

**Canadian Borderlands:**  
Equality Rights for Temporary Migrant Labourers  
Under Section 15 of the *Charter*

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“While migrant workers are temporary, temporary migration is permanent.”

–Harsha Walia, *Border and Rule*<sup>1</sup>

*To survive the Borderlands  
you must live sin fronteras  
Be a crossroads.*

–Gloria E. Anzaldúa, *Borderlands/La Frontera: The New Mestiza*<sup>2</sup>

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<sup>1</sup> Harsha Walia, *Border and Rule: Global Migration, Capitalism, and the Rise of Racist Nationalism* (Nova Scotia: Fernwood Press, 2021) at 8.

<sup>2</sup> Gloria Anzaldúa, *Borderlands/La Frontera: The New Mestiza* (San Francisco: Spinsters/Aunt Lute, 1987) at 195.

## Introduction

In this paper, I explore the use of section 15 of the *Canadian Charter of Rights and Freedoms* as a tool to combat discrimination against temporary migrant labourers in Canada.<sup>3</sup> Thus far, the bulk of both academic doctrine and jurisprudence in this area has concentrated primarily on migrants' ss. 2(d) and 7 rights to freedom of association and freedom of life, liberty, and security of the person in accordance with the principles of fundamental justice, respectively.<sup>4</sup> Some provincial human rights tribunal administrative decisions have also shone light on employer violations of statutory law.<sup>5</sup> However, these cases typically focus on the individual "bad apple" employers who abuse the system. Yet, tribunal decisionmakers and judges are hesitant to acknowledge the ways in which the system writ large *facilitates* these abuses.

The Temporary Foreign Worker Program (TFWP) and its substreams are designed to keep workers vulnerable.<sup>6</sup> Racialized workers, especially women, from the Global South face extreme discrimination from the system.<sup>7</sup> They are neither treated equally to their citizen counterparts, nor to other non-citizens in Canada. With this disparity in mind, could a novel s. 15 *Charter* violation claim succeed against impugned provisions of the TFWPs? I argue that these programs' employer-tying work policies infringe migrant workers' *Charter* equality rights, and, as such, should be declared invalid.

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<sup>3</sup> *Canadian Charter of Rights and Freedoms*, s 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

<sup>4</sup> See *Tigchelaar Berry Farms v. Espinoza*, 2013 ONSC 1506 [*Tigchelaar*]; See also Eugénie Depatie-Pelletier et al, "Migrant Care and Farm Workers, Canadian Law, and Unfree Labour" (2018), online (pdf): *Association for the Rights of Household/Farm Workers – Association pour la défense des droits du personnel domestique* <addpd.files.wordpress.com/2018/11/addpd-arhw-2018-final1.pdf>

<sup>5</sup> Examples of employer statutory violations include: Violations of the Ontario *Human Rights Code*, see *O.P.T. v. Presteve Foods Ltd.*, 2015 HRTO 675 [*OPT*]; Violations of the *Health Protection and Promotion Act* (HPPA), see *Schuyler Farms Limited v. Nesathurai*, 2020 CanLII 41811 [*Schuyler*]; Violations of the *Criminal Code* and the *Immigration and Refugee Protection Act* (IRPA), see *R. v. Mantolino*, 2019 NSSC 87.

<sup>6</sup> See generally Kerry Preibisch, "Migrant Workers and Changing Work-Place Regimes in Contemporary Agricultural Production in Canada," *International Journal of Agriculture and Food* 19, no. 1 (2011): 63 at 77; See also Yan Zhang et al, "Almost half of all foreign workers in agriculture come from Mexico," in *Foreign workers in the Canadian agriculture industry* (28 April 2021), online: *Statistics Canada, Economic and Social Reports* <www150.statcan.gc.ca/n1/pub/36-28-0001/2021004/article/00002-eng.htm>

<sup>7</sup> Walia, *Border and Rule*, *supra* note 1 at 196.

# I. Background and Context Setting

## *Migrant Labour in Canada*

Recent critical scholarship has resituated liberal bromides of migration within their greater histories of border imperialism, capitalist globalization, and the “concomitant demonization of the Other.”<sup>8</sup> Canada is no exception. The Global North encourages the displacement and dispossession of groups of the Global South through, *inter alia*, climate destruction, neoliberal trade policy, state expansionism, and industry privatization and deregulation.<sup>9</sup> Marginalized groups are then forced into migration, subsequently navigating the hostile external and internal borders of countries like Canada.<sup>10</sup> National migrant labour programs maintain the status quo of temporary, cheap labour in the Global North.

Work and economic benefit have been through lines in the history of Canadian colonialism and immigration—as has race.<sup>11</sup> Mid-19<sup>th</sup> century immigration laws actively recruited northern Europeans, Britons, and Americans to Canada. Immigration policy was, as it still is, linked to newcomers’ potential benefits to the economy. The government encouraged these preferred groups to expand Canadian industry, incentivizing them with land. In contrast, contract labourers recruited specifically from the non-hegemonic southern and eastern European countries faced indenture, low wages, poor working conditions, and very little chance of obtaining permanent residence.<sup>12</sup>

By the turn of the century, Canadian immigration had crystallized into a four-tier system of preference: British and American nationals welcomed; other northern Europeans able to immigrate primarily through family links; eastern and southern Europeans needing special permits to enter; and Asians and Africans effectively barred from entry.<sup>13</sup> Notably, the *Chinese Immigration Act of 1885* heavily restricted Chinese immigration on the basis of establishing a “white” society for Canada irreconcilable with the “unassimilable [Chinese] people.”<sup>14</sup> Anti-Chinese exclusion took full effect with the *Chinese Immigration Act, 1923*, which banned Chinese immigration entirely and made

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<sup>8</sup> *Ibid* at xvii.

<sup>9</sup> *Supra* note 1 at 61-74.

<sup>10</sup> *Ibid* at 80.

<sup>11</sup> Sarah Marsden, “The Right to Work: Immigration and Mobility” in David Doorey, ed, *The Law of Work*, 2<sup>nd</sup> ed (Toronto: Emond Montgomery, 2020) 407 at 408.

<sup>12</sup> Donald H. Avery, *Reluctant Host: Canada's Response to Immigrant Workers, 1896-1994* (Toronto, ON: McClelland & Stewart, 1995).

<sup>13</sup> *Supra* note 9 at 408.

<sup>14</sup> Kenneth Munro, "The Chinese Immigration Act, 1885: Adolphe Chapleau and the French Canadian Attitude," *Canadian Ethnic Studies*, no. 3 (1 January 1987): 90; Howay, F.W (1976). "The Settlement and Progress of British Columbia, 1871-1914". *Historical Essays on British Columbia* (Montreal: McGill-Queen's University Press) 23 at 30.

Chinese entry an imprisonable offence.<sup>15</sup> Until the late 1960s, ethnic “suitability” remained an overt underpinning of Canadian immigration law.<sup>16</sup>

The history of Chinese exclusion is incomplete without the history of Chinese labour. In the late 19<sup>th</sup> century, several thousands of Chinese immigrants came to Canada as labourers to build the Canada Pacific Railway (CPR).<sup>17</sup> They were paid a fraction of the pay other workers received, laboured in dangerous conditions, and remained isolated for long periods of time. Many eventually died, their remains buried into the railway.<sup>18</sup> Following the CPR’s completion in 1885, public mistrust and xenophobia towards Chinese immigrants led to the abovementioned legislation. Yet an essential piece of Canadian infrastructure remained—and remains—built by racialized, exploited migrant labour. Migrant labour today forms the backbone of two essential sectors of the Canadian economy: agriculture and domestic care.

After several prototypes, Canada introduced its first largescale temporary worker program, the Non-Immigrant Employment Authorization Program (NIEAP) in 1973. Workers under this program had temporary residency tied to their employers and no path to permanent residence. NIEAP achieved the “re-subordination of many nonwhites entering the country by re-categorizing them as temporary and permanently foreign workers,” eviscerating their chances at permanent immigration.<sup>19</sup> Today’s TFWP is NIEAP’s successor.

### ***Temporary Foreign Worker Programs***

The Canadian government categorizes its immigration programs between permanent immigration and temporary migration.<sup>20</sup> Permanent immigration encompasses economic immigration, family reunification, and refugee resettlement. In contrast, temporary foreign worker (TFW) programs are meant entirely for economic migration.<sup>21</sup> There are two main sub-programs: the International Mobility Program (IMP) and the Temporary Foreign Worker Program (TFWP).<sup>22</sup> The TFWP has four substreams: the Seasonal

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<sup>15</sup> *Chinese Immigration Act, 1923*, 13-14 Geo. V., c. 38.

<sup>16</sup> *Supra* note 9 at 408.

<sup>17</sup> Vic Satzewich, “Racisms: The Reactions to Chinese Migrants in Canada at the Turn of the Century,” *International Sociology* 4, no. 3 (1989): 313.

<sup>18</sup> *Ibid.*

<sup>19</sup> Nandita Sharma, “Freedom to Discriminate: A National State Sovereignty and Temporary Migrant Workers in Canada” in Gökçe Yurdakul & Y. Michal Bodemann, eds, *Citizenship and Immigrant Incorporation* (New York: Palgrave Macmillan, 2007) 163 at 168.

<sup>20</sup> Alberta Civil Liberties Research Centre, “What is the TFWP?”, web: <[aclrc.com/questionsanswers](http://aclrc.com/questionsanswers)>

<sup>21</sup> *Ibid.*

<sup>22</sup> Applicants under the IMP do not need to obtain Labour Market Impact Assessments (LMIAs) in order to receive work permits (discussed further below). They typically receive open work permits. To qualify for the IMP, the worker must be individually eligible, and the prospective position must “provide broad economic, cultural or other competitive advantages for Canada” and reciprocal benefits to citizens. Workers eligible for the program must enter as part of a trade treaty, such as CUSMA (formerly under NAFTA), through a university, or as intra-company transferees. See *Canadian Citizenship & Immigration Resource Center*, Immigration, “International Mobility Program,” web: <<https://www.immigration.ca/international-mobility-program>>

Agricultural Worker Program (SAWP); the Caregiver Program; and the high- and low-wage streams.<sup>23</sup> See the figure below:

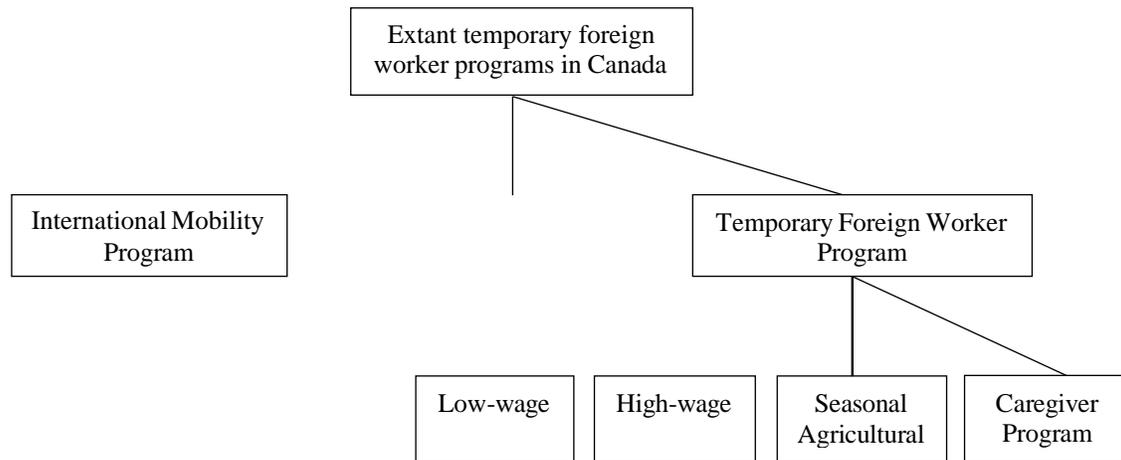


Figure 1: Structure of Canadian temporary worker programs

The TFWP is jointly administered by several federal departments pursuant to the *Immigration and Refugee Protection Regulations (IRPR)*.<sup>24</sup> Regardless of their situations, workers are classified as economic migrants, not refugees. The UN refugee convention does not recognize economic or climate displacement as a reason for refugeeism. Consequently, the state denies refugee protections to workers applying through the TFWP due to climate or economic catastrophe.<sup>25</sup>

Employers hiring through TFW programs must obtain a positive LMIA showing a need to fill job vacancies and no citizens or permanent residents willing or able to fill them.<sup>26</sup> To obtain a work permit, a TFW must provide a job offer letter, a contract stipulating pay and deductions, job duties, and the conditions of work, and an LMIA.<sup>27</sup> Employers also actively recruit TFWs from their home countries, and are permitted to pay them lower wages than their Canadian counterparts.<sup>28</sup>

There has been an exponential rise in temporary migrant labour in Canada over the past two decades, especially in agribusiness. Although there is a 20 percent cap on the

<sup>23</sup> Government of Canada, “Temporary Foreign Worker Program” (20 January 2022), online: *Government of Canada* <[canada.ca/en/employment-social-development/services/foreign-workers.html](http://canada.ca/en/employment-social-development/services/foreign-workers.html)>

<sup>24</sup> These include the Citizenship and Immigration Canada (CIC), Human Resources and Skills Development Canada (HRSDC), and Employment and Social Development Canada (ESDC). See Canadian Union of Public Employees, “Fact Sheet: Temporary Foreign Workers Program,” web: <[shorturl.at/atuwV](http://shorturl.at/atuwV)>; For the *Immigration and Refugee Protection Regulations (IRPR)*, see SOR/2002-227, s 203(1).

<sup>25</sup> *Supra* note 1 at 74.

<sup>26</sup> *Supra* note 26 at s 203(1)(b). See also Government of Canada, “What is a Labour Market Impact Assessment?” (7 April 2022), online: *Employment and Social Development Canada* <[cic.gc.ca/english/helpcentre/answer.asp?qnum=163&top=17](http://cic.gc.ca/english/helpcentre/answer.asp?qnum=163&top=17)>

<sup>27</sup> *Ibid.*

<sup>28</sup> *Supra* note 4 and accompanying text.

proportion of low-wage TFWs an employer can hire in its labour force, the agricultural and caregiving industries are exempt.<sup>29</sup> Between 2005 and 2017, the share of migrant workers in low-wage agricultural positions was more than 90 percent.<sup>30</sup> Despite record unemployment levels between 2020-2021 due to COVID-19, fewer Canadians than ever applied for farming jobs.<sup>31</sup> Meanwhile, the Government has upheld the TFWP as a “last and limited resort” for employers.<sup>32</sup>

These competing points evince a red herring: employers do not have a labour shortage, they have a *cheap, exploited* labour shortage. In reality, the state and commercial industry rely on the “commodified inclusion of migrants [...] as [...] temporary workers with deliberately deflated [labour power]” to “guarantee capital accumulation.”<sup>33</sup> Public liberal discourse more readily focuses on outsourcing production to countries in the Global South, as we see in China, India, and Bangladesh.<sup>34</sup> But the problem is within our own borders—temporary migrant workers exemplify labour *insourcing*. Harsha Walia explains, “Borders are not intended to exclude all people, but to create conditions of ‘deportability’, which increases social and labour precarity.”<sup>35</sup>

The high- and low-wage streams were formerly called high- and low-skill.<sup>36</sup> Agriculture and caregiving jobs are anything *but* low-skill. They require backbreaking work in poor conditions work with few to no breaks.<sup>37</sup> The fact that employers continually seek out migrant labour shows that most Canadians do not have the necessary skills for the job—and will not tolerate the same exploitative conditions. The work’s intrinsically punishing nature does not even begin to paint the full picture of violence and discrimination TFWs face. I discuss the prevalence of sexual abuse, arbitrary detention in worker residences, privacy invasions, wage theft, dangerous conditions, and forced deportation later in this paper.

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<sup>29</sup> Government of Canada, “Program requirements for low-wage positions,” (4 March 2022), online: *Employment and Social Development Canada* <[canada.ca/en/employment-social-development/services/foreign-workers/median-wage/low/requirements.html](https://canada.ca/en/employment-social-development/services/foreign-workers/median-wage/low/requirements.html)>

<sup>30</sup> *Supra* note 36.

<sup>31</sup> Canadian Agricultural Human Resource Council, “Understanding the Effects of COVID-19 on Canada’s Agriculture Workforce,” (20 April 2022), online: *Government of Canada’s Sectoral Initiatives Program* <[ofa.on.ca/wp-content/uploads/2021/04/COVID\\_19\\_E\\_Fin.pdf](https://ofa.on.ca/wp-content/uploads/2021/04/COVID_19_E_Fin.pdf)>

<sup>32</sup> Government of Canada, “Improving Clarity, Transparency and Accountability of the Temporary Foreign Worker Program,” (13 April 2022), online: *Employment and Social Development Canada* <[canada.ca/content/dam/canada/employment-social-development/migration/documents/assets/portfolio/docs/en/foreign\\_workers/employers/overhauling\\_TFW.pdf](https://canada.ca/content/dam/canada/employment-social-development/migration/documents/assets/portfolio/docs/en/foreign_workers/employers/overhauling_TFW.pdf)>

<sup>33</sup> *Supra* note 1 at 85.

<sup>34</sup> Statistics Canada, *Outsourcing and Offshoring in Canada*, by John R. Baldwin & Wulong Gu, in *Statistics Canada: Economic Analysis (EA) Research Paper Series*, Catalogue No 11F0027MIE No. 055 (Ottawa: Statistics Canada, May 2008), at 8.

<sup>35</sup> Harsha Walia, “Why climate justice must go beyond borders,” in *Open Democracy* (20 January 2022), web: <[opendemocracy.net/en/oureconomy/climate-justice-migrant-labour-harsha-walia/](https://opendemocracy.net/en/oureconomy/climate-justice-migrant-labour-harsha-walia/)>

<sup>36</sup> CIC News: The voice of Canadian immigration, “Breaking News: Overhaul of Temporary Foreign Worker Program,” *CIC News* (24 June 2014), online: <[cicnews.com/2014/06/breaking-news-overhaul-temporary-foreign-worker-program-063519.html#gs.xuxuyr](https://cicnews.com/2014/06/breaking-news-overhaul-temporary-foreign-worker-program-063519.html#gs.xuxuyr)>

<sup>37</sup> John Cooper, “The *Charter of Rights and Freedoms* and Migrant Farm Workers,” in *Law Now* (7 March 2022), web: <[lawnow.org/the-charter-of-rights-and-freedoms-and-migrant-farm-workers/](https://lawnow.org/the-charter-of-rights-and-freedoms-and-migrant-farm-workers/)>

The Seasonal Agricultural Worker Program is the TFWP's crown jewel. It is only open to citizens from Mexico and participating Caribbean countries.<sup>38</sup> All other agricultural labourers enter through the low-wage stream. In 2018, approximately half of all temporary migrant labour in Canada was agricultural.<sup>39</sup> Through the Program, farms hire migrant workers for a maximum of eight months per year, after which point TFWs must leave Canada and wait to return to work the next year. SAWP workers do not have a pathway to citizenship or permanent residence. They are not allowed to bring their families with them while in Canada. Instead, they often go between Canada and their home countries for many years on these permits, forging a life on the 'borderlands.'

In 2016, approximately 10 percent of TFW entries to Canada were through the Caregiver Program, formerly the Live-in Caregiver Program.<sup>40</sup> Workers in the Program are predominantly southeast Asian women. For instance, in 2015, 95.5 percent of the 13,000 domestic workers employed through the Program were women, more than 90 percent of whom came from the Philippines.<sup>41</sup> Like in the SAWP, workers are prohibited from bringing their families with them while on the temporary work permit. However, unlike the SAWP, entry under this permit can lead to permanent residence.

In 2014, the Government removed its live-in requirement.<sup>42</sup> Workers have long cited abuses relating to this aspect, including lack of privacy, extended and unpaid work hours, sexual abuse, being locked in their rooms without internet access, and being prohibited from leaving during off-hours.<sup>43</sup> Accordingly, migrant workers saw this change as a step in the right direction. However, due to artificially depressed wages and the cost of housing, most caregivers have had to continue living with their employers.<sup>44</sup> Many reported longer hours of work, unpaid wages, greater employer limitation over their movement, and a harder time enforcing their rights after the onset of the COVID-19 pandemic.<sup>45</sup>

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<sup>38</sup> Government of Canada, "Hire a temporary worker through the Seasonal Agricultural Worker Program: Overview," *Employment and Social Development Canada*, web: <[canada.ca/en/employment-social-development/services/foreign-workers/agricultural/seasonal-agricultural.html](http://canada.ca/en/employment-social-development/services/foreign-workers/agricultural/seasonal-agricultural.html)>

<sup>39</sup> *Supra* note 11.

<sup>40</sup> *Immigration and Refugee Protections Regulations*, SOR 2002-227, ss. 110-15. Government of Canada, "Table 3.1: Temporary Foreign Worker Program Work Permit Holders by Program and Sign Year, 2007 to 2016," online: <[open.canada.ca/data/en/dataset/6609320b-ac9e-4737-8e9c-304e6e84317](http://open.canada.ca/data/en/dataset/6609320b-ac9e-4737-8e9c-304e6e84317)>

<sup>41</sup> Julien Debonneville, « Les écoles du care aux Philippines. Le devenir travailleuse domestique au prisme de l'altérité », *Revue Tiers Monde* 1, n° 217 (2014) : 61–78. Voir également Rhacel Salazar Parrenas, *Servants of Globalization: Women, Migration and Domestic Work*, 2nd ed. (Stanford: Stanford University Press, 2015).

<sup>42</sup> Government of Canada, "Improving Canada's Caregiver Program," online: *Government of Canada* <[canada.ca/en/news/archive/2014/10/improving-canada-caregiver-program.html](http://canada.ca/en/news/archive/2014/10/improving-canada-caregiver-program.html)>

<sup>43</sup> See Geraldine Pratt, "Circulating Sadness : Witnessing Filipina Mothers' Stories of Family Separation" (2009) 16:1 *Gend Place Cult* 3.

<sup>44</sup> Caregivers Action Centre et. al., "Behind Closed Doors: Exposing Migrant Care Worker Exploitation During COVID-19" (October 2020), online: <[migrantrights.ca/wp-content/uploads/2020/10/Behind-Closed-Doors\\_Exposing-Migrant-Care-Worker-Exploitation-During-COVID19.pdf](http://migrantrights.ca/wp-content/uploads/2020/10/Behind-Closed-Doors_Exposing-Migrant-Care-Worker-Exploitation-During-COVID19.pdf)>

<sup>45</sup> *Ibid.*

There is undeniable racialization and feminization of temporary migrant labour in Canada. Case law and journalistic research have exposed employer discrimination and abuse on these grounds. However, the problem is systemic, not case-by-case. Employer-tying policies, as I will discuss below, deputise employers as administrators of federal regulations and facilitate an extreme power imbalance between workers and their employers. Importantly “locking workers into an employment relationship deprives them of their most important bargaining chip – their ability to leave.”<sup>46</sup>

### ***Employer-Tying Work Policies and Resultant Abuse***

All TFWs have closed, or employer-tied, work permits. While workers have the right to quit, if they do so, their permits are cancelled. They cannot work for another employer without obtaining a separate work permit (accompanied by a LMIA) issued for their new employer.<sup>47</sup> Workers are ineligible for EI.<sup>48</sup> Administrative delays in processing new permits leave workers in precarious financial and housing situations. These restrictions enable rampant abuse and trap migrants in poor conditions with unfair pay.

Employers must provide SAWP workers with “adequate, suitable and affordable housing” located on the farm or off-site (though, if off-site, almost always adjacent to the farm).<sup>49</sup> The reality is the inverse. Employers house dozens of workers in cramped, unsafe conditions where they are often exposed to poisonous farming chemicals. Employers enforce curfews, ban internet access and cellphones, and prohibit workers from leaving the farm.<sup>50</sup>

In May 2011, Golden Eagle Blueberry Farms of Pitt Meadows, owned by the billionaire Aquilini Family, was fined more than \$125, 402 for failing to maintain basic safety standards for migrant workers, including failing to provide first aid to seriously injured workers.<sup>51</sup> A few years prior, Mexican farmworkers had gone on strike, protesting Golden Eagle’s unsafe and insalubrious conditions. In an open letter, they detailed having no access to the washroom other than a single, excrement-filled facility; being forced to go to the bathroom outside; becoming sick with diarrhea and from infection; and being denied medication or access to a doctor.<sup>52</sup>

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<sup>46</sup> Depatie-Pelletier et al *supra* note 5 at 4.

<sup>47</sup> *Supra* note 20.

<sup>48</sup> Niagara Migrant Workers Interest Group, “What is SAWP?” web: <[nmwig.ca/site/seasonal-agricultural-worker-program](http://nmwig.ca/site/seasonal-agricultural-worker-program)>

<sup>49</sup> Government of Canada, “Hire a temporary worker through the Seasonal Agricultural Worker Program: Program requirements,” online: *Employment and Social Development Canada* <[canada.ca/en/employment-social-development/services/foreign-workers/agricultural/seasonal-agricultural/requirements.html](http://canada.ca/en/employment-social-development/services/foreign-workers/agricultural/seasonal-agricultural/requirements.html)>

<sup>50</sup> Irving Andre, “The Genesis and Persistence of the Commonwealth Caribbean Seasonal Agricultural Workers Program in Canada,” *Osgood Hall Law Journal* 28, no. 28 (Summer 2019): 243-301.

<sup>51</sup> Phil Melnychuk, “Aquilinis fined \$125K again,” *Maple Ridge-Pitt Meadows News*, web: <<https://www.mapleridge.news.com/news/aquilinis-fined-125k-again/>>

<sup>52</sup> Mexican Agricultural Workers of the Golden Eagle Group Farm, “Letter of Concern from the Mexican Agricultural Workers of the Golden Eagle Group Farm, Pitt Meadow,” Justicia for Migrant Workers (7 April 2006), web: <[justicia4migrantworkers.org/bc/pdf/GE\\_Worker\\_Letter\\_En.pdf](http://justicia4migrantworkers.org/bc/pdf/GE_Worker_Letter_En.pdf)>

In 2019, the Ministry of Labour ordered Golden Eagle Farm to pay more than \$131,000 in backpay to Guatemalan migrant workers. The Farm had stolen the workers' wages, forced them to work unpaid overtime, and denied them vacation.<sup>53</sup> These workers also decried their working and living conditions. They described "ninety-eight women crammed into two houses with inadequate appliances or showers, working in the freezer area for fifteen hours a day without warm clothing, workplace injuries with no first aid or medical attention," being denied water, invasions of their privacy, and the threat of deportation if they complained.<sup>54</sup> Employers commonly employ this threat as a compliance tactic.

Migrant women labourers are additionally vulnerable to sexual abuse and harassment. In 2015, OPT and MPT sued their employer, Presteve Foods Ltd., and their individual supervisor on the basis of sexual harassment and discrimination contrary to the Ontario *Human Rights Code*.<sup>55</sup> Their supervisor had harassed and abused them unendingly, and forced them to have sex with him on threats of deportation if they did not comply.<sup>56</sup> He also confiscated their passports and green cards, meaning they had no mobility or access to healthcare.<sup>57</sup>

The court found the defendants liable and ordered them to pay OPT and MPT damage awards of \$150,000 and \$50,000, respectively. They were also ordered to provide all TFWs with "human rights information and training."<sup>58</sup> However, Presteve was not barred from participating in the TFWP, nor was it put on the government's non-compliant employer list. OPT and MPT received one of the largest awards for injury to dignity ever made by a Canadian human rights tribunal. Still, in essence, Presteve received a slap on the wrist.

Caregivers also widely report sexual abuse and privacy violations.<sup>59</sup> As with farmworkers, it is disproportionately prevalent amongst racialized women. In the case of *PN v. FR and another (No.2)*, the BC Human Rights Tribunal awarded over \$50,000 to a Filipina domestic care worker who was kept by her employers as a "virtual slave."<sup>60</sup> PN originally worked for the respondents, a couple identified as FR and MR, in Hong Kong, after being recruited by an employment agency from the Philippines. It was there that the couple began their abuse: MR, FR's wife, would verbally attack PN and threaten to kill

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<sup>53</sup> Melnychuk, "Pitt Meadows blueberry farm ordered to pay \$131,000 to foreign workers," *Maple Ridge-Pitt Meadows News*, web: <[www.mapleridgenews.com/news/pitt-meadows-blueberry-farm-ordered-to-pay-131000-to-foreign-workers/](http://www.mapleridgenews.com/news/pitt-meadows-blueberry-farm-ordered-to-pay-131000-to-foreign-workers/)>

<sup>54</sup> *Supra* note 1 at 163-64; See also Ash Kelly and Hana Mae Nassar, "Guatemalan Workers Accuse Management of Harassment at Aquilini Blueberry Farm," News 1130, 28 May 2019, web: <[citynews1130.com/2019/05/28/Guatemalan-workers-accuse-aquilini-farm/](http://citynews1130.com/2019/05/28/Guatemalan-workers-accuse-aquilini-farm/)>

<sup>55</sup> *O.P.T. v. Presteve Foods Ltd.*, 2015 HRTO 675 (CanLII) at 2.

<sup>56</sup> *Ibid* at 3-6.

<sup>57</sup> *Ibid* at 20.

<sup>58</sup> *Ibid* at 230.

<sup>59</sup> *Supra* note 44.

<sup>60</sup> *PN v. FR and another (No. 2)*, 2015 BCHRT 60 (CanLII) at 101.

her.<sup>61</sup> FR began to sexually abuse PN, forcing her to masturbate him several times a week.<sup>62</sup>

When the couple decided to move to Canada, FR forced PN to sign an employment contract under duress. The contract stipulated that PN would be liable for any of the administrative fees associated with her permit in the case that she decided to quit. The couple also confiscated her passport under the pretense of keeping it for “safekeeping.” PN believed she was entering Canada through the LCP. In actuality, her employers had secured her a visitor’s visa, making PN’s employment illegal, and thus making PN’s status considerably more precarious.<sup>63</sup> In Canada, the couple intensified their abuse: they starved her and deprived her of sleep, imprisoned her in their home, withheld her wages, verbally abused and sexually assaulted her, and threatened her children’s safety in the Philippines.<sup>64</sup>

PN eventually escaped their home, and later filed a complaint against FR. However, because she had not been formally recruited through the LCP, PN was legally unable to work in Canada. In her decision, Tribunal Member Catherine McCreary ruled that FR and MR’s treatment of PN was motivated in large part due to PN’s ethnicity, sex, and family caregiver status, and was exacerbated by relevant “stereotypes or prejudices.”<sup>65</sup> PN’s case may seem extreme, but sexual abuse and exploitation are commonplace in Canada’s temporary migrant labour programs.<sup>66</sup>

To counteract employer “non-compliance” with the TFWP, the government has enacted the Administrative Monetary Penalty.<sup>67</sup> Non-compliant employers may face a financial penalty or a period of ineligibility from the TFWP. The regime operates on a points-based system, considering the type and severity of the employer’s violation, the employer’s history, its size, and whether it has voluntarily disclosed non-compliance.<sup>68</sup>

If an employer is found to be non-compliant, it first has the opportunity to address red flags and improve working conditions, which the government says is “preferable to simply imposing sanctions.”<sup>69</sup> Monetary penalties range between zero dollars and \$100,000, and findings of ineligibility from the program range from no ban to a permanent ban. The government may place repeated non-compliant employers on a public list,

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<sup>61</sup> *Ibid* at 21-22.

<sup>62</sup> *Ibid* at 23.

<sup>63</sup> *Ibid* at 25-29.

<sup>64</sup> *Ibid* at 30-51.

<sup>65</sup> *Ibid* at 72.

<sup>66</sup> Elsa Galerand et Martin Gallié, “Travail non libre et rapports sociaux de sexe – À propos des programmes canadiens d’immigration temporaire,” (2018) *Revue Canadienne Droit et Société*, Vol 33, no. 2, at 223–241.

<sup>67</sup> *Supra* note 26 at s 209.2(1)(b)(i)-209.4(1)(c).

<sup>68</sup> Stefanie Di Francesco and Jennifer Allman, “Significant New Penalties for Non-Compliance with Temporary Foreign Worker Program,” *McMillan LLP* (2015), web: <mcmillan.ca/insights/significant-new-penalties-for-non-compliance-with-temporary-foreign-worker-program/>

<sup>69</sup> Teresa Wright, “Liberals step up monitoring for temporary foreign workers program,” in *CBC News* (13 May 2018), web: <www.cbc.ca/news/politics/government-temporary-foreign-workers-audit-1.4661312>

though the majority of employers on this list are still eligible to hire TFWs.<sup>70</sup> Employers are also given warning ahead of time that an inspection of possible non-compliance will be taking place, leaving them time to temporarily ameliorate any sub-standard work and living conditions. It is dubious how effective the state is in ensuring employer compliance and accountability.

Migrant workers holding employer-tied work permits may exceptionally apply for an open work permit if they can demonstrate they are at risk of or experiencing abuse.<sup>71</sup> However, these are rarely issued and there are multiple reasons why vulnerable workers choose not to report their abuse. They may not speak English and be unaware of their rights, including the knowledge of how to report their abuse. Their employer may isolate them, denying them access to resources and support. They may be “emotionally, physically or economically dependent on the perpetrator of the abuse,” especially if their employer is providing their housing. They may fear retribution from their employer. In addition, these special permits are temporary, and renewal is conditional.<sup>72</sup>

Open work permits clearly ensure greater safety, mobility, and dignity for migrant workers. Employer-tied permits are not just problematic within the scope of employment law. Depatie-Pelletier et al demonstrate in their paper the effects employer-tied policies have on migrant labourers’ fundamental rights to liberty and security of the person, pursuant to section 7 of the *Charter*.<sup>73</sup> I echo this argument and add that these policies contravene many temporary migrant labourers’ section 15 *Charter* equality rights. They perpetuate disadvantage and cannot be “demonstrably justified in a free and democratic society.”<sup>74</sup> They are constitutionally invalid under s. 15 and cannot be saved by s. 1.

## II. Section 15 and Temporary Migrant Labourers

### *Charter Rights for Temporary Migrant Labourers*

Canada is party to seven of the nine major United Nations human rights treaties and has committed itself to several optional protocols that allow individuals to advance complaints against it.<sup>75</sup> It is telling that one of the two core instruments Canada is not a signatory to is the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*. No country in the Global North has attached itself to this

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<sup>70</sup> *Supra* note 26 at s 209.2(1)(b)(i)-209.4(1)(c).

<sup>71</sup> *Supra* note 26 at s 207.1

<sup>72</sup> *Ibid.*

<sup>73</sup> *Supra* note 5 at 4 and accompanying text.

<sup>74</sup> *Charter* at s 1.

<sup>75</sup> Catherine Dauvergne, “How The Charter has Failed Non-Citizens in Canada: Reviewing Thirty Years of Jurisprudence” (2013) 58:3 McGill LJ 663 at 1.

treaty.<sup>76</sup> Catherine Dauvergne has coined the term “*Charter* hubris” to describe the trend in Canadian *Charter*-era jurisprudence in which the judiciary “implicitly takes the position that the *Charter* delivers all the human rights protections that any individual could need.”<sup>77</sup> The issue in ignoring international law, as she points out, is that Supreme Court *Charter*-era jurisprudence suggests that it is an unreliable tool for non-citizens.

Prof. Donald Galloway describes lawyers’ tendencies to rely on s. 7 of the *Charter* in challenging harmful immigration laws and promotes the use of s. 15 as a novel instrument:

Rather than disallow equality-based challenges to our immigration laws, we should welcome litigation that seeks to prove the suspicions that our immigration laws may have been shaped by the influence of xenophobic ideologies which may, in turn, have been fertilized autopoetically by government laws and policies. Even where oppressive immigration laws are applicable to all non-citizens and differentiate them as a class from citizens, we should welcome a forum for review in which we scrutinize their full impact on non-citizens so that we can appraise accurately the actual harms and benefits and consider government reasons for imposing such rules under section 1 of the *Charter*.<sup>78</sup>

Accordingly, while employer-tying policies are harmful to all TFWs, they are also discriminatory on the bases of race, colour, origin, citizenship, sex, and family status.<sup>79</sup> *Ontario v. Fraser* also opens the door to subsequent s. 15 challenges by temporary agricultural migrant labourers.<sup>80</sup> However, it also exposes the Court’s struggle to reconcile intersecting enumerated and analogous grounds.

Ontario farmworkers argued that labour provisions precluding them from collective agreement bargaining infringed their s. 2(d) association rights. They also argued that the statute arbitrarily treated farmworkers distinctly from other kinds of workers, violating s. 15. While the appellants were comprised of both citizens and non-citizens, the high proportion of TFWs in Ontario’s agricultural sector meant the case was significant for migrant labourer rights. *Justicia for Migrant Workers*, an intervenor, argued, “The interests of migrant agricultural workers, other temporary foreign workers and undocumented workers should be further considered and contextualized in the interpretation of these *Charter* rights.”<sup>81</sup>

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<sup>76</sup> *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, 18 December 1990, United Nations, Treaty Series, vol. 2220, at 3.

<sup>77</sup> *Supra* note 77 at 55.

<sup>78</sup> Donald Galloway, “Immigration, Xenophobia and Equality Rights,” in *Dalhousie Law Journal* Volume 42 Issue 1 42:1 (2019) Special Issue: Immigration Law (1 April 2019) at 22-23.

<sup>79</sup> See *Andrews v. Law Society of British Columbia*, 1989 CanLII 2 (SCC).

<sup>80</sup> *Ontario (Attorney-General) v Fraser*, 2011 SCC 20 [*Fraser 2011*].

<sup>81</sup> *Factum of the Intervener, Justicia for Migrant Workers and Industrial Accident Victims of Ontario* at 1, re *Ontario v Fraser*, *supra* note 82.

Despite being presented with the reality of migrant labourer discrimination in Canada, the Court declined to deal with this in any of its decisions. Only Abella J, in her dissent, briefly mentioned the non-citizenship status of many of the farmworkers.<sup>82</sup> The majority focused primarily on the workers' s. 2(d) argument, rather than s. 15. Instead of dismissing their s. 15 claim on the basis of employment status not being recognised as an analogous ground, they did so on the basis that it was “premature” due to a lack of evidence.<sup>83</sup> Deschamps J, concurring, posited that “it would be more faithful to the design of the *Charter* to open the door to the recognition of more analogous grounds under s. 15” in order to redress economic inequality, yet did not mention migrant status.<sup>84</sup>

In 2013, the Quebec Court of Appeal reached the same conclusion in a similar case, though it went further in reading out s. 15 through two related “modes of rearticulation.”<sup>85</sup> Through subtraction, the Court reasoned that asserted grounds lose protection when a characteristic is appended to them. In this case, the Quebec Labour Code did not discriminate against migrant labourers because it discriminated against migrant labourers “from Mexico.” Through addition, the Court reasoned that the Code did not discriminate against migrant farmworkers because it discriminated against *all* farmworkers, regardless of origin.<sup>86</sup>

Recent decisions like *Fraser v. Canada* and *Withler v. Canada* suggest a future claim may succeed should the Court look to the discriminatory adverse effects policies have over subgroups of the *same* group through contextual analysis.<sup>87</sup> Employer-tied permits are indiscriminately harmful, but have disproportionate effects on temporary migrant agricultural and domestic care workers. In turn, these workers are further disadvantaged on the bases of race, sex, origin, and family status.

### ***The Charter and Administrative Actors: The Public-Private Junction***

In 2013 in Ontario, three SAWP agricultural workers from Mexico commenced an action against their former employer, Tigchelaar Berry Farms, for wrongful dismissal.<sup>88</sup> In their suit, they also alleged the Government of Canada, Foreign Agricultural Resource Management Services (F.A.R.M.S.), and Tigchelaar had violated, *inter alia*, their ss. 7 and 15 *Charter* rights. They claimed to have been privately deported under improper administrative procedure, and that “before that happened they should have been told the reason for their dismissal and repatriation and given a meaningful opportunity to respond.”<sup>89</sup>

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<sup>82</sup> *Supra* note 81 at 438.

<sup>83</sup> *Supra* note 81 at 116.

<sup>84</sup> *Supra* note 81 at 319.

<sup>85</sup> Joshua Sealy-Harrington, “The Alchemy of Equality Rights,” *Constitutional Forum constitutionnel*, Vol. 30, No. 2 (2021) at 62-63.

<sup>86</sup> *L'Écuyer v. Côté*, 2013 QCCS 973.

<sup>87</sup> *Fraser v. Canada (Attorney General)*, 2020 SCC 28 (CanLII) [*Fraser 2020*]; *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396 [*Withler*].

<sup>88</sup> *Tigchelaar Berry Farms v. Espinoza*, 2013 ONSC 1506 (CanLII)

<sup>89</sup> *Ibid.*

The Court considered the question: did the *Charter* apply to Tigchelaar Berry Farms, a private employer, and to F.A.R.M.S., a government-funded and controlled regulatory body?<sup>90</sup> Typically, the *Charter* can only be exercised over the government, though there are two scenarios in which a non-governmental entity may be subject to it: “if (1) it is found to be “government” because of its very nature or because the government exercises substantial control over it; or (2) it is not itself a government body but nevertheless performs “governmental activities”, such as exercising delegated governmental authority or implementing a specific government program or policy.”<sup>91</sup>

The farmworkers argued that the *Charter* applied to both entities for two reasons. Firstly, the Canadian government delegated “coercive power” to them to terminate and remove the migrant workers from Canada absent “sufficient procedural protections.” Furthermore, by exercising this coercive power, they implemented the specific government SAWP policy that “unsuitable temporary workers should not remain in Canada.”<sup>92</sup> They presented ample evidence to this effect. The SAWP is, as I discuss, deliberately constructed to ensure temporary, reliable migrant labour. The Government deputises F.A.R.M.S. as an intermediary between it and private agricultural employers to recruit TFWs to Canada. The Government, F.A.R.M.S., and employers like Tigchelaar function in tandem to administer the SAWP and privately deport migrant workers deemed “unreliable.”<sup>93</sup> Tigchelaar recommends certain employees for private deportation, and F.A.R.M.S. summarily arranges their removal. Therefore, the SAWP effectively deputized both private entities to exercise “authority pursuant to SAWP’s statutory and administrative framework,” making them subject to *Charter* scrutiny.<sup>94</sup>

The court dealt with Tigchelaar and F.A.R.M.S. separately. Concerning Tigchelaar, it noted that the SAWP required private employers and migrant workers to sign a contract expressly authorising the employer to “cause the worker to be repatriated,” arguably delegating governmental authority to Tigchelaar.<sup>95</sup> The court also found a conceivable connection between Tigchelaar’s authority to forcibly repatriate migrant workers and the Government’s policy objective of the SAWP ensuring strictly temporary migrant labour in Canada. The court then deferred to the Government’s stated objective of using the SAWP to fill agricultural employers’ varying seasonal labour demands. As I note earlier, this paints an inaccurate picture of the SAWP’s effect. Agribusiness *de facto* demands temporary migrant labour every season beyond the SAWP’s last-resort status.

Evidently, the court did not flippantly dismiss the *Charter*’s potential applicability to Tigchelaar. However, it ultimately decided it could not answer this “important and complex question” without being “presented with all the relevant adjudicative and

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<sup>90</sup> *Charter* at s 32(1).

<sup>91</sup> *Ibid* at 16, citing *McKinney v. University of Guelph*, 1990 CanLII 60 (SCC), [1990] 3 S.C.R. 229, at 25-45; *Eldridge v. British Columbia (A.G.)*, 1997 CanLII 327 (SCC), [1997] 3 S.C.R. 624, at 20-22 & 43-44.

<sup>92</sup> *Ibid* at 17.

<sup>93</sup> *Ibid* at 18.

<sup>94</sup> *Ibid* at 19-20.

<sup>95</sup> *Ibid* at 23.

legislative facts.”<sup>96</sup> It also highlighted several uncertain technicalities, including the question of whether the private employer or a governmental administrative body bore the costs of repatriated workers’ return trips, and the timing of the deportation in relation to the workers’ permits’ expiries.<sup>97</sup> Nonetheless, it did not shut down the possibility of the *Charter* applying to another private employer in the TFWP or SAWP in the future.

Whether the *Charter* applied to F.A.R.M.S. posed a much more straightforward question. F.A.R.M.S. was “was incorporated with the assistance of the Government of Canada to act as the administrative arm of the SAWP, and carries out functions under the SAWP that were carried out by the Government of Canada prior to 1987.”<sup>98</sup> In addition to administering the SAWP program, F.A.R.M.S. arranged for the farmworkers’ forced repatriation back to Mexico and was granted discretionary decision-making authority in the Government’s stead. Intermediary administrative bodies are, in the court’s opinion, subject to the *Charter*. *Tigchelaar* indicates that the *Charter*’s scope of exercise includes private sector-run, federally incorporated organisations like F.A.R.M.S. It also suggests that, given enough convincing evidence, private employers operating under TFW programs may also be subject to the *Charter*.

### **III. Section 15 Application to Employer-Tied Policy**

#### ***Section 15 Analysis***

Section 15(1) of the *Charter* provides, “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”<sup>99</sup> The test for finding a breach of a claimant’s s. 15 equality rights has gone through several iterations since its first application in *Andrews*. Starting with that case, the Court has always focused on substantive over formal equality.<sup>100</sup> Abella J clearly states the two-part test in *Fraser v. Canada*. A claimant must prove that the impugned law or state action (including government program): “[1] on its face or in its impact, creates a distinction based on enumerated or analogous grounds; and [2] imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.”<sup>101</sup>

Abella J clarifies several important issues in *Fraser* concerning the test’s application. Firstly, she addresses previous issues with Court’s approach to adverse effects and enumerated and analogous grounds. Citing Prof. Colleen Sheppard, she asks:

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<sup>96</sup> *Ibid* at 27.

<sup>97</sup> *Ibid* at 27.

<sup>98</sup> *Ibid* at 28.

<sup>99</sup> *Charter*, s 15.

<sup>100</sup> *R. v. Kapp*, [2008] 2 S.C.R. 483 at paragraph 15 citing *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at 171, *per* McIntyre J.

<sup>101</sup> *Fraser 2020* at 27.

Why is it so critical to expand on our understanding of adverse effect discrimination? If we do not, there is a significant risk that discrimination embedded in apparently neutral institutional policies, rules, or procedures will not be recognized as discriminatory. This risk is accentuated by the necessity in anti-discrimination law to connect the experience of exclusion, harm, prejudice, or disadvantage to a recognized ground of discrimination . . . . We need a sophisticated and coherent theory of adverse effect discrimination to assist claimants, lawyers, and adjudicators with the complexities of the manifestations of systemic discrimination.<sup>102</sup>

The Government may argue that the distinctions its TFWPs make on the basis of enumerated and analogous grounds are facially neutral. However, they have adverse effects on migrants belonging to the *Charter*'s protected grounds.

The Court has also struggled to incorporate comparator groups into its s. 15 analyses. In *Withler*, the Court affirms the use of comparison as a general tool in s. 15 analysis, though it rejects the need for a claimant to show disparate treatment in relation to a clearly identifiable comparator group. This approach “provides the flexibility required to accommodate claims based on intersecting grounds of discrimination. It also avoids the problem of eliminating claims at the outset because no precisely corresponding group can be posited.”<sup>103</sup> Claims such as this would feature several intersecting grounds requiring a contextual analysis. Therefore, sidestepping the need for a comparator group is advantageous.<sup>104</sup>

The next question is, of course, which intersecting grounds such a claim engages. In *Tigchelaar*, the Court reiterated that national origin is an enumerated ground and that the occupational status of an agricultural worker has been recognized as an analogous ground.<sup>105</sup> More than this, the discrimination embedded within TFW programs has disproportionate adverse effects on Black and Brown racialized individuals, and on racialized women. The policy therefore infringes the protected enumerated grounds of race, colour, and sex, too.

The International Labour Organisation (ILO), of which Canada has been a member since 1919, has unequivocally affirmed employment discrimination's disproportionate impacts on “ethnic minorities, indigenous and tribal peoples, migrant workers, including migrant

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<sup>102</sup> *Fraser 2020 supra* note 87 at 29, per Abella J, citing Colleen Sheppard, “Of Forest Fires and Systemic Discrimination: A Review of *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*” (2001), 46 *McGill L.J.* 533, at 542.

<sup>103</sup> *Withler supra* note 87 at 63.

<sup>104</sup> For more discussion of the pitfalls of the comparator group, see also Nathan Irving, “Disabling Poverty/Enabling Citizenship,” *Council of Canadians with Disabilities CURA* (6 September 2009), web: <[ccdonline.ca/en/socialpolicy/poverty-citizenship/legal-protections/human-rights-jurisprudence-group-analysis](http://ccdonline.ca/en/socialpolicy/poverty-citizenship/legal-protections/human-rights-jurisprudence-group-analysis)>; The Court, per McLachlin J, affirms the importance of a contextual analysis of s. 15(1) “having regard to all the circumstances and the context of the legislation,” in *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84 at 28.

<sup>105</sup> *Tigchelaar supra* note 88 at 66.

domestic workers, afro-descendants, national minorities and Roma people, among others, as an aspect of discrimination on the basis of race, colour and national extraction.”<sup>106</sup>

In 2021, a group of Mexican migrant labourer women submitted a formal complaint against the United States under CUSMA in a bid to end gender and racial discrimination in U.S. temporary migrant labour programs. They alleged sexual violence from their employers, racist recruitment practices, and gender and racial segregation. Listed amongst the United States’ alleged violations of CUSMA’s race and sex equality guarantees was its use of employer-tied visas.<sup>107</sup> U.S. officials promised to incorporate the petitioners’ recommendations, though as of the third supplemental filing in March 2022, they have yet to do so.<sup>108</sup> The SCC may see the U.S. government’s acknowledgment of discrimination in its migrant labour programs under CUSMA as a compelling parallel to Canada’s own TFWPs.

Discrimination within Canada’s TFWP also has historical precedent. First, consider the managed migration of Chinese labourers to Canada in the late 1800s (discussed in Part 1). Robyn Maynard notes that the prevalence of Black Caribbean agricultural migrant labour is an “extension and consolidation of Jim Crow-style labour practices in Canada” rooted in anti-Black racism and the plantation economy.<sup>109</sup> The LCP has its roots in the recruitment of Black migrant domestic workers arriving from the British-ruled Caribbean between the 1910s and 1930s, and the West Indian Domestic Scheme, which ran from 1955-1967. The latter brought thousands of Black Caribbean women to Canada as domestic servants.<sup>110</sup> They were subject to discriminatory levels of “moral scrutiny,” experienced widespread wage theft, and were forced to work longer hours. The 1973 launch of NIEAP barred domestic workers with spouses or children from permanent immigration and maintained the precarity of gendered domestic work as part of the global supply chain.<sup>111</sup> The SAWP and Caregiver Program are merely new faces of state-

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<sup>106</sup> ILO Committee of Experts on the Application of Conventions and Recommendations, Discrimination (Employment and Occupation) Convention, 1958 (No. 111), General observation 2019, at 3-4. See also The Preamble to the ILO Declaration on Fundamental Principles and Rights at Work recognizes the need for “special attention to the problems of persons with special social needs, particularly the unemployed and migrant workers.”

<sup>107</sup> Ponce, Pérez, et al, *Labor Law Matters Arising in the United States* submitted to the Labor Policy and Institutional Relations Unit through the General Labor and Social Welfare (STPS) United States-Mexico-Canada Agreement Regarding the Failure of the U.S. Government to Effectively Enforce its Domestic Labor Laws and Promote the Elimination of Employment Discrimination in the H-2 Program in Violation of Chapter 23 of the United-States-Mexico-Canada Agreement (USMCA), 23 March 2021 (Petition submitted by the Petitioners signed by the *Centro de los Derechos del Migrante, Inc.*), at 22-26, web: <cdmigrante.org/wp-content/uploads/2021/03/USMCA-Amended-Petition-and-Appendices\_March-23-2021\_reduced.pdf>

<sup>108</sup> Centro de los Derechos del Migrante, Inc., “Migrant worker women submit first-ever petition against the U.S. under the USMCA: Update,” (31 March 2022), online: <cdmigrante.org/migrant-worker-women-usmca/>

<sup>109</sup> Robyn Maynard, *Policing Black Lives: State Violence in Canada from Slavery to the Present* (Halifax: Fernwood, 2017), at 69.

<sup>110</sup> For the relevant history between the 1910s and 1930s, see Andre *supra* note 49; For the later history, see Government of Canada, “West Indian Domestic Scheme (1955–1967),” *Parks Canada*, web: <canada.ca/en/parks-canada/news/2020/07/west-indian-domestic-scheme-19551967.html>

<sup>111</sup> See generally Geraldine Pratt, *Working Feminism* (Philadelphia, PA: Temple University Press, 2004).

sanctioned racial and sex discrimination. Employer-tied work policies are refinements of colonial servitude.

Lastly, the respondents' s. 15 claim in *Tigchelaar* stumbled at the first part of the test due to insufficient material facts. Nonetheless, per *Withler*, the Court prioritised the second branch of the test. However, it ultimately also found insufficient facts to prove that the alleged distinctions perpetuated disadvantage. Thus, *Tigchelaar* suggests that the hurdle in a s. 15 claim against temporary migrant labour policy lies in the court's evidentiary burden, rather than its ability to apply the test outright. As I have shown, there is overwhelming evidence to suggest that closed work permits, worker-tied housing, administrative delays, and employers' powers to authorize visa cancellations and force deportations leave migrant workers precarious.<sup>112</sup> Employer-tied work policies exacerbate disadvantage and perpetuate stereotypes against racialized migrants and migrant women of colour, contrary to the *Charter's* equality guarantee.

### ***Section 1 General Considerations***

The test set out in *R. v. Oakes* forms the basis for the Court's analysis of what constitutes a reasonable limit on a claimant's rights according to s. 1 of the *Charter*. The test has two arms: once a claimant has shown that her *Charter* rights have been infringed by a law or government action, the onus then shifts to the government to establish that the impugned law/action has a "pressing and substantial" goal. Second, the Court conducts a proportionality analysis, weighing (a) whether the impugned provision has a rational connection to the law's purpose; (b) whether there is "minimal impairment" of the individual's *Charter* right(s); and (c) whether there is proportionality between the importance of the impugned law's objective and its deleterious effects.<sup>113</sup>

To undergo a full analysis of whether the infringement of a claimant's s. 15 rights due to the employer-tying policies can be saved under s. 1 of the *Charter* is beyond the scope of this paper. It would require a larger canvassing of relevant s. 1 jurisprudence. However, at first glance, even if the Government could identify a pressing and substantial reason for employer-tying policies, like the ability to ensure temporary migrant workers remain in Canada on temporary permits so as not to potentially overwhelm the immigration system, such a conclusion admits several dark truths. Essentially, it must be of pressing and substantial importance to the Government of Canada to limit rights, access to justice, and a pathway to permanent residence and citizenship for certain migrants. It must also be of pressing and substantial importance for the Government to ensure a constant stream of temporary labour. Thirdly, employer-tying work policies and their vulnerabilities-by-design necessarily have a rational connection to the purpose of TFWPs.

In 2006, the Supreme Court of Israel struck down the use of employer-specific permits on the basis that they maintained an arbitrary policy and caused disproportionate harm to

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<sup>112</sup> Fay Faraday, "Made in Canada: How the Law Constructs Migrant Workers' Insecurity," *The Metcalf Foundation* (September 2012), at 76-79.

<sup>113</sup> *R v Oakes*, [1986] 1 SCR 103, 1986 CanLii 46 (1986); See also *Charter* at s 1.

migrant workers.<sup>114</sup> In its decision, that Court said the policy infringed several of the workers' fundamental human rights, including the principle of non-discrimination between citizens and non-citizens and the migrants' equal employment rights.<sup>115</sup> The Supreme Court of Canada may look to international decisions such as these to see how Courts in other jurisdictions adjudicate employer-specific work policies, including whether they can be "demonstrably justified in a free and democratic society."<sup>116</sup>

## IV. Conclusion

The Temporary Foreign Worker Program and its substreams, the Seasonal Agricultural Worker Program, the Caregiver Program, and the low-wage stream, promote discrimination against several intersecting protected enumerated and analogous grounds of section 15 of the *Charter*. Employer-tying work policies like the closed work permit are key to the systemic abuse of temporary migrant labourers. There are myriad areas of Canada's TFWPs in need of systemic rehabilitation to combat discrimination and inequality. Declaring these policies constitutionally invalid and thus unworkable is the first step to ensure justice for all migrants, regardless of their sex, family status, race, colour, or origin.

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<sup>114</sup> *Kav LaOved Worker's Hotline v. Government of Israel* (2006), 1 IsrLR 4542/02; HCJ 4542/02 (Supreme Court of Israel) at 305-306 & 307-308.

<sup>115</sup> *Ibid* at 296.

<sup>116</sup> *Charter* at s 1.