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No or conditional access to permanent status: Infringement on the Rule of Law/ (im)migrant workers' right to access justice

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Abstract

Canada's immigration policy negates or restricts access to permanent status for a portion of (im)migrant workers admitted in the country. This was not always the case. The nationalization of employer reprisals on immigrant workers and of its enormous cost, disproportionately affecting non-white workers, was at the beginning in 1906, and still today, highly controversial. Contemporary examples and historical iterations of state restrictions on permanent status illustrate how they infringe on workers' right to access justice in the country and, therefore, on the integrity of Rule of law - and structure of democracy. In order to be compatible with Canada's constitutional protections, worker admission schemes should be associated with automatic permanent status recognition upon arrival, in tandem - to ensure viability in the long term - with other key circular migration/return migration/onward migration incentives, such as permanent status renunciation procedures, unemployment benefits, workers' compensation and pension benefits accessible from abroad. While 'serious criminality' may constitute a justified reason to deny permanent status and infringe on access to justice under courts' scrutiny, revoking a worker's legal status or deporting her because of a work accident, a lack of employer approval, a low level of earnings, a deadline incompatible with her capacity because of said precarious legal status, a limited language proficiency, an illness or any other arbitrary reason, on the other hand, might not.

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"We wanted workers, but we got human beings instead."
Max Frisch (1983)[1]

The Canadian jurisprudence establishes that (1) the constitution implicitly protects individuals' right to access justice in the country and, in parallel, the courts' jurisdiction and the Rule of Law. However, (2) policies denying or restricting access to permanent legal status for (im)migrant workers uniquely interfere with these constitutional protections, as well as with Canada's democratic structure. In this context, (3) to be compatible with the Canadian constitution, all foreign worker admission programs would need to constitute the first two-steps of immigration schemes, which are characterized first by recognition of automatic permanent legal status upon arrival. Secondly, to ensure its viability on the long term, such permanent status policy would need to be complemented, not only with the current path to citizenship, but also with circular migration/voluntary return incentives other than the fast-track permanent status renunciation procedure – starting with unemployment benefits, workers' compensation, and pension benefits accessible from abroad.

1. The constitutional right to access justice and protection of courts' jurisdiction

The Supreme Court of Canada (SCC) has acknowledged on various occasions that individuals' Charter rights imply a right to a meaningful access to the country's court system. At the same time, the SCC jurisprudence confirmed that the courts' jurisdiction and integrity of the Rule of law are in fact threatened, when a state policy restricts individuals' capacity to access justice.

[1] Max Frisch (1983), *Die Tagebücher 1949-1966 und 1966-1971*, Frankfurt: Suhrkamp Verlag, at 416.

The rights to life, liberty and security of the person, as well as the rights to procedural fairness, have been interpreted in Canada to imply a fundamental right to court access, as summarized in *Reference re Criminal Code (Man.)*:

> Section 7 and … ss. 8‑14 protect individuals against the state … when it restricts other liberties by employing the method of sanction and punishment (…). … The common thread that runs throughout s. 7 and ss. 8‑14, however, is [individuals' right to] the involvement of the judicial branch as guardian of the justice (…). … One of the central principles to be found in these rights is that of *habeas corpus*, the traditional writ requiring that a person be brought before a judge to investigate (…).[2] [Emphasis added]

The SCC recognized that the constitutional right to liberty and security implies, in practice, a meaningful access to the court system - in particular in the *G.(J.)* decision.[3] The fundamental right of every individual in the country to access the court system has also been exceptionally articulated as a necessary implication of the protection of the judiciary's jurisdiction by the Canadian constitution[4]:

> [T]he other constitutional grant of power that must be considered is … the core jurisdiction of … courts (…). … [Section] 96 … guarantee the core jurisdiction of … courts: … "[t]he jurisdiction which forms this core cannot be removed from the … courts … without amending the Constitution" (…). … [T]he Canadian Constitution "confers a special and inalienable status on … courts'" (…). Section 96 restricts the legislative competence of provincial legislature and Parliament--neither level of government can enact legislation that … removes part of … [courts'] core or inherent jurisdiction: *MacMillan*

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[2] *Reference re Criminal Code (Man.),* [1990] 1 SCR 1123, at paras 1174-1175.

[3] New Brunswick (Minister of Health and Community Services) v. G. (J.), [1999] 3 SCR 46 *Papachristou v. City of Jacksonville* (1972), 405 US 156 (United State Supreme Court), online: <https://law.resource.org/pub/us/case/reporter/US/405/405.US.156.70-5030.html>, at paras 57-58, 61, 63-64, 70, 76-77, 87.

[4] Canada, *Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No. 5*, s 96, online: < http://laws-lois.justice.gc.ca/eng/Const/index.html >.

> *Bloedel* (…); *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] (…). … The historic task of the … courts is to resolve disputes between individuals and decide questions of private and public law. Measures that prevent people from coming to the courts … are at odds with this basic judicial function. The resolution of these disputes and resulting determination of issues of private and public law … are central to what the … courts do. … To prevent this business being done strikes at the core of … s. 96 of the *Constitution Act, 1867*. As a result … [any policies] that deny people access to the courts infringe the core jurisdiction of the … courts. The jurisprudence under s. 96 supports this conclusion. The cases decided under s. 96 have been concerned either with legislation that purports to transfer an aspect of the core jurisdiction of the … court to another decisionmaking body or with privative clauses that would bar judicial reviews *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714; *MacMillan Bloedel*; *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220. The thread throughout these cases is that laws may impinge on the core jurisdiction of the … courts by denying access to the powers traditionally exercised by those courts. In *Residential Tenancies*, the law at issue unconstitutionally denied access to the … courts by requiring that a certain class of cases be decided by an administrative tribunal. In *Crevier*, the law at issue unconstitutionally denied access to the … courts by imposing a privative clause excluding the supervisory jurisdiction of the … courts. In *MacMillan Bloedel*, the legislation at issue unconstitutionally barred access to the … courts for a segment of society — young persons — by conferring an exclusive power on youth courts to try youths for contempt in the face of … courts. This Court, *per* Lamer C.J., relied on *Crevier*, concluding that "[it] establishes . . . that powers which are 'hallmarks of superior courts' cannot be removed from those courts" (*MacMillan Bloedel*, at para. 35). … [T]he province's powers … must be exercised in a manner that is consistent with the right of individuals to bring their cases to the … courts and have them resolved there. … It follows that the province does not have the power … to enact legislation that prevents people from accessing the courts.[5] [Emphasis added]

According to the SCC, the state restrictions of individuals' access to justice, in fact, further implies a restriction of the application of the Rule of Law in the country:

[5] *Trial Lawyers Assn. of B.C. v. B.C. (A.G.)*, [2014] 3 SCR 31 at paras 28-30, 32-34, 36-37.

> [T]he connection between s. 96 and access to justice is further supported by considerations relating to the rule of law. This Court affirmed that access to the courts is essential to the rule of law in *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214. As Dickson C.J. put it, "[t]here cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice" (p. 230). … As stated more recently in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, *per* Karakatsanis J., "without an accessible public forum for the adjudication of disputes, the rule of law is threatened and the development of the common law undermined" (para. 26). … The … judicial function and the rule of law are inextricably intertwined. As Lamer C.J. stated in *MacMillan Bloedel*, "[i]n the constitutional arrangements … recognized by … the *Constitution Act, 1867*, the … courts are the foundation of the rule of law itself" (para. 37). The very rationale for the provision is said to be "the maintenance of the rule of law through the protection of the judicial role": *Provincial Judges Reference*, at para. 88. As access to justice is fundamental to the rule of law, and the rule of law is fostered by the continued existence of the … courts, it is only natural that [the constitution] provide[s] some … protection for access to justice. … In the context of legislation which effectively denies people the right to take their cases to court, concerns about the maintenance of the rule of law are not abstract or theoretical. If people cannot challenge government actions in court, individuals cannot hold the state to account — the government will be, or be seen to be, above the law. If people cannot bring legitimate issues to court, the creation and maintenance of positive laws will be hampered, as laws will not be given effect. And the balance between the state's power to make and enforce laws and the courts' responsibility to rule on … challenges to them may be skewed: *Christie v. British Columbia (Attorney General)*, 2005 BCCA 631, 262 D.L.R. (4th) 51, at paras. 6869, *per* Newbury J.A.[6] [Emphasis added]

Individuals facing restrictions to their right to access justice in the country are also subjected, more broadly, to a restricted and limited protection of the law. In sum, while individuals' right to access justice is not explicitly mentioned by the Canadian

[6] *Id.,* at paras 38-40.

constitution, the jurisprudence confirmed that it is a right acknowledged to be necessary both to the meaningful exercise of Charter rights and to the courts' function as protector of the Rule of Law.

In this context, since policies denying or jeopardizing access to permanent legal status create obstacles to access tribunals and courts and enjoy the protection of the law, they interfere with (im)migrant workers' constitutional right to access justice – and with the courts' jurisdiction, as defined by the constitution.

2. No/conditional access to permanent status: Infringement on access to justice

In terms of demography, (2.1.) permanent status holders are a population quite distinct from the population of permanent residents meeting the residency requirements associated with access to citizenship. While permanent status does not entail permanent residency and the seeking of citizenship status, it does have other important legal implications. In particular, (2.2.) no access to a permanent legal status will infringe on workers' right to access justice and protection of the law in the country. However, (2.3.) conditional access to permanent legal status will create both indirect exclusions and interfere with the exercise of the right to access justice.

2.1. Foreign worker admission and access to permanent legal status

In terms of demography, (2.1.1.) permanent status holders are a population quite distinct from the population of permanent residents meeting the residency requirements associated with access to citizenship. While permanent status does not entail permanent residency and the seeking of citizenship status, it does have other important legal implications. (2.1.2.) Permanent status was initially referred to as "domicile in Canada", and its denial and associated worker deportation policies have always been controversial, even after their formalization into the legal framework in 1906. (2.1.3) Taking (restriction on) access to permanent status into account, individuals

admitted under worker status today are employed in Canada within one of five regimes, as outlined (see section 2.1.3).

2.1.1. Permanent legal/resident status (PS) vs permanent residency-citizenship

When the federal government announced recently that it wants to add 1.45 million permanent residents over the next three years,[7] a lot of people panicked. Well, legitimately so: the government did not deal head on with the irrelevant myths still associated with the recognition of permanent legal/resident status.

Generally the idea, which is a misconception, is that once a person accesses permanent legal status, and is allowed to reside in the country indefinitely, they will remain permanently in the country and most of them will become citizens.

In fact, it is almost the opposite.[8] Yes in the past, people took a transatlantic boat, once in a lifetime. With permanent status, they stayed, permanently, in Canada. They, generally, became citizens. That is not, anymore, the most significant demographic trend:

> Evidence on trends in out-migration is essential to keep policy up to date. The literature on return migration has raised awareness that migration is not necessarily a permanent move for many migrants. However, return migration itself has often been taken as permanent, if only because of the data limitations in treating it differently. <u>In the increasingly global labour market it may be more appropriate to treat international migration more like internal migration. Individuals may move around from place to place for job-related or other reasons several times in a lifetime</u>. [9] [Emphasis added]

[7] Christian Collington, C. (2023), 40% decline in permanent residents becoming Canadian citizens since 2001, data shows, The Canadian Press, Global News, February 15.
[8] Aydemir, A. & C. Robinson (2006), Return and Onward Migration among Working Age Men, *Analytical Studies – Research Paper Series*, Statistics Canada catalogue no. 11F0019MIE, no. 273, at 8.
[9] *Id*., at 6.

Statistic Canada data confirms that a third of men admitted as workers with permanent status will have left Canada within 5 years. And 25% of them will never come back - following trajectories of return migration to their country of origin, or onward migration to another country:

> For the immigrants aged 25 to 30 who landed in 1985, 20.2% were absent, according to this definition. For the same age group that landed in 1989, this rate had risen to 33.7%. This definition does not require the absence to be permanent (see Appendix for more details). Column (3), however, shows that a large part of this absence is long term. Column (3) reports the percentage of immigrants absent according to the above definition, and who didn't reappear within 10 years from the time of landing. This ranges from 17.7% among the 1985 landings to 24.6% for the 1989 landings.[10] [Emphasis added]

The 2021 census shows that, in fact, less than half of individuals who secured permanent status in Canada had asked and obtained citizenship 10 years later. This represents a 40 percent decline in citizenship uptake over the last 20 years.[11] Additionally, Canada's voluntary permanent status renunciation program receives thousands of applications every year.[12]

In sum, demographic data now confirm that permanent status facilitates as much circular migration, return migration to the country of origin and onward migration, than permanent settlement and new/dual citizenship.

In comparison, workers without permanent status cannot move freely across borders, and so have much more incentive to remain in the receiving country,even when, for whatever reason, they are not working. For most of them, once they physically leave the

[10] *Id.*, at 10.
[11] *Supra*, note 7.
[12] Keung, N. (2016), Thousands of immigrants quietly giving up permanent resident status, *The Toronto Star,* October 31.

country, they lose the ability to re-enter and start working again in Canada. As observed in other countries:

> Migrants who enjoyed free labor mobility were the most likely to engage in circular migration, according to data … for 1984–1997. About 60% of migrants … who were … in Germany over that period were circular movers. Among them, two-thirds came from other EU countries. Migrants from Greece, Italy, and Spain were particularly mobile, while migrants from Turkey and the former Yugoslavia, who as citizens of non-EU countries were unable to re-enter the country easily, were less mobile, exiting fewer times and spending less time outside Germany. This pattern was also observed in Denmark, where migrants from Pakistan and Turkey had the lowest levels of return migration. … [I]n 1964 … due to … restrictive immigration and border policies … Mexican families began settling permanently throughout the US. … [R]eturn migration fell because [restrictions on international mobility] increased the costs and risks for Mexican migrants, so that they stayed longer once they managed to cross the border.[13] [Emphasis added]

As such, rather than thinking of permanent status as an automatic pathway to settlement and citizenship, permanent status, also known as permanent resident status, is better understood as a legal status that confers, upon the individual, some important additional rights but, most importantly as discussed below in sections 2.2. and 2.3., it confers in particular to the individual a meaningful capacity to exercise the constitutional right to access justice and, more generally, to access rights and protection of the law, in the country.

Nevertheless, (2.1.2.) the Canadian authorities legalized in 1906 and clarified in 1910 the pro-white function of restriction on access to permanent status, of restrictions on worker status renewals, and of worker deportations.

[13] Zimmermann, K. F. (2014), Circular migration: Why restricting labor mobility can be counterproductive, *IZA World of Labor* May 2, at 1-7, 9.

2.1.2. Restricted access to PS/worker deportation: Controversial since 1890

Nevertheless, no matter the voiceful disagreements expressed at the time by lawyers and courts, Canadian authorities formalized, between 1890 and 1930, their support to big employers and white supremacy through the systematization and legalization of negation of permanent status recognition (for workers already in the country) - and of worker status revocation and worker deportation policies.

Controversial nationalization of employer reprisals/worker repatriation costs

The Canadian government extra-legally aided the first colonial employers in Canada to extract service from individuals under indentured work contracts. This aid extended to returning injured or troublesome workers to their countries of origin when they were deemed unfit for service. In 1906, lawyers and courts' regular systematic interference with worker legal status revocation and deportation led employers to retaliate by seeking formal legal authority to deport unwanted workers from the Canadian government:

> Deportations were made on an ad hoc basis when individual immigrants came to the notice of the department (...). Often these people were casualties of industrial accidents. Sometimes the inability was related to moral rather than physical "disability"; this was a real and serious liability for women domestic servants at this time, as they were judged fit to work in their employers' homes not only on the basis of their physical but also their moral condition. … Although the Department did not have the legal power to deport immigrants before 1906, statistics show deportations did take place from 1902 onwards. As early as the 1890s the federal government had a firmly established policy of sending back unwanted immigrants (...). … Correspondence of the Department of the Interior (...) for 1895 …reported, "it is the practice to send them back, as the simplest and cheapest mode of dealing with them." … Often these people had been in Canada for less than a year, but departmental files describe deportations of immigrants who had been here four years or as many as ten years. … Often immigrants fell on hard times through no fault of their own.

> Immigrants who were disabled at work received no compensation from their employers, and were sent home by the government at public expense.[14]

Importantly, the government denial of permanent status/worker status revocation/worker deportation authority was not "simply" to repatriate individuals abroad. It was conceived as a double tool, serving adjacent to anti-vagrancy legislations as an efficient threat to force workers to comply without trouble to employers' offers of work arrangements:

> In the 1908 depression a myth appeared that was to enjoy significant publicity in the ensuing decades: the immigrant caused his/her own deportability by being lazy or unwilling to work (...). … Indiscriminate deportation of people who had become public charges would encourage "idle and indolent habits". … The Departement did not want it though that unemployment and deportation were automatically linked. … By November 1908 Scott's tone had become exceedingly moralistic and sometimes verged on the hysterical. "Lazy immigrants should not be encouraged in the idea" that they can give up and go home, or escape without paying any penalty for their failures in Canada," Scott urged. "If they will not work, and are physically fit for employment, they should be properly punished before resorting to deportation. … An unemployed immigrant could be arrested and convicted for vagrancy, and then easily deported. Sometimes, the length of a vagrancy sentence was directly influenced by the wishes of the Department of Immigration. The sentence had to be long enough to permit the Department to arrange for the deportation and short enough to save the municipality maintenance costs (...). This sort of covert bargaining occurred with the blessing of the Department of Justice." [15]

[14] Roberts, B. (1988), *Whence They Came: Deportation from Canada 1900-1935*, Ottawa: University of Ottawa Press, at p. 53-54.
[15] *Id.*, p. 59-60, 66.

However, it is only since the first world war that Canada revoked, in an efficient and systematized fashion, worker legal status to ensure the deportation of workers unwanted by their employer:

> After the 1906 Act, the Department could legally deport within two years of arrival. This limit was relaxed by the Department of Justice: "there is no limit to the time in which he may be deported." … The Department advised … to obtain written consent to their deportations (…). … The deportation period was extended to three years and further defined by the 1910 Amendment to the Immigration Act. … The war also provided unique opportunities to ship out some residents who were not otherwise deportable because they had been here long enough to have domicile. As immigrants originating from enemy countries, they could be shipped out along with the internees. In fact, since one sure way to make someone deportable was to intern them, some politically troublesome people were interned for the express purpose of deportation after the war. Although the major target groups remained the unfit and the unemployed, added to these were two new categories: enemy aliens, and agitators. Late in the war and just after, the deportation of agitators and radicals would become systematized, as the Department deliberately moved into the field of political deportations, based on wartime authority and experiences, but functioning to benefit interest groups such as large employers.[16] [Emphasis added]

Controversial anti non-white immigration policy tool

After 1910, such restriction on access to permanent status started to affect predominantly non-white workers in Canada:

> [L]'*Acte d'immigration de 1910* a étendu le pouvoir discrétionnaire du gouvernement de déclarer certains immigrants inadmissibles, en ajoutant des considérations raciales. En plus des interdictions précédentes, l'article 38 octroyait au Gouverneur-en-conseil le pouvoir d'« interdire … le débarquement en Canada […] de toute race jugée impropre au climat ou

[16] *Id.*, p. 63-65.

aux nécessités du Canada, ou d'immigrants d'une catégorie, d'une occupation ou d'un caractère particulier ». Ces nouvelles interdictions à l'entrée étaient également accompagnées d'un processus de déportation (…). … Nouveau ministre de l'intérieur responsable de l'immigration, Frank Oliver était le porte-étendard de cette philosophie, en exprimant son désir de :

> « *heed to the characteristics of those who seek to become citizens, by endeavouring to secure the preponderance of immigrants from those races which have given the most pronounced and consistent evidence of these desirable qualities, and, if necessary, by refusing to admit those who do not measure up to this standard*. »

Du point de vue du gouvernement canadien, ces « caractéristiques désirables» s'avéraient en fait presqu'exclusivement réservées aux immigrants de provenance britannique, d'Europe du Nord-ouest ou des États-Unis, reflétant ainsi une sorte de « nouvel impérialisme » fondé sur les racines impériales britanniques. Les immigrants d'autres origines, notamment ceux provenant d'Asie et d'Europe du Sud-est dont l'arrivée massive dans l'Ouest canadien … étaient alors perçus comme étant menteurs, immoraux, porteurs de maladies et « animalisés ». Or, malgré les efforts soutenus de prohiber l'entrée de ces immigrants indésirables en sol canadien, la demande pressante pour de la main-d'œuvre a engendré une augmentation considérable des taux d'immigration entre 1906 et 1908, dont un nombre important provenait de pays considérés indésirables … laissant croire que les nouvelles politiques migratoires n'ont pas eu l'effet escompté. Cependant, une étude approfondie des statistiques migratoires canadiennes entre 1906 et 1914 démontre que, plutôt que se voir interdit d'entrée, ces immigrants considérés «indésirables» se retrouvaient en fait en proie à la déportation lorsque leur labeur n'était plus nécessaire.[17] [Emphasis added]

Such discriminatory policies affected in particular workers originating from China, as well as black workers:

> Le … traitement était également réservé aux immigrants noirs qui étaient quant à eux considérés comme un problème social potentiel pour le

[17] Dumont Robillard, M. (2023), Le statut de travailleur migrant temporaire : exploration des origines et justifications d'un système d'exploitation post-colonial racialisé, thèse de doctorat en droit – soumission initiale, Université McGill, p. 148-149.

Canada puisque stigmatisés comme individus inférieurs mentalement, physiquement, moralement et socialement. Tel était le cas notamment pour des centaines de travailleuses domestiques provenant des Caraïbes. Alors que l'article 38 de l'*Acte d'immigration de 1910* était utilisé pour interdire l'entrée de tous les immigrants noirs à l'époque, le besoin d'une main d'œuvre à bon marché pour pallier les pénuries dans le secteur domestique (peu attrayant pour les Canadiens et les immigrants britanniques à causes des conditions de travail déplorables) a mené à la création du premier programme de travail accueillant des immigrantes caribéennes. Or, les statistiques démontrent que durant la récession, les noirs provenant des Caraïbes détenaient le plus haut taux de déportation, en majorité des travailleuses domestiques. Des politiques migratoires similaires étaient appliqués aux hommes noirs caribéens durant la même période. Recrutés principalement pour œuvrer dans les mines et en métallurgie en Nouvelle-Écosse, ces travailleurs racisés étaient en proie à la déportation dans les périodes de difficultés économiques :

> « *During the 1914-15 recession, some Caribbean miners and steel workers returned to the Caribbean until they were recalled for work. Thus, they were in effect migrant workers. This concealed migrant-worker system offered significant economic and political advantages to employers and the state.(…)*

En somme, sur la base de considérations d'ordre … racial, les Actes d'immigration de … 1910 ont introduit au Canada le concept de domicile, ancêtre de la résidence permanente … sans lequel un immigrant se retrouvant dans une des catégories « d'immigrants indésirables » devenait sujet à déportation. Or, l'histoire démontre qu'en période de difficultés économiques, les travailleurs racisés… cette législation constitue en quelque sorte la première forme de statut temporaire pour des travailleurs étrangers nécessaires économiquement mais considérés indésirables par le gouvernement pour immigrer de manière permanente au Canada.[18] [Emphasis added]

[18] *Id.,* p. 151-152.

Ultra vires: Illegal practices quietly consolidated as government power

From the start, these worker legal status revocation and deportation measures were controversial:

> Anything done before the 1906 Act "really was not sanctioned by any special law," as Superintendent Scott explained (...). The Department continued to prefer deportations (...) to take place quietly, even though they were now quite legal, "since experience in New York has shown that the speculative lawyer may by habeas corpus proceedings give a good deal of trouble before the case has gotten out of the country." … Department wanted to make the arrangements "without exciting… suspicion," in order to avoid controversy or upset.[19] [Emphasis added]

However, with time, the legal framework was modified to give full power to the executive, thus removing restrictions on access to permanent status from the scrutiny of courts:

> [I]n 1911 the Vancouver Agent J. H. MacGill expressed his concern that deportations of persons … were being carried out by a letter from Superintendent Scott, rather than by an Order for Deportation issued by a Board of Inquiry, as provided in the Act. … Scott replied that … "the Department may safely continue the present practice." In fact, it could not. … The writ argued … that deportations were not legal. The new … agent … suggested that other such deportation cases might be stopped by the courts on the same grounds. The Departement had ordered …. to follow legal procedures … only when it was felt … judicious to do so. Scott still thought that the Department could follow its informal (albeit extralegal) practice as before …[d]espite court cases unfavourable to the Department

[19] *Id.*, p. 58-59

(...). … Of course, as the provisions of the deportation laws became more comprehensive there would be less need to act outside the law. Each new law or regulation increased the powers allowed to the Department. The war period, from 1914 to the very early 1920s, was characterized … by a sharp increase in the intensity of deportation work. Between these years the Head office in Ottawa devoted a good deal of attention to instructing the local offices in how to build a tight case for each deportation, a case that could stand up to challenges from the courts … and from interests groups in Canada. The war period offered a unique opportunity for the Department to learn how to conceal illegal or unfair practices behind the legal categories through which it reported its deportation work.[20] [Emphasis added]

2.1.3. (Im)migrant worker employment regimes: Variation on access to PS

Thus, while Canada has a long history of using immigration policy to consolidate its labour force, there is a demarcation with respect to permanent legal status. Historically, this realized in part through the admission of workers and their families with permanent legal status recognized to them while still abroad. However, since 2006 only a minority of workers have been admitted with permanent legal status; instead, the bulk are now admitted in Canada under worker legal status.[21]

More precisely, workers admitted in Canada may be employed through one of five regimes. First, we have the workers recognized abroad with permanent status, before their arrival in Canada - often referred to as "landed immigrants."

We also have the individuals admitted under worker status, who, from day one, are

[20] Roberts, B. (1988), *supra* note 14, p.64- 65.
[21] Goldring, L. (2014), Resituating Temporariness as the Precarity and Conditionality of Non-Citizenship, in Vosko, F. L., V. Preston & R. Latham (eds) Liberating temporariness? Migration, Work, and Citizenship in an Age of Insecurity, Montreal & Kingston-London-Ithaca: McGill-Queens' University Press, at 218-255.

eligible to apply for permanent status - these are individuals that could have been "landed immigrants", but who preferred to come to Canada first and then, from here, ask and wait for permanent status recognition.

In parallel, the majority of individuals admitted under worker status are either explicitly denied access to permanent status, or are formally eligible to one, or more than one, of the dozens of conditional procedures in Canada for providing access to permanent status recognition.

Some of the individuals admitted under worker status have, however, lost, for whatever reason, their legal status - but remained in Canada, under undocumented or irregular legal status. Exceptionally, some of them are provided with access to permanent status through a regularization procedure. In Canada, for example, this included elderly care orderlies during the COVID-19 pandemic and, more recently, Toronto construction workers.

For most of these workers access to permanent status recognition is denied. This includes hundreds of thousands of individuals in Canada who, because of an infinite number of circumstances, lost their worker legal status during the last decades. This is a population that is currently growing exponentially, since individuals every day admitted in Canada under worker status also every day face obstacles to legal status renewal or permanent status recognition, but feel for whatever reason an imperative to nevertheless remain in the country, keep working, typically filling acute needs in sectors often branded as economically and/or socially essential for Canada.

The present analysis focuses on the individuals in the third category, the ones who were admitted under worker legal status, but who were either (2.2.) denied access to permanent status, or (2.3.) provided only a conditional access to it.

2.2. No permanent status: infringement on the right to access justice in the country

'No access to permanent status' policies are common, including in Canada. They maintain a longstanding legal culture of non-citizen permanent underclasses consolidation. However, they infringe on individuals' right to access justice and the protection of the law in the country.

2.2.1. No access to permanent legal status: A common policy

(Im)migrants admitted in Canada under worker status have been excluded from access to permanent status unless they filled a higher-skilled position - with a few exceptions such as the Seasonal agricultural program as illustrated by the following 2016 guideline:

> Employers can hire temporary foreign agricultural workers under 4 streams; however, each stream has specific criteria that must be met.
>
> **1. <u>Seasonal Agricultural Worker Program (SAWP)</u>**
> - Temporary Foreign Workers (TFW) must be from Mexico or certain Caribbean countries
> - production must be included on the National Commodities List
> - activities must be related to on-farm primary agriculture
> - <u>positions can be in</u> lower or <u>higher-skilled occupations</u>
>
> **2. Agricultural Stream**
> - TFWs can be from any country
> - production must be included on the National Commodities List
> - activities must be related to on-farm primary agriculture
> - positions can be in lower or higher-skilled occupations
>
> **<u>Note:</u>** <u>Under the Agricultural Stream, TFWs hired in higher-skilled positions</u> such as: management, professional and technical occupations <u>are eligible for permanent residency</u> as long as they meet all of the immigration requirements set by **Immigration, Refugees and Citizenship Canada** or the Provincial Nominee Program.[22] [Emphasis in the text; underline added]

[22] Employment and Social Development Canada, *Hiring a temporary worker through the Seasonal Agricultural Worker Program* (2016).

These worker status holders explicitly excluded from eligibility to permanent status are instead invited to maintain their legal status through the respect of specific conditions attached to their respective work authorization, and invited to renew their legal status before its expiration. For example, the worker Junior Trinidad lived and worked in Quebec for more than 25 years, thanks to a capacity to renew successfully 25 times his work authorization.[23] In other words, while Mr. Trinidad spent a significant part of the past decades contributing to the socio-economic life of a Quebec community, he was kept 'permanently temporary' in the country under Canada's 'no-access to permanent status' regime.

Canada's policy of no possible legal 'emancipation' for workers may enforce different classes of workers more generally - as for example, the UAE does:

> [T]he UAE does not offer … permanent residency (…). [T]he government … fear[s] that this would dilute Emirati culture … [of] the local population, which makes up a small percentage of the total population of the country. Currently, a residence visa necessitates sponsorship by an employer and needs to be renewed every three years. You can … retain your residency as long as your new employer applies for your new visa on your behalf. The visa can be renewed as many times as you like until you reach retirement age, after which it cannot be further renewed.[24] [Emphasis added]

2.2.2. No access to permanent legal status: A long standing legal culture

State measures permanently excluding specific groups of workers from any access to permanent legal status were initially introduced within the Western legal culture through slave laws:

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[23] Fondation des Entreprises en Recrutement de Main-d'oeuvre agricole Étrangère, *FERME: Foreign Seasonal Farm Workers in Quebec (2006), online:* <*http://www.marketwired.com/press-release/ferme-foreign-seasonal-farm-workers-in-quebec-617772.htm*>, at para 2.

[24] Living in Dubai, "Is it possible to become a Permanent Resident in Dubai?" (9 December 2013).

> *And also be it enacted, by the authority aforesaid, and it is hereby enacted,* That all servants imported and brought into this country … who were not christians in their native country, (except Turks and Moors in amity with her majesty …) shall … be slaves … notwithstanding a conversion to christianity afterward … *Provided always,* That a slave's being in [a "free" jurisdiction such as] England, shall not be sufficient to discharge him of his slavery (…).[25] [Emphasis added]

Policies to exclude some workers from accessing permanent status immediately became associated with forced return processes – as illustrated by the following Californian example:

> Proslavery Democrats in the [1853 California] assembly … drafted a bill … authorizing law enforcement officials to … hire out African American arrivals to white citizens. Migrants bound out in this fashion would labor for their new masters [temporarily and would] … pay for their transportation back to the eastern United States. … [T]he anti-black migration bill passed the assembly by an overwhelming majority. Pending senate approval, the legislature appeared poised to subject incoming African American migrants to a period of semi-slavery before expelling them from the state. … Democratic legislators' proposal to establish a temporary system of African American servitude … demonstrated the malleability and ambiguity of the state's … [anti-slavery] constitution and the ease with which it could be reinterpreted to promote human bondage at the expense of human freedom.[26] [Emphasis added]

In the past, state authorities adopted policy revoking access to permanent status retroactively, under what scholars have termed "concealed guestworker programs"[27] -

[25] Virginia, *An act concerning Servants and Slaves (1705),* online: < http://www.encyclopediavirginia.org/_An_act_concerning_Servants_and_Slaves_1705 >., s IV, VI.
[26] Stacey Leigh Smith, *California bound: Unfree labor, race, and the Reconstruction of the Far West, 1848--1870* (Ph.D., The University of Wisconsin - Madison, 2008) [unpublished], at 160-163.
[27] See e.g. Barbara Roberts, *supra* note 14.

typically used to enforce differential treatment for workers on the basis of their country of origin :

> By the 1920s … [t]he need to replace 7 million workers ended the French state's *laissez-faire* approach to immigration. … [T]he government [of France] stepped in to recruit colonial labor … for docks and military construction sites. French farmers joined forces to import Iberian and Italian workers, and the French government actively assisted industrialists in securing southern Europeans for mines and factories. [T]his was not technically a temporary labor system from the start. But for the non-white colonial laborers and Chinese workers it became a temporary labor system retroactively, as the government summarily repatriated non-white workers as soon as the armistice was signed. In contrast, European immigrants were allowed and, indeed, encouraged to remain to help clear rubble and aid in the country's reconstruction (…).[28] [Emphasis added]

2.2.3. Exclusion from permanent status: Infringement on the right to access justice

> The problem of the insecurity of residence to migrant workers is of crucial importance (…). The problem of affording adequate protection to migrant workers is closely related to the question of security of residence in the country of immigration and the risk of … expulsion. Where the risk is felt by foreign workers they [are] … led to … refrain from claiming their rights.[29] [Emphasis added]

State policies denying access to permanent status are common and have been part of the culture of immigration law for a long time; in the Americas, including in Canada, in fact since the applicability of slave legal regimes. With no access to permanent status

[28] Cindy Hahamovitch, "Creating Perfect Immigrants: Guestworkers of the World in Historical Perspective" (2003) 44:1 Labor History 69, at 78-79.

[29] Riad Al-Ajlani, *The Legal Aspects of International Labour Migration: A Study of National and International Legal Instruments Pertinent To Migrant Workers in Selected Western European Countries* (PhD., University of Glasgow Law and Financial Studies, 1993) [unpublished], at 144.

however, workers experience a restricted capacity to assert rights and access justice and reparation in the case of a right violation.[30]

More precisely, the *fear* of legal status revocation and deportation, as well as the status revocation and the deportation processes themselves, create obstacles for (im)migrant workers to pursue a legal claim until a decision has been reached. Workers without permanent status may, additionally, face explicit status-based obstacles to justice.

Fear of status revocation or non-renewal

Since the non-permanent status workers typically aim to secure an extension of their worker status through work authorization renewal procedures, if accessing justice is associated with any risk to jeopardize the work permit renewal, the fear of the state threat of legal status revocation will *de facto* suffice to ensure that they will refrain from seeking justice, reparation or protection of the law in case of a right violation.

This will have additional implications if an employer or a group or employers' input is relevant to improve the chances of a successful legal status renewal - where workers will refrain from asserting their rights and complaining in the case of a rights violation by the employer - as in the case of SAWP workers who will typically *de facto* refrain from

[30] See e.g. McLaughlin, J. & J. Hennebry (2015), Managed into the Margins: Examining Citizenship and Human Rights of Migrant Workers in Canada, in Howard-Hassmann, R. & M. Walton-Roberts (eds) *The Human Right to Citizenship: A Slippery Concept*, at 176-192; Goldring, L. & P. Landolt eds. (2013), *Producing and Negotiating Non-Citizenship: Precarious Legal Status in Canada*. Toronto: University of Toronto Press, 376 p.; Hennebry, Jenna, *Permanently Temporary? Agricultural Migrant Workers and Their Integration in Canada*, Institute for Research on Public Policy (2012); Torres, S. & D. L. Spitzer, K.D. Hughes. J. Oxman-Martinez & J. Hanley (2012), From Temporary Worker to Resident: The LCP and Its Impact through an Intersectional Lens, in Lenard, P.T. & C. Straehle (eds) Legislated Inequality: Temporary Labour Migration in Canada, Montreal & Kingston-London-Ithaca: McGill-Queens' University Press, at 227-244; Goldring, L. & P. Landolt (2012), The Impact of Precarious Legal Status on Immigrants' Economic Outcomes, *IRPP Study* No. 35, Montreal: Institute for Research on Public Policy; Goldring, L. & P. Landolt (2011), Caught in the Work–Citizenship Matrix: the Lasting Effects of Precarious Legal Status on Work for Toronto Immigrants, *Globalizations* 8:3, 325-341; Goldring, L., C. Berinstein & J. K. Bernhard (2009), Institutionalizing precarious migratory status in Canada, *Citizenship Studies* 13(3), 239-265.

jeopardizing their chances to be re-sponsored and thus avoid making trouble and risk blacklisting:

> Durant la saison de culture de 2003 dans la région de Leamington, deux travailleurs ont été logés dans la chaufferie d'une serre. Les fournaises défectueuses ont provoqué un incendie. Les travailleurs n'y étaient pas au moment de l'incendie, mais leurs vêtements et tout ce qu'ils possédaient – y compris passeports et autres documents – ont été entièrement détruits par le feu. La saison tirait à sa fin et ces travailleurs sont retournés chez eux avec les seuls vêtements qu'ils avaient sur le corps. L'employeur refusait de les indemniser pour les pertes subies. (*RHDSC* [Ressources Humaines Canada] *n'a modifié [par la suite] le PTAS que pour limiter le montant de l'indemnité qu'on peut obtenir d'un employeur dans le cas d'un incendie*).[31] [Italic in the text; emphasis added]

As such, in Canada as well as in other countries such as the USA, (im)migrant workers facing a risk of worker status revocation is fully protected under the law. Without a "secure" or permanent legal status these workers will likely fear that seeking justice in such context would either be a waste of resources and time, or detrimental to her legal and/or socio-economic condition:

> Even if a … worker leaves her employer … and files a civil complaint against the employer to seek enforcement of her employment contract and U.S. labor and employment laws, there is … no guarantee that she will be permitted to work while her complaint is being considered, even though … she does not qualify for federal public benefits, such as welfare, public housing, and food assistance, and could face extreme hardship if not provided work authorization. The INS has discretion to permit her to remain temporarily to pursue a civil action and to work while doing so (…).[32] [Emphasis added]

[31] *Ibid.*

[32] Human Rights Watch, *Hidden in the homes: Abuse of domestic workers with special visas in the United States* (2001) at 2.

Fear of deportation

Second, an obstacle to justice is created through the fear of the risks of deportation associated with seeking justice:

> A woman from Jamaica in her 50s or 60s came to Canada through the live-in caregiver program. In Jamaica, a friend of a friend recruited her. She paid a recruiter fee (unknown amount). She came to Canada with the promise of one job but when she arrived she got a different job, working in a residence for adults who had disabilities. She did not mind working with these clients, but her employers were quite abusive. She did not … receive her full wages. The victim claims that her employer threatened to kill her. The case came to the attention of this community organization through a homeless shelter where the victim ended up staying. She had left her abusive employer because she felt threatened and did not feel safe. In the process … her status [expired and] changed to illegal. She wanted to go to the police but expressed that she was fearful that if she did she would get deported.[33] [Emphasis added]

Status revocation: expiration of work permit

Accessing status-based rights, such as the right to financial compensation in the case of a work accident or work-related illness, is especially jeopardized for workers under temporary work authorization:

> Marino had … dislocated his hip and was unable to perform work in the greenhouse. … [H]e lost his Social Insurance Number and his worker's compensation benefits.[34] [Emphasis added]

[33] Jesse Beatson & Jill Hanley, *The Exploitation of Foreign Workers in Our Own Backyards; An examination of labour exploitation and labour trafficking in Canada*, Committee of Action Against Human Trafficking National and International (2015), at 19.

[34] Adriana Paz Ramirez, *Embodying and resisting labour apartheid: Racism and Mexican farm workers in Canada's seasonal agricultural workers program* (Master of Arts, University of British columbia Sociology, 2013) [unpublished], at 35-36.

While some workers, with the admirable support of a network of community and/or union organizers, have exceptionally been able to contest decisions unfairly ending worker compensation benefits at the expiration of a work permit, such miraculous stories of access to justice and reparation are rare. Without permanent status recognition, (im)migrant workers always face risks of expiration of their legal status before the obtention of full benefits, meaningful justice and/or reparation.

In most cases, when the worker status is expired (or about to expire) - or being automatically revoked by the state, as for example in the instance of travel outside of the country, workers experience a restricted capacity to launch any legal proceedings:

> Juma came to Canada from Tanzania in 2009. In Tanzania, he met a Canadian hunter and taxidermist who had asked Juma to come work for him in Canada. Juma was promised $16.08 per hour. The employer prepared all the immigration papers. … Juma was the only employee and worked seven days a week, 12-14 hours a day except Sunday when he worked 7-8 hours. … Juma went without pay for the first month and had to ask to be paid. He was given $550 which is what he would have been paid back home. … After a few months, the employer raised Juma's pay to $700 and then $800 per month. Juma would actually receive a cheque for $3,168 but was not allowed to keep it. He would go with the employer to the bank, deposit the cheque, and withdraw most of it to hand over to the employer for "taxes". Juma was told that if he paid the taxes he could bring his family over, however he was never shown any receipt or proof that this money was being used in this way. … After 10 months of work, the employer hired a Canadian worker who told Juma that his low wages and the excessive hours he was working were not right. … Finally, after two years of working for the same employer, he confronted him one day at the bank. Juma did not withdraw the money and demanded to see proof that the money was being used to pay taxes. The employer threatened … to have him deported. The employer then called the police and told them Juma had stolen from him. The police heard Juma's story and were sympathetic, taking him to a Salvation Army where he stayed. The employer kept one of Juma's suitcases and refused to return it - it contained precious keepsakes such as wedding clothes, his wedding DVD, his only picture of his dead mother, an anniversary gift from

> his wife, and birthday gifts from his cousins. Juma thought about trying to enforce his rights by working through the legal process, but realized that his work permit would expire before anything could be done.[35] [Emphasis added]

In some cases, work permit durations are extremely short, and in case of a rights violation, this offers no meaningful possibility to access justice if necessary:

> A unique challenge … for SAWP migrants stems from the fact that they are [allowed by the state to reside] in Canadian communities for only up to eight months at a time. … Getting medical care and going through the lengthy workplace safety insurance claims process, which necessitate follow-up, are especially problematic. … Workers … [are compelled by the federal government to] leave Canada before they can … lodge and follow the procedures for a labour complaint or legal challenge.[36] [Emphasis added]

The Quebec Commission on Human Rights acknowledged in 2008[37] that, in particular, migrant workers employed in lower-wage occupations will face interference with their right to seek and obtain justice in case of a right violation:

> Cet élément … signifie de facto que les travailleurs migrants, n'ayant pour la plupart pas de possibilité d'accéder à la résidence permanente … sont sujet au renvoi dans leur pays d'origine sans qu'ils puissent avoir accès à la justice au Québec et exercer un véritable droit de contestation en cas de violation de droit par l'employeur.[38] [Emphasis added]

State-imposed "voluntary return" policies

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[35] Jesse Beatson & Jill Hanley, *supra* note 33, at 16-17.

[36] Jenna Hennebry, *Permanently Temporary? Agricultural Migrant Workers and Their Integration in Canada*, Institute for Research on Public Policy (2012), at 28.

[37] Marie Carpentier, "Le phénomène du travail étranger temporaire envisagé sous l'angle de la discrimination systémique" (paper delivered at the XXe Conférence des juristes de l'état, Montréal, 2013), at 215-216.

[38] Linamar Campos-Flores, "Émotions et globalisation: Les coûts émotionnels de la mondialisation sur les travailleurs agricoles temporaires au Québec et leurs familles. Un regard à partir de la médiation interculturelle" (paper delivered at the Constat de la CDPDJ : Récents développements dans la recherche sur le préjudice systémique subi par les travailleuses et travailleurs migrants au Québec, Montréal, 7 Décember 2012), at 32.

Under Canadian immigration regulations, temporary foreign workers are allowed to ask for the renewal of their work authorization if they have complied with "all conditions":

> **Applications for Extension of Authorization to Remain in Canada as a Temporary Resident**
> **Circumstances**
> **181** (1) A foreign national may apply for an extension of their authorization to remain in Canada as a temporary resident if
> (a) the application is made by the end of the period authorized for their stay; and
> (b) they have complied with all conditions imposed on their entry into Canada (…).[39] [Emphasis in the text; underline added]

The expiration of the work permit is even sometimes combined with the imposition of unique conditions - such as the imposition by the federal government in the case of SAWP workers of the signature of a contract specifying that the worker agrees to leave the country at the end of the employment relationship. This puts an extra pressure on the worker to try to remain in the country to access justice and reparation in case of a right violation.

In 2011, the Quebec Commission des normes du travail (Quebec Labor Standards Board) … explained that 87% of the workers in Quebec who seek justice against their employer for a violation of labour rights do so after the end of the employment relationship[40]. In this context, abused (im)migrant workers under time-limited legal status, are *de facto* highly unlikely to manage to successfully launch legal proceedings in the case of a violation of labour rights or inadequate compensation in the case of a work accident (and even less likely to manage to pursue it until a decision is reached).

[39] *Immigration and Refugee Protection Regulations SOR/2002-227 (last amended on June 13, 2016)*, s 181.
[40] Dalia Gesualdi-Fecteau, "Travailleurs étrangers temporaires: état des lieux et perspectives d'avenir" (paper delivered at the Colloque de la Commission des Normes du Travail - Les Nouvelles réalités du travail: Enjeux et pistes de solutions, Montréal, 1 November 2011).

In other words, revocation of the legal status before it could be renewed is sufficient to restrict workers' meaningful access to protection mechanisms, in particular those offered by human rights and labour legislations.

The state-imposed "voluntary" removal of workers was recognized as an obstacle to justice in particular in a 2011 decision rendered by the President of the Quebec Labour Standards Commission:

> En vertu du PTAS et du contrat de travail type qui en découle, le travailleur saisonnier obtient un visa de résidence temporaire qui … exclut toute demande de résidence permanente au Canada (…). … Le retour obligatoire au pays à la fin de la saison de travail rend aussi plus difficile l'obtention de soins médicaux à la suite d'une maladie ou d'un accident, de même que l'accès à certains bénéfices (remboursement d'impôt, prestations du régime d'assurance parentale, etc.). Ce retour forcé au Mexique entraîne aussi une difficulté à exercer le droit … de contester (…).[41] [Emphasis added]

State removal in the country of origin

For a while, individuals admitted under worker status in Canada were automatically subject to deportation processes after 48 months of employment in the country - if permanent status had not been secured. Removals out of the country constitute another restriction on the capacity to pursue legal claims in the case of a rights violation —as illustrated by the following case:

> **TRAVAILLEURS GUATÉMALTÈQUES FLOUÉS DE MILLIERS DE DOLLARS PAR UNE FIRME DE PLACEMENT** Le propriétaire d'une entreprise de placement prélevait une partie de leur paie en promettant de régulariser leur statut. … Une quinzaine de travailleurs auraient ainsi été floués par … une firme de placement de main-d'œuvre étrangère, qui leur aurait fait perdre plusieurs milliers de dollars, a appris *La Presse*. Le propriétaire de l'entreprise de

[41] *Travailleurs et travailleuses unis de l'alimentation et du commerce, Section locale 501 c. Johanne L'Écuyer, Pierre Locas et Procureur général du Québec,* at paras 126-128, 163, 166-167, 172-174, 177.

placement Les Progrès inc., Esvin Cordon … leur aurait promis faussement de leur faire obtenir un permis de travail, moyennant des débours pouvant atteindre 4500 $, prélevés à même leurs chèques de paie. Il leur aurait également proposé d'aller rencontrer un avocat, à Montréal, pour monter leurs dossiers d'immigration. Sur la foi de ces informations, a-t-on appris, une enquête criminelle a été déclenchée par l'Agence des services frontaliers du Canada à l'endroit de cet individu. Il a été arrêté le 26 octobre, puis relâché, sur promesse de comparaître. … SOUS LE CHOC Les travailleurs guatémaltèques qu'Esvin Cordon hébergeait – et qu'il faisait travailler dans des entreprises agricoles, notamment chez les producteurs de canneberges – ont également été arrêtés et incarcérés lors de cette perquisition menée à Victoriaville le mois dernier. La Commission de l'immigration et du statut de réfugié les a entendus la semaine dernière. Ils étaient tous sous le choc. « Nous ne sommes pas des criminels », a lancé l'un d'eux, dans un cri du cœur qui n'a pas laissé indifférent le commissaire au dossier. « Je suis vraiment et sincèrement désolé de ce qui vous arrive, à vous et à vos compagnons », a tenu à préciser à maintes reprises le commissaire Louis Dubé. … Mais le mal est fait. En vertu de la loi sur l'immigration, les travailleurs … ont fait face à une mesure de renvoi, qui vient d'être prononcée par la Commission. Ils devront rentrer dans leur pays, sans avoir la possibilité de revenir … au … pays au cours des 12 prochains mois, à moins d'une intervention du ministre de l'Immigration. … « Je sais que vous êtes de bonne foi, a insisté le commissaire. On vous a trompés. Vous êtes davantage des victimes que des coupables, c'est mon opinion. » … « Ces pauvres travailleurs croyaient pouvoir améliorer leur situation [et régulariser leur statut légal] en travaillant pour l'agence de placement, rapporte l'avocate spécialisée en immigration. … **« Ils m'ont raconté qu'ils se faisaient amputer une partie importante de leur salaire par leur employeur. Ça pouvait aller jusqu'aux deux tiers de leur salaire, soit environ 600 $ pour une semaine de travail de 70 heures. C'était pour payer leur "dette". »** — Me Idil Omar Abdi. Cette dette, c'était le montant requis par l'employeur, qui leur avait fait miroiter qu'ils obtiendraient des « papiers » pour pouvoir se soustraire à la réglementation (restrictive) touchant les travailleurs temporaires étrangers. Rappelons que, sous le gouvernement Harper, la réglementation touchant la main-d'œuvre temporaire … a été resserrée. Un travailleur … n'a plus le droit de venir travailler … s'il a atteint la limite des 48 mois (…). Les travailleurs [agricoles] du Mexique ne sont pas visés. … « J'avais les mains vides en arrivant ici et je

repars les mains vides parce qu'on m'a volé mon argent. » « Au Guatemala, on tue les gens pour des dettes d'argent. J'ai dû emprunter une grosse somme là-bas [un peu moins de 1000 $] pour me qualifier en tant que travailleur étranger temporaire. Je n'ai pas d'argent pour rembourser ma dette. J'ai peur. » « J'ai une famille. J'ai acheté des cadeaux pour mes enfants. Ils se trouvent dans les appartements de M. Cordon. Est-ce que je pourrai aller les chercher avant de rentrer au Guatemala ? » « Comment est-ce possible qu'on se fasse ainsi voler dans un pays comme le Canada, avec des lois aussi sévères ? (…) … On vient ici pour travailler et gagner de l'argent pour aider nos familles.»[42] [Emphasis in the text; underline added]

Explicit worker legal status-based barriers to justice

The non-recognition of permanent legal status often results in explicit status-based barriers to justice in the country. The most common explicit state-based obstacles to justice are possible (I) exclusions from legal aid programs and (II) exclusions from other procedural protections offered under labour/human rights legislations.

I. Status-based barriers to access to legal aid

Access to the legal aid program in the jurisdiction of employment may be restricted by law, and apply explicitly to individuals residing in the country under permanent legal status or citizen status:

> [T]here are other implications of lacking permanent resident status and citizenship rights in Canada. Access to several rights … are directly tied to [permanent resident or] citizenship status: … access to health insurance (…). Bernadette suffered from an acute case of post-partum depression after her child was born. Her child was taken away from her. When she recovered, she wanted to fight for custody of the child. However, she could only do so with legal aid. She was refused legal aid … on the ground that

[42] Yvon Laprade, "Travailleurs Guatémaltèques; Floués de milliers de dollars par une firme de placement", *LaPresse* 2016).

she was "not a resident of Ontario" – not a de facto definition, but one based on immigration status (Bernadette, 1995 Case Files)[43] [Emphasis added]

Even when legal aid initiatives are available to migrant workers, they are sometimes rendered inefficient, *de facto*:

> [T]he only legal assistance that any farmworker is likely to get is from legal services. … The Legal Services Corporation ("LSC") earmarks certain grants to legal aid programs for the representation of migrant farmworkers. First, LSC grants provide approximately $10.00 per potential client per year to legal aid organizations. The vast majority of this funding is used to handle rudimentary problems. On average, legal aid programs spend only $150 per client, and more than ninety percent of the cases are resolved without going to court. These statistics suggest migrant farmworkers infrequently manage to persuade a legal aid organization to file a suit on their behalf. … Second, LSC-funded programs are prohibited from representing undocumented individuals. The 1986 amendments to the H-2A program provides H-2A workers with an exception to this categorical prohibition. However, this apparent boon for H-2A workers is largely illusory due to restrictions placed on communications with H-2A workers. LSC regulations have been interpreted as prohibiting LSC funded programs from conducting outreach in other countries, and thus H-2A workers are effectively denied the opportunity to make their complaints from the safety of their own communities. Rather, in order for an H-2A worker to gain representation, he usually needs to contact the legal aid program while working in the United States—that is, while housed at the grower's labor camp or during the brief transit period back to Mexico. Significantly enough, grower associations and lobbies have long pushed to deprive migrant workers of access to LSC-funded programs. … The deal struck by the growers and the LSC of Virginia was that the growers would drop their legislation seeking across-the-board restrictions, while LSC of Virginia would agree to stop funding the representation of migrant workers in employment matters. … These growers associations aim to prohibit LSC-funded programs from representing H-2A workers in any way once they have been shipped back to

[43] Sedef Arat-Koc & Fely O. Villasin, *Caregivers Break the Silence* (Toronto: Intercede, 2001), at 61.

> Mexico, essentially making it impossible for them to enforce their rights in court.[44] [Emphasis added]

II. Status-based exclusions from procedural protections offered in legislations

Explicit procedural protections may be warranted for various reasons under the law. In particular, legal protection that may be explicitly adopted to facilitate access to justice for vulnerable workers may not be available for individuals without permanent legal status:

> The Agricultural Worker Protection Act (AWPA) provides … farmworkers with some valuable procedural advantages… because farmworkers tend to travel far from their homes to work in places where they are isolated from the community, are especially vulnerable to retaliation, and lack adequate access to legal services. Therefore, it is crucial that, in practice, AWPA allows a farmworker to maintain suit in a federal district court at the place of recruitment, which is usually relatively near the worker's home. Thus, AWPA gives all farmworkers a ticket into federal court and allows many of them the advantage of filing suit in their home district. By being excluded from AWPA, H-2A workers are denied these rights. … Thus … State courts are H-2A workers' firmest legal foothold in the country, but, at least in the eyes of farmworker advocates, that foothold is far too unstable to be relied upon. … [W]hile it would be rash to assert that H-2A workers cannot get fair treatment in any state court system, it should be recognized that Mexican guest workers run a considerable risk of suffering biased treatment in many of the state trial courts in the rural regions where they are likely to work. … The 1992 study assumed that these apprehensions have some basis in reality and concluded that local biases in state courts do exist and remain "most prevalent in the more rural areas of the country including the Southern and lower Midwest States." While almost all of the surveyed attorneys opined that federal judges were generally more competent than state judges, those attorneys who reported a specific concern with local bias also tended to report that this perceived superiority affected their filing decisions. The moral is that, especially in rural areas of the Southern and lower Midwestern

[44] Michael Holley, "Disadvantaged By Design: How The Law Inhibits Agricultural Guest Workers From Enforcing Their Rights" (2001) 18:Spring Hofstra Labour & Employment Law Journal 575 at 609, 611-613.

> states, attorneys react to the stronger likelihood of local bias by seeking out the presumed superior competency of the federal bench. The very nature of H-2A workers' employment entails that they will be employed in rural, agricultural regions. And, in fiscal year 2000, over sixty percent of H-2A workers were employed in Southern states. Thus, it is a fact that H-2A workers are generally forced to resort to the rural, Southern state trial courts where local bias is widely perceived to be a significant factor in litigation. In light of the findings of the 1992 study, it should be expected that H-2A workers will be hamstrung by local bias in those state courts. This presumption of an unfavorable bias against these out-of-state workers is fortified by the fact that H-2A workers have absolutely no political weight in the United States, are cultural and ethnic foreigners, and usually challenge powerful local interests when filing suit. By offering discrete and insular minorities access to federal courts, it is precisely this type of bias that federal civil rights statutes such as 42 U.S.C. § 1983 are designed to counterbalance. In sum, although H-2A workers as a class of litigants need federal protection from local state court bias more than other out-of-state litigants and farmworkers, they are generally denied access to federal court.[45] [Emphasis added]

Individuals without permanent legal status often end up excluded even more explicitly from procedural protections offered to vulnerable workers:

> In 1996 … a crew of several Mexican H-2A workers arrived in … [Kentucky] to harvest tobacco and vegetables. The contracting grower allegedly … [forced] many of the workers … to return [prematurely] to Mexico at their own expense. In August 1998, these H-2A workers, with the assistance of legal services attorneys, sent a letter to the Kentucky grower explaining their breach of contract claims and proposing settlement discussions. Rather than negotiating, the Kentucky grower filed suit against them in Graves County Circuit Court for allegedly breaching their H-2A employment contract in 1996. As the grower's attorney candidly told the press, the suit was filed to pre-empt the possibility that the workers would file their own suit in Texas. By filing this preemptive lawsuit, the grower ran the risk of violating the H-2A regulations' anti-retaliation provision. This risk was apparently worth it to the grower due to the perceived importance of establishing Kentucky county

[45] *Id.,* at 603-608.

> court as the forum for the dispute. And it appears the growers did not stop there. Within months, two Kentucky Congressman introduced a bill to the House of Representatives. It mandated that an H-2A worker could file suit against an H-2A employer only in the county in which the worker was employed. … Why have Kentucky tobacco growers clung to their county courts? Possibly because tobacco is king in these counties, and the growers can count on the king to influence the judge or the jury.[46] [Emphasis added]

Finally, formal exclusions from procedural protections, if not adopted explicitly to exclude individuals with or without a specific legal status, may, however, disproportionately impact individuals without permanent status:

> At present, an H-2A worker's most feasible route into federal court is to assert a cause of action that serves as an independent ground for federal jurisdiction. … The traditional justification for allowing federal jurisdiction in diversity cases is to give an out-of-state litigant the ability to avoid the risk of local bias in state court. Since there is always complete diversity between a foreign H-2A worker and his domestic employer, this traditional justification for federal jurisdiction is relevant in every H-2A lawsuit. The only reason that H-2A workers do not enjoy diversity jurisdiction is that the amount in controversy in their suits is almost always less than the jurisdictional minimum of $75,000. Nevertheless, the relatively modest sums they do seek to recover (say roughly a maximum of $10,000 for actual damages for the breach of a season's contract) are of great importance to plaintiffs who have gone into debt to get the chance to work and whose total family income for a year is normally less than $10,000. Presumably, having to run the risk of local bias is at least as unfair for a Mexican guest worker seeking to recover his annual wages as it is for an out-of-state insurance company defending a $75,000 claim.[47] [Emphasis added]

In sum, no permanent status negatively interferes for workers with the right to access justice and protection of the law.

[46] *Id.,* at 608-609.
[47] *Id.,* at 605-606.

This being said, as will be further discussed in detail in the following sections, (2.2.) '*conditional* access to permanent status' policies, and in particular 'employer-based access', 'employment-based access', and 'funds-based access' to permanent status recognition schemes each result – even if indirectly – in major obstacles to justice for (im)migrant workers. In this context, likely with exceptions in cases of "national security" and "serious criminality", section (3) explains why unconditional permanent status recognition is both sustainable and strategic from a demographic perspective and necessary if worker admission programs are to take the constitutional rights, and the right to access justice, seriously.

2.3. Conditional access to permanent status: Exclusions and infringement on justice

> On the eve of the Liberals' anticipated reforms to foreign worker programs, expected later this month, Danieles and others planned to share their stories at a news conference on Sunday — a[n] … effort to persuade Ottawa to grant … foreign workers permanent status upon arrival (…). … "There is a path, but it is a minefield. … " … We … are at a disadvantage because our rights are not sufficiently protected by law," said Kristina Torres, who came to Canada in 2012 (…).[48] [Emphasis added]

While permanent status recognition is necessary to ensure workers' meaningful exercise of the right to access justice, conditions on such recognition also negatively interfere with the capacity to assert rights and enjoy the protection of the law: (2.3.1.) employer-validation requirements, (2.3.2.) 'local employment experience' requirements, (2.3.3.) "funds-based" requirements, (2.3.4.) health requirements, and (2.3.5) other requirements such as time deadlines.

[48] Keung, N. (2016), Ottawa urged to grant permanent status to migrant workers upon arrival, *The Toronto Star,* September 11.

2.3.1. Employer-based access to permanency: Exclusions and infringement on justice

The privilege to decide if a worker is "worth" accessing permanent legal status is still commonly recognized and attributed to employers by authorities. This type of immigration measure has been part of the legal culture for centuries now – when access to justice was not yet understood as a fundamental human right in theory, let alone in practice. However, such a policy implies that a significant portion, if not the majority of eligible (im)migrant workers, never access permanent legal status and, thus, a meaningful access to justice in the country. Moreover, such employer-validation requirement for permanent status interferes with individuals' access to justice and protection of the law during the process. Thus, in order to respect individuals' fundamental right to access to justice in the country, permanent legal status recognition must be independently accessible to workers – no matter their employer's (or other private stakeholders') opinion. In fact, since it leaves legal status recognition dependent on an arbitrary form of "community acceptance", employer-validation requirements for permanent status would likely be confirmed by Canadian courts as an unjustifiable state policy infringing on the constitutional right to access justice in the country.

Employer validation' requirement for permanent status: A common policy

Under many contemporary procedures to access permanent legal status, an initial and sometimes ongoing 'nomination' by the employer is required. For example, various Canadian provincial governments restrict or have restricted their sponsorship/nomination/selection of workers for permanent status only to cases formally requested by employers:

> Additional pathways to permanent residence are provided by Provincial Nominee Programs (PNP …). … For example, Alberta accepts applications from semiskilled workers (NOC C or D) in food and beverage processing, food services, hotel and lodging, manufacturing, long-haul trucking and

> heavy-haul trucking. Manitoba's PNP is not limited to the high-skilled or people working in particular occupational fields. Ontario [and Quebec] allows only high-skilled … TFWs [temporary foreign workers] to apply. PNPs have become the most likely path to residency for TFWs: in 2012, of the 38,067 TFWs who became residents, 34 percent did so though PNPs [F. Leslie Seidle 2013]. Because TFWs must have a job offer in qualifying sectors to apply under a PNP, employers play a very important role (…). However, not all employers are true facilitators. CBC News reported (May 5, 2014) on advice a recruitment firm provided to Houston Pizza in Estevan, Saskatchewan about managing the expectations of Filipino workers hoping to become permanent residents under the Saskatchewan Immigrant Nominee Program (SINP). The email stated that "since you are supporting them for SINP, you can choose to withdraw their support." It added: "An employer choosing to withdraw their support is not punishing their workers, rather, showing them [the employer] has the right to support them or not." It is clear that the 'carrot' of becoming Canadian … [is] used as a stick against … TFWs. … [W]e need to ask some hard questions about the rules governing the initial stage [of two-step immigration processes].[49] [Emphasis added]

Moreover, when at least in part applicable to (im)migrant workers that do not hold a valid temporary work authorization, permanent status recognition policies are sometimes referred to as (permanent) status 'regularization' programs – permanent status access mechanisms that have been preferred in countries such as Italy,[50] and that may equally integrate an employer-validation requirement:

> PLACING TOO MUCH POWER IN THE HANDS OF THE EMPLOYER … [T]he 2009 regularization amounted to an amnesty for those employing carers and domestic workers without a regular contract. These employers could avoid the severe sanctions … by declaring the existence of the employment relationship to the authorities and paying a fee of 500 euros per worker. The "parties" (i.e. the employer and the migrant worker) would then be summoned before local immigration authorities to complete the procedure

[49] Leslie Seidle, *The exploitation of temporary foreign workers*, IRPP (2014).

[50] Immigration and Refugee Board of Canada, *Italy: Italian residence permits, including the carta di soggiorno (permanent residence card); rights and obligations of holders; whether the holders have access to Italian citizenship* (2012).

and apply for a residence permit. However, the procedure of the 2009 regularisation focused … on the employer (…):

- The migrant worker could not submit the application. Only the employer, not the worker, was entitled to submit an application. In other words, access to the regularisation process was entirely left to the discretion of the employer, even where the employment relationship met the criteria required by law.
- … Any … communication from the authorities was sent to the employer, who was required to pass it on to the migrant worker. This included providing the migrant worker with … the document which entitled them to stay in Italy until completion of the procedure …. as well as information about further … requirements
- The migrant worker could not finalise the procedure without the cooperation of the employer (…). …
- The migrant worker was effectively prevented from leaving their employer. In the 2009 regularisation, migrant workers who had left or lost their job after the application was made were not allowed to work on a regular basis for a different employer before completion of the procedure. Because in some cases it took more than two years to complete the regularization procedure, due to excessive bureaucracy, workers were effectively not free to change employers during this period, regardless of the circumstances.

As a result of these employer-centred procedural requirements, migrant workers were both completely dependent on their employer to obtain a residence permit and effectively prevented from leaving their employment for a period of potentially up to two years. This made it extremely difficult for migrant workers to report exploitation (…).[51] [Emphasis added]

Employer's validation for permanent status: A long standing legal culture

> In all three [Roman, Cuban, and American] societies the slave who had been promised freedom was, in Brice's terms, a member of a "third class," not wholly a slave but certainly not

[51] Amnesty International, *Italy: The regularisation should protect the rights of migrant workers* (2012) at 6-7.

possessed of all the rights or duties of a freeborn person.[52] [Emphasis added]

Employer-based access to permanent legal status has a long history. For example, 'delayed manumission' work arrangements became of widespread interest for employers in the USA around 1830, first in Baltimore:

> Maryland's blacks … [a]rriv[ed in Baltimore] as slaves either purchased from or migrating with masters leaving the … Shores (…). For many, hard labor … became a tool with which to carve out autonomy within slavery and, ultimately, to propel themselves out of slavery through … manumission granted after a further term of service. So widespread were such manumissions that by 1830 four-fifth of Baltimore's blacks were legally free, the largest group of free people of color in any U.S. city. Meanwhile … elsewhere in Maryland … [n]early three-quarters of the state's rural blacks were still slaves in 1830... Thus, Baltimore's hinterlands remained strongly committed to slave labor even as blacks transformed the city into an island of freedom. … Roman or Cuban slaveholders could use legal process to re-enslave former chattels who were "ungrateful" or "negligent," that is, freedmen who failed to show appropriate deference to former masters or who did not perform ongoing duties that had been stipulated as part of the freedom bargain. Marylanders who felt insulted or ignored by their onetime slaves had no such right. This important distinction goes far to help explain their making prospective manumissions contingent on faithful service in the interim before freedom arrived, as well as the desire to punish the ungrateful with extended terms or even the reimposition of slavery for life: Maryland masters could exact deference and service with the force of law only while the would-be freeman was yet a slave. … One way for a master to gain from gradual manumission would be to buy term slaves in succession, replacing those who gained their freedom with new time-limited slaves. Such an owner might have reasoned that people with a promise of eventual freedom were less likely to run away than perpetual bondmen. They might also work harder, out of motivation to acquire … [the capacity] to build a life as a freedman (…). Moreover, the owner of term slaves avoided the expense

[52] T. Stephen Whitman,, *The Price of Freedom: Slavery and Manumission in Baltimore and Early National Maryland*: University Press of Kentucky, 1997), at 114.

> of maintaining old, worn-out slaves, although owners of slaves for life could offer delayed emancipation to deal with this problem as well.[53] [Emphasis added]

This being said, even in the past, ethical reasons sometimes played a role in employers' interest to validate workers' future access to permanent legal status:

> In sequential slavery's most fully developed form, we find master buying slaves for … a term of years, and then buying a replacement when that slave's term expired. John Kelso, a butcher and merchant of Baltimore, thus bought Thomas Cook … in 1802. About nine months later … Kelso manumitted him effective in 1811. … [I]n the late 1810 Kelso purchased Romulus … who had fifteen years to serve (…). In 1820 … Kelso bought … Jacob for the remaining eight years of his servitude. … As a Methodist, Kelso was … complying with the letter, if not the spirit, of church discipline banning the ownership of slave for life. … [S]ome masters … preferr[ed] … to schedule a slave's future manumission and then sell him to a new owner (…). Methodist scruples regarding selling slaves for life may have helped generate some such transactions. But more tangible appeals to self-interest may have informed other actions. … [T]he inference that Davis was disposing of troublesome property and attempting to wangle compliance from Harriet by promising eventual freedom is strengthened by the fact that Davis had originally intended to sell her to another buyer (…).[54] [Emphasis added]

(Indirect) exclusions from access to permanent status

Most importantly, only a portion of (im)migrant workers end up accessing permanent legal status (and associated right to access justice in the country), as illustrated by the case of the non-agricultural temporary foreign workers employed in 2008 in the United States (see below Tables 1 and 2):

[53] *Id*., at 114.
[54] *Id.,* at 117.

Since the employer holds the work permit, H-1B and L-1 visa workers can only switch jobs in very limited circumstances, and their employer can revoke the visa at any time by terminating their employment, forcing the worker out of status with immigration authorities. … H-1B visas can be used for a wide variety of occupations that require a bachelor's degree. The duration of the visa is three years, extendable to a maximum of six. This can be extended indefinitely beyond the six years, in one year increments, if the employer is sponsoring the H-1B worker for permanent residence. The L-1 visa … allows intra-company transfers of foreign workers … L-1A for executives and managers, and L-1B for workers with specialized knowledge. Unlike the H-1B … no academic degree or higher learning is required. L-1A visas are valid for up to seven years, L-1B visas for five. … To examine this "bridge to immigration," I introduce a measure I call *immigration yield*, which is the ratio of PERM applications filed to H-1B petitions received by a specific employer. … It is clear from the data that many, if not most, of the top H-1B and L-1 employers do not use the visa programs as a bridge to permanent immigration.[55] [Emphasis added]

[55] Ron Hira, *Bridge to Immigration or Cheap Temporary Labor? The H-1B & L-1 Visa Programs Are a Source of Both*, Economic Policy Institute (2010), at 2-5, 11.

Table 1 - US "immigration yield" of skilled (im)migrant workers (2008)

Top 20 H-1B employers' immigration yield, 2008

Company	H-1B use rank	H-1Bs received	PERMs from H-1B	H-1B immigration yield
Infosys Technologies Limited	1	4,559	237	5%
Wipro Limited	2	2,678	31	1
Satyam Computer Services Limited	3	1,917	10	1
Tata Consultancy Services Limited	4	1,539	0	0
Microsoft Corporation	5	1,037	703	68
Accenture LLP	6	731	12	2
Cognizant Tech Solutions U.S. Corp	7	467	332	71
Cisco Systems Inc.	8	422	117	28
Larsen & Tourbro Infotech Limited	9	403	11	3
IBM India Private Limited	10	381	0	0
Intel Corporation	11	351	2	1
Ernst & Young LLP	12	321	150	47
Patni Americas Inc.	13	296	37	13
Terra Infotech Inc.	14	281	7	2
Qualcomm Incorporated	15	255	281	110
MPhasis Corporation	16	251	81	32
KPMG LLP	17	245	62	25
Prince Georges County Public Schools	18	239	60	25
Baltimore City Public School System	19	229	0	0
Deloitte Consulting LLP	20	218	77	35

Source: Hira 2010[56]

Table 2 - US "immigration yield" of project-tied workers (2008)

Top 20 L-1 employers' immigration yield, 2008

Company	L-1 use rank	L-1s received	PERMs from L-1	L-1 immigration yield
Tata Consultancy Services Limited	1	1,998	0	0%
Cognizant Tech Solutions U.S. Corp	2	1,839	342	19
Wipro Limited	3	662	3	0
Satyam Computer Services Limited	4	604	0	0
Infosys Technologies Limited	5	377	18	5
IBM India Private Limited	6	364	0	0
Hewlett-Packard Company	7	319	9	3
GSTechnical Services Inc.	8	288	0	0
Schlumberger Technology Corp.	9	287	3	1
Intel Corporation	10	226	0	0
Exxon Mobil Corporation	11	207	0	0
PriceWaterhouseCooper LLP	12	207	4	2
HCL America Inc.	13	185	25	14
IBM Corporation	14	178	4	2
Oracle USA Inc.	15	172	42	24
Halliburton Energy Services Inc.	16	165	14	8
Microsoft Corporation	17	156	100	64
Ernst & Young LLP	18	150	4	3
Capgemini Finacial Services USA Inc.	19	149	2	1
Sapient Corporation	20	147	0	0

Source: Hira 2010[57]

[56] *Id.,* at 14.
[57] *Id.,* at 15.

Indeed, economically speaking, it is often in the employers' short-term interests to have (im)migrant workers be denied access, as long as possible if not forever, to permanent status recognition:

> A recent *Wall Street Journal* article reports that one … firm, HCL America … has been hiring Americans rather than bringing in foreign workers on H-1Bs. The article notes that HCL has received a mere 87 H-1B guest workers in FY2010 (Jordan 2009). What the article completely missed is the fact that while HCL may have decreased its H-1B visa use, it has substantially increased its L-1 visa use in the past few years. It appears to be replacing its use of the H-1B with L-1 visas, a program that has even fewer labor market protections than the H-1B (Herbst 2009). … [Firms with] abundant availability of H-1B and L-1 visas [use legal] loopholes that allow below-market wages (…). For example … Tata Consultancy had 10,843 workers in the United States in 2007, only 739 (9%) were Americans. … [A]ccording to a Tata Consultancy Services executive, H-1B workers are less expensive (…). Then Vice President Phiroz Vandrevala described, in an interview with an India-based business magazine, how his company derives competitive advantages by paying its visa holders below-market wages:
>
> > … It's a fact that Indian IT companies have an advantage here and there's nothing wrong in that….The issue is that of getting workers in the U.S. on wages far lower than local wage rate. (Singh 2003)
>
> … Of course, there are some firms that use both the L-1 and H-1B visas for knowledge transfer with the explicit purpose of laying off their higher-cost American workers … sometimes … through contractors. An example of this … Siemens used Tata Consultancy Services to replace its American workers with L-1 visa holders earning one-third of the wages.[58] [Emphasis added]

Such trends of employers' behavior may one day be confirmed as being consistent across jurisdictions. In any case, Canadian evidence, such as the following example documented in Alberta, illustrates why employers mostly use 'employer-based access to permanent status' policies not to facilitate immigration but instead to access a maximal

[58] *Id.,* at 4-6, 11.

– and thus likely harmful – labour extraction from employees prohibited from working for another employer in the country:

> Employers also use nomination for the PNP as a means of pitting workers in a degrading fashion against each other in competition for the pivoted spots as nominees in the program. Even when nominated workers have raised fears over employers threatening to withdraw their nomination if an employee raises concerns about working conditions, or refuses to comply with the employers' demands. "My boss … [will] pick only one person for the PNP, so every day he says we have to work harder and the best worker will win." Sully, Migrant Worker in Alberta.[59] [Emphasis added]

Furthermore, as well illustrated also by historical examples, under employer-based permanent status recognition schemes, even in cases of employers' complete collaboration and formal support, external factors always further restrict, for a portion of the eligible individuals, access to (free) permanent status:

> In the spring of 1850, Knox … started overland for California. Among Knox's party were several white hired men and six enslaved men and women—Sarah, George, Fred, Lewis, and Bill and Romeo Hunter—who had, until recently, been struggling to pay their purchase prices. "I propose now to free them," Knox wrote of the men and women, "on the condition that they work for me one year in the gold mines of California." It is uncertain whether the enslaved people accompanying Knox found the journey to California—a long, difficult sojourn that would separate them from their families in Missouri for several years—an ideal path to … [freedom]. Certainly Bill Hunter, who was probably forced to leave behind his wife, Harriet, may have been a reluctant western migrant. The trip West held the promise of emancipation, but Hunter may have found the prospect of being

[59] United Food and Commercial Workers/Travailleurs et Travailleuses Unis de l'Alimentation et du Commerce - Canada, *Report on the Status of Migrant Workers in Canada, 2011* (2011), at 35-36.

> compelled to pay for his freedom in California as difficult and as burdensome as hiring out in St. Louis. … Upon reaching Sacramento, Knox left the six slaves in the city and arranged for them to work off their one-year terms by hiring out their labor. … While George, Romeo, and Sarah preferred flight to working out the terms of their contracts, the remaining slaves, Bill Hunter, Fred, and Lewis responded differently. According to Knox, the three men abided by the terms of their contracts and joined Reuben to work on his ranch after the other men and women had fled. … [T]hough each of the men had ample opportunities to take their freedom by running away, they may have regarded the freedom promised by Knox as safer and less tenuous than that seized by Romeo, George, and Sarah. … [T]he three remaining men may have thought they had a greater chance to escape slavery by complying with Knox's demands. Unfortunately for the three men, however, working out the terms of their contracts may not have provided a secure path to freedom. In late May of 1851, only eight months into the contract, Reuben Knox died suddenly. Knox's sons, charged with the task of disposing of his estate in California, may … very well have opted to retain the men … [and deny them access to freedom papers].[60] [Emphasis added]

Past employer-based access to (free) permanent legal status' schemes similarly guaranteed no more than a dream to individuals under precarious legal status:

> By working out their contracts … many enslaved people achieved manumission … [a] condition … that seemed entirely out of their grasp … [outside 'antislavery constitution' California]. Of course, many slaves had little choice but to fulfill the … obligations imposed upon them by their owners. … [But t]here was almost no guarantee, beyond mere promises of goodwill and paternalist regard, that masters would comply with their part of the bargain. Enslaved people, then, were faced with the very real

[60] Stacey Leigh Smith, *supra* note 26, at 174-180.

> possibility that after they … completed their terms, their masters would extort more money from them or, worse, would ignore the … [emancipation agreement] altogether and … [postponed indefinitely their access to freedom]. Thus, while enslaved African Americans found that … contract labor in the mines promised new opportunities for freedom in some contexts, attempts to achieve emancipation in California were often fraught with … fraud.[61] [Emphasis added]

Infringement on the right to access justice and the protection of the law

(Im)migrant workers eligible to employer-based permanent status recognition typically refrain not only from seeking justice in the case of a rights violation, but also from asserting their rights or leaving abusive workplaces – even if "highly skilled"[62]:

> By design, current high-skill immigration policies in the United States place enormous power in the hands of employers. Employers hold the H-1B [skilled work] or L-1 [multinational intra-company transfer] visa for workers, and employers have complete discretion whether and when to apply for permanent residence for those workers. … [T]he employers are able to keep their H-1B and L-1 visa employees captive. The very large numbers of H-1B and L-1 workers, coupled with the smaller allotment of employment-based immigration visas, often put guest workers who want to become permanent residents in a state of indentured limbo. Once an employer applies for permanent residence for the worker, that worker cannot [even] change jobs within the company, even to take a promotion, without hurting his chances for a green card (Ferriss 2006). If the guest worker decides to switch

[61] *Id.,* at 173-174.

[62] Valiani, S. (2015), *The Rise of Temporary Migration and Employer-Driven Immigration in Canada : Tracing policy shifts of the late 20th and early 21st centuries*, online: <http://www.yorku.ca/raps1/events/pdf/Salimah_Valiani.pdf>; Polanco, G. (2016), Globalizing "Immobile" Worksites: Fast Food under Canada's Temporary Foreign Worker Program, in Choudry, A. & A. A. Smith (eds) Unfree Labour? Struggles of Migrant and Immigrant Workers in Canada, at 71-86; Nakache, D. & S. D'Aoust (2012), Provincial/Territory Nominee Programs: An Avenue to Permanent Residency for Low-Skilled Temporary Foreign Workers?, in Lenard, P.T. & C. Straehle (eds) Legislated Inequality: Temporary Labour Migration in Canada, Montreal & Kingston-London-Ithaca: McGill-Queens' University Press, at 158-177; Valiani, S. (2006), *The Shift in Canadian Immigration Policy and Unheeded Lessons of the Live-in Caregiver Program*, online: <http://www.ccsl.carleton.ca/~dana/TempPermLCPFINAL.pdf>.

> positions, within the company or with another employer, he would go to the back of the line for permanent residence, so there are strong incentives to stay in the same position. (…) When employers need skilled foreign workers, they should rely primarily on … [(im)migrant workers under] permanent [legal status] … to supply them. Guest worker visa programs should be … significantly overhauled to ensure that foreign workers cannot be exploited and American workers are not undercut.[63] [Emphasis added]

This has also been confirmed by recent Canadian empirical evidence:

> Similar to the LCP, applicants in the strategic occupations stream of the BC PNP have to complete a work requirement term, 9 months, before becoming eligible to apply for a nomination. The permanent residence application is characterized as a 'joint application' between employer and employee. This means that the employee has to have an open-ended job offer from the employer throughout the immigration process which can take an average of 2 years to complete. Like the LCP, the research team heard many stories of workers enduring exploitative work conditions in order to maintain their jobs and their permanent residence applications.[64] [Emphasis added]

In particular, documented cases illustrate how employer-based access to permanent status restricts workers' capacity to access justice and reparation in the case of a rights violation:

> Back in the Philippines Luke worked as a registered nurse. His monthly salary of $200 was not enough to support himself, his wife and his two children, so he decided to apply to come to Canada. For two years Luke worked for a fast food chain as a food counter attendant for minimum wage and under difficult conditions. He worked ten hour days, six days a week and did not receive overtime pay. His employer provided accommodation but charged him $300 a month in rent. When the provincial minimum wage increased, Luke's employer raised his rent to $500 a month so Luke affectively did not earn any more. At one point, there were seven workers living in a one bedroom apartment sleeping in bunk beds and sharing a small bathroom and kitchen. Luke's work permit was issued for a specific location but when

[63] Ron Hira, *supra* note 55, at 12-13.
[64] West Coast Domestic Workers Association, *Access to Justice for Migrant Workers in British Columbia* (2013), at 36-37.

> his employer asked him to work at other locations he agreed because he did not think he could say no and even though he knew that the change in location was not authorized. Some of his co-workers filed complaints but he did not because his employer had agreed to help him apply for permanent residence under the BC Provincial Nominee Program.[65] [Emphasis added]

Under employer-based permanent status "regularization" policies, (im)migrant worker face similar obstacles to access justice and reparation in case of a right violation:

> THE 2009 REGULARISATION: "GENERALISED FRAUD" … [T]he 2009 regularization was exclusively targeted at a specific category of migrant workers: domestic workers and carers. … Some … employers … bended the rules and declared that their migrant employees were working as carers or domestic workers when, in fact, they were employed in the family business. Many [migrant workers] fell prey to unscrupulous "agencies", "consultants" and other individuals, both Italian and foreign, who cashed thousands of euros, often borrowed from family and friends, to … sell fake documents. … Many "employers" and intermediaries disappeared after having taken large sums of money, never showing up before the immigration authorities. Others kept requesting additional money to complete the procedure, after having received the payment necessary to submit the application. These situations were widespread all over Italy. Law-enforcement authorities reportedly discovered about 40 cases in the Sondrio area; more than 400 cases in the Milan area; at least 700 cases in the Vicenza, Verona and Padova areas; about 200 cases in the Rovigo, Bologna, Forlì and Ravenna areas; about 200 cases in the Reggio Emilia area; at least 250 cases in the Firenze area; at least 200 cases in the Pisa area; more than 300 cases in the Massa Carrara area; about 70 cases in the Pistoia area; as much as 1,000 cases in the Rome area. According to law-enforcement authorities, in Padova 81% of the applications involved some criminal conduct. Estimating the true extent of the phenomenon, however, is extremely difficult. The cases discovered by law-enforcement authorities are likely to be only a part of the total number of cases. In the Caserta area, the International Organization for Migration deemed the distortions of the 2009 regularization to be so widespread that it denounced a situation of 'generalised fraud'. According to Naga, an Italian NGO, an extremely conservative estimate based on the number of rejected and withdrawn applications would put the likely cases of fraud-type

[65] *Id.,* at 35.

> situations to more than 15,000. … [A] real risk remained for the migrant workers who were victims of fraud-type situations of being … expelled … if they approached public authorities. As a result, many were too afraid to report the crime. According to a survey organized in Milan by Naga, only 11% of the 438 migrant workers interviewed decided to report having been victim of a fraud to law-enforcement authorities.[66] [Emphasis added]

If (im)migrant workers eligible for permanent status recognition under an employer-based 'regularization' policy seek justice against an abusive employer or agent, they will in fact face radical state sanctions such as detention or deportation:

> In Padova, the migrants who had reported cases of fraud [during the 2009 regularisation] enjoyed de facto toleration for about a year, as local authorities refrained from detaining and expelling them. In Massa Carrara, some of the migrants who reported cases of fraud were given a residence permit for 'justice reasons'. In Verona, prosecution authorities declared that each individual case would be examined to determine whether a residence permit for 'social protection' could be issued (…). In the majority of cases, no allegation of responsibility or complicity in the frauds was formulated against the migrants, showing a recognition that they had been victims of a crime; at the same time, however, regularisation procedures were stopped and expulsion procedures initiated.[67] [Emphasis added]

In sum, under contemporary 'employer-based access to permanent status' policies, (im)migrant workers face major barriers to the claiming of their rights and the launching of judicial proceedings in the case of an abuse of rights.

Permanent status compatible with justice: No employer validation requirement

Recent empirical evidence on the conditions of (im)migrant workers under employer-based access to permanent status in Canada confirms that only a "secure", and in particular 'non employer-based', access to permanent legal status would allow

[66] Amnesty International, *supra* note 51, at 10-11.
[67] *Id.*, at 11-12.

(im)migrant workers a meaningful capacity to exercise their rights during a permanent legal status recognition process, including their right in the country to access justice:

> [T]emporary migrants … [may] transition … to permanent residency through the Manitoba Provincial Nominee Program (…). … [H]ow the promise of permanent settlement … with a two-step immigration process influences … the lived experiences … [?]. Even though transitions to permanency for temporary migrants is a positive step toward reducing their vulnerabilities and precariousness … two-step immigration processes are not a panacea for the ills of the Temporary Foreign Worker Program. The promise of eventually obtaining permanent residency can compound temporary migrants' vulnerabilities by placing even more power in the hands of employers as it is a process that rests upon the decisions and favourable supports of those who hire migrants. In this relationship, migrant employees … [are] disciplined through the threat of deportation or failure to support residency applications. In addition, migrants will do what is needed to gain the favour of their employers (…). … [Q]ualitative interview data from twenty-six migrants working in Manitoba's hog processing industry … supports calls for secure paths to permanent residency for all temporary migrants (…).[68] [Emphasis added]

During Italy's special case of regularization for (im)migrant workers under irregular legal status, Amnesty International further concluded that it is essential that the law acknowledges an implied legal status for the individual also during the waiting period:

> The 2012 (Italy) regularisation procedure should be revised … to prevent and combat labour exploitation. To this purpose:
>
> - Migrant workers should be entitled to initiate the regularisation procedure, by submitting to the authorities information about their employment relationship;
> - Migrant workers should be entitled to receive all relevant documents and information directly from the authorities;

[68] Bucklashuk, J. (2016), Negotiating Two-Step Migration and Experiencing Precarious Legal Status in Manitoba, paper delivered at the conference *Migration, Labour & Social Justice Honouring the Scholarship of Kerry Preibisch*, University of Guelph, September 18.

- If relevant requirements are met, migrant workers should be entitled to complete the procedure without the cooperation of the employer;
- Migrant workers should be allowed to legally change employer during the time necessary for the procedure to be completed.[69] [Emphasis added]

In sum, in order to ensure a meaningful capacity to access justice in the country for (im)migrant workers, independent, 'non employer-based' permanent status recognition policy is necessary – as has been acknowledged historically in various circles for quite some time now, as illustrated by this Californian example:

> [T]he bill, in its original form, virtually allowed black women and men to be held in bondage in California for an indeterminate period of time. … As one fierce opponent of the bill summed it up, the measure "virtually establish[ed] slavery in [the] State … in open violation of the constitutional provision prohibiting the toleration of that institution." Crabb's … bill passed the assembly with minimal debate, but its future was much less certain in the senate. … Broderick and his followers challenged its constitutionality (…). … [T]he antislavery men noted, the bill's proposal to deny slaves all due process rights … rendered California's African American residents vulnerable to … fraud. Of special concern were those … men and women who had been brought to California … under contracts to labor for their freedom. (…) [I]t would be impossible for slaves to prove that they … had a … claim to freedom. … [A] colleague [presented] … a personal liberty law … that would entitle … [the slaves] to make a case for their freedom, testify on their own behalf (…).[70] [Emphasis added]

Inputs from employers should be taken into consideration within immigration policies *without* imposing an increased dependence on the employer for the worker interested in securing a permanent status and, thus, without creating restrictions on workers' access to justice in the country. Employers' input should, in sum, never be given value within (the government-validated) admission or status recognition processes of *specific* individuals that would thus *de facto* end up compelled to become and stay silent, and to

[69] *Id.*, at 9-10.
[70] Stacey Leigh Smith, *supra* note 26, at 119-123.

provide the highest bid – systematically jeopardizing one's bodily integrity - to secure the employer support.

Employers' threat of sponsorship revocation may compel workers to endure abusive conditions in various ways and refrain from accessing justice to obtain reparation:

> In another case, Joan … who complained … could not leave her employer because they were now sponsoring her sister to come to Canada … (Joan, Workshop Discussions). Although individuals' reasons for staying with exploitative and abusive employers are sometimes different, what connects these different reasons are the ways in which … [the immigration law] creates and maintains relationships of dependency [to the employer] (…).[71] [Emphasis added]

Instead, employers' wishes on permanent status recognition should never be incorporated into immigration policymaking. There are only two justifiable reasons: (1) as part of a national labour market analysis to establish annual quotas of workers (and families) of various skill sets for the annual issuance of work permits and sponsorship for foreign workers (and families) by the Federal government, and (2) for the establishment of priority skill sets for various level of fast-tracking, as well as emergency protocols, necessary within any work permit application processing policy. In any case, employers' input should never be allowed to integrate specific individual names of workers – who would then possibly feel forced to "buy" from their future employer such support/naming/sponsorship for work permit application fast tracking – which could put workers back into various forms of debt bondage with their Canadian employer, and back into the associated condition of restricted capacity to assert rights and seek justice until such debt has been erased.

Permanent status recognition based on individuals' opinion: Justifiable?

[71] Sedef Arat-Koc & Fely O. Villasin, *supra* note 43, at 41.

Employer-based permanent legal status recognition policies imply a major restriction of individuals' right to access justice and the protection of the law in the country. Since individuals' access to permanent legal status is directly relevant to her or his relation with state authorities, employer-based requirements are likely to be confirmed in Canada as an unjustifiable infringement of constitutional rights since it constitutes a form of arbitrary "community acceptance':

> The issue in *Powley* was who is Métis under s. 35 of the *Constitution Act, 1982*. The case involved two Métis hunters who were charged with violating the Game and Fish Act, R.S.O. 1990, c. G.1. They claimed that the Métis had an Aboriginal right to hunt for food under s. 35(1). The Court agreed and suggested three criteria for defining who qualifies as Métis for purposes of s. 35(1): … connection to an historic Métis community; and … Acceptance by the modern Métis community. The … community acceptance [criterion] … raises particular concerns (…). The criteria in *Powley* were developed specifically for purposes of … protecting historic community-held rights (…). That is why acceptance by the community was found to be … a prerequisite to holding those rights. Section 91(24) serves a very different constitutional purpose. It is about the federal government's relationship with Canada's Aboriginal peoples. This includes people who may no longer be accepted by their communities because … for example, of government policies (…). There is no principled reason for presumptively and arbitrarily excluding them from Parliament's protective authority on the basis of a "community acceptance" test. … Nonstatus Indians and Métis are "Indians" (…). …The … Federal Court of Appeal's conclusion that the … declaration should exclude non-status Indians or apply only to those Métis who meet the Powley criteria, is set aside.[72] [Emphasis added]

If a "community acceptance test" should not be the basis in Canada of a legal status recognition, then, *a fortiori*, a single (individual or organisational) community member's opinion, the employer's, is unlikely to be found under courts' scrutiny a legitimate criteria to determine the status that directly relates to "the federal government relationship with"[73] the individual.

[72] *Daniels v. Canada (Indian Affairs and Northern Development)*, [2016] 2016 SCC 12 at paras 48-50, 58.
[73] *Id*.

Though the constitutionality of 'employer-based (permanent) legal status recognition' schemes has never been challenged in Canada, the necessity of removing the requirement of the (positive) employer's input from status recognition procedures has been acknowledged in various Italian court decisions:

> Recognising some of the deficiencies of the 2009 regularisation in guaranteeing migrant workers' rights, Italian courts have intervened on a number of occasions to ensure that its implementation complies with Italy's own non-discrimination and labour legislation. In September 2009, considering the case of a migrant domestic worker who had lost her job after having requested that the employer apply for regularisation, the Employment Tribunal in Brescia ordered that the employer must submit the application, as regularisation cannot be dependent on the discretion of the employer. In December 2010 the Regional Administrative Tribunal of Lombardy confirmed that, when the employment relationship exists and other objective criteria required by law are met, the regularisation procedure must be completed even in the absence of the employer, as it cannot be left solely to the latter's discretion. Similarly, the regional Administrative Tribunals for Piedmont and Tuscany ruled that the authorities have an obligation not only to notify the migrant worker of all relevant information about completion of the procedure, but also to allow them to complete the process in the absence of the employer if all of the relevant requirements are met.[74] [Emphasis added]

2.3.2. Employment requirements: Exclusions and infringement on access to justice

State authorities also often make access to permanent status conditional upon the (im)migrant worker's completion of a specific duration of authorized employment in the country. However, such 'employment-based' permanent status recognition schemes *indirectly* constitute 'employer-based' access to status policies. Thus, eligible (im)migrant workers face obstacles to the claiming of rights and seeking of justice. Furthermore, this

[74] Amnesty International, *supra* note 51, at 7-8.

policy always ends up restricting the right to a meaningful access to justice for a portion of the eligible (im)migrant workers. This being said, risks of exclusion and infringement on the right to access justice and the protection of the law during the permanent status recognition process are higher when one or various employment sub-requirements are specified. In sum, for the permanent status recognition process to be compatible with workers' right to access to justice in the country, it must not only be accessible independently of the employer(s)' formal validation, but also "upon arrival."

Employment-based access: Indirect requirement of employers' input

'Employment-based access to permanent status' policies rely, by definition, on government records of the workers' employment in the country. Such records of employment are submitted to authorities by employers. In this context, without the employer's input confirming a sufficient period of employment, the (im)migrant worker's eligibility will not be recognized for permanent status by state authorities:

> The possibility of permanent status, and essentially the future of the person in Canada and their rights –or lack thereof—are directly tied to and conditional upon a good work record. … [E]mployers are very aware of this. "Without landed status, you are always scared. … You are afraid to terminate your contract with your employer. … I feel like I am in a cage (…)." (Filipina Group, Interviews)[75] [Emphasis added]

Employment-based access to perm status: Indirect exclusions

Furthermore, under employment-based access to permanent legal status, an employers' sudden physical/financial incapacity (or death), negligent behavior, and/or illegal employment practices may at any time, and often do, end up negating workers' access to permanent status. In particular, workers risk additional delays or the denial of permanent

[75] Sedef Arat-Koc & Fely O. Villasin, *supra* note 43, at 37.

status every time an employer is unwilling to register the employment relationship with authorities:

> [T]wo … [(im)migrant workers admitted in Canada under the Live-in Caregiver Program and recognized access to permanent status after 24 months of government-validated employment] hired [by Liberal Member of Parliament Ruby Dhalla] to care for her mother were illegally employed and then mistreated. … The nannies also allege Dhalla improperly seized their passports and family members forced them to do non-nanny jobs such as washing cars, shining shoes and cleaning family-owned chiropractic clinics. … Magdalene Gordo, 31, and Richelyn Tongson, 37, say they were hired by Dhalla to work at the family home in Mississauga (…). The Dhalla family did not obtain the necessary federal approval … for the women to … work [legally] in their home [and thus remain eligible for access to permanent legal status].[76] [Emphasis added]

(Im)migrants are compelled *not* to exercise their basic human rights, in order to maximize their chances of remaining in the country. Even though there is hope that their employer will submit the necessary work records that ensure employment authorization, safeguarding/renewals, and a transition to permanent legal status, such results are *never* guaranteed:

> This research arose from encounters with … migrants during my practice as an immigration and refugee lawyer. For example, I advised one woman who had entered Canada as a live-in caregiver … and became pregnant (…). The father of the child was her employer, who prevented the woman from leaving his home/her workplace, and she was having difficulty obtaining prenatal care [without legal status] while making a decision about whether to stay in Canada [illegally] or to return in her country of origin [since the employer/father did not submit the follow-up paperwork necessary to ensure for her legal status, access to health care services and eligibility to permanent status].[77] [Emphasis added]

[76] Dale Brazao, "Ruby Dhalla's nanny trouble", *The Star* (2009) at 1.
[77] Sarah Marsden, *Law's Permissions, Law's Exclusions: Precarious Migration Status in Canada* (University of British Columbia 2013) [unpublished] at 1.

In some cases, employers are not simply involuntarily or voluntarily negligent with the paperwork necessary for the worker's eligibility and recognition of permanent status; they actively lie to authorities to specifically create an additional obstacle for the (im)migrant worker's permanent status recognition (and for meaningful access to justice in the country):

> Lilliane came to Canada from Uganda to work as a live-in caregiver. Her passport and work permit were taken by her employer upon arrival. She had no private space and had to share a room with the youngest child. Contract specified that Lilliane was expected to work 45 hours per week, however she was forced to work from 8am until 11pm. She never had a day off. She had to ask for permission to leave the house just to see a hairdresser, but when she left for her appointment her employer threatened her and said she would call Immigration because Lilliane was not allowed out of the house by herself. Lilliane was paid $100 in cash each month which was far lower than the amount specified on her contract (she received $2100 for 2 years' worth of work). Her mother at home got sick and she asked for more pay so she could send money home. Her employer said no. One day at the library Lilliane broke down crying and a concerned woman asked her what was the matter. Lilliane told her everything, to which the woman replied "You are too young to be under slavery" and provided her with the phone number for a shelter. After leaving her employer, Lilliane requested her record of employment (she needed to show the government that she had worked 24month so she could apply for permanent residence). Her employer falsified the record of employment to show that she had worked less.[78] [Emphasis added]

In sum, 'employment-based' permanent status recognition policies constitute 'minefields' for (im)migrant workers, and for many of them result in the state denial of a meaningful access to justice and the protection of the law.

[78] Jesse Beatson & Jill Hanley, *supra* note 33, at 15.

Employment-based access: Infringement on the right to justice and protection of the law

Workers under employment-based access to permanent legal status typically refrain from claiming their rights, and *a fortiori* from seeking justice and reparation through legal proceedings, in the hope that pleasing their employer at all costs will result in securing the "employment records" required by the state:

> "Workdays are always more than 8 hours – landed immigrants work 8 to 9 hour days but if you are not landed you could be working up to 12 hour days regularly, extra babysitting nights or weekends are never paid overtime." (Caribbean Group, Interviews)[79] [Emphasis added]

In this context, it is no surprise that under employment-based permanent status recognition policies most (im)migrant workers further refrain from seeking justice in the case of a rights violation – thus maximizing their chances to obtain the necessary employment records and the permanent status recognition *as soon as possible*:

> According to Natalie Drolet, a lawyer for the West Coast Domestic Workers Association, roughly one in three of her organization's 2,500 annual [(im)migrant worker] clients has experienced some form of abuse. "They choose Canada because it provides a pathway for permanent residence for them," she explained. "In a way, that's also incentive to stay with employers who are abusive because they want to finish the requirements of the program so they can apply for permanent residency."[80] [Emphasis added]

If, under an 'employer-based' permanent status recognition scheme, an (im)migrant worker decides to exercise her or his labour rights and/or launch judicial proceedings to obtain justice and reparation in the case of a rights violation, employers can easily retaliate through the non-production of employment records[81]. Regularly, employers

[79] *Id.,* at 39.
[80] Elizabeth McSheffrey, "Migrant workers call on Trudeau to reform Temporary Foreign Worker Program", *National Observer* 2016).
[81] Salimah Valiani, *The Shift in Canadian Immigration Policy and Unheeded Lessons of the Live-in Caregiver Program* (2009) at 18.

even use criminal accusations to negate (im)migrant workers' right to obtain justice and, at least potentially, jeopardize their access to permanent legal status:

> ESB [Ontario Employment Standards Branch] claim … Although most accusations of theft were proven unfounded, they threatened to destroy' caregivers' chances of … success of their application for permanent status. In most cases, they caused tremendous psychological suffering for the caregivers. During the interviews, Elly shared how she suffered from severe stress and anxiety and went into depression following accusation of theft by her former employer: "I did not have any appetite and had no confidence in myself. I kept asking what I did wrong (…). … Sometimes I did not want to take a shower (…). … Sometimes I would feel loss of breath. … I would walk aimlessly. …" (Elly, Interviews) … Another caregiver, Luisa … [was] taken to court by the employer for $25 000 damages to the carpet … which the employer claimed was destroyed by Luisa's use of wrong cleaning agents. The complaint came much later than the incident, only after Luisa made an ESB [Employment Standards Board] claim for unpaid overtime hours and vacation pay. Luisa, hired as a childcare provider, and not a certified carpet cleaner, was intimidated by the court case and offered to pay the employer in installments. Luckily, the case was dismissed (Luisa, 1997 Case Files). Whether or not there are actual legal consequences (in the form of criminal charges or financial penalties, etc.) to the intimidation and reprisals by employers to ESB claims, intimidation and reprisals still "work". If and when the word gets around among caregivers that these incidents occur, or if the employers make threats that they may use reprisals, caregivers often give up before they even try. They "put up and shut up" and decidedly avoid making waves until at least their immigration status in Canada becomes less precarious.[82] [Emphasis added]

In the words of (im)migrant workers under Canadian employment-based access to permanent status, this policy results in workers feeling "punished" by the state for leaving an abusive employer:

> Staying with abusive employers is due … to the strong desire to complete … [the] months of full-time work … as fast as possible. "Yes, we can leave an

[82] Sedef Arat-Koc & Fely O. Villasin, *supra* note 43, at 50-52.

> employer but is it easy to do that? Immigration punishes us for the number of day we are not employed… So we have to avoid losing our jobs or changing employers. You are haunted, as it is in the back of your head, something is always warning you that you could be punished … if you don't obey (…)." (Filipina Group, Interviews) Rosario contacted INTERCEDE totally exhausted with her long working hours and with constant babysitting in her "off" hours without pay. She wanted to leave, but was only two months away from completing her 24 months … she decided to stay. (Rosario, 1993 Case Files)[83] [Emphasis added]

In sum, employers' (threats of) reprisal are more damaging against workers whose "future immigration to Canada is directly tied to their employment":

> Further examples of employer reprisals in response to workers' attempts to … [access justice] demonstrate the links between restricted … Canadian law … and the power … [Canadian employers] are permitted to exercise through … [a temporary foreign worker program]:
>
> > [E]mployers [often] respond … to Employment Standards Branch (ESB) claims by reprisals. Reprisals from employers can be intimidating for any employee. They have extra intimidation power, however, for employees whose status in and future immigration to Canada is directly tied to their employment. One typical reprisal took the form of employers … refusing to provide record of employment … which were needed for Immigration (…). (Arat-Koc: 2001, 50, 51)[84] [Emphasis added]

Finally, in addition to employers' increased power reprisals, the applicable labour legislations themselves may indirectly create obstacles to justice, specifically for workers admitted under conditional immigration policies. This may be illustrated, once again, by the case of the (im)migrant caregivers admitted in Canada under an 'employment-based permanent status recognition' regime:

[83] *Id.,* at 41.
[84] Salimah Valiani, *supra* note 81, at 8.

> In the fall of 1996, further changes were made to the Employment Standards Act (ESA) which further restricted workers' rights. Up until 1996, there were no official limits on the amount of financial claims workers could make. In 1006, a $10,000 cap was placed on claims that the Employment Standards Branch (ESB) would handle. The only way around this limit would be for workers to go to courts, which is punitively expensive and intimidating. Another change to the ESA involved shortening the deadline within which claims had to be made. Up until 1996, workers had two years to make a complaint. With new legislation, the deadline came in 6 months. Interview with a staff lawyer at a community legal clinic revealed that the $10,000 limit, as well as the 6 months deadline for Employment Standards claims have particularly negative impact on caregivers. As Caregivers are less likely than most other groups of workers to leave an employer immediately upon breach of contract (due to concern about meeting immigration requirements), they often wait a long time (often until after they complete their 2 years of work and leave their employer), if they do at all, to make an Employment Standards claim. By this time, caregivers' claims often involve big sums of money, up to $40,000 according to the staff lawyer.[85] [Emphasis added]

If the requirement of a "number of months of employment" to access permanent status results in the restriction of individuals' capacity to claim rights, access justice, and enjoy the protection of the law, additional conditions put (im)migrant workers in an even more precarious situation. These additional conditions commonly take the form of (I) an obligation to work only for the employer authorized by the government, (II) an obligation to remain in a specific sector, occupation, or area, and/or (III) an obligation to accept a specific work arrangement such as taking up full-time residence at the location of work.

I. Specific employer/full-time employment to access permanent legal status

The imposition of an additional obligation to work only for a specific employer results, as shown by the example below, in (im)migrant workers being denied permanent status for

[85] Sedef Arat-Koc & Fely O. Villasin, *supra* note 43, at 66.

working for other employers, even if doing so upon the authorized employer's (direct order or) encouragement:

> Leticia Cables, dubbed by Canadian newspapers as "the hardworking nanny," was ordered deported after the Immigration Department found out that she worked for other employers in violation of … [the conditions of the admission program]. Leticia's quandary arose after her employer terminated her employment because the employer's wife decided to stay at home and take over Leticia's work. Upon reconsideration, she was again admitted by the same employer but only on a limited basis. To make up for her lost wages therefore, Leticia decided to do odd jobs for neighbors upon the advice and encouragement of her lawyer-employer. When found out by the CIC [the Department of Citizenship and Immigration Canada], she was ordered deported. … While various groups and individuals rallied to challenge her deportation, a deeply disappointed Leticia just decided to go back to the Philippines (…). … [T]he … [Canadian government immigration policy creates] a special class of temporary migrant workers who are made vulnerable to abuses facilitated by onerous conditions [to access permanent legal status]. Often, these requirements force them to work without a permit and risk deportation, or endure abuse … for fear of losing the chance at becoming permanent residents … at the very least. These highly exploitative conditions … [may further be] overlooked by the immigration officers … evaluating the … application for permanent residence, and/or when ruling whether or not the [(im)migrant worker failed to meet the requirements and thus] … should be deported.[86] [Emphasis added]

Much like today, in the past the imposition of this condition, where workers' eligibility to permanent status relied on the completion of one (or more) *specific* employment contract(s), however, typically varied on the basis of the workers' national origin:

> Aside from the pressure from the Dutch government to ensure that the emigrants were not defined as farm labourers, it appears that the Canadian state defined them as 'racially' unsuitable for incorporation as unfree labour in the country. According to representatives of the Department of Labour,'

[86] Maria Deanna P. Santos, *Human rights and migrant domestic work: A comparative analysis of the socio-legal status of Filip*, at 152.

we cannot consider them as a mobile working force for agriculture and direct them to activities selected by us at will' The reasons why they could not be 'directed' to activities selected by the Department of Labour were set out clearly by the Director of the Immigration Branch of the Department of Citizenship and Immigration:

> … their urge to a free initiative, their close-knit family ties and their spiritual and moral characteristics would doom any movement to failure if regarded as merely a mass movement to meet labour deficiencies.

This assessment of the Dutch 'people' by the Director of the Immigration Branch was echoed by what Porter argues was a common belief in the 1950's that

> …members of these three language groups [English, German and Dutch) ... are physically interchangeable .... They have the same standards of personal and household cleanliness. At the higher social levels they dress in identical ways and appreciate the same leisure time pursuits. They profess Christian farms of religion and greatly value military prowess. Understandably, such ... groups are welcomed in Canada, and they prosper soon after settlement here.

What is notable about the state's evaluation of Dutch immigrants (as well as English and German immigrants) in this context was that they were defined as a fixed biological grouping which seemed, in a deterministic manner, and by cultural traits. As such, the Dutch were the objects of a process of racialization, but this process involved a series of positive evaluations of their 'racial' characteristics, and was not, then, strictly speaking, racist. These evaluations meant that the Canadian state defined them as a naturally 'free' group of people who were unsuitable for a mode of incorporation which would limit their ability to circulate in the labour market. The state's claim that these people's 'free initiative' could not justifiably be curtailed even for an initial limited period of time after arrival in Canada contrasts starkly with its position an Polish Veterans and Displaced Persons. In the latter two cases, an initial period as unfree labour in Canada was defined by the Canadian state as a prerequisite for citizenship, assimilation, and the enjoyment of subsequent freedoms in the country…(In contrast) The state's willingness to allocate Polish veterans and Displaced Persons to positions as unfree wage labour was therefore based on the fact that they were political refugees who did not choose to migrate to Canada 'freely'. This contradicted the Deputy Minister of Labour's claim noted earlier that Displaced Person's entered into

> these contracts freely'. Thus state's recognition that Polish veterans' faced … compulsion to migrate provided the impetus for the state to allocate them to positions as unfree immigrant labour.[87] [Emphasis added]

Similarly, the enforcement of this condition, that is the denial of permanent status and deportation of (im)migrant workers who worked for an employer other than the one authorized by authorities, has also been historically confirmed as greatly dependant on workers' national origins:

> The group which appears to have been the first target of the state is recruitment under the assisted passages scheme were ethnic Germans who lived in the Eastern Zone but who escaped to the west through Berlin. … Later, a range of other western and southern European immigrants were granted assisted passage loans, including a large number from Portugal. … It appears that between 1951 and 1955 … about 14.4% of the total of Assisted Passage immigrants were channelled to Ontario farms. Those who were granted an assisted passage loan were required to repay them within two years of arriving in Canada," (…). … Those who were granted such loans were expected to remain in the employment to which they were initially allocated to until the loan was repaid, or in any case, for at least a period of one year. In theory, then, during their initial year in Canada, assisted passage immigrants were unable to circulate in the labour market. They could not quit their jobs … without the formal sanction of the state. In this light it is possible to see the loan system as a subtle form of debt bondage whereby the state attempted to insure that those permanent settlers admitted to the country would remain for at least one year in the employment for which they were recruited. … [T]he scheme could … be seen as a form of state control over the circulation of labour in the market… Even though one of the formal conditions of receiving a loan was that the person agreed to remain in the employment for which they were recruited for a period of one year, a large proportion appear to have left farm labour positions before they repaid their loans and before the end of one year in the country... For instance, in 1953 some 2,050 single male German farm workers who arrived under the Assisted Passages plan were allocated to farm labour positions in

[87] Victor Satzewich, *Modes of Incorporation and Racialiazation: The Canadian Case* (Ph.D. Thesis, University of Glasgow Department of Sociology, 1988) [unpublished], at 215-216.

> Ontario by the Ontario Federal Provincial Farm Labour Commitee. By the end of the year, 639 or 31.2% had left the farm labour positions for which they were recruited. In Alberta, this figure was even higher as it stood at 60%, and it was recorded to be almost as high in New Brunswick and Saskatchewan. "
> … As with Polish Veterans and Displaced Persons who did not live up to the terms of their contracts, farmers and other employers exerted pressure on the state for the deportation of Assisted Passage immigrants who refused to live up to the terms of their agreements. But, unlike the Polish veterans and Displaced Persons, the state did not force them … to remain in those positions. … Some … defined the 'problem' in terms of 'race'. One member of the Department of Citizenship and Immigration … suggested that
>
> > … a sounder means of control lies in facilitating the movement of races that experience has shown are likely to remain in agriculture (…). …
>
> … Despite the precise specification given of the types of people who were likely to remain in farm labour employment, the tightening of selection criteria appears to have had little effect on the subsequent labour market behaviour of those recruited for farm work as farmers continued to complain about the 'poor quality' of the workers recruited. … [T]he recruitment and retention problems were not simply the result of the state's faulty recruitment of 'suitably qualified' workers or of some peculiarly 'ethnic' characteristics, which in the case of Polish war veterans, was defined in terms of 'restlessness'. A brief examination of the employment practices of the Canada and Dominion Sugar Company is useful in this respect because it shows that … retention problems were structural problems (…).[88] [Emphasis added]

II. Employment in a specific sector/occupation/area to access permanent legal status

States also often associate the additional condition of a specific occupation, sector, or geographical area with the imposition of an ‘employment requirement’ for accessing permanent status. For example, since 1955, the Canadian government admitted thousands of (im)migrant workers under the obligation to remain in the live-in caregiver occupation in order to access permanent legal status. Among them, the workers who

[88] *Id.* at 197-200, 203.

became unemployable in that specific occupation thus ended up being denied permanent status by the state – sometimes for exercising a basic human freedom:

> Aside from the varying court interpretations and rulings on the decisions of immigration officers, all-too-often, the actual decisions of the immigration officers also reflect a shocking lack of sensitivity to the situation of applicants (…). … [Various]… cases … illustrate the vulnerability of … participants … despite the … advantages [of the –delayed-- access to permanent legal status] that the program supposedly provides. … After [Melca Salvador] gave birth … [she] found extremely difficult to land another live-in caregiver job which resulted in her failure to fulfill the … requirement (…). … Despite having endured all these [abuses], the fact that she has a son born in Canada and has proven her adaptability and resourcefulness (she never went on welfare and has paid the Canadian government the total amount of $4500 in taxes and application fees) amidst her difficult situation, the government still denied her application for permanent status and threatened her with deportation (…).[89] [Emphasis added]

III. Specific work condition(s) to access permanent legal status

State authorities may, furthermore, make one or various specific work arrangements as additional requirements for eligibility to permanent status. For example, the (im)migrant workers in Canada without post-secondary diplomas who are not highly fluent in English or French who have been employed for more than 24 months as a caregiver will only be eligible for permanent legal status if they have managed to keep residence with their employer during their required 24 months of employment:

> **I am working as a live-in caregiver but would like to move into my own home. Can I?** To work as a caregiver on a live-out basis, your employer will need a new Labour Market Impact Assessment (LMIA) and you will need to apply for a new work permit based on that LMIA. In addition, you would have to apply for permanent residence through the Caring for Children or

[89] Maria Deanna P. Santos, *supra* note 86, at 151-154.

> Caring for People with High Medical Needs pathway, and not through the Live-in Caregiver Program.[90] [Emphasis in the text; underline added]

Indeed, both the "Caring for Children" and the "Caring for People with High Medical Needs" pathways to permanent status of the Canadian Caregiver program require proof of high language ability and higher education:

> Starting November 30, 2014, the Caregiver Program will include two new pathways for permanent residence for foreign workers with experience as caregivers in Canada. The two new pathways are:
>
> - Caring for Children
> - Caring for People with High Medical Needs
>
> For both the Caring for Children Pathway and the Caring for People with High Medical Needs Pathway … [y]ou will need to meet requirements for language ability and education. In addition, the Live-in Caregiver Program pathway to permanent residence is still open for all live-in caregivers who … have applied for a work permit as a live-in caregiver … and complete the work requirement of the Live-in Caregiver Program.[91] [Emphasis added]

In this context, for some (im)migrant workers, such as those without post-secondary diplomas or English/French fluency, who are employed in Canada as caregivers, an additional 'specific work arrangement' requirement is imposed to access permanent status, which in fact subjects them to additional obstacles to the exercise of rights and seeking of reparation in the case of a rights violation.

In the case of the additional "live-in" requirement for permanent status, the evidence confirms that these (im)migrant workers under employment-based access to permanent status recognition face increased risks to rights violations, obstacles to reparation and protection of the law in the country:

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[90] Immigration, Refugee and Citizenship, *I am working as a live-in caregiver but would like to move into my own home. Can I?* (2016).
[91] *Ibid*.

> [T]he "live-in" [requirement imposing residence with the employer] … [as a condition for access permanent legal status] has all-too-often facilitated the perpetration of sexual, physical and emotional abuse on many such MDWs [migrant domestic workers], as well as the violations of labour code requirements (ranging from unpaid overtime work to extended/flexible hours, etc.).[92] [Emphasis added]

As with other forms of additional conditions (specific employer, full-time employment, specific sector, specific occupation, specific area), the employers' input plays an increased role in the confirmation of the (non-)fulfillment of requirements for status recognition. In this context, additional 'employment requirements' only increase employers' tools to ensure that abused (im)migrant employees will refrain from obtaining justice and reparation in court:

> While access for all guestworkers to permanent legal status is necessary to minimize downward pressure on labour markets and to facilitate circular migration, researchers have observed that the requirement to be 'sponsored' by the employer to access permanent legal status significantly contributes to guestworkers' position of extreme vulnerability to abuse by employers and recruiters (Bals, 2009; Bilala, 2013; Byl, 2010; CCR, 2010; Depatie-Pelletier, 2012; Osmani, 2008 ; Ruhs, 2004, 2006; Valiani, 2009). Therefore, guestworkers' must be able to access permanent legal status through an independent procedure without any employer sponsorship or validation requirement -- such as the obligation currently imposed on live-in caregivers requiring them, to access permanent status, to obtain from their employer a confirmation that the 'live-in' obligation was met for the employment duration. In other words, employers' opinions are paramount to understand which skills are necessary in order to select guestworkers for permanent status via the immigration grid, but also through fast-track admissions for immediate integration within a regional labour market. However, employers' opinions on the legitimacy of their employee's entitlement to secure permanent legal status is not relevant. In fact, since giving value to these opinions creates major obstacles to the migrant workers' capacity to exercise their basic labour rights, employers'

[92] Maria Deanna P. Santos, *supra* note 86, at 160.

> opinions should never be considered as relevant by any government in determining permanent legal status for guestworkers.[93] [Emphasis added]

In sum, (im)migrant workers' capacity to claim rights and seek justice and reparation in court is significantly jeopardized by any form of an 'employment-based' permanent status recognition scheme.

Necessary for justice: Access to permanent legal status upon arrival

In this context, some (im)migrant workers have explicitly described 'employment-based access to permanent status' policies as a state-induced powerlessness in the face of rights violations:

> "The way I see it, if you have your landed [permanent legal status] and you stand up and say what you think, and say I am not doing this, [the employers will] … take it. But if you don't have your landed [permanent legal status] and you talk to them like that, they can threaten you and do you kind of things." (Caribbean Group, Interviews) Temporary status means less rights and protection by the state, while it also involves more regulations and restrictions over people's lives. In this sense, it is analogous to the treatment of criminals by the state. It involves, however, being treated like a criminal until proven innocent!" We are treated like criminals. Why can't we be treated as legitimate human beings? Why not give us legitimate [permanent legal] status (…)?" (Filipina Group, Interviews) Some caregivers are very articulate about the relationship between abuses by employers and their own … immigration … status (…): "I blame the system for our victimization. (…)" (Filipina Group, Interviews)[94] [Emphasis added]

In this context, since delaying access to permanent status according to the completion of the required hours of work significantly restricts individuals' access to justice and

[93] Denise Helly, Eugénie Depatie-Pelletier & Adrienne Gibson, "Lessons from Canada: The Economic Necessity to Make All Guestworker Regimes '2-Step Immigration Program Facilitating Just-In-Time Integration and Circular Migration'" (paper delivered at the International CRIMT Conference, Montreal, 5 May 2014), at 24-25.
[94] Sedef Arat-Koc & Fely O. Villasin, *supra* note 43, at 37.

protection of the law, an (independent) access to permanent status for (im)migrant workers is necessary – no matter the number of months of employment in the country or, in other words, upon arrival:

> Interviewee testimony throughout our research has confirmed that many workers endure terrible work conditions and employer abuse in the hopes of attaining permanent residence down the road. … Live-in caregivers should receive permanent residence upon arrival to Canada.[95] [Emphasis added]

2.3.3. Funds-based access to permanent status: Exclusions and infringement on justice

"Funds-based" access to permanent status is often recognized by state authorities *explicitly* (restricted to workers accessing higher wages and/or annual income), and/or *implicitly* (restricted to workers associated with specific occupations, skill levels, and/or education, and/or able to afford high 'status recognition' fees). These traditional forms of status policies, the "buying of freedom papers", indeed has been enforced for centuries by state authorities. First, the financial restrictions may result in the non-access or denial of permanent status recognition for specific groups of individuals. Furthermore, because employers may easily impact any form of funds-based access to permanent status, such a policy in particular implies a restriction of workers' capacity to access justice and protection of the law. In sum, since most funds-based restrictions on justice are likely to be found unjustified under judicial review, only 'fees-based' types of funds-based access to permanent status – if *de facto* affordable for all individuals, for instance if combined with governmental micro-loans programs – could be conceptualized as a reasonable restriction of access to permanent status.

Funds-based access to permanent status: A common policy

[95] West Coast Domestic Workers Association, *supra* note 64, at 42.

States often make eligibility to permanent legal status recognition for (im)migrant workers dependent upon the individual's wealth and/or income. More precisely, these types of permanent status recognition policies may (A) be explicitly restricted to individuals that fit *de jure a* specific financial category, or (B) implicitly impose a level of fees that *de facto* exclude specific groups of individuals.

A. Explicit funds-based restrictions on access to permanent status

Explicit 'funds-based access to permanent status' policies typically discriminate on the basis of a worker's specific annual, monthly, and/or hourly income. For instance, the permanent status recognition program managed by the provincial government in British Columbia, Canada may be accessed only by (im)migrant workers (and family members if applicable) who may demonstrate a specific level of annual (family) income:

> "I am Gina Bahiwal from the Philippines. I came to Canada in 2008 under the temporary foreign worker program, so I have been here for eight years. I worked as a vegetable packer for four years and moved to B.C. with the hope of getting permanent residency under the B.C. PNP. … I had to pay a recruiter for the housekeeping job. While in B.C., I did not stop my advocacy work for migrant workers. I tried to help other migrant workers and I ended up loosing my job. I had to pay another recruiter for my food and counter attendant job (…). Unfortunately, I did not meet the family income threshold. So my B.C. PNP application was denied. … I have been talking to many migrant workers across Canada and we are shouting the same thing. It's for [permanent] status upon arrival. If other migrant workers, under the skilled category, [may] have [access to permanent] status upon arrival, then why can't we have that too? … Yet, all of us come here with the same purpose, to work and make the Canadian economy better."[96] [Emphasis added]

If facing the state denial of automatic work permits for a spouse and/or children of working age, married and/or parent (im)migrant workers under explicit funds-based

[96] Coalition for Migrant Worker Rights Canada, *Migrant Workers address Parliament* (June 20 2016).

access policies will encounter the highest risks of denial since the evaluation of their family's 'financial capacity' will be based on only *one* annual income in the country:

> Luke was never told about the income cut-off and was devastated when his nomination was denied because his income did not meet the required threshold. … Eligibility is only the first hurdle to overcome. Many eligible 'entry level' and 'semi-skilled' applicants that gain successful nominations through the BC PNP are eventually denied permanent residence because they are deemed as not being able to successfully establish themselves economically in Canada. As economic migrants, all applicants in the program are expected to meet an income threshold. The BC PNP website states: "BC PNP will not approve an application if it appears likely that the nominee applicant's family income will be less than the applicable income threshold for the nominee applicant's place of residence". Family income is calculated by totaling the applicants' annual regular wage from their employer's supporting the application and, if applicable, the spouse's annual regular wage in BC from work authorized under a valid work permit. Income assessment creates several barriers for so called lower and semi-skilled nominee applicants. Firstly, many workers in NOC C and D categories make entry-level wages. Secondly, and <u>in contrast to higher-skilled workers, lower-skilled workers are barred from bringing their spouses to Canada with them to work. Thus they cannot benefit from including a second income to the calculation</u>.[97] [Emphasis added]

B. Implicit funds-based restrictions on permanent status recognition

On the other hand, permanent status recognition policies may be only implicitly based on financial considerations. Typically, 'implicit' funds-based access to permanent status will rely on (I) skills levels, education, and/or types of occupation (or equivalent proxy variables for annual/hourly income), or (II) 'status recognition' fees possibly only affordable to (im)migrant workers with high disposable incomes and/or easy access to credit money for exclusion.

[97] West Coast Domestic Workers Association, *supra* note 64, at 38.

I. 'Skill level/occupation/education'-based restrictions to access to permanent status

As illustrated by the following example, permanent status recognition for (im)migrant workers may be restricted *implicitly* on the basis of financial considerations, through occupation-based, skill level-based, education level-based, and/or languages proficiency-based restrictions – all functional proxies for higher earnings:

> The new eligibility rules introduced in 2008 and amended in 2010 (Government of Canada, 2008) … under the skilled worker class is limited to: (1) applicants with an offer of arranged employment or (2) applicants with one year of full-time work experience in one of 29 listed occupations. For the latter category, there is an annual 20,000 cap on applications; a maximum of 1,000 applications can be considered in each occupation. Applications that do not fall within one of the two categories are not put into processing. What's more, occupations within the two categories are skilled only (i.e., Skill Type 0 (managerial occupations), Skill Level A (professional occupations) or B (technical occupations and skilled trades) on the Canadian National Occupational Classification list). Therefore … low-skilled workers [employed in occupation required a skill level C or D] already in Canada … will be unable to earn admission into Canada through the FSWP [Federal Skilled Worker Program]. The CEC [Canadian Experience Class program] was implemented in September 2008 (…). Accordingly, the program allows skilled TFWs [temporary foreign workers] with … full-time skilled work experience in Canada … to apply for permanent residence from within the country. … While this new immigration stream permits skilled workers under the TFWP to apply for permanent residency from within Canada, those in NOC C and D occupations are not eligible.[98] [Emphasis added]

As in the case of "explicit" funds-based access to permanent status, implicit funds-based restrictions, such as 'education level-based' restrictions on access to permanent status, may, as illustrated in the following example, be structured not as eligibility restrictions but, instead, as file treatment restrictions on access:

[98] Delphine Nakache, "The Canadian Temporary Foreign Worker Program: Regulations, Practices and Protection Gaps" (2010):5 IRPP Study .

The Liberal government's immigration plan is a blow to thousands of people — mostly women — who came to Canada as … caregivers and hoped for a chance at permanent resident status and a new life for their families, say advocates for the workers. The live-in caregiver program allowed foreign workers, mostly women from countries like Philippines, Peru and Indonesia, to come to Canada and work as nannies or other caregivers. Workers were promised the chance to apply for permanent residency after two years in Canada, which would bring more opportunities and, often, the chance to be reunited with children and spouses the workers had left behind. The caregivers already faced a wait of more than four years for [permanent] residency applications to be processed. The Harper government's 2015 immigration plan set a target that allowed up to 30,000 workers' applications a year for permanent residency. The new Liberal government reduced that to 22,000 a year. And the government's immigration plan released this week cut that target to 18,000 workers a year. The program was revamped in late 2014, but thousands of applicants who came to Canada before the change could have to wait up to eight years to have their permanent residency status processed, said Natalie Drolet of the West Coast Domestic Workers Association. "During that time they are separated from their families," she said. … The 2014 changes … created two "pathways" for … [caregivers instead of one] — one aimed at caring for children and one aimed at caring for those with high medical needs. … Despite the lofty targets, the government only manages to process about 5,500 applications a year, she said. … [C]aregivers who arrived after the 2014 changes are also included in the government's new target of 18,000 new permanent residents processed. But their applications are being processed in just two months, she said. "It's confounding," Drolet said. "Why is it that they're processing applications under the new pathways so quickly when there are caregivers who have been here for seven, eight years still waiting for the permanent residence?" New Democrat immigration critic Jenny Kwan said the Liberals' plan shows they intend to continue treating caregivers as "second-tier economic immigrants." Nancy Caron, a spokesperson for Immigration, Refugees and Citizenship Canada … said … applications were waiting to be processed … now [is] down to 31,000. Caron said foreign caregivers have the option of applying under the revamped program. "Most … caregiver … applicants would also qualify under one of the two newer caregiver permanent residence programs and benefit from much faster processing times for their

> applications (…)," she said in an email. But Drolet said the new rules set a higher bar… [and in particular a post-secondary education requirement to be eligible] for residency status, and many caregivers won't apply for fear of rejection. The Liberals talked about the caregiver … before the election, she said. This week's immigration's changes are an "about face" from the rhetoric, she said.[99] [Emphasis added]

II. Fees-based restrictions to access to permanent status

Furthermore, implicit 'funds-based permanent status recognition policies' may be constructed as conditional upon the payment of administrative fees. Under this form of status recognition policy, States only *de facto* exclude specific groups of individuals from status recognition.

For example, since 1992, trained and/or experienced caregivers admitted in Canada under temporary work authorization have been forced to 'buy' their permanent legal status recognition from the government.[100] If the (im)migrant worker employed as a caregiver was a married mother of three children with a monthly gross salary of $1,625 in 2011, the permanent status recognition cost for the worker was $3,430, at the minimum, with the possibility of an increased cost of $5,880 in the case of delayed application processing:

> An example of a female caregiver who has three children plus husband
> (The process fee upon submitting the application [for permanent status])
> - principal applicant $550
> - 3 children (under age 22) $150*3
> - Spouse 550
>
> Sub-total $1,550$
>
> (The right of permanent residence fee after the application is approved)
> - principal applicant $490

[99] Jeremy J. Nuttall, "Liberal Immigration Changes Bad News for Caregivers, Says Advocate", *The Tyee* November 3 2016).

[100] Louise Langevin & Marie-Claire Belleau, *Trafficking in Women in Canada : A Critical Analysis of the Legal Framework Governing Immigrant Live-in Caregivers and Mail-Order Brides*, Status of Women Canada (2000) at 22 ff.

- spouse $490

Health exam fees $100*4 persons*2 times=$800
(valid for a year)
Passport $25 (950 Pesos)
*4 persons=$100…
* Standard wage of a live-in caregiver in Quebec $9,90/hour
Annual income $19,404 (before tax) = 40hours*49 weeks[101] [Emphasis added]

In the case of these (im)migrant caregivers, it has been documented that the Canadian government commonly took up to four years to process their application for permanent status[102] and, thus, the payment of additional fees was systematically necessary given the 'one-year-only' validity of the required health certificates.[103]

However, since the Canadian government put caregivers without higher education diplomas on a separate non-priority application, wait list processing times for permanent status estimated in 2016 reveal that individuals in this group faced a 6-year waiting list for the evaluation of their application for permanent status.[104]

Funds-based access to permanent status: A long standing policy

Funds-based access to (free) permanent legal status are not 'modern' policies. More precisely, states in particular have been enforcing implicit, fees-based, legal status recognition measures for a long time through actions of the judicial branch of the state and/or actions of the legislative and executive branches of the state.

Under past employer-based access to permanent status schemes, access to (free) permanent status was completely dependent on the employer's sponsorship. However,

[101] Kazue Takamura, "The Path toward Family Reunification: Social Constraints on Filipina Live-In Caregivers in Canada" (paper delivered at the CCSEAS Conference "Multiple Encountrers, Shifting Spaces: Southeast Asia at the Crossroads", Montreal, 19 October 2013) at 31.
[102] *Id.,* at 23.
[103] *Id.,* at 31.
[104] Jeremy J. Nuttall, *supra* note 99.

employers could decide to register a 'freedom contract' with a court of justice, and thus have their human resources employed under a 'funds-based access to (free) permanent status' regime. For instance, in both Roman and American societies, a significant portion of slave owners saw it useful to provide judicial protection to individuals' funds-based access to (free) permanent status recognition:

> Buying and selling of freedom occurred commonly enough to warrant legal recognition (…). … Since Maryland law did not … acknowledge a slave's legal personality in manumission, most were in law deeds of gifts and not contracts. However, the master manumitting prospectively could not revoke his or her action without challenge once the deed was filed with the county court; a slave thus denied liberty could file a petition of freedom. But the slave could not formally participate in establishing the terms of manumission or insist on their being recorded. … In neither [Roman or American] society was a master compelled by law to allow a slave to accumulate such wealth [in order to fulfill manumission through self-purchase]; rather, the voluntary concession of that privilege [to earn money], accompanied by respect for slaves' claims to property thus acquired, served as an incentive to hard work [i.e. to remittances of higher levels of earnings] that stood benefit the master as well as the slave. … [M]asters allowing a slave to hold his or her property might … be expected to provide some or all of his maintenance … some or all of their own food; urban workers allowed to hire their own time might also be required to maintain themselves from sums left over after the master received a portion of the slave's earnings. Neither Romans nor Americans emulated *coartacion*'s formalizing of the [Cuban] slave's right to self-purchase through court intervention, but all three societies did tolerate, and even provided some legal protection for, installment payment contracts for freedom. And although neither Roman nor American courts would imposed manumission of a slave on an unwilling master, slaveholders in those societies could go to a court and bind themselves to manumit, both to legitimize their actions and to make their promises credible to slaves, in the hope that slaves would enter wholeheartedly into the self-purchase bargain.[105] [Italic in the text; underline added]

[105] T. Stephen Whitman, *supra* note 52, at 98, 114.

This being said, the origins of the structure of contemporary fees-based permanent status recognition policies may, in particular, be found in authorities' earliest 'slave market-based' schemes developed to interfere, at least minimally, with slave owners' absolute control over their workforce. For instance, in Cuba, the 'master's sponsorship' requirement for (free) permanent status recognition was replaced with the requirement of a specified monetary payment:

> [T]he significance of coartacion went beyond … the number of slaves who obtained freedom through it. … Slave owners resented coartacion … not so much because large numbers of slaves used it to obtain freedom, but because they could do it without the acquiescence of the masters. … Although the possibility of manumission was long recognized in the Castilian codes and tradition, it was always dependent on the goodwill and benevolence of the master. It was a master's prerogative, not a slave right. … No written law referred to th[e] … institution [of coartacion], although a law in the Partidas [of 1265] mentioned the sale of slaves "under the condition that they be emancipated within a certain time" and established that such conditions could not be altered – one of the main elements of the institution as it evolved later. … [T]he institution was known in Havana and in southern Spain since the late 16th century. … A 1581 Malaga population count and seventeenth-century royal decrees refer to slaves who were "cortados." The 1729 edition of the Dictionary of the Spanish Royal Academy defined "cortarse" as the action by which a slave "adjusted" with his master the terms of his freedom. Cortarse referred to the action by which slaves cut or divided their price into pieces. By the late eighteenth century, however, the practice was known as "coartacion," which literally means "hindrance" or "restriction." Whereas cortar evokes the action of the slave, coartar refers to limitations on the master's power. Over time, the slaves' actions had become a constraint on the master's dominium. … The one element of the institution that seems to have been accepted by all involved was the invariability of the price. … Another slave, Juana … agreed with her master in 1690 on a freedom price of 300 pesos, of which she paid half. The owner issued a notarized receipt, declaring that he would grant her freedom whenever she paid the other half. It was understood that a slave who had paid a fraction of his redemption price could not be mortgaged or sold for a higher value. That is why when the slave Juan, a 17-year old criollo, was sold

> four time in 1690, it was always in the condition that he was going to be freed as soon as he was able to pay the 200 pesos remaining for his total value. … Royal regulations ratified the invariability of the price … [for which] coartado slaves could … be sold [or self-purchased]. … One subject of litigation concerned the coartados[‘] … control over the portion of time and labor for which they had already paid. Some slave owners believed that since the coartado had purchase a portion of himself or herself, they owned only part of the slave. … Another element … of coartacion … poorly defined … [and] litigated in the courts of Havana in the early nineteenth century … [was] the masters’ obligation to accept their slaves’ payment towards coartacion. Although some owners clearly resented any attempt to treat manumission as a slave right, instead of a prerogative of the master, the sindicos were invariably successful on this point. They invoked the traditional principle of favor libertatis, contained in the Partidas [of 1265], and forced reluctant masters to issue … coartacion papers to those slaves who could pay for them. As a sindico put it in a demand against a master who claimed outstanding debts to refuse a payment from a coartado slave, “neither this motive nor any other of greater importance can have the effect of delaying or creating obstacles” for freedom. On this point legislation had been consistent: freedom was to be favored. The Consejo de Indias ratified the principle in a 1778 pronouncement concerning coartación: masters were “obligated, according to custom, to give [slaves] their freedom whenever they showed the corresponding price.” … As long as these practices remained anchored just in custom and fragmentary royal regulations, masters could successfully curd their slaves’ insolence through litigation (…).[106] [Emphasis added]

In the past, fees-based (free) permanent status recognition measures were not associated with “universal” fee scales (equally applicable to all workers). Instead, status recognition required a unique (slave) labour market analysis every time – typically contested in court by masters as being inadequately low:

[106] Alejandro de la Fuente, "Slaves and the Creation of Legal Rights in Cuba: Coartación and Papel" (paper delivered at the L’Expérience Coloniale: Dynamiques des Échanges dans les Espaces Atlantiques à l’époque de l’esclavage, Nantes, 2005), at 10, 19-21, 23, 26.

> On August 16 1855 doña Carlota Dascar, a resident in Santiago de Cuba, initiated a legal suit against Miguel Rodriguez, síndico procurador of the city (…). Dascar had tried to sell her slave … for 700 pesos, but the slave had "presented" herself before the síndico to "request her coartación because she had cincuenta [50] pesos." As the municipal official charged with the representation of slave interests, the síndico then initiated the customary process of assessing the value of the slave to fix the price … that she would have to pay to purchase her freedom. He invited Dascar to appoint an appraiser, whose assessment would be compared to that produced by the síndico's own assessor. As was frequently the case, the valuations were widely apart and had to be settled in court. The representative of the owner appraised at María in 600 pesos; the síndico's valued her at 450. The local justice then proceeded to appoint a legal assessor, who ratified 450 pesos as the right value of the slave, making this the price at which María would be coartada.[107] [Emphasis added]

With time, at least under Cuban law, the type of occupation/skill level was removed from the factors considered in the establishment of the (portion of the) fee that a worker had to pay to (become eligible and) access (free) permanent status:

> The Reglamento de Esclavos of 1842 modified the legal landscape. … Approved by Governor… Valdés … this … ordinance was Spain's response to "a series of concurrent pressure" from within and without. … The articles that masters attacked the most were those dealing with coartacion. Article 34 defined coartacion as a true slave right, for it was stated that owners "may not refuse" the coartación [the eligibility to funds-based access to free permanent status] of any slave who offered at least fifty pesos towards his or her price. … One of the principles over which some slave owners continued to litigate concerned their obligation to accept their slaves' payments for coartación and freedom under all circumstances. … Coartacion could work to the advantage of masters, as the price did not change despite the slave's depreciation due to age, but only if the slave waited long enough to complete his payments after his prime age (when depreciation began) (…). … Alarmed, in the 1850s several owners and local officials proposed to the central government to raise the coartacion amount

[107] *Id.,* at 2.

> to … a minimum of 200 pesos. … [S]everal individual owners, frustrated by unfavorable judicial outcomes … took their case to the highest court of the land, only to be rebuked. … In 1862, when the recently created Consejo de Administración issued a final report about coartación, it deemed it unadvisable to modify the Reglamento. … [T]he report offered a careful assessment of the conflicts of interests that surrounded coartación. On one side there were "private interests" that, invoking property rights … aspired to "curtail concessions given to the slaves." On the other side there was "a well understood public interest" supported by the laws, which the members of the Council depicted as monuments to humanity and Spanish civilization. … For instance … appraisers were instructed that in cases of coartación or self-purchase the price of slaves should be based … regardless of qualifications and abilities. … It is unknown to what extent these regulations were enforced. What seems clear, however, is that this ordinance restricted further the dominium of slave owners and represented another expression of a thread of legal thinking that subordinated the rights of the property owners to the stability and "true interests" of the colony. … Slaves could now claim rights that could be exercised even against the will of the master, and rights that produced other rights in turn.[108] [Emphasis added]

Funds-based permanent status recognition: Indirect exclusions

Much like today[109], historically 'funds-based (free) permanent status recognition' schemes could always end without improvement for the eligible workers:

> Big Jim, Little Jim, Nat, and Jacob, the slaves of Robert McElrath, traveled to California under the supervision of their master's son-in-law, George Dodson, in 1851. According to one family memoir, McElrath provided an incentive to the black men to keep them faithful in California. If the men labored for McElrath and Dodson five days a week in the mines, they could keep any gold they dug on Saturday (…). McElrath's records indicate that the four enslaved men accumulated hundreds of dollars of personal income during their first years in the mines. … Though these were large sums of

[108] *Id.,* at 26, 28-31, 36-37, 39.
[109] Coalition for Migrant Worker Rights Canada, *supra* note 96.

> money, they did not come close to approaching the … price … usually demanded for … [freedom] in the 1850s. Indeed, records suggest that the McElrath slaves never earned enough money to purchase their freedom. When McElrath died in 1854, at least three of the four enslaved men who had made the journey to California had returned … in North Carolina and were listed in the property auctioned by his estate. … For the McElrath slaves, then, California earnings were insufficient to meet the … [payment necessary to access "free" permanent legal status] (…).[110] [Emphasis added]

More generally, since workers under explicit or implicit funds-based access to permanent status by definition sometimes do fall ill, are injured at work, are victim of financial fraud, or face an emergency situation that requires the use of all their savings or accessible credit, in the end any financially restricted (permanent) status recognition means the denial of a meaningful access to justice in the country for individuals among the initial eligible (im)migrant workers.

Even if explicitly protected under the law, historical examples show that funds-based access to permanent status often constitute a political illusion rather than a path to status recognition for specific groups, if not for the majority, of eligible individuals:

> Determining the proportion of coartado slaves [in Cuba] is nearly impossible, for it is likely that only a fraction of the slaves under coartacion ever completed their payments and obtained their freedom. According to the census of 1871 only 2,137 slaves were coartados in a slave population of over 280,000. In their study of the Cuban slave market, however, Laird Bergad and his collaborators found that in a random sample of notarized sales between 1790 and 1880, coartados represented 13% of the total. "Significant numbers of slaves became coartados, and this was no doubt critical for the hopes … of slave communities." … Whatever the proportion of slaves that became coartados, it is difficult to sustain the claim that this represented, in quantitative terms, a major avenue towards freedom in nineteenth-century Cuba. According to various sources, the number of slaves manumitted in the island each year during the 1850s and early 1860s was

[110] Stacey Leigh Smith, *supra* note 26, at 184-185.

> around two thousands, which would suggest annual manumission rates below one percent. These figures of course included all sorts of manumission, not just gradual self-purchase, so the annual number of slaves obtaining freedom through coartacion was probably small.[111] [Emphasis added]

As under contemporary programs, under past funds-based permanent status recognition policies, employers by definition could very easily delay, if not negate, workers' (judicially or legally protected) access to permanent status through the non-recognition of the worker's rightful personal earnings or through the legal or illegal request(s) of an additional sum of money[112]:

> [E]vidence suggests that … [i]n addition to paying the price demanded for their self-purchase … [slave] men and women [in the California mines districts] paid their masters a weekly or monthly sum for the "privilege" of working (…). … Unlike Isaac Dixon, who found most of his hiring opportunities in mining labor, Ellen Mason most likely sought domestic employment. Upon reaching California in 1849, she contracted with her master to pay him fifty cents a week, probably as payment both for her time and toward her purchase price.[113] [Emphasis added]

Funds-based access to permanent status: Infringement on the right to justice

Funds-based permanent legal status recognition schemes thus also indirectly constitute a form of 'employer-based access to permanent status' policy, under which the worker, if not explicitly, is nevertheless implicitly put, by the state, in a condition of dependency towards the 'good behavior' of his or her boss – even to ensure her or his access to keep a specific salary, a specific capacity to save for later, a specific position, enough time to study and practice a specific language, etc. In this context, a funds-base requirement will

[111] Alejandro de la Fuente, *supra* note 106, at 9.
[112] *Id*., at 39.
[113] Stacey Leigh Smith, *supra* note 26, at 181.

not simply exclude a portion of individuals from access. In some cases, it will also interfere with the individual's capacity to seek justice and reparation in the case of a right violation.

Compatibility with constitutional guarantees: No funds-based requirements

In this context, a permanent legal status recognition policy compatible with foreign workers' constitutional right to access justice and reparation in the country would constitute a policy that recognizes permanent legal status, no matter the level of earnings, type of occupation, or capacity to speak a language.

Funds-based restrictions on access to permanent status/right to justice: Justifiable?

In fact, according to empirical data, it is the other way around: permanent legal status increases individuals' capacity to earn more, raise their proficiency in one or multiple languages, raise their education level, raise their skill levels, occupy higher paid positions and skilled occupations, and save money to invest in their family's future.

In this context, funds-based restrictions constitute an obstacle to the right to access justice. It would likely be found in court as an arbitrary and unjustifiable reason for excluding individuals from access to permanent legal status – possibly except for a small, reasonable fee, especially if associated with federal micro-loans programs.

According to the Supreme Court of Canada' jurisprudence, state-imposed fees that are subjectively high, to the point of limiting individuals' meaningful access to justice in the country, are likely to be declared under judicial review as an unjustifiable state policy:

> On its face, s. 92(14) does not limit the powers … to impose … fees. However, that does not mean that the province can impose … fees in any fashion it chooses. … First, particular constitutional grants of power must be read together with other grants of power so that the Constitution

operates as an internally consistent harmonious whole. Thus s. 92(14) does not operate in isolation. Its ambit must be determined … with respect to other powers conferred by the Constitution. … Second, the interpretation of s. 92(14) must be consistent not only with other express terms of the Constitution, but with requirements that "flow by necessary implication from those terms": *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 (…) … *Reference re Senate Reform*, 2014 (…). … Here, the legislation at issue bars access to the … courts … by imposing … fees that prevent some individuals from having their private and public law disputes resolved by the courts … — the hallmark of what … courts exist to do. As in *MacMillan Bloedel*, a segment of society is effectively denied the ability to bring their matter before the … court. … [T]he province's power to impose … fees cannot deny people the right to have their disputes resolved in the … courts. To do so would be to impermissibly impinge on s. 96 of the *Constitution Act, 1867.* … The right of the province to impose … fees is limited by constitutional constraints. In defining those constraints, the Court does not impermissibly venture into territory that is the exclusive turf of the legislature. The remaining question is how to determine when … fees deny access to … courts. … [F]ees deprive [individuals] … of access to the … courts … when … [they] cause undue hardship to the … [individuals] who seeks the adjudication of the … court. … A … fee scheme that does not exempt impoverished people clearly oversteps the constitutional minimum — as tacitly recognized by the exemption in the B.C. scheme at issue here. But providing exemptions only to the truly impoverished may set the access bar too high. A fee that is so high that it requires … [individuals] who are not impoverished to sacrifice reasonable expenses in order to bring a claim may, absent adequate exemptions, be unconstitutional because it subjects [individuals] … to undue hardship, thereby effectively preventing access to the courts. … [A]s a general rule … fees must be coupled with an exemption that allows … fees [to be waived] for people who cannot, by reason of their financial situation, bring nonfrivolous or nonvexatious litigation to court. A … fee scheme can include an exemption for the truly impoverished, but the … fees must be set at an amount such that anyone who is not impoverished can afford them. Higher fees must be coupled with enough … discretion to waive … fees in any case where they would effectively prevent access to the courts because they require … [individuals] to forgo reasonable expenses in order to bring claims. This is in keeping with a long tradition in the common law of providing exemptions for classes of

> people who might be prevented from accessing the courts — a tradition that goes back to the *Statute of Henry VII*, 11 Hen. 7, c. 12, of 1495, which provided relief for people who could not afford court fees. [114] [Emphasis added]

More precisely, status recognition schemes integrating, for instance, conditions equivalent to Canada's 2011 permanent status fees scale[115] would likely be declared as unjustifiable state practices under judicial review, at least if the following Supreme Court of Canada "unacceptable fees-revenues ratio" standard is taken into consideration:

> The … fee amounted to some $3,600 — almost the net monthly income of the family (…). Ms. Vilardell is not an "impoverished" person in the ordinary sense of the word. … However … she could not afford the … fee. … On the findings of the trial judge, the … fee scheme at issue in this case places an undue hardship on [individuals] … and impedes the right … to bring legitimate cases to court. … To put it in other words, the Province's aim is to establish a revenue neutral … service. … The trial judge, affirmed by the Court of Appeal, found that B.C.'s … fees go beyond these purposes and limit access to courts for … [individuals] who are not … impoverished (and therefore who do not fall under the exemption provision), but for whom the … fees are nonetheless unaffordable. This is supported by the evidence. … Mr. Carson's summary is as follows: … [R]ecent immigrants … are certain to be overrepresented among … those with incomes that are too high to qualify for indigence, but low enough that … fees would represent a significant barrier to recourse to a court. … Most fundamentally … [t]hese … fees … promote *less* use of court time.[116] [Emphasis added]

Moreover, fee-based procedures to access permanent legal status may discriminate in particular against parents and individuals that are married or in a common-law relationship. Furthermore, for an "atypical family" (over-aged children, pregnant children, sick or handicapped children), the status recognition fees might result in the highest possible cost.[117] However, again on the basis of the Supreme Court of Canada

[114] *Trial Lawyers Assn. of B.C. v. B.C. (A.G.), supra* note 5, at paras 24-26, 35-36, 42, 44-46, 48.
[115] West Coast Domestic Workers Association, *supra* note 64.
[116] *Trial Lawyers Assn. of B.C. v. B.C. (A.G.), supra* note 5, at paras 5, 50-53, 63.
[117] Kazue Takamura, *supra* note 101, at 23

jurisprudence, schemes incorporating a similar "proportional" application of access restrictions would be likely further declared unjustifiable since they are at odds with basic "fairness" (or, arguably, since they are incompatible with the principles of fundamental justice on the grounds of "arbitrariness" and "overbreadth"[118]):

> The contention that this … fee regime promotes proportionality … does not answer the findings of the trial judge that it unconstitutionally prevents access to the courts. … Prolonged [procedures] … may be caused by the nature of the case (…). [Individuals] … in long … [procedures] ought not to be penalized by … fees — particularly fees that escalate with the length of the … [procedure]. Moreover, the [individual] … who is required to pay the … fee may not control the length … of the … [procedure]. … [F]ees … may escalate through no fault of her own. If she cannot afford the prospective fees, she may reasonably conclude that she cannot bring her dispute to the court.[119] [Emphasis added]

If fee-based (permanent) status recognition schemes – or similar policies *implicitly* restricting the meaningful access to justice for some individuals on financial grounds – would likely be found unjustifiable under judicial review, then, *a fortiori*, *explicit* funds-based policies, such as exclusion from (permanent) status recognition for all individuals in low-wages occupations and/or showing a low annual family income, would also likely be found as unjustifiable state obstacles to justice under judicial review.

[118] *Canada (Attorney General) v. Bedford,* [2013] 3 SCR 1101 at paras 105 ff.
[119] *Trial Lawyers Assn. of B.C. v. B.C. (A.G.), supra* note 5, at paras 61-62.

In this context, since the implied right to a meaningful access to justice in the country is also essential for individuals under temporary work authorization, it might be necessary for state authorities to enforce exclusively permanent status recognition policies that are not only independent from employers' input but also *de facto* affordable (if not completely *free* as for other legal status recognition procedures currently administered by Immigration, Refugees and Citizenship Canada[120]) upon arrival.

2.3.4. Health-based permanent status: Exclusions and infringement on justice

Various additional types of '*conditional* permanent status recognition' policies are commonly enforced by states, particularly 'health-based permanent status recognition' policies. This being said, such century-old state practices have often been enforced under the population's radar. These forms of restrictive 'permanent status' policies also result, however in a more or less random fashion, in the negation of the right to a meaningful access to justice in the country for a portion of (im)migrant workers admitted under temporary work authorization. While possibly never challenged in a court of justice, at least once in Canada an instance of such 'health-based permanent recognition' policy was unanimously considered unjustified when put under the scrutiny of members of a legislative committee.

Health-based access to permanent status: A common policy

Canadian law, among other legal frameworks around the world, denies permanent status and allows for the associated deportation process of injured or sick (im)migrant

[120] See especially Nicholas Keung, "Thousands of immigrants quietly giving up permanent resident status", *The Star* October 31 2016.

workers. More precisely, without applicable exception[121], all (im)migrant workers admitted under temporary work authorization may be found inadmissible for permanent status on health grounds if their health condition is likely to be a danger to public health, is likely to be a "danger to public safety, or might reasonably be expected to cause excessive demand on health or social services"[122].

Cancer treatment, for instance, has been found by *immigration* officers to constitute an "excessive demand" on *health* programs. Officers have decided in some cases that denial of resident status and revocation of access to health services for badly injured and sick individuals is in the best financial interests of the government. This is decided even if it is associated with the risk of a significant increase in costly (temporary detention if warranted and) deportation practice measures:

> Journalists discuss[ed] participants [of the Live-in Caregiver program] who were denied [permanent legal status] … because of medical problems, which developed during or after their work experience, such as one Filipino caregiver who was "denied [permanent] residency because she had breast cancer" (Lee Shanok 1993).[123] [Emphasis added]

Moreover, again without applicable exception[124], all (im)migrant workers admitted in Canada under temporary work authorization may be found inadmissible for permanent status on "grounds of an inadmissible family member, if their accompanying family member or … their non-accompanying family member is inadmissible"[125], on health grounds[126]:

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[121] *Immigration and Refugee Protection Act, S.C. 2001, c. 27 (last amended on July 1, 2015),* s 38(2).
[122] *Id.*, s 38(1).
[123] Julia Sarah Jane Gillilan, *Permanent Worker, Temporary Resident: Media Representations of Canada's Live-In Caregiver Program* (Master of Arts, University of Virginia Anthropology, 2008) [unpublished], at 78.
[124] *Immigration and Refugee Protection Act, S.C. 2001, c. 27 (last amended on July 1, 2015), supra*, s 38(2).
[125] *Id.*, s 38(1).
[126] *Ibid*.

> Another problem identified in the media reports is where a caregiver and her family are denied residency because of the health problems of family members. One popular story involved a caregiver, Hesanna Santiago, who completed her work experience and applied for residency. When her family went for their medical examinations, her daughter was diagnosed with chronic kidney failure, which made her [the mother] inadmissible for … [permanent legal] status.[127] [Emphasis added]

Ironically, the revocation of the eligibility for permanent status on the basis of a health problem of a family member abroad may, however, indirectly result from the very actions of the state. For instance, the Canadian government enforces an 'exclusion of family members from work permit/access to school' policy, which denies union of a mother/loved one with family members abroad. This also means denial of an early access to school and healthcare systems, which would minimize risks of physical and mental health problems:

> Danieles cared for other people's children in Canada for [six] years, only to learn she wouldn't be allowed to stay because her own daughter is "retarded." … According to the Toronto Caregivers' Action Centre, there are at least 25 current cases across Canada where foreign workers have been denied permanent status because their dependents were deemed medically inadmissible. … After meeting her live-in employment requirement and waiting four years for the processing of her permanent residence application, Danieles learned about the denial earlier this year. She agrees that her elder daughter, who lives with the family in a small village, has a learning disability. But she says the girl has been doing better in school since the medical assessment for immigration discovered that her vision was poor and she started using glasses.[128] [Emphasis added]

The traditional negation of permanent status to injured and sick workers

[127] Julia Sarah Jane Gillilan, *supra* note 123, at 79.

[128] Nicholas Keung, "Ottawa urged to grant permanent status to migrant workers upon arrival", *The Star* September 11 2016.

Thus, various authorities still apply a policy that has been more or less systematically enforced by state authorities for decades if not centuries, and in Canada at least since the 1900s:

> By 1913, Immigration officials were concerned that Canada was becoming increasingly committed to a guestworker form of immigration. … These industries wanted an "expendable labour force [that] takes its problem away when it is re-exported," as the American Dillingham Commission on Immigration put it in 1910. The Department could only refuse to issue temporary work permits. This did not matter to the employers (…): … it made little difference whether they were … landed immigrants. In fact, the latter status offered a number of advantages … in part because it was unregulated. Canada's concealed guest worker system offered significant advantages to employers (…). … Unless immigrants lived here continuously long enough … they could be deported if they got into trouble or ceased to be productive workers. This deportation could take place legally … or it could take place informally, outside the legal framework. … Deportation, both formal and informal, helped to create a hidden system of migrant labour that functioned much like a "guest worker" system, even though state policy was that immigrants were to be permanent settlers. It was concealed but … a critical determinant of Canadian immigration policy and practice between 1900 and 1935.[129] [Emphasis added]

Health-based access to permanent status: Exclusions

Heath-based permanent status recognition policies imply the denial of permanent status and associated meaningful capacity to access justice and protection of the law in the country. However, for a portion of (im)migrant workers with health problems this policy gives rise to high risks of revocation of their access to the public healthcare system in their country of origin (where they are also subject to healthcare and social services financing through income and consumption taxes) and, therefore, high risks of more negative consequences for their physical and psychological integrity.

[129] Barbara Roberts, *supra* note 14, at 6-9.

Health-based access to permanent status: Infringement on access to justice

In this context, given what is at stake, some (im)migrant workers will refrain from seeking justice in the case of rights violations that affect their health, and possibly even refrain from seeking medical help when necessary, in order to prevent the documentation of their health problem in Canada.

Health-based restrictions to permanent status: justifiable?

Members of the Canadian Parliament carefully studied the objectives and effects of this type of systemic government health-based denials of permanent status recognition to workers already in the country. Health-based denials are structured as the requirement of a second positive medical exam imposed upon (im)migrants already in the country employed as caregivers. Members unanimously declared that such a state policy was unjustified:

> Toronto, Ontario, December 16, 2009 – When Citizenship and Immigration Canada finally granted Juana Tejada's dying wish of permanent residence on humanitarian grounds in 2008, it acknowledged an injustice that had befallen her. While she had otherwise met all the requirements … under the Live-in Caregiver Program ("LCP"), being stricken with terminal cancer rendered her medically inadmissible to Canada, her application was initially refused, and she was told by an immigration officer to leave Canada immediately. Inspired by Juana's struggle for justice, the Independent Workers Association ("iWorkers") launched a public campaign for The Juana Tejada Law in August 2008, calling for the elimination of the required medical examination … [for permanent residency for temporary foreign workers already employed as caregiver in Canada]. The iWorkers … presented this campaign to the Minister of Citizenship, Immigration and Multiculturalism … and to the Standing Committee on Citizenship and Immigration [of the Canadian parliament]… in May 2009. The Standing Committee quickly responded by unanimously recommending that the

> Canadian Government implement The Juana Tejada Law, and on Saturday, December 12, 2009, the Canadian Government announced that it would adopt this recommendation (…). … As an organization committed to improving the conditions of the workers, "iWorkers will continue its call for changes to the LCP not yet addressed with this announcement", said Maru Maesa, a caregiver and an iWorkers organizer. "The iWorkers believe that no level of abuse and exploitation is acceptable. We reiterate our call for open work permits; for a 'live-in' component that is optional; for mandatory information sessions for caregivers and employers … for a moratorium on deportations of victimized caregivers … for family members to be with the caregiver in Canada and allowed to work or study … and for the monitoring of our wage rates", Maru continued.[130] [Emphasis added]

In the end, however, the reform implemented by the government was more a smokescreen than a policy reorientation: the exemption did not cover the estimated 40,000 (im)migrant caregivers already in Canada at the time[131], caregivers could still be found inadmissible for permanent status on the grounds of a family member health-based objection. More importantly, the government safeguarded the *prerogative* to require, also for this group of (im)migrant workers, a second medical examination and if applicable the denial of permanent status on grounds of a problematic health condition. Even though the 'mandatory' requirement for this medical examination was eliminated, the 'discretion' for an Officer to require it, still exists:

> **Regulatory LCP changes effective April 1, 2010 1. Changes to Medical Examination Requirements at the Application for Permanent Residence Stage**
> **Section 30 of the *Immigration and Refugee Protection Regulations* is amended by adding the following after subsection (2):**
> Exception
> … The medical examination completed at the initial work permit/temporary residence stage will continue to screen for health conditions that would pose a risk to public health and safety. Officers retain the discretion to request a medical examination at the application for permanent residence stage.

[130] *Caregivers' group lauds Juana Tejada Law implementation* (2009).
[131] Faye Arellano, "Juana Tejada Law excludes thousands of caregivers", *Balita* February 1 2010.

> Effective immediately, and during the transition phase, officers are encouraged to request a medical examination at the application for permanent residence stage in cases where the medical examination undertaken at the initial work permit/temporary residence stage resulted in an M2 or M3 assessment.[132] [Emphasis in the text; underline added]

Health-based denials of permanent status recognition for (im)migrant workers already legally incorporated in the society imply the restriction of their right to access justice and protection of the law in the country. However, for groups of individuals that faced an accident or complex pregnancy, given the 2009 perspective of the Canadian members of Parliament, it may be hard for governments to justify health-based denials – as other forms of restrictions on access to permanent status - if ever put under judicial scrutiny.

2.3.5. Time-limited access to permanency: Exclusions and infringement on justice

Another common form of *conditional* '(permanent) legal status recognition' policies are based on a time restriction during which the (im)migrant worker, in order to avoid becoming subject to deportation policy enforcement, must access (permanent) legal status recognition. However, time-limited access to (permanent) legal status recognition, as with other forms of conditions presented above, result in the negation of liberty/security-implied right to access justice and protection of the law by authorities, for a targeted group of individuals legally working in the country.

Time-limited access to permanent legal status: A common policy

Indeed, state authorities often restrict (im)migrant workers' access to (permanent) legal status recognition procedures for a limited period of time. For instance, except for

[132] Immigration, Refugee and Citizenship, *Regulatory and administrative changes to the Live-in Caregiver Program* (2010).

domestics of diplomats and some workers admitted under a bilateral agreement[133], all workers employed in Canada under temporary work authorization were until the arrival of the Trudeau administration (in 2015) subject to deportation at the end of their 48th month of work in the country – unless they have already secured by that time a permanent legal status.

Temporary access to (permanent) legal status: indirect exclusions

Time-limited access to (permanent) status recognition by definition always, more or less, results in the exclusion of eligible (im)migrant workers' from status recognition, as acknowledged during a recent parliamentary review of contemporary Canadian immigration law:

> During the course of the study, the Committee had the opportunity to hear from various witnesses about existing barriers to accessing pathways to permanent residency. Witnesses spoke, for example, of the "cumulative duration" rule, which makes workers ineligible for new work permits if they have been working in Canada for four years and bans them from applying for a new one for an additional four years. These are often workers who have already integrated into Canadian society, filled a permanent labour need, and even started their own families, they noted. Along with the processing delays associated with various immigration programs, design flaws of the Express Entry program and recent changes with respect to caregivers, witnesses explained, the "cumulative duration" rule has contributed to the exodus of temporary foreign workers whose work permits have expired before being able to secure permanent residency status.[134] [Emphasis added]

[133]Immigration, Refugees and Citizenship, *International Mobility Program: Canadian interests – Significant benefit – Intra-company transferees [R205(a)] (exemption code C12)* (2014).

[134] House of Commons of Canada - Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities, *Temporary Foreign Worker Program : Report of the Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities* (2016) at 21.

As a matter of fact, ironically, the incapacity to access *in time* permanent status recognition may, and often does, directly result from state-induced obstacles, as acknowledged at least in a few Canadian court decisions:

> In line with these liberal interpretations of the requirements [for access to permanent legal status] of the Live-in Caregiver Program [developed by the Federal court in the previous *Karim*, *Turinghan* and *Bernandez* cases], the court in the case of *Peje v. Canada* [1997] set aside the immigration officer's decision to disqualify the applicant from becoming a permanent resident for failure to fulfil the 24-month employment within the three-year period. After finding that the main reason for the applicant's failure to satisfy this requirement was the government's refusal to grant her a work permit, the court reasoned that: "the applicant appears to have been trapped in a situation where she was afraid to work without the required authorization and yet unable to obtain the necessary permit from the Minister. The Respondent surely must bear some portion of the responsibility for her failing to meet the conditions of the program."[135] [Emphasis added]

Given that such a policy is typically formulated under strict terms[136], the rare time-exclusion cases that reached the courts have not been systematically overturned – at least in Canada:

> Curiously, a similar set of circumstances did not merit a similar ruling [to *Peje*] from the court in another case. That is, in *Laluna* v. *Canada* [2000] … the MDW [migrant domestic worker] failed to meet [within the three-year period] the required 24 months of live-in domestic work. … [I]in *Laluna,* the MDW was denied permanent resident status without the court even considering the reasons for such failure. The court emphasized that the 24-month requirement [within a three-year period] involves a ministerial and not a discretionary duty on the part of the immigration officer assessing the applicant. Hence the automatic denial once it is found that this requirement is not satisfied. This is a clear case of inconsistency with the Peje judgment. Both cases involved very similar key facts. In *Laluna*, [when

[135] Maria Deanna P. Santos, *supra* note 86, at 149.

[136] *Immigration and Refugee Protection Regulations SOR/2002-227 (last amended on June 13, 2016), supra* note 39, s 200(3)(g)(i).

> reaching the three-year limit] the applicant was only three months short of the 24- month employment required. What is more, there was at least a four month delay in the issuance of her work permit needed to be legally employed by her second employer. Part of her inability therefore, to fulfil the 24-month requirement was due to the delay or temporary lack of a work permit, just like in the case of Peje.[137] [Emphasis added]

In this context, (im)migrant workers under time-limited access to permanent status have been – and still are – denied permanent status recognition if they are, for instance, unlucky enough to have been ill at the wrong time:

> Mamann (2008) in an article for Metro News recounts the story of Laila Suan Elumbra, a caregiver who fell into a coma two months before finishing the two years of service, and "was ordered to leave Canada in August 2006."[138] [Emphasis added]

Similarly, in addition to cases of sickness, work accidents, employment illness, and/or pregnancy[139], (im)migrant workers have been at risk of being (or in the end were) denied permanent status for reasons such as a traffic accident:

> [The] process and results of not meeting … [the] requirements [to access permanent status] are … cruel. After Milagros had a traffic accident, she was unable to do heavy work for a while. She lost her job and was unemployed for a significant length of time. As a result, Milagros could not fulfil the requirement to complete 24 months full-time work in a three year period and was rejected in her application for landed [permanent] immigrant status. Following the rejection, she faced a deportation order. Even though INTERCEDE fought the deportation order, asking for permanent resident status on humanitarian and compassionate grounds, Milagros eventually gave up and … [left Canada] (Milagros, 1997 Case Files).[140] [Emphasis added]

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[137] Maria Deanna P. Santos, *supra* note 86, at 150.
[138] Julia Sarah Jane Gillilan, *supra* note 123, at 78-79.
[139] Immigration, Refugee and Citizenship, *Backgrounders - Improvements to the Live-in Caregiver Program* (2010).
[140] Sedef Arat-Koc & Fely O. Villasin, *supra* note 43, at 60.

Time-limited access to permanent status: infringement on the right to justice

If, for permanent status recognition, (im)migrant workers find themselves in a hurry to fulfill a requirement, such as the completion of the 'number of months of employment', they will be even less likely to claim basic human and labour rights and to seek justice in courts in the case of a rights violation:

> A live-in caregiver's ability to apply for permanent resident status is contingent on the successful completion of two years of authorized work within the four years immediately following entry into Canada (…). … Many caregivers recount to WCDWA how … the urgency to complete the requirements of the program increases the caregiver's dependence on the employment relationship. Many caregivers tell WCDWA that they are willing to endure bad employment situations so as to complete program requirements (…). Many state that unemployment, financial insecurity and the challenges of finding a suitable employer are risks that they cannot afford as the potential cost of the application for permanent residence. … Immigration regulations capping the duration of time a migrant worker can remain in Canada [and apply for permanent status] must be abolished.[141] [Emphasis added]

For instance, until 2010, (im)migrant caregivers admitted in Canada had 36 months to fulfill their '24 months of employment' requirement[142]. Various researchers and community organisations observed that this factor directly impacted their willingness to leave workplaces where their psychological integrity was jeopardized, as illustrated in the following example:

> Some authors point out that the fear of not completing the required two years of labour within the allotted time can also lead caregivers to stay in bad situations. "For Ms. Robles, the need … pushed her to put up with unreasonable demands. … [T]he mother followed her around while she was

[141] West Coast Domestic Workers Association, *supra* note 64, at 36, 41.
[142] Immigration, Refugee and Citizenship, *Backgrounders - Improvements to the Live-in Caregiver Program* (2010).

> cleaning, Ms. Robles says, criticizing her. "I was working and crying because I didn't know the reason she was always angry at me." (Pearce and Sokoloff 2007, Globe and Mail)[143] [Emphasis added]

Importantly, this time limit directly impacts (im)migrant workers' decisions to seek justice in court and reparation in the case of a rights violation:

> Because sources of psychological harm are hard to document and prove, caregivers cannot look for compensation for it. There are legal and administrative channels, though, to pursue financial claims. Despite the commonality of abuses of working hours, unpaid wages, sudden termination, etc. relatively few caregivers make and pursue claims for compensation. In many cases, this is due to a need to get a reference letter from the former employer in order that one can hope to find employment immediately [if fired]. When caregivers know they have [to apply for permanent status] … within … [a limited period of time], they can hardly afford to wait between employers. So, most caregivers, swallow whatever the financial cost to themselves and look forward to "successfully" (as defined by Immigration and employers) completing their "term".[144] [Emphasis added]

Empirical evidence confirms that, in *extreme* cases, some (im)migrant workers under time-limited conditional access to permanent status will claim rights and even seek justice and reparation through legal means. In these cases, however, (im)migrant workers face an increased pressure to quickly accept settlements, even if they are unfair, and put themselves at higher risks of non-fulfillment in time to meet state requirements and, thus, at higher risks of state denial of permanent status (and state denial of the right to a meaningful access to justice in the country):

> Marisa (not her real name) came to … Canada … in April 2001. After short stints with earlier employers, she finally landed her latest job in February 2002, which lasted longer than her previous employments. That is, until one

[143] Julia Sarah Jane Gillilan, *supra* note 123, at 122.
[144] Sedef Arat-Koc & Fely O. Villasin, *supra* note 43, at 50.

> day in early 2003, when her employer brought her to the hospital for what the employer said was "something that would be good for her." Thinking that it was for a routine medical check up, she obliged. She later learned however, that her employer arranged for her to have an abortion (after having learned that she was pregnant). Shocked, Marisa refused to undergo the procedure (…). … Because of Marisa's refusal to abort her baby, the employer fired her on 5 March 2003. She later revealed that both her employment agency and her employer threatened to have her deported if she did not agree to have the abortion. Marisa then filed a complaint for illegal dismissal with the Quebec Labour Board and for discrimination with the Quebec Human Rights Commission. The complaint with the Labour Board was settled for a measly sum. … Meanwhile, Marisa's … period to complete the two-year fulltime … work looms in the horizon. If she fails to satisfy this requirement in time … then … the threat of deportation may likely be enforced without delay.[145] [Emphasis added]

Status 'regularisation' measures also often take the form of a time-limited access to (permanent) legal status' policy. For example, the 2012 Italian administration managed a scheme under which a portion of workers with expired or irregular legal status were deemed eligible (if sponsored by an employer) for legal status recognition only during one month:

> PREVENTING LABOUR EXPLOITATION IN THE 2012 REGULARISATION: A MISSED OPPORTUNITY Similar to the 2009 regularisation, the 2012 procedure is presented as an amnesty for employers irregularly employing migrant workers and was adopted at the same time as new sanctions and other measures were also introduced. These employers have a month (from 15 September to 15 October 2012) to declare the existence of the employment relationship to the authorities and pay a fee of 1,000 euros per worker. The "parties" will then be summoned before local immigration authorities, to complete the procedure and apply for a residence permit. The significant shortcomings of the 2009 regularisation, which unduly restricted the rights of migrant workers were perpetuated in the 2012 regularisation.

[145] Maria Deanna P. Santos, *supra* note 86, at 151-154.

> … [T]here is nothing to suggest that the Italian authorities intend to correct the shortcoming of the 2009 regularisation.[146] [Emphasis added]

Temporary access to (permanent) legal status: justifiable restriction of rights?

Time-limited access to permanent status *de facto* results in the exclusion of a portion of the (im)migrant workers in the country and, therefore, in the state restriction of individuals' right to a meaningful access to justice and protection of the law in the country. Furthermore, if, as already mentioned above, temporary access to permanent status is combined with the fulfilment of specific requirements imposed by authorities – such as the completion of a specific number of months of employment, the earning of a specific level of income or the payment of a specific fee – the affected individuals face seemingly insurmountable obstacles to the claiming of rights and launching of legal proceedings in the country.

This type of permanent status denial policy restricts the fundamental right to a meaningful access to court in a uniquely arbitrary way for some individuals. However, , government would likely have a hard time trying to establish – for any possible policy goal – a rational justification for such a major and extremely negative impact on individuals' fundamental rights.

3. Permanent status policy for workers compatible with the Canadian constitution

Therefore, for (3.1.) immigrant worker admission policies to allow for individuals' meaningful access to justice in the country, permanent status recognition must be available to them. In this context, (3.2) if at all, very few restrictions on access to permanent status would likely qualify, under court's scrutiny, as non-arbitrary and a

[146] Amnesty International, *supra* note 51, at 7-8.

proportionate interference with constitutional protections such as the right to access justice in the country.

3.1. Permanent status recognition for workers and their families

While (3.1.1.) recognition of permanent status would facilitate circular and return migration in countries of origin and are, therefore, sustainable in the long term, (3.1.2.) making it unconditional and automatic constitutes a necessary step to ensure a 100% compatibility with constitutional protections found in the Canadian Charter.

3.1.1. Permanent legal status as part of circular migration incentives

It is necessary to acknowledge and respect international workers fundamental rights to fundamental autonomy, family life, psychological integrity and, therefore, minimal international mobility[147]:

> [L]a mobilité humaine étant « inscrite dans l'ADN de l'espèce humaine », les États devraient légiférer pour que cette dernière soit « facilitée », « régulée » et « taxée » plutôt que réprimée, afin de permettre aux individus de poursuivre leurs objectifs de vie, notamment dans le domaine du travail.[148] [Emphasis added]

This is important. Restrictions on permanent status are justified by a will to restrict citizenship - but about half of permanent status holders are not interested in permanent settlement and new citizenship:

> In popular opinion, migration is about foreigners being attracted by Western countries' generous welfare systems and wanting to move permanently to the receiving country. In reality, a large share of migrants move for work-related reasons—and do so on a temporary basis. The movement of labor migrants is therefore often circular: They move back and forth between their homeland and foreign places of work. … When policymakers

[147] See for instance Crépeau, F. (2018), Towards a Mobile and Diverse World: 'Facilitating Mobility' as a Central Objective of the Global Compact on Migration, *Int'l J Refugee L* 30:4, 650.
[148] Dumont Robillard, M., supra note 17, at 129.

> misinterpret the real motivations underlying workers' migration decisions, the results can be costly not just for individual migrants but for society as well. … Following the economic downturn after the 1973 oil crisis, however, Germany … provided economic incentives to encourage workers to return to their home countries. For all but Turkish nationals, the stocks of guest workers declined (…). … [M]igration into Germany from Greece, Spain, and Portugal—all countries whose citizens could move … freely among … countries—virtually stopped. … Without sufficient labor demand and with free labor mobility, net immigration declined. It did not decline, however, in cases where … mobility restrictions were in place, as was the case for Turkish migrants. … [Restrictive immigration p]olicies that … have often failed … backfired. Consequences have included … reduced return migration (…). Policies that make it easy for migrants to move freely back and forth between home and host countries—with workers basing their migration decisions on labor market conditions at home and abroad—are the best way to avoid the adverse labor market outcomes and social effects associated with restrictive immigration policies. Establishing a well-defined right for migrants to move freely between home and host countries, by enabling circular migration, is essential to a successful immigration policy. Supportive instruments include dual citizenship, permanent residence permits, and liberal immigration agreements between countries.[149] [Emphasis added]

Also in pragmatic terms, to be sustainable in the long run, any permanent status recognition measures should be combined with other circular migration incentives and "transnational" rights[150]:

> Since migrants without permanent legal status do not move freely across borders, they tend more to establish themselves in the receiving country or move to undocumented status. Access to permanent resident status facilitates, rather than permanent settlement, international mobility (Constant and Zimmerman, 2011). In other words, access to permanent legal status upon arrival does ensure a real possibility for migrant workers to go return permanently or temporarily in their countries of origin, as they wish. At the same time, access to citizenship is necessary for those who chose to

[149] Zimmermann, K. F. (2014), Circular migration: Why restricting labor mobility can be counterproductive, *IZA World of Labor* May 2, at 1-7, 9.

[150] See e.g. Gordon, J. (2009) Towards Transnational Labour Citizenship: Restructuring Labour Migration to Reinforce Workers' Rights, January 4, available at SSRN: https://ssrn.com/abstract=1348064.

> settle permanently (Zilbershats et al. 2003). … Their settlement in the country of employment should not be imposed by authorities, however. Instead, the residency requirements to maintain temporary or permanent legal status must be removed (and be limited to procedures to access the legal status of citizen) in order to facilitate the mobility and circular migration of international migrant workers.[151] [Emphasis added]

Measures such as an easy permanent status renunciation procedure are key:

> This just might be the most efficient program run by Canada's immigration department. It has no application fees, takes an average of 14 days to process and applicants have a success rate as high as 97 per cent. … Instead of being barred from entry with a removal order for failing to meet residency requirements, those who give up their status voluntarily face no negative consequences if they choose to re-apply for immigration to Canada in the future, said immigration lawyer Lorne Waldman. Under immigration law, a person can't lose their status until officials make a finding that they've breached their residency obligations — a situation that often involves a lot of red tape that clogs up the system. With tens of thousands of (im)migrants who have left the country for all sorts of reasons with no intention of returning, Waldman said the voluntary renunciation program is a great alternative.[152] [Emphasis added]

Other sustainable measures include tax neutral measures and, more importantly, social benefits policies, such as access to unemployment benefits, workers compensation, and pension benefits accessible from abroad:

> [T]o facilitate voluntary permanent and temporary returns in countries of origin, governments must develop policies to ensure access to benefits from abroad, especially to unemployment insurance, worker's compensation and pension benefits:
>
> > There is no good reason [...] why [...] only about 20 percent of international migrants can take their social security benefits with them

[151] Helly, D., E. Depatie-Pelletier & A. Gibson (2014), Lessons from Canada: The Economic Necessity to Make All Guestworker Regimes '2-Step Immigration Program Facilitating Just-In-Time Integration and Circular Migration', paper delivered at the *2014 International CRIMT Conference*, Montreal, 5 May, at 23-24.
[152] Keung, N. (2016), *supra* note 12.

> when they return home. [...] It is now time to begin building a system of human mobility that responds to the realities of the twenty-first century. [...] We must develop ways [... to] make rights portable [... and] create innovative approaches to mobility (...).[153]

3.1.2. Permanent status as a mean to access justice - for all

As illustrated previously, the origins of restrictive permanent legal status recognition measures may be traced back to reprisals against runaway and injured indentured servants, as well as to slave-owners manumission practices based on goodness of the heart, a predetermined period of "faithful service", and payments by individuals understood as a self-purchase.

In fact, contemporary and historical examples demonstrate the need for permanent legal status policies to be framed in ways that are compatible with individuals' fundamental rights, and in particular with their right to access justice in the country.

More specifically, permanent legal status recognition should take place both upon arrival - and automatically. The meaningful protection of the right to access justice, with a guarantee of being authorized to remain in the country in cases of rights violations, until a court decision has been reached and reparations obtained, *de facto* requires a recognition of permanent legal status; therefore, the right to access justice cannot be optional, left to private preferences; it should not even be considered as a right to which (im)migrant workers may themselves choose to renunciate: the integrity of the country's Rule of Law is at stake – and in the case of country like Canada, also its democratic structure.

Access to permanent legal status should, therefore,not require the involvement of an employer, a private agent, and even the involvement of the migrant worker herself – since too often a work accident or any other complex situation will prevent her from

[153] See above, note 9.

adequately requesting the launch of her permanent status recognition procedure. In fact, requirements should not be imposed at all. Permanent legal status must be accessible in practice - to all, if the Rule of Law, and the right to access justice, are to be taken seriously into account.

Since admission in Canada furthermore often leads to long-term residence, social integration and permanent settlement processes, access to permanent legal status and thus the capacity to fully integrate socially and legally and eventually request citizenship, after a period of residency, is therefore fundamental - if democracy holds meaningful social value.

3.2 No permanent status/worker deportation justifiable in a democratic society?

> How many roads must a man walk down before you call him a man? … How many times must the cannon balls fly before they're forever banned? … How many years can some people exist before they're allowed to be free? Yes, how many times can a man turn his head and pretend that he just doesn't see? … How many ears must one man have before he can hear people cry?
>
> Bob Dylan, *Blowin' in the wind*

Current Canadian foreign worker deportation policies infringe on individuals' constitutional right to procedural fairness.[Yea] This being said, the protection of (im)migrant workers' constitutional rights requires more than merely 'unbiased' procedures allowing government officers to revoke their right to reside in the country. Some justices of the Federal Court of Canada expressed in the past the view that, in order to respect individuals' right to procedural fairness in matters fundamental to their existence, and thus to adequately justify the revocation of individuals' right to reside in the country, authorities need to be able to provide a "good reason" to revoke one's right to reside and earn a living in the country:

> The case of *Grewal* v. *Canada (Minister of Employment and Immigration)* involved a permanent resident convicted of attempted murder (…). … [T]he Court dismissed the appeal. However, the importance of the decision lies in the Court's recognition that "immigration inquiries and hearings engage *Charter* s. 7 rights." Moreover, as Waldman correctly suggests, this acknowledgement is significant as it "means that all such procedures must be in accordance with the principles of fundamental justice." Justice Linden, for the Court, stated … that "this, of course, does not mean that people cannot be deported for good reason, that is, as long as there is no violation of the principles of fundamental justice. (…)" He continued:
>
> > (…) The legislation and the earlier jurisprudence of this Court must yield to the dictates of section 7."
>
> The acknowledgement by the Federal Court that immigration inquiries and hearings engage the *Charter* is significant (…). … In *Nguyen* v. *Canada (Minister of Employment and Immigration)* … Marceau J. added a statement of some importance (…):
>
> > … [F]orcibly deporting an individual against his will has the necessary effect of interfering with his liberty, in any meaning that the word can bear, in the same manner as extradition was found to interfere in *Kindler.*
>
> … [T]he Federal Court … recognized that immigration inquiries do engage the *Charter* and do affect constitutionally protected interests. … [I]n *obiter,* the Court held in *Nguyen* that deportation under certain circumstances would be an "outrage to public standards of decency'' and a violation of fundamental justice. The Court's use of such language to lay the foundation for future section 7 deportation challenges is, I suggest, a reaction to what Luc Tremblay characterizes as "an unreasonable law." … Marceau J.'s holding, then, acknowledged that … the courts will look beyond the procedural rights afforded to persons subject to deportation proceedings, and to the substantive effects of that action.[154] [Italic in the text; underline added]

'Exclusion from permanent status' policies and 'conditional access to permanent status' policies are, by definition, associated with deportation measures, since the right to reside in the country implied by current temporary work authorizations is formally associated with an 'expiration date.'

[154] Russell Cohen P., "Fundamental (In)Justice: The Deportation of Long-Term Residents from Canada" (1994) 32 Osgoode Hall Law Journal 457, at 473-478.

In this context, restrictive permanent status recognition policies not only interfere with a constitutional right to access justice and with courts' jurisdiction and the Rule of Law, but ultimately also with the country's democratic nature as well as individuals' rights to procedural fairness, physical liberty, psychological integrity, and right not to be discriminated on the basis of the country of origin. In particular, following the Canadian jurisprudence on anti-vagrancy policies restricting physical liberty, state actions putting individuals under physical constraints without proof of "malevolence", such as exclusion from permanent status and associated worker deportation policies, might indeed be found by Canadian courts as impossible to justify adequately in a free and democratic society.

While a simple "serious crime" was recently confirmed by the Supreme Court of Canada as in fact not constituting a sufficient reason to deport individuals with permanent legal status,[155] considerations of "danger to the public"[156] might very well, one day, end up being confirmed by courts as constituting in fact, the only reason good enough for the government to deny permanent status recognition to individuals invited in the country to integrate within our communities[157] - and, even then, not always. In cases where humanitarian grounds, such as having children in Canada, justify the decision not to deport, or to qualify when such deportation could endanger the public abroad.[158]

[155] Mason v. MCI 2023 SCC 21.
[156] See e.g. Agbakoba v. British Columbia (Adult Forensic Psychiatric Services), 2022 BCCA 394.
[157] See e.g. Hanley, J. & E. Shragge, A. Rivard and J. Koo (2012), "Good Enough to Work? Good Enough to Stay!" Organizing among Temporary Foreign Workers, in Lenard, P.T. & C. Straehle (eds) Legislated Inequality: Temporary Labour Migration in Canada, Montreal & Kingston-London-Ithaca: McGill-Queens' University Press, at 245-271.
[158] See e.g., Navaneelan, A. (2023), Criminal Law Issues and Immigration, presentation at the 47th annual CIAJ conference *The Law of Borders*, Ottawa, Oct 26.