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Migrant Workers, Rights, and the Rule of Law: Responding to the Justice Gap

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Migrant Workers, Rights, and the Rule of Law:
Responding to the Justice Gap

Migrant agricultural workers provide an essential and longstanding contribution to food security in Canada. Exploitation and rights shortfalls for these workers are well-documented. On paper, they have rights on par with Canadian workers, but these rights do little to address the structure and dynamics underpinning their subordination in Canadian society. In this article, I argue that law creates a “justice gap” in the case of these workers. Law gives rights to these workers on an individual basis but also creates structural vulnerability which renders them unlikely to make use of individual remedies or compliance-based systems. Rights and protection discourse does not challenge the underlying institutional arrangements in which workers’ labour unfreedom is maintained. I argue that the justice gap can be understood as a rule of law problem, but that the utility of this approach is ultimately limited and direct action by workers is more likely to address justice issues.

Les travailleurs agricoles migrants apportent une contribution essentielle et de longue date à la sécurité alimentaire au Canada. L’exploitation et les lacunes en matière de droits de ces travailleurs sont bien documentées. Sur le papier, ils ont des droits équivalents à ceux des travailleurs canadiens, mais ces droits ne contribuent guère à régler le problème structurel et la dynamique qui sous-tendent leur subordination dans la société canadienne. Dans cet article, je soutiens que la loi crée un « vide juridique » dans le cas de ces travailleurs. La loi confère des droits à ces travailleurs sur une base individuelle mais crée également une vulnérabilité structurelle qui les rend peu susceptibles d’engager des recours individuels ou de s’appuyer sur des systèmes fondés sur le respect des dispositions législatives. Le discours sur les droits et la protection ne remet pas en question les arrangements institutionnels sous-jacents dans lesquels l’absence de liberté des travailleurs est maintenue. Je soutiens que le vide juridique peut être compris comme un problème de primauté du droit, mais que l’utilité de cette approche est en fin de compte limitée et que l’action directe des travailleurs est plus susceptible de régler les problèmes de justice.

* Associate Professor, Faculty of Law, Thompson Rivers University. I would like to thank both the academic colleagues who reviewed this article and the editorial staff at the Dalhousie Law Journal for their excellent work.

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I. *Migrant agricultural workers in Canada*

In response to the persistent critique of Canada's temporary migrant labour programs, in 2016, a federal Standing Committee report heard evidence from workers, industry representatives, community organizations, and researchers on the use and impact of migrant labour in Canada. Among the recommendations to the federal government arising from this report are the following, of particular relevance to migrant agricultural workers:

- develop policy to prevent the use of temporary foreign workers to fill permanent labour shortages;
- “immediate steps” to remove the requirement for employer-specific work permits;
- the provision of multiple-entry work permits to seasonal migrant workers;
- review of permanent resident policy with a view to facilitating access to permanent residency for migrant workers who have integrated into Canadian society and are filling a permanent labour need; and
- improvement of employer monitoring and compliance regimes, including information sharing with provinces and the establishment of a dispute resolution mechanism for migrant workers.¹

Two years after this report, the federal government had partially undertaken one of the above recommendations. The 2018 federal budget pledged \$194.1 million to employer compliance and inspections over the first five years, and \$33.19 million per year thereafter to fund compliance and employer inspections. It also promised \$3.4 million over two years to establish a pilot network of support organizations for migrant workers dealing with abuse from their employers, designed “to support these workers in reporting wrongdoing and provide information on their rights

1. House of Commons, Standing Committee on Human Resources, Skills, and Social Development and the Status of Persons with Disabilities, *Temporary Foreign Worker Program* (September 2016) at 35-39 (Chair: Bryan May).

to temporarily remain and work in Canada free from harassment and abuse.”² There is no mention in budget, policy, or regulatory documents subsequent to the Standing Committee report of attempts to provide greater labour mobility to workers through the issuance of open or sector-specific work permits rather than the current permits, which bind workers to an individual employer. Likewise, options for permanent residence for returning migrant agricultural workers, or those filling a permanent labour need, do not appear in any subsequent discussions. In addition to the regulatory exclusion of agricultural workers from permanent residence through their categorization as “low-skilled” workers,³ a 2017 Statistics Canada report confirms that only 2% of seasonal agricultural workers eventually obtain permanent residence, while 56% of those entering through caregiving streams do transition to permanent residence.⁴ Unlike in past decades, policy discourse is now replete with the language of “rights” and “protection,” for migrant workers, and the federal government is allocating increased financial resources to regulatory enforcement against employers and information sharing with the provinces. However, the federal government leaves out the two options that would most clearly address the structural concerns leading to the exploitation of migrant agricultural workers, namely the provision of pathways to permanent status and the removal of bonded work permits. The rights of migrant agricultural workers may be increasing, but this does not correspond to an increase in access to justice, because the underlying structure of migrant work programs functionally limits the use of individual rights.

Canada has relied on the labour of agricultural workers through temporary migration since 1966, when the Seasonal Agricultural Workers Program (SAWP) started. Unique among Canadian temporary work programs, the SAWP is founded on bilateral agreements between Canada and sending states. It started with an agreement between Canada and Jamaica in 1966 and grew to include Mexico as well as a group of other Caribbean countries represented by the Organization of Eastern

2. House of Commons, *Equality and Growth: A Strong Middle Class* (February 2018) at 212 (Minster: William Morneau), online (pdf): <budget.gc.ca/2018/docs/plan/budget-2018-en.pdf> [perma.cc/HPL8-JXRQ].

3. Sarah Marsden, “Assessing the Regulation of Temporary Foreign Workers in Canada” (2011) 49:1 Osgoode Hall LJ 39 at 41 [Marsden, “Assessing the Regulation”]; Judy Fudge & Fiona MacPhail, “The Temporary Foreign Worker Program in Canada: Low Skilled Workers as an Extreme Form of Flexible Labour” (2009) 31 Comp Lab L & Pol’y J 5 at 11 (domestic workers are the exception to this, as they have in recent years been able to obtain permanent residence after a number of years of work).

4. Statistics Canada, *Transition from Temporary Foreign Workers to Permanent Residents, 1990 to 2014*, by Yuqian Lu & Feng Hou, in *Analytical Studies Branch Research Paper Series*, Catalogue No 11F0019M-389 (Ottawa: Stats Can, 2017) at 8, online (pdf): <www150.statcan.gc.ca/n1/en/pub/11f0019m/11f0019m2017389-eng.pdf?st=mgJJ9nsh> [perma.cc/V8PZ-LPA5].

Caribbean States.⁵ Alongside difficult, dangerous working conditions, the racialization of workers has been endemic in this program since its origins, and remains prevalent.⁶ Most Canadian provinces receive migrant workers through SAWP, with the majority working in Ontario, Quebec, and British Columbia. Workers are permitted to stay in Canada for a maximum of 8 months between January 1 and December 15 of the year for which they are hired. There is no limit on the number of years for which workers can return to Canada, and many do return for many years; in one study, 57% of Mexican workers returned for 6 years or more, and 22% returned for more than ten years.⁷ In addition to using SAWP, employers can also hire migrant agricultural workers through the Agricultural Stream for primary agriculture work in specified agricultural commodities.⁸ The number of migrant agricultural workers is increasing: in 2017, the most recent year for which full data are available, a total of 48,185 migrant workers entered Canada through SAWP and the Agricultural Stream combined, which is almost double the number recorded in 2006.⁹

Agricultural labour migration is one piece of a larger pattern in which temporary labour migration provides an increasingly large proportion of Canada's workforce across multiple sectors and evidence that temporary migrant workers are meeting permanent labour market needs.¹⁰ Canada's "general-purpose" temporary labour migration program, the Temporary Foreign Worker Program (TFWP), like the SAWP, is premised on

5. The included countries are: Antigua and Barbuda, Commonwealth of Dominica Grenada, Montserrat, St. Kitts-Nevis, Saint Lucia, and St. Vincent and the Grenadines.

6. Leigh Binford & Kerry Preibisch, "Interrogating Racialized Global Labor Supply: Caribbean and Mexican Workers in Canada's SAWP" in Leigh Binford, ed, *Tomorrow We're All Going to the Harvest: Temporary Foreign Worker Programs and Neoliberal Political Economy* (Austin: University of Texas Press, 2013) 93 at 95.

7. Jenna Hennebray, "Permanently Temporary? Agricultural Migrant Workers and Their Integration in Canada" (2012) 26 *Institute for Research on Public Policy* 1 at 13, online (pdf): <irpp.org/wp-content/uploads/assets/research/diversity-immigration-and-integration/permanently-temporary/IRPP-Study-no26.pdf> [perma.cc/J9H7-ZLDV] [Hennebray, "Permanently Temporary?"].

8. Employment and Social Development Canada, *Hire A Temporary Foreign Worker Through the Agricultural Stream* (Overview) (Ottawa: ESDC, 2017), online: <www.canada.ca/en/employment-social-development/services/foreign-workers/agricultural/agricultural.html> [perma.cc/RK5C-A49Q].

9. Immigration, Refugees and Citizenship Canada, *Canada—Temporary Foreign Worker Program (TFWP) work permit holders by province/territory of intended destination, program and year in which permit(s) became effective, January 2015–December 2018* (Dataset) (Ottawa: IRCC, 2017), online: <open.canada.ca/data/en/dataset/360024f2-17e9-4558-bfc1-3616485d65b9?_ga=2.64526252.2057289744.1521233311-1838033800.1501022758> [perma.cc/RWN6-XFK7].

10. Karl Flecker, "Building a Disposable Workforce Through Temporary Migration Policy" (2010) *Can Issues/Themes Can* 99; Patti Tamara Lenard & Christine Straehle, eds, *Legislated Inequality: Temporary Labour Migration in Canada* (Montreal: McGill-Queen's University Press, 2012); Kerry Cundal & Brian Seaman, "Canada's Temporary Foreign Worker Programme: A Discussion of Human Rights Issues" (2012) 9:3 *Migration Letters* 201.

workers' temporary presence in Canada, requires employer endorsement, and uses work permits that are bonded to a specific job and employer. The TFWP is used across various labour segments in Canada, from upper-level white collar work to retail, food service, primary industry, and construction. Workers classified as "high skilled" generally have more reliable pathways to permanent residence and family reunification than those classified as "low skilled."¹¹ The number of workers admitted under the TFWP continues to outstrip the number of permanent economic immigrants to Canada, and those classified as "low-skilled" constitute a growing proportion of total migrant workers in what Judy Fudge and Fiona MacPhail call an "extreme form of flexible labour."¹² Nandita Sharma has also documented racialization in the TFWP generally as a mechanism of constituting "others" as part of a nationalist discourse in Canada.¹³ The TFWP and the SAWP share structural features flowing from the legal regulation of migrant work, and in particular the limitation of labour mobility and capacity to remain in Canada. The SAWP can be seen as the most extreme extension of federal policies which emphasize temporariness and exaggerate the power differential between worker and employer. All TFWP workers are time-limited, but SAWP workers are seasonal; all TFWP workers need an employer to endorse their permit, but employers have a stronger role in program determination in SAWP. Added to this dynamic is the geographic and cultural isolation of agricultural work in rural Canada and the occupational hazards associated with farm labour, further increasing the risk to workers in SAWP particularly. In this paper, while I focus on the SAWP specifically as one of the two programs in which migrant workers are most vulnerable (the other being domestic work), the analysis that follows is applicable to some degree to the TFWP as well, and in particular to low-skilled workers in that program.

Agricultural workers in general, including migrant workers, do not have access to standard protections of the unionization process and formal collective action through labour law in Ontario, as they are subject to a separate regime.¹⁴ In British Columbia, where they are not excluded

11. Marsden, "Assessing the Regulation," *supra* note 3 at 45.

12. Fudge & MacPhail, *supra* note 3 at 43.

13. Nandita Sharma, *Home economics: nationalism and the making of 'migrant workers' in Canada* (Toronto, University of Toronto Press, 2006) at 4.

14. For a detailed treatment of the exclusion of agricultural workers from Ontario labour law, see Fay Faraday, Judy Fudge & Eric Tucker, *Constitutional labour rights in Canada: Farm workers and the Fraser case* (Toronto: Irwin, 2012).

from labour law, unionization efforts have been fraught with difficulty.¹⁵ In addition to the problems arising within the employment relationship, researchers have established the long-term negative impacts of the SAWP program on migrant participants, including family estrangement¹⁶ and long-term health problems.¹⁷ Weiler and McLaughlin have documented the impact of SAWP participation on food security for migrant workers, demonstrating the multiple barriers that arise for workers who live in Canada without access to adequate kitchen and food storage facilities or access to fresh, affordable food; ironically so, given their role in providing food security to Canada.¹⁸ Migrant workers under these programs are exclusively nationals of Mexico and the Caribbean, and workers are racialized within Canada's programs.¹⁹

The substandard living and working conditions often faced by migrant agricultural workers in Canada are well-documented, including unliveable employer-supplied housing, inadequate cooking and sanitation facilities, occupational health and safety problems,²⁰ wage theft, unlawful termination, barriers to accessing health care,²¹ and racist and sexualized harassment and abuse on the job.²² Workers sometimes pursue complaint-based remedies or engage in other forms of resistance that do not rely on the legal system, but the ready threat of deportation and non-renewal of permits functions to increase worker compliance through what Basok and Belanger call "performances of self-discipline."²³ It is important

15. Leah F Vosko, "Blacklisting as a modality of deportability: Mexico's response to circular migrant agricultural workers' pursuit of collective bargaining rights in British Columbia, Canada" (2016) 42:8 *J of Ethnic and Migration Studies* 1371.

16. Janet McLaughlin et al, "Temporary Workers, Temporary Fathers: Transnational Family Impacts of Canada's Seasonal Agricultural Worker Program" (2017) 72:4 *Industrial Relations* 682.

17. Kerry Preibisch & Jenna Henneby, "Temporary migration, chronic effects: The health of international migrant workers in Canada" (2011) 183:9 *CMAJ* 1033.

18. Anelyse M Weiler, Janet McLaughlin & Donald C Cole, "Food Security at Whose Expense? A Critique of the Canadian Temporary Farm Labour Migration Regime and Proposals for Change" (2017) 55:4 *Intl Migration* 4.

19. Kerry Preibisch & Leigh Binford, "Interrogating Racialized Global Labour Supply: An Exploration of the Racial/National Replacement of Foreign Agricultural Workers in Canada" (2007) 44:1 *Can Rev Sociology* 5. See also Nandita Sharma, "On Being Not Canadian: The Social Organization of "Migrant Workers" in Canada" (2001) 38:4 *Can Rev Sociology* 415.

20. Janet McLaughlin, Jenna Henneby & Ted Haines, "Paper versus Practice: Occupational Health and Safety Protections and Realities for Temporary Foreign Agricultural Workers in Ontario" (2014) 16:2 *Perspectives interdisciplinaires sur le travail et la santé* 1.

21. Jenna Henneby, Janet McLaughlin & Kerry Preibisch, "Out of the Loop: (In)access to Health Care for Migrant Workers in Canada" (2016) 17:2 *J Intl Migration & Integration* 521.

22. Kerry Preibisch & Gerardo Otero, "Does Citizenship Status Matter in Canadian Agriculture? Workplace Health and Safety for Migrant and Immigrant Laborers" (2014) 79:2 *Rural Sociology* 174.

23. Tanya Basok & Daniele Belanger, "Migration Management, Disciplinary Power, and Performances of Subjectivity: Agricultural Migrant Workers in Ontario" (2016) 41:2 *Can J Sociology* 139 at 141.

not to understate workers' successes and meaningful acts of resistance both within and outside legal remedies. However, the subordination of migrant workers as a group has remained a structural feature of migrant work programs in Canada. As I revisit in detail below, temporary status, deportability, and labour immobility, including employers' power to influence the selection of workers' opportunities to return underpin the subordination of workers.²⁴ This disjuncture arising from the operation of law on multiple levels gives rise to a justice gap: not only a gap between migrant workers and citizen workers, but a gap between the promise of law and its actual functioning.

A patchwork of laws apply to migrant workers in general, although agricultural and domestic workers have been subject to particular exceptions, notably with regard to basic employment standards in some provinces.²⁵ In large part, however, migrant agricultural workers are *de jure* equal to citizen workers with regard to the protection of basic working conditions and other formal rights, but the legal institutional features of migrant work programs create conditions under which workers' capacity to obtain remedies is undermined, or the available remedies are inadequate given the differences between migrant and citizen workers, leading to *de facto* exclusion. Employment standards, labour, and occupational safety regimes tend to have no self-reflexivity in this regard—the justice gap is not visible within structures in which workers are implicitly assumed to have citizenship. An exception to this is found in provincial human rights law in Canada, in which there has recently been a turn toward the analysis of the structural features of migrant work programs that create workers vulnerability and the relationship between migration status and grounds such as sex and race, for which human rights law provides protection against discrimination.²⁶ Despite this, the promise of individual remedies

24. Jill Lindsay Harrison & Sarah E Lloyd, "Illegality at Work: Deportability and the Productive New Era of Immigration Enforcement" (2012) 44:2 *Antipode* 365. See also Tanya Basok, Danièle Bélanger & Eloy Rivas, "Reproducing Deportability: Migrant Agricultural Workers in South-western Ontario" (2014) 40:9 *J Ethnic & Migration Studies* 1394.

25. See, e.g., *Industries and jobs with exemptions or special rules*, 4 January 2019, online: *Ontario Ministry of Labour Exemptions Tool* <www.ontario.ca/document/industries-and-jobs-exemptions-or-special-rules> [perma.cc/7CFP-64G3] (in 2018, an overhaul of employment standards legislation brought domestic workers within full coverage of the *Employment Standards Act* for the first time). Agricultural workers in British Columbia are exempt from several standard protections: see *Farm Workers Factsheet*, July 2016, online: *British Columbia Employment Standards* <www2.gov.bc.ca/gov/content/employment-business/employment-standards-advice/employment-standards/factsheets/farm-workers> [perma.cc/VJJ9-WHAT].

26. See, e.g., *CSWU Local 1611 v SELI Canada Ltd*, 2008 BCHRT 436; *T(OP) v Presteve Foods Ltd*, 2015 HRTO 675 at para 216; *Monrose v Double Diamond Acres Ltd*, 2013 HRTO 1273; *PN v FR*, 2015 BCHRT 60 at para 92; *Ben Saad v 1544982 Ontario Inc*, 2017 HRTO 1.

in human rights is limited. In her analysis of recent human rights cases, Bethany Hastie notes that human rights tribunals are taking account of “the underlying structural inequality between nation-states that gives rise to the need to migrate for labour, the regulatory structure governing migrant labour, and the racialization of migrant workers”²⁷ and connecting these factors to findings of discrimination against individual workers, and associated remedies. However, Hastie concludes that such remedies can play “only a small role in solving what is a much larger problem”²⁸ because while they acknowledge the impact of structural features, they do not address them directly. Human rights remedies are domestic, retroactive, and focused on measuring harm to an individual, whereas the systems giving rise to discrimination are fundamentally transnational, require preventative action, and impact migrant workers collectively.

In describing the gap between *de jure* and *de facto* rights for migrant agricultural workers, Janet McLaughlin and Jenna Hennebry use the metaphor of a rope, representing full citizenship, to which migrants have access to a few strands, but not the full strength of the rope’s fabric. They attribute the elusiveness of rights for migrant workers to the “dual precarity of migrant workers’ employment and immigration status.”²⁹ In addition to reduced rights “on paper,” they link the preclusion of rights claims *de facto* by migrant workers to the “highly restricted and controlled” migration regimes through which these workers enter Canada, including the laws and policies through which the right to stay in Canada can be terminated at any time,³⁰ and workers’ housing and mobility are controlled by employers.³¹ They conclude that the denial of citizenship to migrant workers is a significant factor in their exploitation and that the provision of citizenship or permanent residence status would alleviate the rights shortfall, as well as increasing political and social inclusion.³²

The centrality of migrant labour in agricultural production, and the substandard living and working conditions of migrant workers have long been justified on the basis of Canadian food security. While sometimes framed as “agricultural exceptionalism,” reliance on unfree migrant labour

27. Bethany Hastie, “The Inequality of Low-Wage Migrant Labour: Reflections on PN v FR and OPT v Presteve Foods” (2018) 33:2 CJLS 243 at 255.

28. *Ibid* at 258.

29. Janet McLaughlin & Jenna Hennebry, “Managed into the Margins: Examining Citizenship and Human Rights of Migrant Workers in Canada” in Rhoda E Howard-Hassmann & Margaret Walton-Roberts, eds, *The Human Right to Citizenship: A Slippery Concept* (Philadelphia: University of Pennsylvania Press, 2015) at 176.

30. *Ibid* at 184.

31. *Ibid* at 187.

32. *Ibid* at 190.

is normalized in Canadian food production and enacted through law and policy despite a recent turn to more rights talk.³³ Rights and enforcement talk is increasingly present in public and policy discourse with regard to migrant workers in Canada. But both rights and enforcement frameworks tend to frame workers and employers as isolated individuals. Through well-functioning rights mechanisms, the worker becomes eligible for an individual remedy based on the harm they can establish to themselves personally, and the employer is named as a wrongdoer, with the implicit assumption that the employer is an outlier.³⁴ In enforcement mechanisms, as well, individual employers are named publicly and subject to sanction. Neither of these methods leaves room for examining or challenging the conditions under which unfree labour becomes structurally embedded, nor for examining “the role of states—especially through labour and immigration policy—in fostering conditions in which the most severe forms of exploitation can thrive.”³⁵

In the following section, I will map the basic legal rights of migrant agricultural workers and their limits in terms of the structural regulation of migrant labour, before turning to consider whether the “justice gap” thereby created can be addressed by a rule of law argument.

II. *Rights without equality*

A patchwork of laws provides rights to migrant agricultural workers in Canada, and while the array of remedies available varies between jurisdiction, I will use examples from Ontario and British Columbia. This section will provide a brief map of rights and entitlements for migrant workers, including remedies and the few available reported cases. While there is room for improvement in the individual rights of migrant workers, those workers are by and large included in the basic employment, human rights, and housing standards provided by law to all workers. In other words, the justice gap cannot be attributed to a failure to include migrant workers in standard workplace protections.

Seasonal agricultural work programs form a standalone stream of temporary migrant labour in Canada, based on bilateral agreements between Canada and Mexico, Jamaica, Barbados, Trinidad and Tobago,

33. Weiler, McLaughlin & Cole, *supra* note 18. See also Adrian A Smith, “Racialized in Justice: The Legal and Extra-Legal Struggles of Migrant Agricultural Workers in Canada” (2013) 31 Windsor YB Access Just 15.

34. Jenna Hennebry, “Not Just a Few Bad Apples: Vulnerability, Health, and Temporary Migration in Canada” (2010) Can Issues/Themes Can 73.

35. Genevieve LeBaron, “Unfree Labour Beyond Binaries” (2015) 17:1 Intl Feminist J of Politics 1 at 2.

and the Organization of Eastern Caribbean States.³⁶ The legal status of these agreements is not that of a treaty, but rather an “intergovernmental administrative arrangement” for mutual benefit under which parties undertake to resolve disputes through consultation.³⁷ The agreements state that workers are to receive “fair and equitable treatment while in Canada under the auspices of the Program” in the case of Caribbean workers³⁸ and “adequate accommodation and treatment equal to that received by Canadian workers performing the same type of agricultural work, in accordance with Canadian laws” in the case of Mexican workers. Employers are not directly bound by this as they are not parties to the agreement. However, standard form contracts for workers are attached as appendices to the bilateral agreements, and spell out workers’ and employers’ rights and obligations, and are intended to be signed by workers, employers, and a consular agent of the sending government. The Mexican contract includes a standard working day of 8 hours, with voluntary paid overtime and a limit on “excessive hours that would be detrimental to (workers’) health and safety”³⁹ and overtime requests should be made “giving the same rights to Mexican workers as given to Canadian workers.”⁴⁰ Workers must be given two breaks of ten minutes during the day, paid or unpaid according to provincial legislation, as well as one day off after six working days.⁴¹ Workers are entitled to pay for 40 hours per week at either the minimum wage, the prevailing wage according to ESDC, or the rate paid to Canadian workers, whichever is greater (except BC, which uses a piece rate, in which workers are paid by the weight of the fruit they pick, with the minimum wage as the floor).⁴² The contract provides that employers may terminate workers for “non-compliance, refusal to work, or any other sufficient reason stated in this agreement” (except in British Columbia).⁴³

Employers must provide “suitable accommodation” to workers without cost (except in British Columbia, where they may charge for

36. Hennebry, “Permanently Temporary?,” *supra* note 7 at 9.

37. Veena Verma, “The Regulatory and Policy Framework of the Caribbean Seasonal Agricultural Worker Program” (2017) North-South Institute 1 at 5, online (pdf): <s3.amazonaws.com/migrants_heroku_production/datas/149/Verma_2007_original.pdf?1311694811> [perma.cc/E7ML-DK82].

38. *Ibid* at 7.

39. Employment and Social Development Canada, *Contract for the Employment in Canada of Seasonal Agricultural Workers from Mexico—2019* (Ottawa: ESDC, 2018), s 1.3, online: <www.canada.ca/en/employment-social-development/services/foreign-workers/agricultural/seasonal-agricultural/apply/mexico.html> [perma.cc/GX9K-U372].

40. *Ibid*.

41. *Ibid*, s II(11-12).

42. *Ibid*, s III(5-7).

43. *Ibid*, s X(2).

it) and subject to annual inspection by a health authority.⁴⁴ In addition to provincial reporting requirements for occupational injury, employers must also report to the sending consulate any injuries requiring medical attention⁴⁵ and provide protective gear and equipment to workers handling chemicals and pesticides.⁴⁶ Similarly, employers must provide records of hours and wages to the sending consulate.⁴⁷ The SAWP contract purports to bind workers to reside at the place of employment or otherwise, at the whim of the employer,⁴⁸ and to “return promptly” to their country of origin upon completion of the work permit.⁴⁹ The Caribbean contract is similar in content, with minor variations.⁵⁰

The SAWP agreements are contracts of employment between individual workers and employers, and could thus be enforceable in any Canadian court, but to date there are no published decisions in which either a worker or an employer has sought to enforce their terms. Some terms seem to invite judicial clarification. For example, the concept of ‘sufficient reason’ for termination appears to deviate from the commonly accepted standard of ‘just cause’ for termination in employment law. Is this language intended to make it easier to terminate workers, and if so, would judges countenance the application of a separate standard for migrant agricultural workers? Likewise, the contract includes terms allowing the employer to determine where the worker will reside and obligating the worker to return to their home country, both of which seem to obligate specific performance beyond the employment relationship: again, would such terms be seen as enforceable, or unconscionable, under Canadian employment law? As I will elaborate below, it is no accident that these terms have remained judicially unexamined, but on the face of it, there is nothing to suggest that migrant agricultural workers are excluded from standard common law for unfair termination of limited duration contracts, breach of terms, or unconscionability available to all workers; in some

44. *Ibid.*, s II(2).

45. *Ibid.*, s V(5).

46. *Ibid.*, s VIII(3)(b).

47. *Ibid.*, s VU(1).

48. *Ibid.*, s IX(6).

49. *Ibid.*, s IX(4).

50. Employment and Social Development Canada, *Contract for the Employment in Canada of Commonwealth Caribbean Seasonal Agricultural Workers—2019* (Ottawa: ESDC, 2018), online: <www.canada.ca/en/employment-social-development/services/foreign-workers/agricultural/seasonal-agricultural/apply/caribbean.html> [perma.cc/GX9K-U372].

situations, migrant workers may also have recourse to tort claims for breach of fiduciary duty.⁵¹

In addition to the common law of employment, Canadian law offers statutory minimum standards of employment in every province and territory, providing a minimum wage, basic overtime and leave provisions, and prohibition of unauthorized payroll deductions, among others. Migrant agricultural workers are included in some, but not all, of these protections, at least in British Columbia and Ontario. In British Columbia, farm workers (including both citizens and migrants) are excluded from overtime pay provisions, meal break requirements, minimum hours free from work, and statutory holiday pay⁵² although they remain protected from excessive hours, or hours detrimental to the worker's health and safety.⁵³ While their wages are determined by piecework rates based on weight, they are entitled to at least minimum wage no matter how much they pick, and they are entitled to regular wage statements and timely pay, vacation pay, and protection from unauthorized deductions and fees for job placement, as well as a basic level of compensation for termination without cause.⁵⁴ The situation is similar in Ontario: harvesters in fruit, vegetable, and tobacco are excluded from caps on hours of work, mandatory rest periods, meal breaks, overtime, and statutory holiday pay. They remain entitled to termination pay, timely pay statements, and protection from unauthorized deductions. With regard to minimum wage, there is somewhat less protection, as employers can benefit from 'deemed compliance' with minimum wage rules where workers are paid a piece rate under which the worker's 'reasonable effort' would amount to minimum wage, even if the employee does not actually receive minimum wage.⁵⁵ Any worker in Ontario pursuant to a temporary work permit program, including migrant agricultural workers, is entitled to additional protections under the *Employment Protections For Foreign Nationals Act*.⁵⁶ This prohibits employers from taking passports from workers, from charging workers for employment costs, from reprisal against workers for complaints, and it requires employers to provide rights information

51. See *Mustaji v Tjin*, 25 BCLR (3rd) 220, 128 WAC 178. See also *Espinoza v Canada (Attorney General)*, 2013 ONSC 1506, in which the Superior Court of Ontario held that the worker had an action for wrongful dismissal but made no decision on the merits of that action.

52. *Employment Standards Regulation*, BC Reg 396/95, s 34(1).

53. *Ibid*, s 34(1); *Employment Standards Act*, RSBC 1996, c 113, s 39 [BC ESA].

54. *BC ESA*, *supra* note 53, ss 10, 21, 27, 57, 63.

55. *Exemptions, Special Rules, and Establishment of Minimum Wage*, O Reg 285/01, s 25(2).

56. *Employment Protection for Foreign Nationals Act (Live-in Caregivers and Others)*, SO 2009, c 32.

to workers in an appropriate language if they do not speak English.⁵⁷ All of these statutes rely on workers to initiate a complaint, as do all similar employment standards laws across Canada.

In terms of occupational health and safety, migrant agricultural workers are generally included as workers: in British Columbia, for example, there is no distinction based on migration status in the legislation, and these workers can make compensation claims for injury and occupational disease, as well as making complaints about unsafe working conditions. In the case of compensation claims, employers and employees both have an obligation to report workplace injuries resulting in lost time or medical attention. Occupational health and safety issues rely on workers' reports, which migrant workers may be less likely to make given the stakes of job loss and deportation. In some cases, the outcome for migrant workers in terms of workers' compensation is categorically diminished, due in particular to the logic underlying loss of earnings assessments. For example, a migrant worker's losses would be calculated (and reduced) based on the assumption that the worker could obtain suitable alternate employment in Ontario, even when such employment was legally impossible (due to the ending of a work permit and repatriation of the worker). This logic has recently been overturned in an Ontario appeal tribunal decision, which held that the worker's local labour market in their country of origin is the appropriate context in which to assess loss of earnings.⁵⁸

Seasonal agricultural workers, like all workers, are also entitled to seek compensation for loss of earnings and injury to dignity on the basis of discriminatory conduct by an employer under human rights law. While neither seasonal agricultural workers nor migrant workers in general have been recognized as a protected group under human rights legislation,⁵⁹ tribunals are increasingly willing to recognize the particular context of migrant workers in fashioning remedies. In the only published example of a human rights decision concerning a migrant agricultural worker, the Ontario Human Rights Tribunal heard a claim from a migrant agricultural worker who was terminated from his position and repatriated after complaining about racial slurs from the employer. The Tribunal received expert academic evidence on the unique vulnerabilities of migrant workers and the connection between fear of deportation and workers' reluctance to report workplace concerns, and considered the particular

57. *Ibid*, ss 8, 11.

58. *Decision No 1773/17*, 2017 ONWSIAT 2962.

59. "Migration status" has been rejected as a basis for protection under s 15 of the *Charter* (*Toussaint v Canada* (MCI), 2011 FCA 213), while "citizenship" is accepted (*Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, 56 DLR (4th) 1).

vulnerability of workers in this program in issuing a remedy.⁶⁰ While human rights remedies consist primarily of compensation for injury to dignity and lost wages, they may also include reinstatement or other job-specific remedies.⁶¹ For migrant workers, a reinstatement remedy could be complicated by the lack of labour mobility—if they no longer have a valid work permit under federal law, a reinstatement order would be frustrated. Human rights remedies in both Ontario and British Columbia are based entirely on complainant-initiated processes, and despite the availability of compensation for employer retaliation, this, like other remedies, does not account for deportability and lack of labour mobility.

Agricultural migrant workers are required to live on the farms where they work, or in other housing under the control of their employers, and concerns with unsafe and inadequate housing are well-documented.⁶² There are multiple sources of law which could be used to deal with housing concerns, the first of which is the employer's requirement to provide 'suitable' housing in the SAWP contract itself, and the attendant annual inspections. While annual inspections do not require worker complaint, the results may not reflect the actual living conditions of workers, due, for example, to relocation of workers by the employer to avoid the impression of overcrowding in advance of inspections. In addition, workers who pay rent could have recourse to residential tenancy protections, such as those available through the *Residential Tenancy Act* in British Columbia.⁶³ These include basic maintenance and sanitation standards, as well as privacy from the employer/landlord. There are no published decisions in which a seasonal agricultural worker has used residential tenancy law. Once again, the process is complaint based, and damages can be limited: while punitive awards are possible, often the only compensation is for rent paid, which is minimal for these workers.⁶⁴ Finally, some provinces have specific laws regulating the use of "work camp" style accommodation

60. *Monrose v Double Diamond Acres Limited*, 2013 HRTO 1273.

61. *Human Rights Code*, RSO 1990, c H.19, s 45.2; *Human Rights Code*, RSBC 1996, c 210, s 37.

62. See Adrian Smith, "The Bunk House Rules: A Materialist Approach to Legal Consciousness in the Context of Migrant Workers' Housing in Ontario" (2015) 52:3 Osgoode Hall LJ 863. See also Patricia Tomic, Ricardo Trumper & Luis LM Aguiar, "Housing Regulations and Living Conditions of Mexican Migrant Workers in the Okanagan Valley, BC" (2010) *Can Issues/Themes Can* 78; Mervyn Horgan & Sara Liinamaa, "The Social Quarantining of Migrant Labour: Everyday Effects of Temporary Foreign Worker Regulation in Canada" (2017) 43:5 *J Ethnic & Migration Studies* 713.

63. *Residential Tenancy Act*, SBC 2002, c 78.

64. Migrant workers (non-agricultural) have attempted to use human rights legislation to obtain compensation for substandard housing, on facts in which discrimination was established with regard to employment. *Chein v Tim Hortons Inc*, 2015 BCHRT 169. On the facts of the case, the complaint with regard to housing was denied by the BCHRT, but remains a possible basis for compensation where discrimination in housing could be proven.

that includes farms. In British Columbia, for example, the *Industrial Camps Regulation* establishes standards for heating, ventilation, number of occupations, structural integrity, and pest control.⁶⁵ Investigations and possible remedial action are based on complaint, and are aimed at correcting the conditions, rather than compensating the workers. These regulations have been used for agricultural complaints approximately 12 times since 2012 in the interior region of British Columbia, and a subset of these likely involve housing conditions for migrant workers.⁶⁶

While this brief review of rights and remedies available to migrant agricultural workers is far from a comprehensive account, it provides enough of a picture to make a few initial observations. First, these workers are, by and large, included *de jure* as workers—that is to say, they are not excluded from either common law or regulatory claims on the basis of their status as temporary migrant workers. They are excluded as *agricultural* workers from certain facets of employment standards, but, seeing the set of potentially applicable protective laws as a whole, this exclusion is the exception, not the rule. So in at least this most formal sense, migrant agricultural workers are “rights-bearers” in the realm of law’s protection of working conditions, health and safety, human rights, and housing. Put another way, the law cannot be implicated as a source of inequality in terms of the legislative or judicial exclusion of these workers from specific legal remedies. For reasons that I will detail below, these protective features are rarely used. The resulting gap between the promise of individual rights and the achievement of *de facto* equality is one in which the law’s role should be carefully examined, if one agrees, as I do, that part of law’s promise is a concern for justice.⁶⁷

Part of the reason for the absence of effective remedy in the situation of migrant workers is not unique to this group, but can instead be seen as a shortcoming of compliance-based remedies for workers, particularly where they rely on worker complaint. Based on her fieldwork with wage-theft cases in Ontario, Leah Vosko concludes that “heavy reliance on compliance over deterrence is unlikely to effectively prevent or remedy [employment standards]” in the context of increasing precarity for workers, and that this emphasis on compliance creates “a situation

65. *Industrial Camps Regulation*, BC Reg 70/2012.

66. Records of reports and inspections under the *Industrial Camps Regulation* provided to the author on 9 July 2018 by Interior Health in response to a request under the *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, Part 6 (045-IH-2018-2019). The reports do not record migrant worker status. Other regions had not provided data by the time of writing.

67. For further elaboration on the relationship between law and justice, see, e.g., Jeremy Waldron, “Does Law Promise Justice?” (2000) 17:3 Ga St U L Rev 759.

in which employers who violate the ESA and are caught can expect that in most cases the worst that will happen is that they will be required to pay what they owe.”⁶⁸ Furthermore, she notes, the risks to workers of initiating a complaint “are shaped by the social location of the claimants,” giving the example of migrant workers whose permits are tied to a specific employer, and who therefore fear loss not only of employment, but of their status in Canada, as reprisal for making complaints against an employer.⁶⁹ While Vosko’s fieldwork was specific to the employment standards context, these arguments are equally applicable to the procedurally similar mechanisms attached to human rights, housing, and occupational health and safety complaints, and the risk to workers in terms of reprisal would be indistinguishable as between statutes. Even for those statutes in which there is compensation for employer reprisal, this would be cold comfort to a worker deprived of their livelihood, or their migration status.

In addition to problems with compliance-based systems for workers at large, other areas of Canadian law contribute to the unequal position of migrant workers and effectively undermine the potential of rights remedies. The federal *Immigration and Refugee Protection Act* and its regulations create a taxonomy of status and structural employment vulnerabilities for migrant workers against which even the most inclusive of rights remedies are limited at best. Deportability is a part of this; workers who are temporary face a risk of removal, because they are in Canada as a matter of privilege, not a matter of right, as compared to permanent residents and citizens.⁷⁰ The stakes are therefore not only higher, but of a completely different nature. For migrant agricultural workers specifically, there is also a real risk of not being retained or recalled to work in subsequent seasons, otherwise known as “blacklisting,” a disciplining response in which the government of Mexico has also been complicit as a sending state. In her detailed account of actual blacklisting in agricultural work, Leah Vosko documents both threats of blacklisting and acts of blacklisting by employers and Mexican consular officials in response to unionization efforts. Blacklisting as a form of deportability effectively limits the exercise of labour rights by workers, but also serves the interests of employers and both state parties in maintaining the status quo: a “model” migration program in a “climate

68. Leah F Vosko et al, “The Compliance Model of Employment Standards Enforcement: An Evidence-based Assessment of its Efficacy in Instances of Wage Theft” (2017) 48:3 *Industrial Relations J* 256 at 270.

69. *Ibid* at 264. See also Fay Faraday, *Profiting from the Precarious: How Recruitment Practices Exploit Migrant Workers* (Toronto: Metcalf Foundation, 2014).

70. *Immigration and Refugee Protection Act*, SC 2001, c 27, ss 11, 29 [IRPA].

of fear” is institutionalized for workers.⁷¹ Compounding the vulnerability engendered by deportability is the closed work permit system: based on a protectionist policy impulse, migrant workers are limited to working for a single employer (unless they have that employer’s support to move), in a single position, and therefore lack basic labour mobility.⁷² These workers provide unfree labour in contrast to citizen workers, permanent residents, and open work permit holders.⁷³ Researchers have also explicated how status precariousness is institutionalized in immigration law, as it is easy to lose status, and difficult to maintain or restore it.⁷⁴ Finally, immigration law creates a distinction between “high-skilled” and “low-skilled” workers; the former have access to permanent residence, family accompaniment, and family reunification, whereas the latter generally do not.⁷⁵

In the case of migrant agricultural workers specifically, the legal limitations on labour mobility and migration status exist to provide stability in labour supply for food production and remittances to sending countries, and are established through long-term bilateral agreements for the movement of labour. As many others have noted, the very features of the legal arrangements which make migrant workers desirable as a stable, flexible work force in food production serve as strong disincentives to the pursuit of individual rights-based remedies. Risks of deportation, non-recall, and loss of income are simply not accounted for in rights remedies because the necessity of temporary, flexible labour is naturalized in Canadian and global political economy. While it is important to recognize the individual victories of workers and their advocates in using rights-based protections, the resulting gains should not be overstated in assessing the role and potential of law; it is an example of situation in which rights exist but “the framework is not compatible with the problem.”⁷⁶ The

71. *United Mexican States v British Columbia (Labour Relations Board)*, 2015 BCCA 32; Leah Vosko, “Blacklisting as a Modality of Deportability: Mexico’s Response to Circular Migrant Agricultural Workers’ Pursuit of Collective Bargaining Rights in British Columbia, Canada” (2016) 42:8 *J Ethnic & Migration Studies* 1371 at 1382.

72. *Immigration and Refugee Protection Regulations*, SOR/2002-227, s 203 [IRPR].

73. See Aziz Choudry & Adrian A Smith, eds, *Unfree labour? Struggles of Migrant and Immigrant Workers in Canada* (San Francisco: PM Press, 2016). See also Kendra Strauss & Siobhán McGrath, “Temporary Migration, Precarious Employment and Unfree Labour Relations: Exploring the ‘Continuum of Exploitation’ in Canada’s Temporary Foreign Worker Program” (2017) 78 *Geoforum* 199.

74. Luin Goldring, Carolina Berinstein & Judith K Bernard, “Institutionalizing Precarious Migratory Status in Canada” (2009) 13:3 *Citizenship Studies* 239.

75. Sarah Marsden, “Assessing the Regulation of Temporary Foreign Workers in Canada” (2011) 49:1 *Osgoode Hall LJ* 39.

76. Sally Merry, “Inequality, Gender Violence, Human Rights” in Simon Archer, Daniel Drache & Peer Zumbansen, eds, *The Daunting Enterprise of Law: Essays in Honour of Harry Arthurs* (Kingston: McGill-Queen’s University Press, 2017) at 302.

liberal gesture is pervasive—the language of equity, protection, and rights appears in the bilateral agreement between governments, the workers’ contract, and the multiple protections to which workers have *de jure* recourse—but, without a substantive linking of these three sources of law and their underlying political economy, rights statutes alone are ineffective in improving the material conditions of workers in a systemic way.⁷⁷ The federal government’s recent response to ongoing rights shortfalls in the migrant worker program has as its centrepiece a new enforcement and compliance system, to which I will turn in the next section.

III. *Enforcement against employers*

In 2015, Canada’s federal government made changes to the *Immigration and Refugee Protection Regulations* in which specific workplace rights were linked with the migrant labour program for the first time. Until recently, the federal government disclaimed responsibility for protecting migrant workers because employment standards were a matter of provincial jurisdiction. Short of actually breaching the *Act* or *Regulations*, for example by hiring unauthorized workers, employers were not accountable within the prior framework for the treatment or working conditions of migrant workers; under previous regulations, employers’ responsibility was limited to compliance with the conditions specified in the labour market assessments under which they had hired workers. Compliance checks were undertaken only for returning employers, evidence was sought primarily from employers, and remedies were focused on ‘education’ of employers, rather than deterrence.⁷⁸

The new compliance and enforcement system is much more extensive in both scope and remedy. Employers of all migrant workers with employer-tied work permits are now also required to comply with “federal and provincial laws that regulate employment, and the recruiting of employees,”⁷⁹ which clearly includes provincial employment standards and occupational health and safety laws, and arguably also includes the sections of provincial human rights laws that apply specifically to employment. However, the mention of provincial standards does not mean that federal agencies will enforce provincial standards. Instead, federal sanctions are triggered once a provincial agency (such as the

77. Daiva K Stasiulis, “International Migration, Rights, and the Decline of ‘Actually Existing Liberal Democracy’” (1997) 23:2 *J Ethnic & Migration Studies* 197.

78. Employment and Social Development Canada, *Integrity Operations Manual—Chapter 63—Temporary Foreign Worker Compliance Reviews* (Ottawa: ESDC, 2013) at 4. This document was provided on request under the *Access to Information Act*, RSC 1985, c A-1.

79. *IRPR*, *supra* note 72, s 209.2(1)(ii).

British Columbia Employment Standards Branch) has completed its process and found an employer in breach of employment standards. In effect, employers of migrant workers found in breach of provincial standards may face additional penalties federally. Employers must also “make reasonable efforts to provide a workplace free of abuse,” with abuse defined as including physical, sexual, psychological, and financial abuse.⁸⁰ The scope of investigative power is also significantly expanded: rather than simply requesting documentary evidence, federal agents can question employers, conduct on-site inspections, and enter workplaces without a warrant, triggered by a “reason to suspect” the employer is non-compliant.⁸¹ Inspections can be based on public (or worker) complaints through tip lines, on the employer’s previous record, or based on random selection; by some reports, there is already backlash from agricultural employers in response to compliance inspections.⁸² Consequences for noncompliant employers include monetary penalties of up to \$100,000, ineligibility periods in which migrant workers cannot be hired (up to a permanent ban) and online publication of the employer’s name and noncompliance.⁸³ Based on numbers provided by the responsible federal agencies, thousands of inspections are undertaken annually. As of 1 April 2018, a total of 50 employers had been subject to penalties under this regime, of which 26 were subject to monetary penalties (up to \$54,000 in one case, but with the vast majority under \$2000), and 24 were subject to a two-year ban on hiring migrant workers.⁸⁴

Two of the penalized employers are farms, one of which appealed, giving rise to the only judicial consideration of this regulatory system so far. In the *Farms* case, a federal investigator found Obeid Farms in breach of multiple requirements, including failure to pay workers on a timely basis and to provide a rest period, improper deductions, and failing to make reasonable efforts to provide a workplace free of abuse.⁸⁵ The employer argued that the pay and working hours breaches were justified because they arose from unintentional administrative errors.⁸⁶ The Court

80. *Ibid*, s 196.2.

81. *Ibid*.

82. Canadian Agricultural Human Resource Council, *A Review of Canada’s Seasonal Agriculture Worker Program* (Ottawa: CAHRC, 2017), online (pdf): <cahrc-ccrha.ca/sites/default/files/Emerging-Issues-Research/A%20Review%20of%20Canada%27s%20SAWP-Final.pdf> [perma.cc/G8XD-XFLS].

83. *IRPR*, *supra* note 72, Schedule 2.

84. Immigration, Refugees and Citizenship Canada, “Employers Who Have Been Non-compliant” (2008), online: <www.canada.ca/en/immigration-refugees-citizenship/services/work-canada/employers-non-compliant.html> [perma.cc/FD63-GVLH].

85. *Farms v Canada (Employment and Social Development)*, 2017 FC 302 [*Farms*].

86. *IRPR*, *supra* note 72, ss 203(1.1), 209.3(3)-(4).

upheld the investigator's findings with regard to these breaches, holding that the justification provisions within the enforcement regime are to be strictly interpreted, stating:

[31] ...it is the Court's view that the justification provisions must be strictly interpreted....The intention of Parliament in enacting these provisions was to prevent abuse of highly vulnerable temporary foreign workers, given the tenuous circumstances of their employment which lack the normal safeguards preventing abuse otherwise available to most Canadian workers.

[32] Given the purpose and context of the justification provisions, the Court is of the opinion that a good faith justification can only arise where the non-compliant conduct can be seen to *benefit* the worker and is in the worker's best or desired interest. Otherwise, the justification provisions would be used to circumvent a scheme which must be strictly interpreted.⁸⁷

The Court gave the specific example of providing cash advances to workers (which is a breach of conditions if not agreed to in writing) as ostensibly in the workers' benefit, and therefore potentially justifiable. Removing workers' only contractual rest day, however, could not be seen as beneficial to workers, and cannot be subject to justification on the basis of an unintentional breach.

With regard to the finding of the employer's failure to make reasonable efforts to provide a workplace free of abuse, the Court found there does not need to be evidence of abuse in order to find a breach, but also that the employer does not have an obligation to provide a workplace free of abuse, simply to make reasonable efforts. In this case, the Court found that the inspector had effectively condemned the employer for not making concrete efforts, such as using policies and staff training to prevent abuse, without making it clear what constituted "reasonable efforts."⁸⁸ The Court therefore quashed this aspect of the inspector's decision, returning it for redetermination, clarifying that the proper issue to be determined is "what efforts the [employer] undertook to provide a workplace free of abuse, and whether, in the [employer's] circumstances, these efforts were reasonable."⁸⁹

The introduction of enforcement powers provides an additional venue for the protection of migrant workers—and as clearly signalled by the Federal Court, the structural vulnerability of these workers can

87. *Farms*, *supra* note 85 at paras 31-32 [emphasis in original].

88. *Ibid* at paras 54-55.

89. *Ibid* at para 58.

be considered in interpreting the new rules. The new enforcement system responds only partially to Vosko's critique of compliance-based mechanisms: it still proceeds on the basic assumption that non-compliance is exceptional and provides the potential for defences on the basis of unintentional breaches; in fact, the regulation itself makes clear that the intention of these changes is "to encourage compliance with the provisions of the Act and these Regulations and not to punish."⁹⁰ Many of the actual financial penalties have been small and may not deter. The new system relies in part on evidence and reports from workers, whose deportability may render them reluctant to disclose employer wrongdoing.

On the other hand, strict limits on employer defences, unannounced inspections independent of worker complaint, and potentially heavy penalties may act as deterrent features, notwithstanding the fact that this is fundamentally a compliance model. Only further experience will show whether there is a deterrent effect, or whether employers integrate this as part of the cost of doing business, outweighed by the benefits of flexible migrant labour. As I have argued elsewhere, this enforcement system also fails to take adequate account of the particular vulnerabilities inherent in the relationship between migrant workers and their employers.⁹¹ In this way, the burden of enforcement still rests unduly on the workers, and this, too contributes to the justice gap. As is the case with rights, the gesture of protection figures heavily in both legislative provisions and the single instance of judicial consideration. While this may mean gains in working conditions on some farms, like individual employment rights, it does nothing to challenge the sources of worker vulnerability that give rise to the very problems it purports to address. Further research is required to determine whether the penalties have a deterrent effect on employers, as well to measure the actual impact of these regulations on workers. And perhaps most importantly, the legal constructs giving rise to temporariness, deportability, and labour immobility remain unchallenged in the new rules, limiting their potential to address the justice gap for migrant workers.

IV. *Responding to the justice gap*

In the foregoing sections, I have set out a few immediately visible forms of law as they concern migrant farmworkers. There is an obvious tension between *de jure* rights inclusion and employer compliance regimes on the one hand, and immigration law's categorical subordination of migrant agricultural workers on the other. The rights gesture is important

90. *IRPR*, *supra* note 72, s 209.94.

91. Sarah Marsden, "Who Bears the Burden of Enforcement?" (forthcoming, *Canadian Lab & Emp LJ*, 2019).

in Canada, as in any liberal democracy, but legal rights do not serve as a mechanism for change on a large scale for migrant workers; at best, rights-based remedies can take note of the underlying conditions, but they do not pose an effective challenge to those conditions or the role of law and state in creating them. The material conditions of migrant workers are cemented by federal immigration law and policy that create and maintain unfreedom through temporariness, deportability, and labour immobility. In the words of Adrian Smith, if we wish to contest the subordination of migrant workers, “the task here is to push beyond general recognition of the existence of unfree labour to address the specific mechanisms of incorporation deployed by participating capitalist states.”⁹² The *de facto* denial of rights occurs on the basis of institutional arrangements backed by law and policy which are not within the ambit of individual rights or employer sanctions. Rights and sanctions are in effect a concession to workers in a system in which deportability, temporariness, and labour immobility, of which contribute to labour unfreedom for migrant workers, are considered to be unchangeable and necessary features of labour migration in Canada’s economy.

Recent labour scholarship rejects the idea of free/unfree labour as a strict binary, characterizing it instead as a spectrum.⁹³ Genevieve LeBaron situates increasing labour unfreedom as an aspect of deepening neoliberal policy on a global scale, and notes the concentration of unfree labour in migrant populations.⁹⁴ Judy Fudge argues that traditional Marxist and liberal theory has underestimated the role of law in shaping forms of unfreedom, and cautions against seeing labour unfreedom as the result of individual culpability but instead understanding it as the result of “systemic and institutional features of state policies and practices relating to immigration and labour regulation combined with the ‘free market’ behaviour of employers.”⁹⁵ While the underlying structures remain unchallenged, the justice gap between the promise of rights and sanctions and their limitations will not be closed by more individual rights, better access to existing rights, or more sanctions. Rather the justice gap signals the need to challenge this naturalization of labour unfreedom and the specific legal and institutional forms it takes in Canada. Beyond documenting the limits of legal remedies, I am interested in holding law (and the state) accountable for the subordination of migrant workers

92. Smith, *supra* note 33 at 29.

93. See, e.g., LeBaron, *supra* note 35; Judy Fudge, “Modern Slavery, Unfree Labour and the Labour Market: The Social Dynamics of Legal Characterization” (2018) 27:4 *Social & Leg Studies* 414.

94. LeBaron, *supra* note 35 at 12.

95. Fudge, *supra* note 93.

and understanding how the present institutional arrangements might be challenged. Rather than framing this accountability in terms of failing to extend the same rights to all workers, I suggest that we must go one step further and hold law accountable as a mechanism for labour unfreedom, which forms the underlying basis for the relative impotence of rights. The ways of doing so might include both those that address the state directly, and those which seek justice beyond or outside the state.⁹⁶ In either case, I proceed on the basis that justice requires more than the redistribution of resources (or rights), but must provide reprieve from oppression, with the latter understood broadly in terms of exploitation, marginalization, powerlessness, cultural imperialism, and violence.⁹⁷ These are amply documented in the case of migrant workers, and as results of the SAWP program in particular. I propose that any potential response to the justice gap, whether addressed to the state or otherwise, should be measured in terms of its potential to facilitate change in institutional arrangements such as to remove structurally-based oppression. Here it is not possible to interrogate all options, but I start with a principle whose value is uncontested from the state perspective, namely the rule of law. I hope to move from a critique of the failure of rights to an understanding of law's potential, or lack of potential, in fashioning meaningful responses to inequality, with the assumption that in order to be meaningful, such responses must have real potential to refigure the underlying institutional arrangements through which labour unfreedom is generated. In this paper, I first consider whether rule of law arguments can form the basis for robust critique and a shift in the underlying institutional arrangements through which the state regulates the work and lives of migrant agricultural workers. I conclude that rule of law arguments provide an incomplete response to the justice gap with regard to the regulation of migrant workers, and briefly canvass non-state-facing forms of action as alternative, and potentially more potent, responses.

96. Here I have not addressed the potential of international law, but with regard to the rights of migrant workers it is likely to be quite limited; while the *Immigration and Refugee Protection Act and Regulations* must be applied in a way that “complies with international human rights instruments to which Canada is signatory” (*IRPA, supra* note 72, s 3(3)(f)). See also *de Guzman v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436. Canada has not signed the most relevant treaty: the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*. For a detailed treatment of the potential of international law's application to migrant workers in Canada, see, e.g., Judy Fudge, “Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers” (2011) *Metropolis Working Paper Series*, online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=1958360> [perma.cc/DR3X-PC77].

97. Iris Marion Young, *Justice and the Politics of Difference* (Princeton, NJ: Princeton University, 1990) at 64.

Do the contradictions between the promises of individual rights *de jure* and their *de facto* preclusion through the legal structuring of labour unfreedom amount to a rule of law problem? Without wading too far into the rich debates on the appropriate definition of the rule of law, it can be understood in a thin or strictly formal sense in which the legal system meets certain criteria, regardless of the content of the laws themselves. Such criteria might include clarity, stability, the creation of laws through properly authorized means, the subjection of all individuals and the state to the power of law, and the availability of court review.⁹⁸ In a similar vein, Lon Fuller enumerated the requisite eight features to govern good lawmaking (which he characterized as procedural, but some view as substantive),⁹⁹ namely: generality, publicity, clarity, consistency, feasibility, constancy, prospectivity, and congruence. The requirements of the rule of law can also be understood in a thicker, more overtly substantive sense, either by requiring that positive law recognize certain rights¹⁰⁰ or through features that are said to be intrinsic to the functioning of law such as justice, equality, or fairness. The latter position does not necessarily dictate the content of the law, although it does acknowledge “abstract substantive values” at its core.¹⁰¹

Audrey Macklin notes that because the rule of law is determined by jurisdiction, and not citizenship, its reach extends to non-citizens subject to Canadian law (or the relevant law in any national jurisdiction), but that there are nonetheless observable “distortions” in the rule of law in the case of non-citizens.¹⁰² Macklin’s analysis identifies two “constitutive features of contemporary sovereignty” that are key to understanding the relative weakening of the rule of law with regard to non-citizens: territoriality and status.¹⁰³ Macklin focuses to a large degree on interactions at the territorial border; for example, she documents the RCMP’s recent actions in interrogating would-be refugee claimants, including on the basis of religious practices and political activity. This expression of discretionary authority at the physical border is founded on the state’s power to refuse admission to non-citizens, to attach “what conditions it pleases” to the

98. Paul P Craig, “Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework” (1997) Public L 467 at 468.

99. David Luban, “The Rule of Law and Human Dignity: Re-examining Fuller’s Canons” (2010) 2 Hague JI on the Rule of Law, 29 at 31.

100. Craig, *supra* note 98 at 473.

101. *Ibid* at 477.

102. Audrey Macklin, “Citizenship, Non-Citizenship and the Rule of Law” (2018) 69:1 UNBLJ (2018) 19 at 22.

103. *Ibid* at 55.

entry of non-citizens, and to remove non-citizens at will.¹⁰⁴ In essence, the state's expression of control over non-citizens in terms of entry to and presence in Canada tends to erode the rule of law insofar as it justifies uses of discretion that would not be acceptable in the case of non-citizens. Actions by state officials that seem arbitrary or have no statutory basis (such as the questioning of refugee claimants as to their feelings about women who do not cover their heads, and other clearly Islamophobic questions) demonstrate not an "outright negation" of the rule of law with regard to non-citizens, but rather situations in which the rule of law becomes less potent. This is underpinned by a narrowing of review potential, which, in Macklin's view, falls short of the requirements of the rule of law in terms of the susceptibility of state actions to review under law. This is so because while a non-citizen can apply for judicial review of any decision under immigration law, they require leave from the court to do so; Macklin argues that this leaves the process subject to a "culture of suspicion" amongst judges with regard to the merit of claims, and does not satisfy the basic requirement of reviewability.¹⁰⁵

While Macklin focuses in large part on examples from the operation of the physical border, the same analysis applies with regard to non-citizens within Canada. While they have already entered Canada, both status and territoriality justify distinct forms of discretion that, as at the border, are founded on the expression of sovereignty through ultimate control over the conditions applied to non-citizens' presence in Canada, and underpinned by the state's authority to deport. The argument here is not that the state should not issue conditions or have the authority to deport (although this premise is corollary to the more assertive forms of open borders arguments), but rather that the rule of law tends to be less potent in the same sites in which the state exercises control over membership, either at the border or inside Canada. Exclusion of non-citizens does not occur only at the territorial border. This is consistent with the work of Bridget Anderson (among others)¹⁰⁶ who argue that borders also exist within the state, by way of social, legal, and physical exclusion. Migrant agricultural workers in Canada are included in most individual rights, but excluded as members in other ways through their legal status as

104. *Ibid.*

105. *Ibid.* at 26.

106. Bridget Anderson, *Us and Them?: The Dangerous Politics of Immigration Control* (Oxford: Oxford University Press, 2013). See also Gabriel Popescu, *Bordering and Ordering the Twenty-First Century: Understanding Borders* (Lanham, MD: Rowman & Littlefield, 2011); Sandro Mezzadra & Brett Neilson, *Border as Method, or, the Multiplication of Labor* (Durham, NC: Duke University Press, 2013).

temporary migrant workers in terms of deportability, limited-term status, and labour immobility. Physically, they also are segregated: this flows from a requirement in the SAWP contract for workers to reside on the farm or otherwise as determined by the employer, in employer-provided housing. They live apart from nearby cities or towns, often without transportation, and in some cases are actually disallowed from leaving the farm.¹⁰⁷ Sequestered on a private farm, or otherwise on employer-owned private property, these workers are separated from public space and public life, but also from public goods such as access to healthcare.¹⁰⁸ Macklin's argument could also be applied to argue that the exclusion of this group of migrant workers from Canadian society is sufficiently complete as to function as a border within the state. Macklin's point about reviewability applies as well; the discretionary power that governs non-citizens inside Canada flows from the *Immigration and Refugee Protection Act*, in which reviewability is limited by the narrow gate of judicial leave requirement.

I suggest that the case of migrant agricultural workers provides the strongest example of the diminishment of the rule of law with regard to non-citizens inside Canada. The *de jure* inclusion of migrant agricultural workers in individual rights on par with all workers would seem to point away from a rule of law problem at first, the problem (with few exceptions) is not that employment standards and similar laws do not apply to migrant agricultural workers. By and large, they do, and as I describe above, there seems to be increasing state interest in establishing and enforcing sanctions against abusive employers. But the barriers to legal remedy for these workers are themselves established through law, as well; the law requires these workers to remain in a state of temporariness, deportability, and labour immobility; perpetual "privilege-holders" rather than full legal subjects.¹⁰⁹ Are these institutional arrangements susceptible to critique due to the diminishment of the rule of law?

If by "temporariness" one means simply the authorization to remain in Canada for a specified period and the requirement to leave at the end of that period, it most likely does not diminish the rule of law: this is a discretionary decision made within a legal framework issuing permission

107. See, e.g., Amy Cohen, "'Slavery Hasn't Ended, It Has Just Become Modernized': Border Imperialism and the Lived Realities of Migrant Farmworkers in British Columbia, Canada" (2017) *Acme: An Intl J for Critical Geographies*, online (pdf): <www.acme-journal.org/index.php/acme/article/view/1430/1308> [perma.cc/TWX6-LE9S].

108. See, e.g., Horgan & Liinamaa, *supra* note 62. See also Amy Cohen & Susana Caxaj, "Bodies and Borders: Migrant Women Farmworkers and the Struggle for Sexual and Reproductive Justice in British Columbia, Canada" (2018) 29 *Alternate Routes* 90, online: <www.alternateroutes.ca/index.php/ar/article/view/22448> [perma.cc/S9CX-ETSC].

109. Macklin, *supra* note 102 at 56.

to employers to hire agricultural workers, and issuing work permits to workers themselves, and both are subject to judicial review on application (assuming, for the moment, that judicial review is reasonably available, contrary to Macklin's position) and subject to a basic duty of procedural fairness.¹¹⁰ If by "temporariness," one means instead the manner in which private employers' decisions can result in removal of status or failure to allow workers to return (i.e., blacklisting), this seems more likely to erode the rule of law. The program under which these workers are hired is founded on an agreement between sending and receiving countries which refers to itself as an "agreement" rather than as any form of enforceable law,¹¹¹ and neither this agreement nor any particular instance of selecting, or not selecting, a particular worker, is reviewable in any forum. This is so not because the rule of law requires every private exercise of discretion to be reviewable (it doesn't), but because in this case, the exercise of discretion by employers and foreign states are mandatory precursors to the exercise of statutory authority which are hidden from accountability and review. In other words, if state power is founded on non-reviewable private discretion, it creates legal terrain in which state authority is exercised outside the reach of the rule of law. This is distinguishable from the way in which employers' non-reviewable discretion impacts on any worker through the simple action of preferring one worker over another, or not hiring a worker (for non-discriminatory reasons). In the latter case, the employer's decision is not an extension of state power. In the case of migrant workers, the endorsement of an employer is built in as a necessary prerequisite to the labour market opinion process established in the *Immigration and Refugee Protection Act* and associated regulations, which is in turn required to obtain a work permit. Without a work permit, workers are in violation of the law simply by being present in Canada, and susceptible to detention and removal on that basis. Furthermore, because the work permit binds the worker to a specific employer and does not permit them to work elsewhere (i.e., labour immobility), the impact of employers'

110. See, e.g., *IRPA*, *supra* note 70, s 72. See also *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817, 174 DLR (4th) 193.

111. *Memorandum of Understanding between the Government of the United Mexican States and the Government of Canada Concerning the Mexican Seasonal Agricultural Workers Program* (1995), in Irma Cruz-Lopez, *The Seasonal Agricultural Workers' Program: Looking at Mexican Participation Through a Magnifying Glass* (Doctor of Laws, University of Ottawa Faculty of Law, 2013) [unpublished], online (pdf): <www.ruor.uottawa.ca/bitstream/10393/23782/1/Cruz-Lopez_Irma_2013_thesis.pdf> [perma.cc/9WGZ-72BG]. The agreement itself states that it does not constitute an international treaty but rather is an "intergovernmental administrative arrangement," and that any difference will be resolved through consultation between the parties, leaving neither a legal venue for redress nor any opportunity for workers to do so.

discretion is further enlarged; the premise of free labour circulation that is assumed in the standard allocation of rights and obligations to workers and employers is obviated in the case of migrant workers.

The justice gap for migrant workers does not arise from the failure to include them *de jure* in basic rights accorded to all workers, but rather from the contingency of their ability to live and work Canada, and the strict limitation of labour mobility, in combination with the powerful role of employers' unilateral and unchecked discretion in the application of state power. In a formalistic conception of the rule of law, let us say that an exercise of discretionary authority is consistent with the rule of law where it is legally authorized, subject to rules about the fair exercise of authority, and made accountable to on this basis in a manner to which the legal subject has access, whether through judicial review or otherwise. The regulation of migrant workers in Canada, and agricultural workers most obviously, creates a problem even in this thin understanding of the rule of law: although the role of employers is authorized by law, employer discretion is the lynchpin of the legal regulation of workers, and employers' discretion is not reviewable in any manner nor subject to rules about the fair exercise of authority. In a more substantive understanding, the mechanisms through which employer discretion becomes paramount could also be critiqued on the basis of a lack of consistent application of the law, because the creation of a separate, lower stratum of workers for whom the heightened risks inherent in seeking redress effectively precludes consistent application of employment and human rights laws clearly intended to cover all workers.

If this argument is correct, what would the rule of law require? At the minimum, one would expect any exercise of employer discretion that has an impact on the immigration status of workers to be subject to control and review, including review mechanisms available to workers. In a substantive understanding of the rule of law, this may not be satisfying—if workers remain temporary, deportable, and immobile in the labour market, any remedy to which they have access will be limited by these features. On the “thickest” end of the spectrum, if migrant workers were provided with open permits or permanent residence upon arrival, the justice gap would almost certainly be reduced, if not closed. Workers or worker collectives could be given a meaningful role in the negotiation of the bilateral agreement, worker contracts, or the terms on which labour is available. Similarly, the removal of employers' control of workers' housing, the removal of unilateral employer power to determine recall and replacement, and recourse in Canadian law for workers whose status has been impacted by employers or consulates would all assist in closing the justice gap. But in a system in which the law itself is formulated to provide

access to flexible labour in response to a market in which unfree labour has long been a component, a rule of law argument is unlikely to garner these material gains and institutional changes for workers, although it may be useful in advocating for procedural improvements. What seems likely instead is that the legal system will continue to respond to critiques of rights shortfalls with measures such as the new federal enforcement regime, and other compliance-based requirements for employers, such as the Ontario *Employment Protection for Foreign Nationals Act* and British Columbia's recently enacted *Temporary Foreign Worker Protection Act (TFWPA)*. All of these provide heightened requirements for employers in terms specific to the vulnerabilities migrant workers face; the *TFWPA*, for example, forbids employers from threatening deportation or misrepresenting a position, and requires employers of temporary foreign workers to register with the Employment Standards Branch.¹¹² While these may all provide further remedies for migrant workers, they do not aim to resolve any of the underlying institutional arrangements in which their unfreedom is generated and maintained. It cannot be seen as sufficient for justice for the state to naturalize unfree labour, imbed it in law, and then offer individual rights *de jure* and retrospective compliance measures to take the edge off and/or to promote surface or formal equality.

If a rule of law argument provides at best a partial and unsatisfying response to the justice gap for migrant workers, and recent statutory changes provide concessionary remedies, rather than institutional change, how should the justice gap be addressed? Justice, whether defined redistributively or as action toward ending oppression, is broader than the law, and power is negotiated both within and outside the bounds set through the state's mediation of relationships. Justice might well be met through collective and individual worker-initiated acts of resistance and change outside, and sometimes against, the dictates of law. Cohen and Hjalmarson, for example, document multiple forms of everyday resistance by farmworkers including working beyond the ambit of the work permit, collective actions to pace work to manage employers' expectations, adding hours on timesheets to account for work done outside of regular hours, and

112. Bill 48 – 2018, *Temporary Foreign Worker Protection Act*, 3rd Sess, 41st Parl, British Columbia, 2018, ss 10, 20(c), 20(d).

reappropriation of farm produce.¹¹³ They connect these types of worker actions with the history of quiet resistance: acts undertaken against, or around, structural constraints where overt resistance is impossible or too risky. Collective action outside the scope of legally regulated labour relations (such a general strike) would be a more overt version of the same. In a less confrontational vein, this might include changes to non-state relationships such as those between consumers and suppliers through supply chain accountability and consumer awareness.¹¹⁴ Other forms of collective action include grassroots organizing,¹¹⁵ and acts of resistance and collective voice through art and culture.¹¹⁶ The demands for institutional change, especially in the form of open or sectoral work permits and permanent residence, continue to be sounded by frontline activists and academics alike, but the law's response never questions the naturalization of flexible, differentiated, immobile, and "temporary" labour, nor does it become accountable for the material effects of this. Perhaps the most satisfactory answers to the justice gap may be those in which migrant workers exercise freedom not only in terms of labour mobility, but in terms of the capacity to negotiate, confront, or avoid the institutional structures that entrench oppressive conditions, and in which both workers' allies and the law are measured by their relationship to this struggle.

113. Amy Cohen & Elise Hjalmarson, "Quiet struggles: Migrant Farmworkers, Informal Labor, and Everyday Resistance in Canada" (2018) *Intl J of Comp Soc* 1. See also Adriana Gabriela Paz Ramirez, *Embodying and Resisting Labour Apartheid: Racism and Mexican Farm Workers in Canada's Seasonal Agricultural Worker Program* (Master of Arts in Sociology, University of British Columbia, 2013) [unpublished], online (pdf): <open.library.ubc.ca/cIRcle/collections/ubctheses/24/items/1.0103384> [perma.cc/V54B-FQZ2]; Janet McLaughlin, *Trouble in our Fields: Health and Human Rights among Mexican and Caribbean Migrant Farm Workers in Canada* (Doctoral of Philosophy in Anthropology, University of Toronto, 2009) [unpublished], online (pdf): <tspace.library.utoronto.ca/bitstream/1807/24317/1/McLaughlin_Janet_E_200911_PhD_thesis.pdf> [perma.cc/L9XX-7ZR6].

114. See, e.g., Manoj Dias-Abey, "Justice On Our Fields: Can Alt-Labor Organizations Improve Migrant Farm Workers' Conditions" (2018) 53:1 *Harv CR-CLL Rev* 167.

115. See, e.g., Aziz Choudry & Mark Thomas, "Labour Struggles for Workplace Justice: Migrant and Immigrant Worker Organizing in Canada" (2013) 55:2 *J Industrial Relations* 212; Geraldine Pratt, "Organizing Filipina Domestic Workers in Vancouver, Canada: Gendered Geographies and Community Mobilization" in Rina Agarwala & Jennifer Jihye Chun, eds, *Gendering Struggles against Informal and Precarious Work* (Bingley, UK: Emerald Publishing Limited, 2018).

116. See, e.g., Adam J Perry, "Images of Work, Images of Defiance: Engaging Migrant Farm Worker Voice through Community-Based Arts" (2018) *Agriculture and Human Values* 1; Geraldine Pratt & Caleb Johnston, "Filipina Domestic Workers, Violent Insecurity, Testimonial Theatre and Transnational Ambivalence" (2014) 46:4 *Area* 358.