". A "trade union" is defined in the OLRA as "an organization of employees formed

[244] *Ibid*, s. 5.
[245] *Ibid*, ss.7-15.
[246] *Ibid*, s. 70.
[247] *Ibid*, s. 72.
[248] *Ibid*, s. 17.
[249] S.O. 2002, c. 16 ["AEPA"].
[250] *Ibid*, s. 2(1).
[251] *Ibid*, s. 1.
[252] *Fraser* Factum of the Appellants, *supra* note 15, p. 8.

for purposes that include the regulation of relations between employees and employers…"[253]. Meanwhile, an "employees' association" under the AEPA is defined as "an association of employees formed for the purpose of acting in concert"[254]. The distinction between these terms is seen in the AEPA, which provides only for the right to "make representations to their employers, through an employees' association, respecting the terms and conditions of their employment"[255]. Under the AEPA, employers are not required to bargain in good faith or to make every reasonable effort to make a collective agreement with the employees' association, unlike under the OLRA, where employers must do so with respect to trade unions. The AEPA contains no remedies where an employer fails to respond to the "representations" made by employees' association to the employer. The employer is simply required to give the employees' association a "reasonable opportunity to make representations"[256]. The employer is only required to "listen to the representations if made orally, or read them if made in writing"[257], and provide a written acknowledgment that the employer has read the representations[258]. There is no requirement for the employer to otherwise respond to these representations or negotiate with the employees' association. The major distinction between the OLRA and the AEPA is the lack of mechanisms and protection for collective bargaining in the latter legislation.

The AEPA has been subject to court challenges in Canada on the basis that the legislation violates freedom of association under the *Charter*. In 2008, the Ontario Court of Appeal stated that the principle that freedom of association under the *Charter* "should be understood as protecting the right of employees to associate for the purpose of advancing workplace goals through a process of collective bargaining"[259]. The Ontario Court of Appeal concluded that the AEPA infringed the right to freedom of association under the *Charter*. Soon after this decision was released, one of the agricultural employers involved in the case laid-off 50 temporary migrant workers and evicted them from the employer-provided housing[260]. While no reason was given for the terminations of employment, even the *Charter* challenge could not protect these workers from the power their employer has over their status in Canada, as the workers were required to go back to their country of origin after they were fired[261].

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[253] OLRA, s. 1(1).
[254] AEPA, s.2.
[255] AEPA, s. 1(2)(4).
[256] *Ibid*, s. 5(1).
[257] *Ibid*, s. 5(6).
[258] *Ibid*, s. 5(7).
[259] *Fraser v. Ontario (Attorney General)*, 2008 ONCA 760 (CanLII), para. 50.
[260] Fudge and MacPhail, Flexible Labour, *supra* note 10, p. 40.
[261] Susan Mann, "Some migrant workers get paid, some don't" *Better Farming* (8 Dec. 2010). Online: http://www.betterfarming.com/online-news/some-migrant-workers-get-paid-some-don%E2%80%99t-3516 (Date of Access: 29 Apr. 2012).

The government of Ontario appealed the decision of the Ontario Court of Appeal, and was successful at the Supreme Court of Canada ("SCC"). In *Ontario (Attorney General) v. Fraser*[262], the SCC held that freedom of association under the *Charter* protects the right to associate to achieve collective goals, and laws or state actions that substantially interfere with the ability to achieve workplace goals through collective actions have the effect of negating the right of free association and therefore constitute an infringement on the right of free association. While "good faith negotiation" was found to be a requirement of freedom of association, the SCC held that this did not require a particular model of labour relations. According to the SCC, the right to collective bargaining does not provide a right to a particular kind of collective bargaining. The SCC found that under the AEPA, farm workers in Ontario did have meaningful processes by which they can pursue workplace goals. The SCC read into the AEPA a requirement that the employer consider the employee representations in good faith, as it was found that the requirement that the employer listen to or read employee representations could have only one purpose – to assure that the employee will in fact consider the representations. The SCC therefore concluded that the AEPA did not breach freedom of association under the *Charter*.

The exclusion of farm workers from the same level of labour standards as other workers leaves farm workers in Ontario without access to effective trade union representation and collective bargaining. Without these protections, workers are often unable to assert successfully other employment-related rights. As the ILO has stated, the right to establish and join organizations of workers' own choosing if part of freedom of association, and this right applies "without distinction". With respect to Canada in particular, the CFA has found that the absence of machinery for the promotion of collective bargaining for agricultural workers is "an impediment to one of the principle objectives of the guarantee of freedom of association"[263]. The SCC's interpretation of freedom of association is not in accordance with the ILO's view of freedom of association, which is that all workers must enjoy freedom of association without distinction. Ontario continues to fail to live up to the international standards on freedom of association, which requires States to ensure that all necessary and appropriate measures are in place to ensure that all workers may exercise freely the right to organize.

The importance of freedom of association and trade union representation in advancing the rights of TFWs is perhaps seen nowhere better than in a series of cases involving Presteve Foods Ltd. This operation is a fish processing plant in Ontario, and employs both Canadian and temporary foreign workers. CAW-Canada had long represented a bargaining unit of employees at this workplace, where TFWs were eventually hired. CAW-Canada and the employer had

[262] [2011] 2 S.C.R. 3.
[263] Canada (Case No. 1900), *supra* note 149, para. 182.

entered into a collective agreement providing, among other terms, wages and conditions of work. The employer, however, refused to recognize that the collective agreement applied to the TFWs. This was one of the issues in dispute in a labour arbitration decision *Presteve Foods*[264]. The union also alleged in that case that the employer had refused to provide the union with the names and other details concerning the foreign workers.

The arbitrator decided that the TFWs fell under the provisions of the collective agreement, and were employees entitled to seniority rights provided for under the collective agreement. The arbitrator also found that the employer had failed to provide a seniority list of all employees showing their names, addresses, and classifications. As well, the collective agreement required that records be made available to the union where there is a dispute about the accuracy of an employee's pay cheque. The arbitrator ordered the employer to comply with these provisions of the collective agreement, and to compensate any worker who was paid less than he or she was due under the collective agreement, including compensation for any expenses incurred which should have been covered by the health and welfare plan.

This labour arbitration decision in *Presteve Foods* illustrates the importance of unionization for TFWs in accessing similar wage rates that Canadians enjoy, and avoiding the "race to the bottom" often associated with the hiring of TFWs. In this case, the TFWs were faced with an abusive and exploitative employer, who paid them less than they were legally entitled to (among other violations of rights that will be discussed later). Without trade union representation, the options for the migrant workers in attempting to assert and enforce their legal rights would have been much more limited. Domestic workers and farm workers in Ontario do not enjoy the full range of protections associated with trade union representation and access to effective collective bargaining. Due to this lack of labour law protections, when faced with a similarly exploitative employer, domestic workers and farm workers would not likely be able to assert their rights as effectively as the union was able to do for the TFWs employed by Presteve.

In the province of B.C., the *Labour Relations Code*[265] does not exclude farm workers or domestic workers. In practice, effectively accessing collective bargaining has proven to be a challenge for agricultural and domestic workers. The nature of domestic work, involving isolation within private homes, and the live-in requirement of the LCP, makes domestic migrant workers under the LCP very difficult to organize. The immigration status of these workers under the LCP is a further isolating factor. With respect to agricultural workers, the seasonal nature of the agricultural industry, combined with the temporary nature of the TFWs' work permit, has enabled employers to interfere with the

[264] *Presteve Foods* OLAA, *supra* note 14.
[265] RSBC 1996, c. 244 ["BCLRC"].

associational rights of these workers. Here, I will set out a few cases from B.C. demonstrating the extent to which TFWs, who are formally included in labour legislation, have been able to successfully assert their legal rights with respect to freedom of association.

Employers have attempted and failed to have the B.C. Labour Relations Board ("BCLRB") declare that the BCLRC does not apply to workers under SAWP, because the SAWP is a federal program, and the BCLRC is provincial legislation. The BCLRB held in *Greenway Farms Ltd. and U.F.C.W., Loc. 1518*[266], that it is an express principle of the SAWP that foreign workers are to receive "treatment equal to that received by Canadian workers performing the same type of agricultural work, in accordance with Canadian laws". Accordingly, the BCLRB found that employers of SAWP workers must anticipate that just as Canadian farm workers may choose to unionize under the BCLRC, so too can the SAWP workers choose to do so. The BCLRB rejected the employer's argument that unionization would "wholly undermine and negate" the structure of the SAWP. The BCLRB found that the terms and conditions of the SAWP employment agreements are minimum standards that the employer and SAWP workers are free to alter through collective bargaining under the BCLRC.

In *Sidhu & Sons Nursery Ltd. v. U.F.C.W., Loc. 1518*, the union in that case faced a long struggle to represent a group of farm workers, who were working under the SAWP. The union had initially applied to represent these workers at Sidhu & Sons Nursery in 2008. Initially, the certification application was denied, as the BCLRB found that bargaining unit applied for was not appropriate for collective bargaining[267]. The United Food and Commercial Workers, Local 1518 ("UFCW 1518") had applied to represent only workers participating in SAWP, and not the local Canadian employees who also worked for Sidhu & Sons. In its initial decision, the BCLRB decided that the local Canadian and SAWP workers "have as much in common as they do to distinguish them"[268]. However, on reconsideration by the BCLRB of this decision, a new panel found the distinctions between the SAWP and Canadian workers "are marked and real. Simply because they arise from differing terms and conditions of employment and employment status, rather than job duties, does not make them any less meaningful from a collective bargaining standpoint"[269]. The reconsideration panel concluded that these differences need to be acknowledged when determining the appropriateness for collective bargaining of the proposed unit made up of only SAWP workers. The reconsideration panel ordered the original panel to further consider the UFCW1518's arguments.

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[266] BCLRB No. B165/2008 ["*Greenway Farms"*].
[267] *Sidhu & Sons Nursery Ltd. v. U.F.C.W., Loc. 1518*, BCLRB No. B159/2008.
[268] *Ibid*, para. 33.
[269] *Sidhu & Sons Nursery Ltd. v. U.F.C.W., Loc. 1518*, BCLRB No. B3/2009, para. 71.

The original panel of the BCLRB eventually recognized the "exceptional vulnerability" of these workers and their need to access collective bargaining. After being remitted back the case, the original panel of the BCLRB recognized that these workers "are at a relative disadvantage and are vulnerable to the power of the Employer over not just their conditions of work but their living conditions while in Canada and even their ability to remain in Canada under the SAWP Agreement"[270]. The BCLRB found that the fact that if the union is certified the employer would be statutorily required to bargain and to make reasonable efforts to conclude a collective agreement, and that would be a significant step towards achieving the purpose of seeking dignity and respect for these workers[271].

After the UFCW 1518 was finally certified to represent the SAWP workers of Sidhu & Sons Nursery, the employer denied the union access to its members. The workers in this case lived in housing provided by the employer, located on the employer's premises. The workers lived in shared accommodation and did not have transportation to enable them to get to the union office. The employer's view was that unauthorized persons were not permitted on the property. After the union had visited the premises to pick up some members to attend a barbeque, the employer wrote to the union stating that union representatives were not permitted on the property, and they would be treated as trespassers. The union made an application to the BCLRB requesting an order that the union be granted access to the workers without the prior authorization of the employer. The BCLRB agreed with the union and, taking account of the accommodation situation of the workers, ordered the employer to permit union representatives to have unsupervised and unrestricted access to staff housing for the purpose of contacting employees to conduct union business[272]. The BCLRB imposed the conditions that no more than two representatives of the union may approach the housing at the same time, and union representatives may only attend the housing between certain hours in the evening[273].

In the case of *Sidhu & Sons,* it took over two years from the filing of the certification for the workers to finally achieve trade union representation. As seen, the BCLRB was reluctant at first to place much importance on the distinctions between domestic and foreign workers, and the special vulnerabilities of the foreign workers and why this means they may have different interests in collective bargaining. As work permits under the SAWP are valid for only up to eight months at a time, some of the workers who were working for the farm at the time of the application were never able to benefit from trade union representation, although many do return for multiple seasons.

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[270] *Sidhu & Sons Nursery Ltd. v. U.F.C.W., Loc. 1518,* BCLRB No. B26/2010, para. 75.
[271] *Ibid,* para. 76.
[272] *Sidhu & Sons, supra* note 14, para. 27.
[273] *Ibid,* para. 27.

When the union finally was certified, the employer tried to interfere with the union's representation of the workers, and the requirement that SAWP workers live on the premises of the employer enable the employer to do so until the BCLRB intervened.

In another case from B.C., a union was initially successful in representing workers under the TFWP, but after persistent alleged interference by the employer, the union was eventually decertified. The Construction and Specialized Workers' Union, Local 1611 ("CSWU")was certified on June 30, 2006 to represent the workers of a Canadian-Italian venture, SELI Canada Inc., that was building an underground tunnel to be used for mass transit. The CSWU represented all employees who were engaged in tunnelling operations, and 40 out of 55 of these workers were foreign workers from Latin American countries[274]. Following certification, the union quickly served notice to bargain, and although the union and employer initially agreed to meet to collectively bargain, the employer soon set preconditions to meeting. The union filed a complaint with the BCLRB alleging that the employer had failed to bargain in good faith. The BCLRB concluded that the employer cannot simply refuse to meet to bargain collectively, or set preconditions to the commencement of collective bargaining[275]. The BCLRB found the employer violated the BCLRC, and directed the parties to meet to commence collective bargaining[276].

The CSWU made a number of other complaints against the employer relating to interference with collective bargaining, some of which were successful and some of which were not. Faced with multiple and persistent acts of alleged employer interference and BCLRC violations with respect to collective bargaining, the employees of SELI eventually applied to decertify the union. The CSWU was decertified on July 7, 2008. Despite no longer formally representing employees of SELI for the purposes of the BCLRC, the union continued to represent these workers in a claim of discrimination against the employer, which will be discussed in a later section.

The above cases show that even when TFWs are formally protected by the same labour law protections as local Canadian workers, their distinctive situation as compared to locally resident workers makes it difficult to organize the TFWs and ensure they have access to collective bargaining. Despite being represented by a union and entitled to the same collective agreement rights as Canadian workers, the TFWs of Presteve Foods have been confronted with an employer that has refused to recognize that the TFWs have the same rights and are entitled to the same treatment as the Canadian workers they work alongside. The *Greenway Farms* case, where the employer unsuccessfully argued that the BCLRC does not apply to SAWP workers, also reveals the intention of some

[274] *SELI Canada Inc. v. C.S.W.U., Loc. 1611,* BCLRB No. B40/2008.
[275] *SELI Canada Inc. v. C.S.W.U., Loc. No. 1611,* BCLRB No. B177/2006, para. 29.
[276] *Ibid,* para. 20 and 30.

employers to provide less desirable labour conditions to TFWs workers than to Canadian workers. It has been argued elsewhere that the SELI case demonstrates that even when unionized, it is difficult for a union to enforce the rights of TFWs[277]. Further, it has been seen in the decisions involving Sidhu & Sons that the BCLRB was initially reluctant to recognize the relevance of these differences between local and SAWP workers, and the ways in which the different status of the SAWP workers means that they may have very different interests than local workers. The cases involving Sidhu & Sons shows how easy it is for employers to interfere with trade union representation of SAWP workers, in part because these workers must live on the employer's property and are isolated and under the employer's control. The above cases are in fact unusual in that the TFWs were unionized. Even though they have formal access to the collective bargaining regime, TFWs in B.C. are not often represented by unions, due in part to the challenges in organizing these workers because of their immigration status[278]. While formal access to trade union representation and collective bargaining is essential for TFWs to enjoy the same rights and treatment as Canadian workers, formal inclusion of these workers in labour legislation may often not be enough. The precarious position their immigration status puts TFWs in should be accounted for in the law and decisions involving freedom of association of these workers.

4.3 Employment Standards, Terms and Conditions

The law of individual employment in Canada, that is, of non-unionized workers, is governed by the common law and statute. The employment relationship of non-unionized workers and their employers is generally regulated by an employment contract, either written or oral, and by minimum employment standards, as well other workplace legislation such as human rights and occupational health and safety legislation. When faced with a breach of the terms of their employment contract or statutory employment standards, the legal options for these workers are either to pursue a claim in court of breach of contract or wrongful dismissal, or to make a complaint under the relevant legislation. The temporary nature of their immigration status in Canada means that TFWs are often precluded from seeing through the resolution of their legal claims, as they may be required to leave Canada before their case is decided. The power that employers have over TFWs may also have a chilling effect on these workers pursuing remedies for breaches to employment standards. A further issue in the regulation of employment of TFWs is the role of recruitment agencies. Employment or recruitment agencies often charge migrant workers large sums in exchange for the promise of a job in Canada.

Importantly, with respect to TFWs and unlike Canadian workers, an additional factor in the regulation of their employment relationship is the terms of their

[277] Fudge and MacPhail, Flexible Labour, *supra* note 10, p. 40.
[278] *Ibid*, p. 40.

work permit. As discussed earlier, the work permit sets out the specific employer and occupation in which the worker is permitted to work, and the duration of the permit. Thus, TFWs are bound to their particular job and employer in a way not experienced by Canadian workers, who are free under the law to leave their employment and find another job and employer in Canada.

While the TFWP places restrictions on migrant workers that Canadian nationals do not experience, the TFWP does not offer much in the way of corresponding additional protections to TFWs beyond that which is also available to Canadian workers. For example, CIC and HRSDC, while involved in the initial work permit process, are not engaged in the monitoring of the employment relationship between the employer and the worker to ensure that the employer is complying with its legal obligations[279]. HRSDC issues LMOs in which the employer must state the wage rate and conditions of work that will be offered. HRSDC also requires that an employment contract between the employer and worker be signed. However, once HRSDC has approved the LMO, there is very little follow up by HRSDC to ensure the employer is in compliance with the LMO and employment contract. When employers do not comply with the wages, working conditions or occupation as set out in the LMO, TFWs can make complaints to HRSDC and employers will be "blacklisted" and prohibited from hiring TFWs for a period of two years[280]. The names of these employers are to be posted on the HRSDC website, however, at the time of writing in May 2012, there were no employers on this list[281]. As well, this sanction does nothing to remedy the situation of the worker who reported the employer and whose rights were violated[282]. CIC is responsible for issuing work permits, but is not engaged in regulating the employment relationship. The Canadian Labour Congress has stated that TFWs tend to "fall through the cracks between the federal government, which runs the program, and the provinces, which enforce labour law"[283]. While the legal employment options of TFWs are restricted as compared to nationals, the TFWP does not offer corresponding extra protection for the TFWs.

TFWs who are not unionized are therefore left with legislated minimum employment standards and the common law governing contracts. TFWs as such are not a category of workers who are excluded from this legislation. However,

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[279] Nakache and Kinoshita, *supra* note 13.

[280] CIC, "Backgrounders - Improvements to the Temporary Foreign Worker Program". Online: http://www.cic.gc.ca/english/department/media/backgrounders/2010/2010-08-18.asp (Date of Access: Jan. 18, 2012).

[281] CIC, "Temporary Foreign Worker Program: List of Ineligible Employers". Online: http://www.cic.gc.ca/english/work/list.asp (Date of Access: Apr. 7, 2012).

[282] Fudge and MacPhail, Restaurant Sector, *supra* note 61, p. 15.

[283] Brazao, Dale, "Nanny sent to work as underpaid servant" *The Toronto Star* (22 Sept. 2008). Online: www.thestar.com.

these statutory standards do not apply to all workers equally. In some jurisdictions, lesser employment standards apply to domestic workers and agricultural workers. In Ontario, again farm workers and domestic workers do not enjoy the full rights of other workers. Under the Ontario *Employment Standards Act*[284] and its regulations, there are some separate standards for farm workers. For example, the Regulations allow employers to pay farm workers on a piece-work basis[285], while other workers must be paid a minimum hourly wage. As well, farm workers are expressly excluded from other protections including hours of work and overtime pay. The OESA contains special provisions for "domestic workers" and "residential care workers". Workers under the LCP may fall under either of these categories, as these workers provide child care, senior home support care, or care of the disabled in private homes. Employers must provide domestic workers with a written employment contract setting out the regular hours of work and hourly pay[286]. Meanwhile, residential care workers are excluded from the hours of work and overtime pay provisions of the OESA[287].

Ontario has recently enacted legislation providing special protection for "foreign nationals" working in the province. The *Employment Protection for Foreign Nationals Act (Live-in Caregivers and Others), 2009*[288]. This legislation applies to foreign nationals employed in Ontario, or looking for employment in Ontario. The EPFNA applies primarily to foreign nationals working or looking for work as a live-in caregiver "or in such other position or sector as may be prescribed"[289]. At the time of writing, there have been no regulations enacted prescribing other categories of workers that the EPFNA is to apply to, thus at this point the legislation only applies to foreign nationals who are employed or attempting to find employment as live-in caregivers. The main protection for live-in caregivers is that an employer cannot attempt to recover certain costs from the worker, such as costs incurred by the employer in the course of arranging the employment[290]. As well, no recruiter may charge the foreign national a fee for any "service, good or benefit" in connection with the employment of the foreign national[291]. Employers and recruiters are also prohibiting from retaining the property of the foreign national, including the foreign national's passport or work permit[292]. The EPFNA also provides for a complaint process[293] and provides live-in caregivers with protection against

[284] *Employment Standards Act, 2000*, S.O. 2000, c. 41 ["OESA"].
[285] OESA Reg. s 25(2).
[286] *Ibid*, s. 19(1).
[287] *Ibid*, s. 23.
[288] S.O. 2009, c. 32 ["EPFNA"].
[289] *Ibid*, s. 3(1).
[290] *Ibid*, s. 8(1).
[291] *Ibid*, s. 7(1).
[292] *Ibid*, s. 9.
[293] *Ibid*, s. 20.

employer reprisals for making a complaint under the legislation[294]. This legislation came into force on March 22, 2010, and in 2012 the Committee of Experts noted that under this legislation, the Ontario Ministry of Labour conducted 42 inspections, closed 13 claims, and that 67 claims were filed by live-in caregivers[295].

In B.C., the *Employment Standards Act*[296] does not completely exclude farm workers, but it does contain different standards for farm workers than other workers. Unlike other employees, farm workers are paid on a piece-work basis, for instance per apple bin picked[297]. As well, the parts of the BCESA addressing hours of work, overtime, statutory holidays, and payday requirement do not apply to farm workers[298]. There are also different standards for "live-in home support workers" and "residential care workers". The hours of work and overtime provisions do not apply to live-in home support workers and residential care workers[299].

While TFWs are not specifically mentioned in the BCESA, there are special protections for "domestic" workers. The BCESA requires that an employer provide a domestic worker with a written employment contract, clearly stating the conditions of employment, including the duties the domestic worker is to perform; the hours of work; wages; and charges for room and board[300]. Employers who employ workers in private residences must register certain information about the employment[301], including the employer's and the employee's name, address and phone number[302]. The BCESA Regulations also states that the maximum amount an employer must charge a domestic worker for room and board is $325 per month[303].

The BCESA also contains protections against illegal fees charged to migrant workers by employment or recruitment agencies. No person permitted to charge a payment from a person seeking employment for employing, obtaining employment, or providing information about employers[304]. As well, employment agencies are not permitted to make a payment to a person for obtaining employment for someone else[305]. However, recruitment or employment agencies or other persons are permitted to charge or take payments

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[294] *Ibid*, s. 10.
[295] CEACR, *Direct Request: Discrimination (Employment and Occupation) Convention, 1958 (No. 111) – Canada (Ratification: 1964)* (ILC, 101st Sess., Geneva, 2012).
[296] R.S.B.C., 1996, c. 113 ["BCESA"].
[297] *Employment Standards Regulation*, B.C. Reg. 396/95, s. 18 ["B.C. ESA Regs"].
[298] *Ibid*, s. 34.1 and 40.1.
[299] *Ibid*, s. 22 and 34.
[300] BCESA., s. 14.
[301] *Ibid*, s. 15.
[302] BCESA Regs., s. 13.
[303] *Ibid*, s. 14.
[304] BCESA, s. 10.
[305] *Ibid*, s. 11.

for placing advertisements[306]. The BCESA also requires employment agencies to be registered[307], and to keep a record of the name and address of each employer and of each person the agency directs to an employer[308].

There have been a handful of employment standards cases involving claims by TFWs, particularly involving allegations against recruitment agencies. For instance, in *Prince George Nannies and Caregivers Ltd.*[309], 14 workers in the LCP complained that the agency had breached the BCESA by charging fees to a person seeking employment. The B.C. Employment Standards Tribunal ("BCEST") held that under the guise of charging a fee for "advertising" the agency was actually charging a fee to a person seeking employment, contrary to the BCESA. The BCEST found that there was no evidence that any caregiver had been provided with the services the agency claimed to provide, such as image consulting or resumé preparation. In *Terrens Nannies,* an agency was also found to be in breach of the BCESA for charging fees relating to finding a person employment, however, the agency was permitted to charge fees related to immigration services[310].

There have only been a few employment standards decisions involving claims by TFWs against their employers. In a few instances, employers have been found to violate the BCESA with respect to the payment of wages, vacation pay, and deducting the cost of air fare from the TFW's wages[311]. In another decision, there was an agreement between an employer and a domestic worker that the domestic worker would be paid $500 per month plus room and board. This however, did not comply with the minimum standards set out by the BCESA. The BCEST found that it did not need to decide if such an agreement even truly existed, because it would have no force or effect. The BCEST stated, "An employee simply may not enter into an agreement which provides for less than the minimum standards of the Act"[312].

A case demonstrating the problems for TFWs with relying on an individual, complaint driven-system such as the employment standards systems in Canada, involves a restaurant chain operating in B.C. called Denny's. Mr. Alfredo Sales, a TFW employed by Denny's, had advised the employer that he had been charged fees by the recruitment agency, had to pay for his airfare, and was owed overtime by the employer. Mr. Sales also informed the employer that he had been to the Employment Standards Branch about his concerns. About a month after this conversation, the employer terminated Mr. Sales' employment.

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[306] *Ibid,* s. 10(2).
[307] *Ibid,* s. 12.
[308] BCESA Regs., s. 3.
[309] BC EST #RD106/09 (reconsideration of BC EST #D055/09).
[310] *Efren (Sonny) R. Serion and Josefina Serion operating as Terrens Nannies,* BC EST #D378/01.
[311] *Glacier Park Lodge,* BC EST #D059/09.
[312] *Klaus Werner,* B.C. EST #D138/97.

The Director of Employment Standards found that the evidence supported the conclusion that the decision to terminate Mr. Sales' employment was motivated in part by the fact that Mr. Sales had raised issues about the fees, airfare, and overtime and that he had been in contact with the Employment Standards Branch about these issues[313]. The Director found the employer breached the BCESA and ordered the employer to pay Mr. Sales lost wages and interest. In the end despite this successful employment standards claim, Mr. Sales had to leave Canada, as his work permit did not allow him to work for any employer other than Denny's[314].

In another employment standards decision concerning Denny's, a group of employees, including temporary foreign workers and local workers, brought a claim for overtime wages. Under the BCESA, overtime wages are payable to employees who work over eight hours per day or 40 hours per week. The employer was ordered to pay the overtime owed to the employees, and administrative penalties were imposed for each time the BCESA had been contravened[315].

Overall, there are numerous hurdles for TFWs accessing the employment standards systems in Canada. One problem is that in Ontario and B.C., it is an individual complaint-driven system. Individual employees must first make a complaint when their rights are violated in order to have the matter investigated. Employment Standards officers do not investigate employers or conduct inspections on their own initiative. This individual complaint system can be a hurdle for other TFWs in accessing justice. These difficulties with accessing this system include: inexperience with the Canadian legal system; language barriers; misleading employer-provided information; self-censorship to protect their jobs and threats of deportation[316].

In addition to employment standards, there have been a limited number of cases in which TFWs have taken their employment-related claims to the courts. The barriers to the court system for TFWs are obvious, and include the high cost of litigation, absence of legal aid, lack of knowledge of the legal system, and language barriers. A notable case however involves a class action lawsuit, in which a representative plaintiff acts on behalf of a class of litigants with common issues. This type of proceeding may be more accessible for TFWs than an individual case. Instead of each individual bringing separate claims, one plaintiff can represent a whole class of plaintiffs. In the recent decision

[313] ER #067-767, *supra* note 14.
[314] "Denny's fined for firing worker who complained" *Toronto Sun* (6 May 2011). Online: www.torontosun.com/2011/05/06/dennys-fined-for-firing-worker-who-complained (Date of Access: 29 Apr. 2012).
[315] *Director of Employment Standards and Northland Properties Corporation and Dencan Restaurants Inc. carrying on business as Denny's,* ER #067-767 (Jun. 17, 2011).
[316] Nakache and Kinoshita, *supra* note 13.

Dominguez v. Northland Properties Corporation[317], the B.C. Supreme Court ("BCSC") certified a group of TFWs as a class in their claim against their restaurant employer, Denny's, the same restaurant discussed earlier. The majority of the class members are from the Philippines, and applied for jobs with the employer through an employment agency. Employment contracts were entered into concerning wages, hours of work, overtime and other working conditions. The employment contracts stated that the employees would not have to pay airfare or recruitment costs. Yet, the plaintiff ended up paying thousands of dollars in recruitment costs and paid for her own airfare. The claim alleges that the defendants did not provide as many work hours as promised, failed to pay overtime as promised, and failed to reimburse the workers for travel and recruitment costs as promised[318]. The plaintiff is also seeking damages for the conduct of the defendants, including the defendants' breach of their duty of good faith and fair dealing towards the class members, and causing humiliation, anxiety and damage to self-confidence and loss of dignity to the class members[319].

In certifying the class action, the BCSC took into account "the environment in which any such claims under the *Employment Standards Act* may have been made". The BCSC stated that while one of the class members had made a complaint under the BCESA, his employment was terminated shortly after making the complaint, referring to Mr. Sales. The BCSC acknowledged that "It is not difficult to conclude that this reaction on the part of the defendants would have caused other employees to fear similar retribution had they filed similar complaints"[320]. The BCSC noted that investigation by the Employment Standards Branch had already proven to have little effect on the conduct of the defendants[321]. The BCSC decided that a class proceeding would enhance the ability of temporary foreign workers to access justice. In so finding, the BCSC recognized the "vulnerable situation in which these temporary workers find themselves"[322]. In this case, it is important to point out that Ms. Dominguez has already had to leave Canada because her work permit expired. As of May 2012, the resolution of this case remains pending.

The law regulating the employment relationship of TFWs differs from that of the employment relationship of Canadians in that the work permit of TFWs places restrictions on them not experienced by Canadians. However, there are very few corresponding additional legal protections for TFWs who are bound to their employers because of their work permit. TFWs have formal access to the courts and employment standards on a similar basis as Canadian nationals. However, only a limited number of cases have been brought by TFWs, and

[317] 2012 BCSC 328 (CanLII) ["*Dominguez"*].
[318] *Dominguez* Notice of Civil Claim, *supra* note 14.
[319] *Ibid.*
[320] *Dominguez, supra* note 317, para. 233.
[321] *Ibid,* para. 263.
[322] *Ibid,* para. 263.

there are significant barriers to these workers pursuing successful claims with respect to their employment terms and conditions. As seen in the certification decision in *Dominguez,* taking into consideration the vulnerable and precarious status of TFWs may be required to ensure that these workers are able to effectively access justice in their employment claims.

4.4 Discrimination

In most Canadian jurisdictions, human rights legislation has been enacted, although the scope of this legislation is not as broad as in the sense of international human rights, and is mainly limited to provisions prohibiting discrimination. The *Charter,* meanwhile provides for a wider range of human rights. However, the *Charter* distinguishes between citizens and non-citizens with respect to some matters, for instance only citizens and permanent residents have the right to pursue the gaining of a livelihood in any province[323]. Thus, as recently stated elsewhere, "full equality between individuals only exists when "citizenship" is a common feature"[324]. The *Charter* protects against discrimination by the State, while human rights legislation in Canada also protects against discrimination by private actors, including in employment.

In B.C., under the human rights legislation applicable to private actors, a person must not refuse to employ, or discriminate against a person regarding employment or any term or condition of employment because of the race, colour, ancestry, place of origin, religion, sex, and other grounds[325]. Employment agencies are also expressly mentioned and prohibited from refusing to refer a person to employment for the above reasons[326]. Trade unions and employers' organizations are also prohibited from discriminating on the basis of a prohibited ground[327]. In Ontario, the legislation is broader and covers more prohibited grounds, stating "Every person has a right to equal treatment with respect to employment without discrimination" because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex and other grounds[328]. Note, however, that under the Ontario legislation there are several qualifications as to what constitutes prohibited discrimination on the basis of citizenship, including that the right to non-discrimination on the basis of citizenship is not infringed where Canadian citizenship is a requirement, qualification or considered imposed or authorized by law[329]. The OHRC also expressly prohibits harassment in the workplace on the basis of the prohibited

[323] *Charter,* Art. 6(2).
[324] Commission des droits de la personne et des droits de la jeunesse, "Systemic Discrimination Towards Migrant Workers: Summary" (Dec. 2011), p. 14.
[325] *Human Rights Code,* R.S.B.C. 1996, c. 210, s. 13 ["BCHRC"].
[326] *Ibid,* s. 13(2).
[327] *Ibid,* s. 14.
[328] *Human Rights Code,* R.S.O. 1990, c H. 19, s. 5 ["OHRC"].
[329] *Ibid,* s. 16.

grounds[330], and includes a specific provision outlawing harassment in the workplace on the basis of a person's sex[331].

There are two particularly important cases involving claims of discrimination made by TFWs that will be discussed here. A claim under the BCHRC has been brought by TFWs against SELI, the company discussed earlier involving work on a mass transit system in Vancouver, B.C. The CSWU claimed that SELI had discriminated against Latin American foreign workers, as compared to European foreign workers, on the basis of their race, colour, ancestry and place of origin in respect of the terms and conditions of their employment, contrary to s. 13 of the BCHRC. The four main allegations were that the Latin American workers received lower salaries for performing the same or similar work; adverse housing conditions, with the Latin American workers being placed in a motel while the Europeans were housed in condominiums in a prestigious area of Vancouver near the worksite; adverse meal arrangements; and adverse expense arrangements, with the Latin Americans being required to submit receipts and the Europeans being given allowances of $300 per month, regardless of actual expenses incurred.

The B.C. Human Rights Tribunal ("BCHRT") found that the CSWU had established a case of discrimination in that SELI treated the Latin Americans workers adversely as compared to the Europeans in respect to salaries, accommodation, meals and expenses. The BCHRT was satisfied that the CSWU had established that the race, colour, ancestry and place of origin of the Latin American workers were factors in the adverse treatment they experienced. In accordance with the law of discrimination in Canada, the BCHRT further found that SELI did not establish a justification for the discriminatory conduct. In particular, SELI had argued that its international compensation practices, which paid workers according to their country of origin, justified the differences in pay. The BCHRT did not accept this rationale as a legitimate justification, stating the following about SELI's international compensation practices:

> In effect, the application of SELI's actual international compensation practices to the Latin Americans employed by them on the Canada Line project was to take advantage of the existing disadvantaged position of these workers, who are from poorer countries, and to perpetuate that disadvantage, and to do so while they were living and working within the province of British Columbia. As such, the application of those practices in British Columbia perpetuated, compounded and entrenched existing patterns of inequality[332].

[330] *Ibid*, s. 5(2).
[331] *Ibid*, s. 7(2).
[332] *SELI* BCHRT, *supra* note 21, para. 489.

The pay practices were found to be based on assumptions that because they come from poorer countries, the Latin Americans, when working in B.C., did not need or want, or were not entitled, to make as high a wage as the Europeans[333]. The BCHRT accepted the CSWU's argument that this suggestion that workers from poorer countries do not need or want to make as much money as workers from richer countries is essentially the same as the long since discredited argument that women do not need or want to make as much money as men[334]. The BCHRT had strong criticisms of the employer's argument, stating that SELI had in effect submitted that the fact of the difference in prevailing wage rates in poorer and richer countries is in accord with "every rule of economics", with the result that perpetuating that difference in wages paid to workers in B.C. is not discriminatory. The BCHRT found that the pay practices "at the heart of this complaint" were based upon negative stereotypes and assumptions about the needs, desires and abilities of the Latin American workers, that is, "Because they come from countries with lower wage rates, they do not need, want or merit the same wages as employees from countries with higher wage rates while performing substantially the same work in British Columbia"[335].

The BCHRT ordered SELI to pay each member of the complainant group the difference in salary and expenses paid to them and the average salary and expenses paid to the Europeans. As well, the BCHRT awarded compensation to the Latin Americans for injury to dignity, in the amount of $10,000 CAD each. In making this award, the BCHRT explained what the case was really about at its core:

> "..this case is primarily about dignity. As submitted by CSWU, for two years the Respondents' treatment of the members of the Complainant Group conveyed to them the message that they were worth less, and were less worthy, than other employees, because they are Latin American. They were given inferior accommodation, denied any choice about where to eat, and made to account for any reimbursements received, rather than receiving a monthly allowance to do with as they pleased. They worked side by side with Europeans who were paid substantially more than they were for performing substantially the same work. As foreign workers in Canada on temporary work permits, who did not speak English, and were wholly dependent on their employer, not only for their wages, but also their accommodation, food and transportation back to their homes and families, they were uniquely vulnerable. So long as they continued to work on the Canada Line project, they were unable to escape the discriminatory treatment which pervaded every aspect of the working and leisure lives"[336].

The final statement could also summarize the experience of TFWs in Canada generally, who are often paid less than Canadian workers, provided with less favourable terms and conditions of work than Canadians, are made dependent

[333] *Ibid*, para. 497.
[334] *Ibid*, para. 499.
[335] *Ibid*, para. 501.
[336] *Ibid*, para. 558.

on their employer, and are placed in uniquely vulnerable circumstances from which they are unable to escape while working in Canada.

SELI has applied for judicial review of the BCHRT's decision. After arguments and court decisions on evidentiary issues, the judicial review hearing is likely to take place in December 2012. The complainant workers have long since left Canada, and it will still be quite some time before a final decision is issued on whether the BCHRT's decision will be upheld.

In Ontario, CAW-Canada has brought a claim of discrimination against Presteve Foods, the fishing processing plant discussed earlier, with respect to the treatment of the TFWs as compared to Canadian workers. The claimants were all citizens of Thailand or Mexico, employed under the TFWP at Presteve and represented in their employment by CAW-Canada. The complaint alleged discrimination on the basis of race, colour, ancestry, place of origin, citizenship, ethnic origin, sex and sex solicitation and advances. As well, the complaint alleged sexual harassment, which is prohibited by the OHRC, by the owner of Presteve Foods, Mr. José Pratas.

The human rights claim against Presteve Foods, and its owner José Pratas, has not yet been adjudicated. In August 2011, Justicia For Migrant Workers, a non-profit organization working with migrant workers, was granted leave to intervene in the case. J4MW proposed it would give evidence of the TFWPs in Canada, the vulnerability of migrant workers, and the gender-specific concerns that migrant women face. This evidence would include the circumstances that motivate women to migrate to Canada for work, the reasons why women migrants choose to accept degrading working and living conditions, and the different types of exploitation experienced by migrant workers. The HRTO stated that to its knowledge, this was the first case before it involving alleged discrimination against migrant workers. The HRTO found that the relevant social context would be useful and helpful to the evaluation and understanding of the issues raised, and that J4MW had relevant expertise and perspective to add to an understanding of those issues[337]. The HRTO thus granted leave to J4MW to act as intervenors in the case.

Since then, on February 21, 2012, counsel for Presteve Foods and Mr. Pratas was required to withdraw from the sexual harassment claims as a result of a "conflict of interest"[338]. Also at the hearing on that date, the HRTO decided that it would take no further steps for a period of six months, in view of the need to contact claimants who may be out of the country. The HRTO ordered that any claimants who wish to proceed with their claims in relation to wages, must write to the HRTO by August 21, 2012, advising of their desire of proceed with

[337] *Presteve Foods*, 2011 HRTO 1581, para. 12.
[338] *Group of Employees v. Presteve Foods*, 2012 HRTO 361.

their claim[339]. The HRTO ordered that the applications of any claimants who have not done so by that date may be dismissed as abandoned[340].

As of May 2012, there have only been rare claims of discrimination brought by TFWs against their employers, and the outcomes of these cases are not settled. The BCHRT's decision in *SELI* provides optimism that adjudicators may start to recognize the violation of human dignity involved in the differential treatment of TFWs. However, this decision has been appealed and a judicial review is pending. As well, the HRTO's willingness to consider expert evidence about the exploitation experienced by migrant workers in Canada in the *Presteve Foods* case provides hope that decision makers are willing to consider that the differential treatment of migrant workers is the result not just of their differing immigration status as compared to Canadians, but is based on racial and gender stereotypes and discrimination. As Canada has ratified C111 and CERD, these recent developments in the law go some way to fulfilling the obligation on Canada to ensure that migrant workers in Canada are not discriminated against on the basis of their race, colour, descent, national or ethnic origin, or social origin.

4.5 Labour Inspection including Health and Safety

Health and safety legislation in Canada, such as the B.C. *Workers' Compensation Act*[341], requires employers to pay into a workers' compensation scheme designed to provide workers with income when they are injured at work. This legislation also places obligations on employers to ensure the health and safety of its workers, by establishing occupational health and safety policies; ensuring workers are informed about foreseeable health or safety hazards; and remedying hazardous workplace conditions. TFWs are not explicitly excluded from health and safety legislation in Canada. Under the BC WCA, the persons protected by this legislation include "a person who has entered into or works under a contract of service or apprenticeship, written or oral, express or implied, whether by way of manual labour or otherwise"[342]. Penalties may be imposed on employers for repeated or serious violations of occupational health and safety regulations. In B.C., the health and safety legislation was extended to include agricultural workers in 2004[343], however, the public enforcement body, WorkSafeBC, still does not regulate the agricultural industry[344]. In the agriculture, this is left to a private association

[339] *Ibid*, para. 3.
[340] *Ibid*, at para. 3.
[341] R.S.B.C. 1996, c. 492 ["BCWCA"].
[342] *Ibid*, s. 1.
[343] Gerardo Otero and Kerry Preibisch, *Farmworker Health and Safety: Challenges for British Columbia* (WorkSafeBC, August 2010). Online: http://www.sfu.ca/~otero/docs/Otero%20and%20Preibisch%20Final%20Nov-2010.pdf (Date of Access: 13 May 2012) ["Otero and Preibisch"], p. 78.
[344] *Ibid*, p. 82.

which lacks regulatory authority[345]. In Ontario, agricultural workers were only very recently included under health and safety legislation[346] and domestic workers continue to be excluded from these protections in that jurisdiction.

It appears that TFWs are often not reporting injuries when they are injured at work. TFWs sometimes are not aware of the workers' compensation schemes, or are afraid of losing their jobs if they report an injury[347]. Advocates for migrant farm workers have reported intimidation by employers and failure to re-hire SAWP workers for the following season after the worker made a workers' compensation claim[348]. Limited literacy skills, language barriers and fear of losing their immigration status are also factors in migrant workers failing to report injuries[349]. Advocates claim that only about 10% of injuries are reported by migrant farm workers[350]. A recent study conducted in B.C. concluded that a significant proportion of migrant farmworkers do not receive adequate workplace health and safety training[351].

Migrant workers often work in more dangerous conditions than Canadians. Mexican migrant farm workers were found to work longer days than Canadian farm workers, with Mexican migrant farm workers working 12 hours a day on weekdays and 8 hours per day on Saturday and Sunday during the peak of the season[352]. Meanwhile, Canadian farm workers worked 9 hours per day Monday to Friday, and 5 hours on Saturdays and Sundays[353]. It has been found that extremely long working hours increases workers' risk of workplace injury or accident[354]. As well, a considerable number of migrant farm workers were found to have living accommodations that were unsafe, lacked services, and/or were poorly furnished[355]. There have been reports of overcrowding and unsanitary living conditions. For instance, in 2005, it was reported that over 40 SAWP workers lived in a single two-storey house, with four to five men in each room, and all sharing two bathrooms[356].

As well, there is some indication that TFWs may not be able to access workers' compensation benefits on the same basis as Canadian workers. In Alberta, if the Workers' Compensation Board determines that the worker is physically fit to work, but in a different occupation, it does not consider the restrictions on the

[345] *Ibid,* p. 82.
[346] Fudge and MacPhail, Flexible Labour, *supra* note 10, p. 31.
[347] Nakache and Kinoshita, *supra* note 13, p. 26.
[348] Jenna L. Hennebry, "Not Just a Few Bad Apples: Vulnerability, Health and Temporary Migration in Canada" in *Canadian Issues* (Spring 2010) ["Hennebry"], p. 77.
[349] Otero and Preibisch, *supra* note 343, p. 30.
[350] Hennebry, *supra* note 348, p. 76
[351] *Ibid,* p. 75.
[352] Otero and Preibisch, *supra* note 343, p. 37.
[353] *Ibid,* p. 37.
[354] *Ibid,* p. 5.
[355] *Ibid,* p. 5.
[356] *Ibid,* p. 56.

TFW's work permit, which does not allow the TFW to work in any other occupation[357]. This means that for TFWs who are physically able to work in a different job but are legally not allowed to do so because of their work permit, will not be entitled to compensation under the workers' compensation legislation[358].

As seen earlier, TFWs may face discrimination at work, and this may also be expressed in the health and safety conditions sometimes experienced by TFWs at work and in their living conditions provided by employers. While health and safety legislation applies to TFWs generally, agricultural and domestic workers are treated differently in some jurisdictions. TFWs may also face barriers to asserting their right to work safely, which will be discussed further later.

4.6 Access to Legal Services

With respect to procedural rights in terms of accessing legal remedies, a large hurdle for migrant workers is often a lack of funds, resources and information they require in order to make a successful claim in the proper forum. As TFWs are recruited to work in lower-skilled and lower-paying jobs, the inability to afford a lawyer to represent them constitutes a significant hurdle in effectively pursuing legal claims with respect to violations of their workplace rights. In B.C., free legal representation is only available for a limited range of matters: criminal charges, mental health and prison issues, serious family problems, child protection matters, and limited immigration problems. The only immigration issues for which legal aid is available is where the person is facing removal from Canada, or is making a claim for refugee status[359]. There is limited free legal assistance and advice made available to migrant workers through organizations such as Access Pro Bono, made up of volunteer lawyers. There are also some other limited services available to migrant workers, through non-profit organizations such as the Agricultural Workers' Alliance, MOSAIC, and the West Coast Domestic Workers' Association, to name a few. However, there is not a system of public legal aid clinics available to migrant workers in British Columbia. It has been recognized that the lack of legal aid has a particular impact on TFWs, as well as other marginalized groups in Canada[360].

Meanwhile, in Ontario a much wider range of legal aid services is available, including for matters such as domestic violence, workplace safety matters, employment insurance appeals, and appealing other administrative tribunal

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[357] Nakacke and Kinoshita, *supra* note13, p. 27.
[358] *Ibid.*
[359] Legal Services Society, "Legal representation by a lawyer". Online: http://www.lss.bc.ca/legal_aid/legalRepresentation.php (Date of Access: Apr. 14, 2012).
[360] Leonard T. Doust, Q.C., "Foundation for Change: Report of the Public Commission on Legal Aid in British Columbia" (Vancouver: Public Commission on Legal Aid, Mar. 2011), p. 21-22.

decisions[361]. Ontario's publicly-funded legal aid system includes "speciality" clinics, offering legal advice and representation, such as the Centre for Spanish-Speaking People, Injured Workers' Consultants, Toronto Workers Health and Safety Legal Clinic, the Metro Toronto Chinese & Southeast Asian Legal Clinic, and the South Asian Legal Clinic[362]. As well, Legal Aid Ontario funds a network of community legal clinics. Ontario also operates a human rights legal support centre, which provides free legal assistance including filing applications, and legal representation at mediations and hearings[363]. In deciding which applications in which to provide assistance, this centre considers whether the applicant is a member of a historically disadvantaged group, and other factors such as their language and literacy abilities, unfamiliarity with the legal processes, challenges created by recent arrival in Canada, and more[364].

4.7 Conclusions on the Rights of TFWs in Canada

This chapter has set out the extent of the workplace rights of TFWs in Canada, and the ability or inability of TFWs to pursue claims relating to violations of those rights. While TFWs are not expressly excluded, often they are *de facto* excluded from workplace legislation when agricultural and domestic workers are excluded. Further, even when TFWs are formally covered by legislation such as labour and employment laws, it has been seen through the cases discussed that the particular situation of vulnerability and exploitation of TFWs is not always taken into account by decision makers. Recognizing the precarious situation of TFWs in Canada is important to preventing employers and recruiters from exploiting the precarious situation of these workers. The ways in which racial discrimination contributes to the differential treatment of migrant workers is also important to understanding the barriers that exist for TFWs in accessing employment-related protections. The cases discussed indicate there may be some trend towards adjudicators taking greater consideration of how the precarious situation in which TFWs work and live allows employers to exploit and discriminate against these workers. The lack of legal aid and other accessible legal assistance is also a hurdle for these workers in pursuing claims against violations of their rights at work.

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[361] Legal Aid Ontario, "Getting Legal Help". Online: http://www.legalaid.on.ca/en/getting/default.asp (Date of Access: Apr. 14, 2012).
[362] Legal Aid Ontario, "Speciality Clinics". Online: http://www.legalaid.on.ca/en/contact/contact.asp?type=scl (Date of Access: May 4, 2012).
[363] Human Rights Legal Support Centre. Online: http://www.hrlsc.on.ca/en/Default.aspx (Date of Access: Apr. 14, 2012).
[364] Human Rights Legal Support Centre, "Eligibility for Legal Support Services & Case Selection Criteria". Online: http://www.hrlsc.on.ca/en/EligibilityGuidelines.aspx (Date of Access: Apr. 14, 2012).

5. Analysis of the Temporary Foreign Worker Program and Recommendations

5.1 Introduction

Having set out Canada's TFWP regime, the international standards applicable to migrant workers, and the rights at work of TFWs in in Canada, I will now analyse the extent to which the international labour and human rights of TFWs in Canada are protected, and provide recommendations on how Canada could change the TFWP and other laws so as to bring Canada in line with international standards.

Recall that Canada has not actually ratified the vast majority of international instruments set out in Chapter 3. Canada has ratified only the following of the conventions that were discussed:

- ILO *Convention (No. 87) on Freedom of Association and Protection of the Right to Organize*
- ILO *Convention (No. 111) Discrimination (Employment and Occupation)*
- *International Covenant on Civil and Political Rights*
- *International Covenant on Economic, Social and Cultural Rights*
- *International Convention on the Elimination of Racial Discrimination*
- *Convention on the Elimination of All Forms of Discrimination Against Women*
- ILO *Convention (No. 187) concerning the promotional framework for occupational safety and health*

Meanwhile, Canada has not ratified the following instruments set out in Chapter 3:

- ILO *Convention (No. 11) Right of Association (Agriculture)*
- ILO *Convention (No. 98) concerning the application of principles of the right to organise and to bargain collectively*
- ILO *Convention (No. 97) concerning migration for employment*
- ILO *Convention (No. 143) Migrant Workers (Supplementary Provisions)*
- *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*

- ILO *Convention (No. 189) concerning Decent Work for Domestic Workers*
- ILO *Convention (No. 81) concerning labour inspection in industry and commerce*
- ILO *Convention (No. 129) Labour Inspection (Agriculture)*
- ILO *Convention (No. 155) Occupational health and safety*
- ILO *Convention (No. 181) Private Employment Agencies*

Among the reasons given by the Canadian federal government for not ratifying ILO conventions is that it will not ratify conventions with which the provinces do not conform[365]. The provincial governments in Canada have legislative authority over most employment matters. Canada has also justified its failure to ratify the CMW as: "the vast majority of persons who would be considered as migrant workers under the definition of the Convention generally enter Canada as permanent residents…(who) enjoy similar legal rights and social benefits as Canadian citizens"[366]. This is no longer an accurate description of present immigration realities in Canada, as has been seen in the increase in temporary work permits issued year after year. These TFWs do not have the same rights as citizens or non-citizen permanent residents, and therefore Canada's justification for not ratifying the CMW is no longer valid (if it ever was). However, as has been described elsewhere, the Canadian government's failure to ratify the CMW reveals "an attempt to protect its economic 'interests' in exploiting the cheap labour of these workers"[367]. Indeed, economic interests and labour market demands of employers have always been a driving force behind immigration law and policy in Canada, as discussed earlier.

From this, it is seen that Canada has not demonstrated a very strong commitment to international labour and human rights standards as they apply to migrant workers. Despite this lack of commitment, the purpose of this Chapter is to determine to what extent the TFW regime and legal protections applicable to migrant workers in Canada does align with the international labour and human rights applicable to migrant workers, even if Canada has not ratified all Conventions discussed. International labour rights and human rights standards provide a framework in which to analyse how Canada is acting with respect to the rights of migrant workers, and how it should improve its treatment of migrant workers if it were to contemplate ratifying the international conventions. As Canada is a member of the ILO and the UN, international labour and human rights are ideals that Canada should strive to fulfil, regardless of whether or not the government finds it prudent to ratify a particular convention.

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[365] Fudge and MacPhail, Flexible Labour, *supra* note 10, p. 6; Yves Poisson and Allan Torobin, "The Right to Organize and Collective Bargaining: Canada and the International Labour Organization Convention 98", (Summer 1999) 2 Workplace Gazette 86.
[366] Santos, *supra* note 96, p. 74.
[367] *Ibid*, p. 78.

5.2 Summary of International Standards applicable to Migrant Workers' employment-related rights

My research into the international labour and human rights standards that apply to migrant workers has led to a finding that there are a number of central principles reiterated in both the ILO and UN instruments. The main standards under international labour and human rights law that apply to migrant workers can be summarized as follows:

- Freedom of association and the right to collective bargaining, including protection against employer interference and mechanism for collective bargaining;
- Right to form and join a trade union;
- Free choice of employment;
- Right to rest and leisure, including reasonable limitation of working hours;
- Right to an adequate standard of living;
- Equal remuneration for work of equal value without distinction;
- Non-discrimination and equality of opportunity and treatment;
- Special attention to and protection of workers when not working in their home country due to their particular vulnerability;
- Social protection of workers must not be reduced by flexibility in labour markets and the corresponding recognition that "labour is not a commodity";
- Decent work for all including just and favourable conditions of work;
- Protection against illegal recruitment practices;
- Adequate services and information for migrant workers;
- Prohibition on unfair employer competition through "social dumping" or the "race to the bottom";
- System of labour inspection, including occupational health and safety;
- Equal protection of the law and equality before the court and tribunals;
- Effective legal remedies;
- Effective protection against violence and threats.

In the discussion that follows, I will first address the ways in which the restrictions on the work permits under the TFWP itself violates these international standards. Then, I will analyse the extent to which labour law and other protective legislation in Canada protects the rights of TFWs in accordance with the international labour and human rights standards. As will be seen, protective legislation in Canada sometimes in itself does not live up to the international standards, and further, this legislation is often not able to address the violations of migrant workers' rights that occur as a result of the conditions imposed by the TFWP.

5.3 Temporary Foreign Worker Program

The most glaring violation of international standards under the TFWP is with respect to the terms and conditions imposed on TFWs by their immigration status and work permit, and the corresponding lack of free choice of employment. While Canada has not ratified the conventions specific to migrant workers, the right to free choice of employment can be found elsewhere. The non-binding UDHR and the binding ICESCR contain the right to free choice of employment, expressed in Art. 6 of the ICESCR as the "right of everyone to the opportunity to gain his living by work which he freely chooses or accepts". This right is to be enjoyed by "everyone", including migrant workers. The CESCR has said that States must refrain from limiting equal access to decent work for all persons, especially disadvantaged and marginalized individuals and groups, such as migrant workers[368]. As Canada has ratified the ICESCR, the starting point is that Canada should strive to provide equal access to decent work to all persons, including migrant workers.

The extent of the right to free choice of employment of migrant workers is more fully detailed in C143, a convention Canada has not ratified. Art. 10 of C143 provides that migrant workers are entitled to "equality of opportunity and treatment in respect of employment and occupation". For the ILO, the implementation of a policy of equality of treatment and opportunity between nationals and migrant workers represents a measure of protection aimed at securing the respect for the dignity of migrant workers, who are recognized to be particularly vulnerable to abuse[369]. When TFWs are restricted to working for one employer in one job, they clearly do not enjoy equality of opportunity and treatment in respect of employment and occupation as compared to nationals. In practice, TFWs are confined to certain jobs, and Canada has a policy of directing TFWs into the least desirable and least well-paid jobs, as evidenced by the specialized SAWP, LCP and LSPP. The ILO has stated that C143 requires positive action by public authorities to promote equality of opportunity in practice. R151, the Migrant Workers Recommendation 1975[370] provides that effective equality of opportunity and treatment includes access to employment of the migrant workers' own choice on the basis of individual suitability for such employment. This suggests that limiting TFWs to certain occupations is not in conformity with C143. As well, the CEACR of the ILO has stated that provisions that require employers to obtain authorizations prior to hiring migrant workers "certainly run counter to the principle of equality of treatment between foreign and national workers"[371]. In Canada, the LMO requirement places a burden on TFWs in obtaining employment that nationals do not

[368] *General Comment No. 18, supra* note 123, para. 23.
[369] General Survey 1999, *supra* note 184, para. 368.
[370] *Recommendation concerning Migrant Workers (No. 151)* (ILC, 60th Sess., Geneva, 1975) ["R151"].
[371] General Survey 1999, *supra* note 184, para. 390.

experience, which is not in accordance with the principle of equality of opportunity.

Art. 14 of C143 sets out the limits on the free choice of employment of migrant workers. Under Art. 14(a) of C143, States may place restrictions on the free choice of employment for migrant workers for a period not exceeding two years, or if the laws or regulations provide for contracts for a fixed term of less than two years, that the worker has completed his first work contract. The CEACR has explained that the intention of this provision was to prohibit legislative provisions that restrict "the freedom of movement of foreign workers legally within the territory, such as those authorising them to reside only in a given region"[372]. The CEACR has recognized that many countries put restrictions on migrant workers that affect the free choice of employment, and that these restrictions may be permitted by Art. 14[373]. The CEACR has stated that Art. 14(a) does not prevent, during the initial period, restrictions on access to employment which may have an indirect effect on geographical mobility[374]. However, restricting the freedom of movement for migrant workers legally within the territory, such as authorizing them to reside only in a given region or prohibiting their entry to certain areas is not in conformity with Art. 14(a)[375]. With respect to employment policies that give preference to nationals over foreigners, the CEACR has said that this situation "would appear to be contrary to the principle of equality as regards access to employment when it exceeds the period allowed by Article 14(a) of the Convention, which is two years"[376].

Under the TFWPs in Canada, TFWs are only permitted to work for one employer, in one occupation. The location of employment, maximum time period of employment are also specified in the work permit, and the geographical areas within which the worker is permitted or prohibited from travelling in certain areas within Canada. If a TFW violates their work permit by working for an employer other than the one specified on the work permit, the worker will be in violation of Canadian immigration law. Under the general TFWP, work permits are issued for a maximum of two years, and under the SAWP up to eight months at a time. During a TFW's initial work permit, these restrictions on the free choice of employment are in line with Art. 14 of C143, with the exception of the restrictions on travelling to certain areas within Canada.

Meanwhile, restrictions placed on TFWs after a period of two years, or after the worker fulfils their first employment contract is not in accordance with Art. 14(a). Under the TFWP, a worker can be issued a further work permit, up to a

[372] *Ibid*, para. 397.
[373] *Ibid*, para. 397.
[374] *Ibid*, para. 397.
[375] *Ibid*, para. 397.
[376] *Ibid*, para. 393.

total of four cumulative years. Under SAWP, workers can be issued further work permits indefinitely, after leaving Canada for a period of four months after the expiry of each work permit. With these subsequent work permits, TFWs continue to work in Canada as "unfree labour", in that they are still only permitted to work in one specified occupation, for one specified employer. This aspect of the TFWP does not comply with Art. 14 of C143.

Should Canada wish to observe the standards set out in C143, despite not yet ratifying this convention, after TFWs have either worked two years or completed their first employment contract, they should enjoy free choice of employment. The only TFWP that complies with this requirement is the LCP. After the worker has completed 24 months of service for one employer, she or he can apply for permanent residence, and immediately upon application their work permit becomes an "open" work permit, allowing them to work for any employer, in any occupation.

With respect to the work permit conditions for workers in the LCP, Canada would not be in compliance with C189 with respect to the requirement of the LCP that workers must live with the employer. C189 provides that domestic workers must be given the option to reach an agreement with their employer on whether to reside in the household. This is despite the Government of Canada's statement at the International Labour Conference in 2011, in which Canada "affirmed that negotiating residence was fundamental to the employment relationship between domestic workers and their employers, which should be negotiated prior to engaging in employment"[377]. The LCP, by not even providing workers and employers with the option of negotiating whether the worker will live in the household, would not be in compliance with C189 should Canada decide to ratify this new convention. The LCP should be altered to at least give workers and the employer the opportunity to reach an agreement about whether or not the worker will live with the employer, to bring Canada in compliance with C189 and, apparently, with Canada's own views of the requirements of C189.

While Canada has not ratified the migrant worker conventions or C189, the restrictions placed on TFWs are still in violation of Canada's legal obligations under international human rights law. The requirement that TFWs work for only one specified employer can lead to abusive conditions of work by employers who might take advantage of the workers' "unfree" and "disposable" labour[378]. Making the right to work "entirely dependent on the will of the

[377] ILO, *Report of the Committee on Domestic Workers* (ILC, 100th Sess., Geneva, 2011), para. 488.

[378] Terms that have been used to describe the work of migrant workers: Fudge and MacPhail, *supra* note 10, p. 8; Sean O'Shea and Brendan Leffer, "Disposable Labour" *Global News* (23 Apr. 2012). Online: http://www.globalnews.ca/disposable+labour/6442626878/story.html (Date of Access: 28 Apr. 2012).

employer creates a profound human security risk"[379] as workers who lose their job may be forced to work in even more precarious work in the informal sector, and in violation of their work permit. When a migrant worker loses his or her job and therefore their legal immigration status, they become even more vulnerable. These effects of the restrictions placed on migrant workers appear to be in violation of Art. 6 of the ICESCR, a convention Canada has ratified, which provides for the right of everyone to the opportunity to gain his living by work which he freely chooses, and which must be decent work.

5.3 Freedom of Association

Freedom of association and the right to collective bargaining includes, for instance, the right to form and join a trade union, the right to mechanisms for collective bargaining, and protection against employer interference. While Canada has ratified C87 but not C98, the right to freedom of association under C87 has been interpreted broadly by the ILO and places significant obligations on Canada. The major problem for TFWs in Canada with respect to enjoying freedom of association is that industries in which TFWs are disproportionately represented, agricultural work and domestic work, are often excluded from the labour relations regime applicable to other workers. In Ontario, agricultural employers are not required to make a reasonable effort to conclude a collective agreement with employees' associations, or to respond to demands made by employees' associations. Meanwhile, domestic workers in Ontario are totally excluded from labour law protections, including from the right to form and join a trade union.

The CFA has found that the absence of machinery for the promotion of collective bargaining for agricultural workers in Ontario constitutes an impediment to freedom of association[380]. In 2005 and again in 2007, the CEACR noted the need to amend the legislation with a view to guaranteeing the full application of C87 in relation to the effective right to association in the agriculture industry[381]. In 2009, the CEACR urged the government to take all necessary measures to amend the legislation "so as to fully guarantee the right of agricultural workers to organize freely"[382]. In 2010, the CFA considered a complaint with respect to the AEPA and stated that it continued to consider that "the absence of any machinery for the promotion of collective bargaining of

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[379] Khan, *supra* note 26, p. 38.
[380] Canada (Case No. 1900), *supra* note 149, para. 182.
[381] ILO, *Report of the CEACR: Individual Observation concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) Canada (ratification: 1972),* (CEACR, 76th Sess., Geneva, 2005); ILO, *Report of the CEACR: Individual Observation concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) Canada (ratification: 1972)* (CEACR, 78th Sess., Geneva, 2007).
[382] ILO, *Report of the CEACR: Individual Observation concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) Canada (ratification: 1972),* (CEACR, 80th Sess., Geneva, 2009), p. 2.

agricultural workers constitutes an impediment to one of the principal objectives of the guarantee of freedom of association: the forming of independent organizations capable of concluding collective agreements"[383]. The CFA requested that the government of Ontario put in place machinery and procedures for the promotion of collective bargaining in the agricultural sector.

Despite these repeated findings by the ILO supervisory bodies, the government of Ontario has still not amended the AEPA to provide the right of collective bargaining to agricultural workers. While the SCC has found in *Fraser, supra* that Ontario's AEPA does not violate the *Charter,* it is clear that the AEPA does not live up to international standards on freedom of association. In 2012, the CEACR acknowledged the SCC's decision to uphold the AEPA, but the CEACR "nevertheless notes with ***regret*** that the Government of Ontario is not considering any amendments to the AEPA aimed at ensuring sufficient guarantees for the full exercise of freedom of association rights by agricultural workers…"[384]. The CEACR once again urged Ontario to take all necessary measures to amend its legislation so as to fully guarantee the right of agricultural workers to organize freely and to benefit from the protection of C87[385].

C87 requires that all workers, without distinction, should have the right to establish and join organizations of their choosing. C87 requires States to take all necessary and appropriate measures to ensure that workers may exercise freely the right to organize. The CFA has explicitly stated that domestic workers are not excluded from the application of C87 and should therefore have the right to establish and join occupational organizations[386]. C11, which has not been ratified by Canada, requires State to secure to all those engaged in agriculture the same rights of association and as to industrial workers. C189 requires ratifying States to take measures in relation to domestic workers, ensuring respect for freedom of association and the right to collective bargaining. The Committee on Migrant Workers has stated that the exclusion of domestic workers from labour law contributes to exploitative labour practices, and limits avenues for legal redress when violations occur[387]. The CEDAW Committee has also stated that countries of destination must provide legal protection for the rights of women migrant workers, including by ensuring that labour codes apply to women migrant workers and the occupations in which

[383] CFA Report, "Canada (Case No. 2704)" in *Report No. 358* (International Labour Office, Geneva, 2010), para. 361.
[384] ILO, *Report of the CEACR: Individual Observation concerning Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) Canada (ratification: 1972),* (CEACR, 101st Sess., Geneva, 2012).
[385] *Ibid.*
[386] Digest of Decisions, *supra* note 136, para. 267.
[387] Committee on Migrant Workers, *General comment no. 1 migrant domestic workers,* UN doc. CMW/C/GC/1 (2011), ["General Comment No. 1"], para. 18.

they predominate, such as domestic work. These standards are clearly not complied with in some jurisdictions in Canada, such as Ontario.

Another issue with respect to access to collective bargaining for TFWs is when certifying an appropriate unit of employees for bargaining, the special situation of TFWs as compared to Canadian nationals, sometimes needs to be taken into account to ensure that TFWs have access to collective bargaining in practice. In the case of *Sidhu & Sons*, the BCLRB initially did not accord much weight to the differing circumstances under which TFWs and Canadian nationals must live and work. Eventually, the BCLRB did recognize the "exceptional vulnerability" of these workers, and the importance of providing them with access to collective bargaining to achieve dignity and respect in their work.

As well, where domestic workers are formally included in labour law, the Committee on Migrant Workers has recognized that there is often a gap between protections enjoyed by such workers in law and in practice[388]. This is due to the practical obstacles relating to the "hidden" and isolated nature of domestic work taking place in private homes, making organizing and accessing labour rights difficult. The Committee on Migrant Workers has stated that the right to organize and engage in collective bargaining is essential for migrant domestic workers to express their needs and defend their rights, in particular through trade unions and labour organizations[389]. The Committee on Migrant Workers recommended that labour protections be extended to domestic workers, including the right to form and join an organization, and self-organization should be encouraged[390].

It has also been seen that employers have sometimes interfered with the rights of TFWs to trade union representation. Because TFWs often live on the property of their employer, they are more vulnerable to employer interference with their labour rights than local workers. Canadian labour legislation contains provisions against unfair labour practices, and there have been some cases in which unions have made successful claims against employers who have interfered with the rights of TFWs. These unfair labour practice provisions should be strengthened to recognize the particular situations of TFWs that allow employers to such much more easily interfere. For instance, where workers live on the employers' property, there could be greater protections written into legislation stating that during non-working hours, employers must not restrict the comings and goings of trade union representative to the workers' residences.

The international labour and human rights standards recognize the particular vulnerability of migrant workers and importance of protecting the interest of

[388] *Ibid*, para. 25-26.
[389] *Ibid*, para. 45.
[390] *Ibid*, para. 38 and 46.

workers when employed in countries other than their own. The *Declaration on Fundamental Principles* recognizes migrant workers as persons with special social needs, who should be given special attention[391]. This Declaration encourages national efforts aimed at resolving the problems of migrant workers and other social groups with special needs. The ILO has also said that "one of the most effective ways of preventing the exploitation of migrant workers is by giving them the right to join a trade union"[392]. The Special Rapporteur on the Human Rights of Migrants has also stated that trade unions have a major role to play in advocating for the rights of migrant workers and eliminating discrimination through information drives, and reporting violations of migrant workers' rights[393]. Further, the ILO standards require that agricultural workers and domestic workers enjoy freedom of association and effective recognition of the right to collective bargaining[394]. Therefore, international law requires that migrant workers be provided with access to trade union representation and collective bargaining. By excluding occupations in which migrant workers predominate, such as agricultural work and domestic work, from the full range of labour law protections, Canada does not fulfil these principles of freedom of association with respect to migrant workers.

Protection of freedom of association on an equal basis with Canadian nationals is essential to the rights of TFWs, as freedom of association impacts a worker's ability to assert other rights at work. Recognizing that TFWs should have access to collective bargaining on equal basis with Canadian nationals sometimes may mean taking into account the differing circumstances of TFWs and Canadian nationals. The short-term nature of their work permit, and dependence on the employer to a degree that Canadian nationals are not, means that sometimes it will be appropriate for TFWs to form their own bargaining unit, if they would otherwise be denied access to collective bargaining. This is not to say that TFWs should be always be in separate bargaining units from Canadians. That of course could perpetuate the distinctions and discrimination between TFWs and Canadian nationals. Where both Canadian nationals and TFWs work in the same location and perform the same duties, equality of migrant workers would be enhanced if they are covered by the same collective agreement terms and conditions as Canadian nationals. However, where Canadian nationals choose not to be represented by a trade union, the differing circumstances of TFWs should be taken into account to ensure that they still have access to collective bargaining, recognizing that they may have different interests than the Canadian nationals, due to their work temporary work permit and immigration status.

[391] *Declaration on Fundamental Principles, supra* note 103, preamble.
[392] *International Labour Migration, supra* note 23, p. 174.
[393] Special Rapporteur 2004, *supra* note 22, para. 31.
[394] C11, Art. 1; C189, Art. 3(2).

In the end, labour law and tribunals should be cognizant of the particular vulnerability of TFWs. In each particular case, the differing employment situation that is imposed on TFWs by virtue of their work permit and immigration status, should be kept in mind when answering the question of how to improve access to collective bargaining of TFWs. Sometimes this will mean a bargaining unit with Canadian nationals that they work alongside, performing the same work, and sometimes this will mean that a bargaining unit of TFWs alone is appropriate, if Canadian nationals have determined trade union representation is not in their own interests at that particular moment in time.

5.4 Employment Standards

As with labour law, occupations in which migrant workers predominate in Canada are sometimes excluded from minimum employment standards, or are accorded different, lower standards. The ILO has noted that temporary agricultural workers in Canada are exempted for certain labour protections, such as the freedom to change jobs and overtime pay[395]. Under the international standards, such as C143, migrant workers should enjoy treatment not less favourable than that which applies to nationals in respect of other terms and conditions of work. The ILO has stated there is an obligation on States to promote equality of opportunity and treatment in practice. Thus, when migrant workers predominate in certain occupations, equality of treatment requires that those occupations be accorded the same minimum standards as other occupations.

C189 recognizes that domestic work continues to be undervalued and requires Member States to take measures towards ensuring equal treatment between domestic workers and workers generally in relation to hours of work and overtime[396]. The Government of Canada, as part of the group of industrialized market economy countries, has recognized at the International Labour Conference that domestic workers are particularly vulnerable to abuse and often lack legal protections[397]. This group supported the aims and principles of C189, but stressed that States should be allowed "flexibility" in meeting the objectives[398]. The Government of Canada also found C189 to be overly detailed and prescriptive, and raised concerns about privacy issues[399]. In both Ontario and B.C., residential care workers are excluded from hours of work and overtime provisions of the applicable employment standards legislation. On the other hand, in both Ontario and B.C. there are special protections for domestic workers. The EPFNA of Ontario applies primarily to live-in caregivers, and prohibits recruiters and employers from recovering certain costs from the

[395] *Multilateral Framework, supra* note148, p. 53.
[396] C189, Art. 10.
[397] ILO, *Report of the Committee on Domestic Workers* (International Labour Conference, 100th Sess., Geneva, 2011), para. 16.
[398] *Ibid*, para. 16.
[399] *Ibid*, para. 34.

worker. The B.C. ESA requires employers to provide domestic workers with a written employment contract, and where the worker lives in the residence of the employer, certain information about the employment, as well as setting out a maximum amount for room and board that an employer may charge a domestic worker. These provisions go some way to complying with the protections for domestic workers required by C189.

International labour and human rights standards require ratifying States to provide protection from abusive and illegal practices by recruitment agencies. This is seen in C97, C143, CMW and C189. C97 requires States to take steps against "misleading propaganda" relating to immigration. C143 requires States to take action against the organizers of illicit or clandestine movements of migrant for employment. The CMW requires States to take appropriate measures against the dissemination of misleading information relating to immigration, and measures to impose effective sanctions on persons who use intimidation, violence or threats against migrant workers in an irregular situation. C189 requires States to provide domestic workers with protection against abusive and fraudulent practices by recruitment agencies. C189 also requires States to ensure that adequate machinery and procedures exist for the investigation of complaints, and to ensure that fees charged by private employment agencies are not deducted from the remuneration of domestic workers. As was seen in Chapter 4, B.C. and Ontario both regulate the activities of employment and recruitment agencies. The legislation in these provinces seem to be in compliance with the provision of C189 that states fees charged by private employment agencies are not to be deducted from the remuneration of domestic workers.

The main recommendation here with respect to recruitment agencies is that Ontario expand its legislation to include protections for all migrant workers against abusive practices by recruitment agencies. As well, C97 requires States to take steps against "misleading propaganda" relating to immigration, and so Canada should regulate immigration agencies as well. Immigration consultants are currently self-regulated and there is no legislation providing for ethical standards or licensing of immigration consultants. One initiative taken in Canada is that only lawyers, paralegals and immigration consultants registered with the Immigration Consultants of Canada Regulatory Council may charge fees for assisting with immigration applications. This does not go far enough to ensure that immigration consultants do not engage in exploitative practices. Note that the initiatives taken to regulate employment and recruitment agencies are within the jurisdiction of provincial governments in Canada. Meanwhile, immigration is the domain of the federal government, which may explain why immigration consultants have not been regulated by legislation as of yet.

5.5 Discrimination

Canada has ratified many of the conventions containing the right to non-discrimination, including C111, CEDAW, and CERD. The international standards on discrimination prohibit distinctions on various enumerated grounds, which include race, colour, descent, sex, religion, political opinion, national extraction or social origin. Further, these standards provide for the right of equality of opportunity and treatment in employment in occupation. However, the international standards discussed do not prohibit States from making some distinctions between citizens and non-nationals. The ILO has stated that the term "national extraction" does not refer to distinctions between citizens of different countries, but between citizens of the same country on the basis of the person's place of birth, ancestry or foreign origin. Despite this, the ILO has also stated that while States have the sovereign right to maintain temporary restrictions on the basis of nationality, when restrictions of migrant workers go beyond what is necessary and serve no discernible, legitimate purpose, they are discriminatory[400].

The prohibitions in CERD also do not prohibit States from making distinctions between citizens and non-nationals for some purposes. The CERD Committee has cautioned that while some distinctions are permitted, States do have an obligation not to accord differential treatment based on citizenship or immigration unless a legitimate aim exists, and the differential treatment is proportionate to that aim. With respect to working conditions, the CERD Committee has stated that State Parties should eliminate discriminate against non-citizens. The CMW stipulates that migrant workers shall enjoy treatment not less favourable than that which applied to nationals of the State of employment in respect of remuneration and other conditions of work, such as overtime and hours of work.

As well, discrimination against migrant workers may violate C111 where it can be established that the race, colour, religion, or social origin of the migrant worker differs from that of nationals in a particular situation, and that the migrant worker was treated differently because of their race, colour, religion, or social origin, rather than their immigration status. The ILO has recognized the link between nationality and racial discrimination, stating recently that it is "indeed difficult in many circumstances to determine whether discriminatory treatment faced by a migrant worker is exclusively based on his or her nationality or perceived nationality status, on racial, ethnic, religious or other visible grounds, or a combination of these factors"[401]. In Canada as well, it has been recognized that race and national or ethnic origin are concepts closely related to nationality and citizenship. The SCC has stated that "Discrimination

[400] *International Labour Migration, supra* note 23, p. 80-81.
[401] ILO, "Equality at Work: The continuing challenge" (International Labour Conference, 100th Sess., Geneva, 2011), p. 34.

on the basis of nationality has from early times been an inseparable companion of discrimination on the basis of race and national or ethnic origin"[402].

In Canada, human rights legislation prohibits discrimination on the basis of race, colour, ancestry, place of origin, religion, sex and other grounds (including "citizenship" in Ontario). There have been just a few cases involving discrimination against migrant workers in their employment on one or more of the above grounds. In the *SELI* case before the BCHRT, the tribunal was satisfied that Latin American migrant workers had been discriminated against on the basis of their race, colour, ancestry and place of origin when they were provided with inferior salaries, accommodation, and meal and expense arrangements, as compared to the European migrant workers. The BCHRT found that the grounds of race, colour, ancestry and place of origin may be combined to define, in a comprehensive way, ethnic identity as a basis of discrimination, in an attempt to "get at certain complex discriminatory conduct"[403]. The ILO has pointed out that "racial prejudice is largely rooted in social and economic factors, a value judgment without any objective basis and cultural in origin"[404]. This prejudice was an element in the SELI case, recognized by the BCHRT when it stated that SELI's international compensation practices was to take advantage of the existing disadvantaged position of workers from poorer countries, and to perpetuate that disadvantage.

These underlying prejudices about race and gender based on social and economic factors are also at the heart of the claim in the *Presteve Foods* case before the HRTO. There, a claim was brought on behalf of migrant workers of this employer, alleging they were discriminated on the basis of race, colour, ancestry, place of origin, citizenship, ethnic origin, and sex, as compared to the Canadian workers. This case has not yet been decided, but in making a determination on whether there was discrimination on one or more of the above grounds, the HRTO has found that evidence of the social context and the types of exploitation experienced by migrant workers will be relevant.

Canadian human rights legislation is significant to Canada's obligations under C111 and CERD, instruments that Canada has ratified. In particular, if the SELI and Presteve Foods claims of discrimination are ultimately successful, this will go some to demonstrating that migrant workers in Canada can effectively access the legal protections against discrimination on the basis of race, sex, social origin and other grounds, as required by the international standards.

Even though international and Canadian law prohibits discrimination on the basis of race, social origin and other grounds, this does not prohibit the Canadian government from placing some restrictions on workers because of

[402] *Andrews v. Law Society of British Columbia,* [1989] 1 S.C.R. 143, para. 68.
[403] *SELI* BCHRT, *supra* note 21, para. 237.
[404] General Survey 1996, *supra* note154, para. 31.

their citizenship. As discussed, C143 and the CMW allow restrictions on the free choice of employment of migrant workers for an initial period of time. This brings us to the central problem with the TFWP: the distinctions that are made on the basis of citizenship, while not itself prohibited by international or Canadian law, in practice allow discrimination to occur that is prohibited by international labour and human rights standards, and in some cases by Canadian law. The restrictions placed on TFWs in their work permit, and the accompanying differential treatment and exploitation that these restrictions allow to take place, are at least in part grounded in racial stereotypes and discrimination. Such discrimination is prohibited by international and Canadian law, and yet there is not sufficient recognition in the law that these restrictions in the work permits themselves perpetuate the problem of racial discrimination against migrant workers. As stated elsewhere, "The principle of non-discrimination per se does little to help migrant workers who work in sectors of the host state that are exempted from labour standards and rights"[405]. The right of non-discrimination, and other rights "may be of little value to the temporary foreign worker who is in the unique employment situation of needing a work permit that has legal restrictions"[406]. Anti-discrimination laws are very limited in protecting migrant workers from the exploitation and abuse that is able to occur in their employment due to their immigration status.

5.6 Labour inspection including Health and Safety

The ILO conventions require States to provide a system of labour inspection, including inspection of the agricultural industry and domestic work. Canada has not ratified a number of these conventions, but did ratify C187 on the promotional framework for occupational safety and health, in June 2011. This Convention provides for a right of workers to a safe and healthy working environment, and obliges States to develop a national policy on occupational safety and health, including provisions for ensuring compliance and systems of inspection. The ILO *Multilateral Framework* provides that labour inspection should be extended to all workplaces where migrant workers are employed, and that staff are adequately trained in addressing migrant workers' rights[407]. Canada has also ratified CEDAW, and the CEDAW Committee has said that laws should include mechanisms for monitoring workplace conditions of migrant women, especially in the kinds of jobs where they dominate, such as domestic work[408].

States may actually be required to take additional inspection and enforcement measures in certain workplaces where migrant workers predominate. The

[405] Judy Fudge, "The Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers" (Metropolis British Columbia, 2011), p. 43.
[406] Nakache and Kinoshita, *supra* note 13, p. 8.
[407] *Multilateral Framework*, *supra* note 148, p. 19.
[408] General Recommendation No. 26, *supra* note 179, para. 13.

Special Rapporteur on the Human Rights of Migrants has recognized that with respect to temporary agricultural workers, the Government of Canada must take steps to prevent these workers from being abused by employers. She recommended that more emphasis needs to be placed on giving dignity to this type of work, and making it easier for migrant agricultural workers to report abuses and prevent employers from coercing employees to not make complaints[409]. In accordance with C189, labour inspection of domestic workplaces should be tailored keeping in mind the special characteristics of domestic work[410].

In Canada, labour inspection with respect to the special situation of migrant workers is not sufficient. In B.C., WorkSafeBC does not regulate the agricultural industry, leaving these workers with little mechanisms to enforce their rights under occupational health and safety. A recent study found that 70% of Mexican migrant farmworkers in B.C. do not receive any information about workplace health and safety[411]. In B.C., inspection of the living conditions of workers under SAWP is not conducted by the government, but by a private company[412]. In Ontario, another study conducted on the health of migrant workers in Canada, it was found that migrant workers face barriers in accessing Ontario's Workplace Safety and Insurance Board. It was reported that among those workers interviewed who had work-related accidents, 76% reported not receiving compensation, and 93% of respondents said they did not know how to file a WSIB claim[413]. As well, many migrant workers were returned to their country of origin before their claims could be filed or processed. In the case of Presteve Foods, the living conditions of the TFWs were in violation of fire codes, and the WSIB only investigated after the Union called the agency about these conditions. Eventually, the Ministry of Labour made 50 orders with respect to defects in Presteve's equipment and buildings[414]. In both B.C. and Ontario, TFWs are often unaware of their health and safety rights, and as it often up to them or their representatives to report unsafe conditions, labour inspection of workplaces in which TFWs are found is often inadequate under international labour law.

5.7 Procedural Rights

The main procedural rights migrant workers must enjoy in order to have effective access to legal protections relating to work include equal protection of

[409] UN Economic and Social Council, Commission on Human Rights, *Report prepared by Ms. Gabriela Rodriguez Pizarro, Special Rapporteur on the human rights of migrants*, UN Doc. E/CN.4/2001/83/Add.1 (2000) ["Special Rapporteur 2000"], para. 81.
[410] C189, Art. 17(2).
[411] Otero and Preisbich, *supra* note 343, p. 5.
[412] Tomic, Trumper, and Aguiar, "Housing regulations and living conditions of Mexican migrant workers in the Okanagan Valley, B.C." *Canadian Issues* (Spring 2010), p. 80.
[413] Hennebry, *supra* note 348, p. 76.
[414] Ministry investigates Presteve, *supra* note 14.

the law, effective legal remedies, effective protection against violence and threats, availability of legal assistance, and adequate services and information.

Art. 42 of the CMW requires States to at least consider establishing procedures or institutions through which the special needs, aspirations and obligations of migrant workers will be accounted for, and the possibility of having migrant workers to have their chosen representatives in those institutions. Art. 12 of C143 requires Members to formulate a social policy that takes account of "such special needs" migrant workers may have until they are adapted to the society of the country of employment. This includes providing education and other activities aimed at familiarizing migrant workers with their rights and obligations, and effective assistance in the exercise of their rights and for their protections. CERD also requires measures such as teaching and education to be taken, to combat racial discrimination. Further, the ILO *Multilateral Framework* encourages States to provide information on their human rights and obligations, effective enforcement mechanisms, effective remedies and sanctions for those responsible for violating migrant workers' rights, and offering legal services to migrant workers involved in legal proceedings related to employment.

The particular vulnerability of migrant workers in their work means that States must take measures to ensure that migrant workers are protected from threats, intimidation, and violence. Art. 16 of the CMW provides that "Migrant workers and members of their families shall be entitled to effective protection by the State against violence, physical injury, threats and intimidation, whether by public officials or by private individuals, groups or institutions". C189 also requires States to provide effective protection against all forms of abuse, harassment and violence. C189 requires States to ensure effective and accessible complaint mechanisms are in place. R201 encourages State to consider measures to protect domestic workers from abuse, harassment and violence, such as establishing a hotline with interpretation services, developing emergency housing, and providing public outreach to inform domestic workers in languages they understand of their rights. The Committee on Migrant Workers has stated that migrant domestic workers should have access to temporary shelters when needed due to abusive employment conditions[415]. The CEDAW Committee has said that States must ensure that women migrant workers have the ability to access remedies, and this might require the provision of free legal aid and temporary shelters.

A chilling example of a failure in Canada to take account of the particular vulnerability of migrant women workers in legal proceedings once again involves Presteve Foods and its owner, José Pratas. Mr. Pratas was charged with 23 criminal charges of sexual assault and five counts of common assault,

[415] Committee on Migrant Workers, *Report of the Day of General Discussion on Migrant Domestic Workers*, U.N. doc. CMW/C/11/CRP.3 (11th Sess. Oct. 2009), para. 50.

all involving women TFWs employed at Presteve Foods. In March 2010, Mr. Pratas entered a guilty plea to one count of assault, which incorporated all of the complaint. The one count of assault related to seven women in the TFW. At the sentencing hearing, counsel for Mr. Pratas argued that the allegations were "almost de minimis in nature" and that this was really about "a labour dispute that became criminalized"[416]. The Crown argued that the resolution of the case "recognizes that victims were vulnerable and it validates their complaints that they were taken advantage of by a person, their boss who was in a position of trust"[417]. The judge noted that Mr. Pratas had already been charged and received an absolute discharge in an earlier assault case, which was against one of the same women. In sentencing, the judge condemned the touching of persons in his employ, without their consent, and was "mindful of the impact that this might have on employees who may feel that they are not in a position of power with respect to the contact from their employer and who would feel victimized by it". The judge stated that ordinarily, given the position of trust Mr. Pratas occupied as an employer, this kind of conduct might have attracted a jail sentence[418]. However, taking into account the jail time already spent by Mr. Pratas, the judge granted Mr. Pratas a conditional discharge, placing him on probation for only three months[419]. In sentencing, while the judge purported to take into account the position of power Mr. Pratas had over the victims as an employer, perhaps the sentence would have been longer if the judge would have actually considered the particular vulnerability of the women, as TFWs, and the position of power Mr. Pratas had over them not just as employees, but additionally because of their immigration status.

The protection of legal rights can also be hampered by a failure to make information available in a language that migrant workers understands. The HRC has said that the right of "equality of arms" in legal proceedings may require the provision of free interpretation assistance[420]. States such as Canada should also provide free language training, translations of legal information, or interpreter services in legal proceedings to fulfil the State's obligation to ensure equality of arms of migrant workers. The Special Rapporteur has recommended for Canada a well-targeted information campaign on the rights of domestic workers, emphasizing that the work is decent and decently acquired, and specifying workers' rights, since workers are often kept in ignorance of their work contracts and rights[421].

When migrant workers do become involved with the justice system, States may be required to provide free legal aid. The HRC has encouraged States to provide legal aid in proceedings other than just criminal law proceedings, to

[416] Pratas Proceedings, *supra* note 25, p. 9.
[417] *Ibid,* p. 17.
[418] *Ibid,* p. 22.
[419] *Ibid,* p. 24.
[420] General Comment No. 32, *supra* note 116, para. 13.
[421] Special Rapporteur 2000, *supra* note 409, para. 80.

ensure that everyone can access legal proceedings in a meaningful way, in accordance with the principle of equal protection of the law[422]. The CEDAW Committee has emphasised the need to provide legal aid to migrant women[423]. For migrant workers, legal aid in employment-related cases may be necessary, because their employment-related claims could ultimately affect their immigration status. For migrant workers, unlike nationals, a small dispute at work could eventually result in the migrant worker losing their immigration status and being required to leave the country. Because disputes at work have graver consequences for migrants than for nationals, legal aid may be necessary for migrant workers in these claims, even if the State does not provide for legal aid to nationals who have work-related disputes.

States may also be obligated to provide services designed specifically for migrant women. For example, in Canada, the resources and services developed to ensure acceptable living and working conditions for the temporary labour force often does not address women's needs[424]. In rural areas there are fewer places for women to come together than men to discuss their work and their lives generally[425]. When women migrant workers experience violence at the hands of their employer, victim services should be provided by the State. These services must be gender-sensitive, culturally appropriate, and provided in a language the woman understands[426]. The CEDAW Committee has said that temporary shelters should be provided for women who need to leave an abusive employer[427]. When women are required to testify against violent employers, counselling and other support services should be provided.

As discussed above, in some jurisdictions in Canada free legal assistance is very limited. In B.C., only very limited immigration matters are covered by legal aid. In a study of the adequacy of legal aid in the province of B.C., it was recognized that the lack of legal aid has a particular impact on TFWs. Meanwhile, in Ontario free legal assistance is available to those who qualify for employment and human rights matters. Canadian jurisdictions, and in particular, B.C., need to provide more legal and information resources to migrant workers so they can access the justice system and escape exploitative or violent conditions. This includes providing free legal representation in employment-related claims and a wider range of immigration matters; translation services; shelters for migrant women workers in particular who are fleeing violence; and counselling for workers who have been abused or exploited. There needs to be recognition that because of their vulnerable situation, the State may need to actually provide more of these services to

[422] General Comment No. 32, *supra* note 116, para. 8.
[423] General Recommendation No. 26, *supra* note 179, para. 26.
[424] Encalada Grez, *supra* note 23, p. 6.
[425] *Ibid,* p. 6.
[426] General recommendation No. 26, *supra* note 179, para. 26.
[427] *Ibid,* para. 26.

TFWs than to citizens or permanent residents, who are in a more secure situation in employment and immigration status.

When Canada admits migrant workers on a temporary basis only, it must take special and extra steps to ensure these workers have effective protection of the law and access to effective legal remedies. However, the temporary status of TFWs itself is an impediment to accessing justice that cannot be fully remedied without significant changes to Canada's immigration laws.

6. Conclusions

This thesis commenced with a discussion on the history of immigration in Canada, and the driving forces behind immigration. We have seen that there has been a shift from permanent settlement, to filling short-term labour demands of employers. Next, the TFWP in Canada was explained, including the restrictions placed on TFWs by this regime. In Chapter 3, the international labour and human rights of migrants workers were described. Chapter 4 particularized the workplace rights that exist for TFWs in Canada, and examined the extent to which these workers are excluded from some legal protections. The barriers of TFWs in accessing the workplace rights were also discussed. In Chapter 5, the extent to which the rights of TFWs in Canada are in accordance with international labour and human rights standards was analyzed. To summarize, the main problems with the TFWP and workplace legal protections in Canada, in terms of complying with the international labour and human rights standards of migrant workers include:

- The requirement that TFWs work for only a single employer, in one occupation even after the TFW has completed their first contract or two years of employment;
- The LMO requirement also restricts the free choice of employment of TFWs and the principle of equality of opportunity;
- The requirement of the LCP that participants must live with their employer;
- Agricultural and domestic work, jobs in which migrant workers predominate, are excluded from labour law and employment standards protections in some jurisdictions;
- Inadequate labour inspection, particularly for agricultural and domestic workers; and
- Inadequate legal aid and legal information and other services to enable migrant workers to pursue work-related legal claims.

It has been seen that while TFWs in Canada are not expressly excluded from workplace laws, their particular situation of vulnerability is not always taken into account, and this can lead to a denial of access to justice for TFWs. Labour relations codes, employment standards, and even human rights legislation in Canada were not designed to taken into account the special situation of TFWs. Therefore it is really no surprise that adjudicators have not been overly cognizant of the particular vulnerability of TFWs. However, it has been seen that this may be changing. Despite the absence of specific mention of TFWs in employment-related legislation, labour and human rights adjudicators are starting to recognize that the precarious status of TFWs should be taken into account when applying the relevant legislation. This was seen in the *Sidhu & Sons* certification decision, the *SELI* BCHRT case, the HRTO decision in

Presteve Foods granting intervenor status to J4MW, and in the certification of the class action in the Denny's case. Whether these are isolated decisions or part of a trend towards taking greater account of the precarious status of TFWs in the application of employment-related legislation, remains to be seen. Cases to watch in this regard are the judicial review in the *SELI* case, the merits of the Denny's case, and the HRTO proceedings on the merits in *Presteve Foods.*

Workplace legislation alone is not capable of remedying the situation of abuse and exploitation of TFWs that occurs as immigration law places TFWs in a different situation with lesser employment opportunities than that available to citizens and PRs. It has been seen that even in the case of *Presteve Foods*, where TFWs are represented by a union and have access to collective bargaining and enjoy the same wages and rights as the Canadians also working for that employer, the immigration status of the TFWs allowed the employer to exploit these workers. Further, the temporary status of TFWs means that they may not be in Canada when their legal claims are finally resolved. In the *SELI* case, the TFWs have all left the country and the judicial review is still pending. As well, in the *Dominguez* case against Denny's, already the representative plaintiff, Ms. Dominguez, left Canada after the expiry of her work permit. In the *Presteve Foods* case, many of the complainants have either left Canada, or are working in an irregular situation in Canada. These workers must notify the HRTO that they wish to be part of the complaint. Therefore, even when rights such as freedom of association, employment standards, and anti-discrimination law are in place with respect to TFWs, these laws cannot defend TFWs from an immigration program that is inherently exploitative.

Therefore, the primary recommendation is to eliminate the TFWP, and admit foreign workers on a less restricted, more permanent basis. This would go the furthest in fulfilling the right of migrant workers to equality of opportunity and treatment in employment, and preventing the violation of workplace rights that exist for TFWs. The Standing Committee on Citizenship and Immigration of the Parliament of Canada has recommended that the government create a path to permanent residency for all TFWs, modelled on the LCP[428]. However, international law does not prohibit States from granting only temporary immigration status to foreigners, and placing some restrictions on these workers. Therefore, at the very least, migrant workers should not be tied to a single employer. The Standing Committee on Citizenship and Immigration has recommended that work permits be made sector and province specific, rather than employer specific[429]. In order to comply with C143 and the CMW, migrant workers should at least have free choice of employment after two years or after completing their first contract, without the need for an LMO or the restriction of working for only one employer or in one occupation.

[428] Report of the Standing Committee, *supra* note 13, p. 56
[429] *Ibid*, p. 58.

Other recommendations include giving domestic workers participating in the LCP at least the option to come to an agreement with their employer about whether or not to reside with the employer, in order to comply with C189. As well, domestic and agricultural workers must be included in labour law and employment standards protections and additional labour inspection conducted in these areas of work. The Standing Committee on Citizenship and Immigration has recommended that the government conduct unannounced spot checks on working and housing conditions in workplaces with migrant workers[430]. Further, if Canada is going to continue to confer only temporary status to migrant workers, the vulnerability and precariousness this status places on migrant workers should be recognized and addressed. This involves taking extra and special steps to protect the rights of migrant workers, including effective protection against unscrupulous recruitment and immigration agencies, the provision of legal aid and information in a language that the migrant workers understands, and shelters and emergency housing for migrant women in particular escaping situations of violence. Importantly, adjudicators should be alive to the particular vulnerability and precarious situation of migrant workers when exercising their decision making functions.

The international human rights and labour standards discussed in this thesis do not prohibit a State from admitting foreign workers into the State on a temporary basis only, with some limited restrictions on the free choice of employment. However, when States do confer only temporary status with restrictions on migrant workers, it has been seen that international labour and human rights standards requires States to take extra and special steps to ensure the interests of migrant workers are protected at work. While Canada should take steps to ensure migrant workers have greater equality of opportunity with Canadians, international law does not require that Canada eliminate the TFWP. In the end, this is problematic as the temporary immigration status of TFWs leaves them open to exploitation by employers. At the very least, the international standards discussed here would require Canada to make significant changes to the TFWP and to workplace laws in order to fulfil the international labour and human rights of migrant workers. However, to this point, Canada has placed the short-term economic interests of employers in priority to the labour and human rights of migrant workers.

[430] *Ibid,* p. 60.

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