Migrant Care and Farm Workers, Canadian Law, and Unfree Labour
ABOUT THE ARHW/ADDPD

The Association for the Rights of Household/Farm Workers (ADDPD/ARHW) is a non-profit organization founded in 1975 and incorporated in 1977. Through research, education/advocacy and legal activities, the ARHW fights for the abolition of all state policies that violate the fundamental rights of migrant care and agricultural workers.

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SECTION 1

INTRODUCTION

Care workers and agricultural workers provide a type of labour that is essential to the continuing functioning of any society. The orderly and organized quality of human existence would be impossible if housework and farm work was left undone, meals were unprepared, children were left unsupervised, the elderly and those with disabilities were unassisted, or crops were unattended.

Today, much is written about the ongoing care and agricultural ‘crisis’, in which Global North countries face continuous labour shortages in the care work and agro-food sectors. The response, generally, has been a reliance on foreign-born and employer-tied workers. However, these problems are not contemporary – and neither are the responses of governments.

For over a century, Canada has faced perpetual labour shortages in the sectors of care work and agricultural. Yet despite this chronic supply-side shortage, wages and working conditions have stubbornly resisted the laws of supply and demand, failing to rise to levels that could attract and retain a sufficient number of local workers.¹ State efforts to improve the wages and working conditions of care and agricultural work have been limited, rather immigration has long been used as a way to secure labour for Canada’s national care and agricultural work sectors.²

However, the use of immigration to increase the supply of workers did little to remedy the problem. The retention of workers continued to be an issue - both within the two sectors and in individual households and farms. Given the lack of protection and improvement of labour standards in these sectors, workers left these occupations for other employment opportunities – and those that could not leave changed employers frequently.³ In the place of efforts to improve working conditions in these two sectors, Canadian immigration laws and practices maintained, and still incorporate, ‘employer-tying’ policies in order to supply ‘unfree labour’ to Canadian households and farms.

Unfree labour is a socio-legal concept that refers to a set of labour relations in which labour is the result of private or state coercion. Slavery and bondage, the most commonly known forms of unfree labour, result when a person is forced against their will to enter into an labour relationship. However, unfree labour may occur even when an individual enters into a labour relationship voluntarily:

[The dynamics of unfree labour could be said to arise predominantly in the labour relationship that ensues, rather than directly at the site of entry. Indeed, it emerges clearly in all of the contributions that unfree labour in the contemporary era is

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² Sedef Arat-Koç, “From ‘Mothers of the Nation’ to Migrant Workers” in Abigail B. Bakan & Daiva Stasiulis, eds, Not One of the Family: Foreign Domestic Workers in Canada (Toronto: University of Toronto Press, 1997) at 57.
constituted primarily, although not exclusively, by the constraints that are imposed on a person’s ability to leave a particular arrangement – unfreedom at the point of exit.\textsuperscript{4}

The history of migrant care workers and agricultural workers in Canada shows that there are many ways that governments can restrict the ability of a worker to leave their employer. For instance, at the turn of the 20\textsuperscript{th} century, the federal government relied on private indentureship contracts to ensure that workers would remain with their employers:

Between 1888 and the 1920s, when the government did not directly provide assisted passage, private agents arranged for advanced loans from employers, which would tie domestics to them for a specific length of time. The Department of Immigration sometimes ignored protection legislation in order to fulfill its policing function. Around the turn of the century, for example, master and servant legislation was passed in most of the provinces, to protect domestics from exploitative contracts that they might have signed in order to immigrate to Canada. According to this legislation, contracts signed outside the province were not legally binding. The Immigration Department, however, circumvented this legislation by having domestics resign their contract upon arrival, thus enforcing their indentured status.\textsuperscript{5}

Eventually, the Canadian authorities began to rely on more direct measures. Migrant care workers and agricultural workers were denied landed status upon arrival. Instead, they were issued temporary and employer-specific work permits and were only provided with employer-based access to permanent residency\textsuperscript{6}, or employer-based work permit renewal. Furthermore, they were required to live at their employer’s place of residence. Notably, the government’s move towards these more coercive measures coincided with a shift in the racial characteristics of domestic and agricultural workers from predominantly white to include persons of colour.\textsuperscript{7}

These measures, in particular the issuance of employer-tied work authorisations and employer-based access to legal status renewal or consolidation, have been shown to prevent the worker from leaving their employer and as such may be labelled ‘employer-tying’ policies.

In 2014, the federal government removed the requirement that migrant care workers reside with their employer. However, they are still issued employer-specific work permits and must still rely on their employer for access to permanent residency and/or to have their work permit renewed. Furthermore, many migrant agricultural workers are still subject to a legal obligation to reside at a place determined by their employer (which typically means residing at their workplace and employer’s place of residence).

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\textsuperscript{5} Genevieve Leslie, "Domestic services in Canada, 1880-1920" in Janice Acton, ed, Women at Work, 1850-1930 (Toronto: Canadian Women’s Educational Press, 1974) at 122.

\textsuperscript{6} Employer-based access to permanent residency is also further limited or made uncertain by the imposition of high language and education requirements, annual caps, and exclusions based on the health issues or disability of the workers and/or their family members.

\textsuperscript{7} Arat-Koç, supra note 2 at 54; Abigail B. Bakan and Daiva Stasiulis, "Foreign Domestic Worker Policy in Canada and the Social Boundaries of Modern Citizenship" in Abigail B. Bakan & Daiva Stasiulis, eds, Not One of the Family: Foreign Domestic Workers in Canada (Toronto: University of Toronto Press, 1997) at 33-34; Patricia M. Daenzer, Regulating Class Privilege: Immigrant Servants in Canada, 1940s-1990s (Toronto: Canadian Scholars' Press, 1993).
While the use of one employer-tying policy is often enough to prevent workers from leaving their employer, governments tend to use multiple measures that operate in different ways but that are mutually reinforcing. In the case of the federal Caregiver Program, the two remaining policies have been referred to as a ‘carrot and stick’ combination. Similarly, the employer-tying policies applicable to migrant agricultural workers tend to work together to create barriers that prevent the worker from leaving their employer.

During the last decades, the negative impact of employer-tying policies on workers’ rights has been well-documented. Locking workers into an employment relationship deprives them of their most important bargaining chip – their ability to leave. Consequently, it is no surprise that these workers experience flagrant and systemic violations of their employment rights. However, the problematic nature of employer-tying policies extends past the realm of employment law. The effects of these policies have serious implications on these individuals’ fundamental right to liberty, security, and access to justice in the country, protected by section 7 of the *Canadian Charter of Rights and Freedoms* and section 96 of the *Constitution Act, 1867*.

The employer-tying policies of Canada’s temporary foreign worker programs, such as the Caregiver Program and the Seasonal Agricultural Worker Program, have never been explicitly scrutinized by Canadian courts through the lens of either section 7 of the *Charter* or section 96 of the *Constitution Act, 1867*. Using principles emanating from Canadian constitutional jurisprudence, and from jurisdictions with comparable constitutional frameworks, this synthesis sets out in broad terms why the employer-tying policies incorporated into Canadian temporary foreign worker programs are grossly incompatible with the constitutional rights of migrant workers in Canada, and should be declared invalid.

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8 Eugénie Depatie-Pelletier, *Judicial Review and Temporary Labour Migration Programs Declared a “Modern Form of Slavery”: State Restrictions of (Im)Migrant Workers’ Right to Liberty and Security (Not to Be Held Under Servitude) Through Employer-Tying Policies* (LL.D., Université de Montréal Faculté de droit, 2016) [unpublished] at 87.


THE RIGHT TO LIBERTY AND SECURITY OF THE PERSON: GENERAL CONSIDERATIONS

Section 7 of the *Canadian Charter of Rights and Freedom* declares that ‘[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice’. Importantly, section 7 applies to anyone who is physically present in Canada, not just citizens.\(^\text{10}\)

Generally, the guarantees of section 7 arise in connection with the administration of justice. The bulk of section 7 jurisprudence deals with what has been defined as ‘the state’s conduct in the course of enforcing and securing compliance with the law’.\(^\text{11}\) That has traditionally meant processes operating in the criminal law, but has been extended to include a variety of other circumstances, such as child protection proceedings and immigration proceedings where section 7-protected rights are at stake.\(^\text{12}\) The Supreme Court of Canada has also recognized that section 7 may apply to legislation or government action ‘entirely unrelated to adjudicative or administrative proceedings’, provided that it has an impact on the right to life, liberty or security of the person.\(^\text{13}\)

The first step in establishing a section 7 violation is showing that there is a ‘sufficient causal connection’ between the government action or law and the limit on life, liberty or security of the person. This standard does not require that the government action be the only or the dominant cause of the limit, but it cannot be a speculative link. This standard is satisfied by a reasonable inference, drawn on a balance of probabilities.\(^\text{14}\)

Secondly, laws or state actions that interfere with life, liberty or security of person can still be considered constitutionally valid if the interference conforms to the principles of fundamental justice – the basic principles that underlie our notions of justice and fair process. As such, establishing a section 7 violation requires not only demonstrating that a law or policy interferes with one of the three protected interests, but also that the interference is either arbitrary, overbroad or disproportionate.\(^\text{15}\) If this is established, the

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\(^\text{13}\) Chaoulli *v.* Quebec (A.G.), 2005 SCC 35 at para 124 and 194-199.

\(^\text{14}\) Bedford *v.* Canada (A.G.), [2013] 3 S.C.R. 1101 at para 76.

\(^\text{15}\) *Ibid* at paras 96 – 109.
government will have to show that the deprivation is justified pursuant to section 1 of the Charter, which allows limits on Charter rights so long as it is demonstrably justified in a free and democratic society.

The test for what constitutes a reasonable limit according to the section 1 was set out in the 1986 case of R. v. Oakes and refined in subsequent cases over the years. The first part of the test requires that the government show that there is sufficiently important objective to warrant overriding a constitutionally protected right or freedom. The second part requires that the government demonstrate that the limit is reasonable and demonstrably justified. This second branch of the test has three elements:

   a. the limit must be rationally connected to the objective. It must not be arbitrary, unfair or based on irrational considerations (rational connection);
   b. the limit must impair the right or freedom no more than is reasonably necessary to accomplish the objective. The government will be required to show that there are no less rights-impairing means of achieving the objective "in a real and substantial manner" (minimal impairment);
   c. there must be proportionality between the effects of the measure that limits the right and the law's objective. The more serious the deleterious impact on the rights in question, the more important the objective must be (proportionality).

Whether the infringement of section 7 rights caused by employer-tying policies is in accordance with the principles of fundamental justice or is justifiable according to the standard laid out is section 1 is beyond the scope of this synthesis. However, it is worth noting that the Supreme Court of Israel, in the 2006 decision of Kav LaOved Worker's Hotline v. Government of Israel, held that employer-specific permits were an arbitrary policy that caused disproportionate harm to the fundamental rights of migrant workers in Israel. As such, there exists a sort of precedent that employer-tying policies deprive migrant workers of their fundamental right to liberty and security of person in a manner that is not in accordance with the principles of fundamental justice.

Furthermore, the Supreme Court of Canada has stated that it would be very difficult for a government to justify infringements of section 7 under section 1, since a policy that restricts liberty or security of the person that has been established as arbitrary, overbroad or disproportionate would necessarily fail one or more of the three elements of the Oakes test.

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16 Kav LaOved Worker's Hotline v. Government of Israel (2006), 1 IsrLR 4542/02; HCJ 4542/02 (Supreme Court of Israel) at page 305-306 and 307 - 308

THE RIGHT TO LIBERTY

The liberty interest protected under section 7 of the *Canadian Charter* has at least two components. The first is liberty in the physical sense, which is engaged when there is restraint to the individual's mobility, such as when a person is detained, imprisoned, placed under house arrest, or prohibited from going or residing in specific areas. It also protects a sphere of personal autonomy involving ‘fundamental personal choices’ that go to the ‘core of what it means to enjoy individual dignity and independence’.

However, liberty in section 7 'is not synonymous with unconstrained freedom'. The sphere of individual decision-making that is protected by section 7 does not extend to lifestyle choices, such as the decision to smoke marijuana. Rather, it protects a set of important and fundamental life choices. Often, these choices tend to have serious implications concerning a person’s control over their bodily integrity, so that the limitation on an individual’s personal autonomy is also accompanied by issues touching on their right to security of person. As such, the Court has found the liberty interest to be engaged in the following cases:

- the right to refuse medical treatment;
- the right to make “reasonable medical choices” without threat of criminal prosecution, such as the use of medical marijuana;
- a right to physician-assisted dying for those living with a ‘grievous and irremediable’ medical condition.

However, the sphere of personal autonomy protected by the liberty interest is not just limited to decisions that directly implicate issues of bodily integrity. It has also been interpreted to include the right of parents to make certain decisions regarding a child’s wellbeing, concerning things such as health and education.

As discussed in the introduction of this synthesis, employer-tying policies such as the employer-specific work permit and employment-based access to permanent residence operate in practice to restrict the worker’s ability to exit the employment relationship. The work permit does this by making it difficult to change employers, workers who quit or lose their job also lose their authorization to work in the country and therefore cannot, at least legally, earn a livelihood and sustain themselves – unless a new work permit is issued (which is never guaranteed).
The employment-based access to permanent residence imposes a penalty on those who quit or lose their job, in the form of delayed or complete loss of access to permanent residency. The opportunity to apply for permanent residence status has been documented as both an incentive for migrant care workers to come to Canada and to stay in abusive work conditions.\(^{24}\)

Does the right to quit or change one’s employer fall within the sphere of personal autonomy protected by the liberty interest of section 7? The Canadian courts have stated that liberty does not include the right to transact business whenever one wishes, nor the right to exercise one’s chosen profession (without restrictions or even at all).\(^{25}\) The exclusion of these rights from protection under section 7 reflects the long-standing position of the Canadian Supreme Court that the *Charter* does not protect purely economic or property rights.

However, the Court has recognized that rights with an economic component may still find protection under section 7,\(^{26}\) although it has generally entertained that possibility in connection with the right to security of the person. Given that the right to quit or change one’s employer has been held in other jurisdictions as fundamental to the right not to be held in involuntary servitude and to the right to liberty and dignity, there are strong arguments for considering these rights as protected under the section 7 liberty interest.

**THE RIGHT not to be HELD in INVOLUNTARY SERVITUDE**

In the 1986 case of *R. v. Neale*, the Court of Appeal of Alberta stated that even a narrow interpretation of liberty, one that was only concerned with ‘actual physical restraint’, would still prohibit involuntary servitude.\(^{27}\) However, in the decades that have followed that case, the Canadian courts have not elaborated a clear standard on what constitutes involuntary servitude. A search of the legal databases Canlii and LexisNexis reveal only three constitutional challenges brought on the basis of involuntary servitude. Two of those cases involved challenges to taxation\(^{28}\) and one involved a man who alleged that the division of the family patrimony following a divorce required him to continue working in his business and therefore constituted state-imposed involuntary servitude.\(^{29}\) In all three cases, the Court rejected the arguments brought by the claimants but did not give detailed reasons. As such, at the present time there is very little within Canadian jurisprudence defining what constitutes the condition of involuntary servitude or how a law or government action might facilitate or impose it.

Additionally, workers might fail to obtain a work permit for reasons beyond their control, for instance due to fraud on the part of the employer or recruiter. This problem will be further developed in the section on the right to security of the person.


\(^{27}\) *R. v. Neale*, 1986 ABCA 169 (CanLII) at paragraph 23.


\(^{29}\) *Gresham v. Gresham*, 1988 CanLII 5230 (SK CA).
In contrast, the American courts have dealt with state violations of individuals’ right not to be held in involuntary servitude to a much more considerable extent. This right was constitutionalized in 1865 with the enactment of the Thirteenth Amendment. Despite a very clear prohibition against slavery and involuntary servitude, the abolition of slavery in the United States lead the proliferation of a wide variety of laws and practices in southern states designed to hold freed black people in a system of unfree labour. Many of these laws and state practices were challenged under the Thirteenth Amendment, producing case law which helped define the content of the right to not to be held involuntary servitude.

Notably, in the 1944 case of Pollock v. Williams, the right to quit (and change employers) was emphasized as integral to purpose of the Thirteenth Amendment:

The undoubted aim of the Thirteenth Amendment ... was not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States. ... [I]n general, the defense against oppressive hours, pay, working conditions, or treatment is the right to change employers. When the master can compel and the laborer cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work. Resulting depression of working conditions and living standards affects not only the laborer under the system, but every other with whom his labor comes in competition.

Importantly, Thirteenth Amendment jurisprudence did not just elaborate which rights are implied by the right not to be held in involuntary servitude, but also how those rights can be restricted by laws or government action. In 1920 the South Carolina Supreme Court declared the tort of a hiring a laborer under a contractual obligation to work for another invalid under the Thirteenth Amendment. In this case, the Court established that a worker is not legally free to quit their employer if the only alternatives available to the worker were ‘to work for his current employer or to quit and starve’:

If no one else could have employed Carver during the term of his contract with plaintiff, after he had elected to break that contract, without incurring liability to plaintiff for damages, the result would have been to coerce him to perform the labor required by the contract; for he had to work or starve. The compulsion would have been scarcely less effectual than if it had been induced by the fear of punishment under a criminal statute for breach of his contract, which was condemned, as violative of the thirteenth amendment, in Ex parte Hollman, 79 S.C. 9, 60 S.E. 19, 21 L.R.A. (N.S.) 242, 14 Ann. Cas. 1105. The prohibition is as effective against indirect as it is against direct actions and laws — statutes or decisions — which, in operation and effect, produce the condition prohibited. The validity of the law is determined by its operation and effect.

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32 Pollock v. Williams (1944), 322 US 4 (United States Supreme Court).
33 Shaw v. Fisher (1920) 102 S.E. 325, 113 S.C. 287.
34 Pope supra note 31 at 1531.
35 Shaw supra note 33.
This case highlights how integral the ability to freely change employers is to the right to quit – since there was nothing in the decision to suggest that the worker was unable to avoid the effects of the tort by either “working with family members, going into business for himself, or migrating outside the state”.36

The parallels between the effects of the legal restrictions on hiring at issue in Shaw v. Fisher and legal restrictions on working imposed by the employer-specific work permit issued to migrant workers are inescapable. The condition that they work for no employer other than the one specified on their work permit places them in the same position as the worker in Shaw v. Fisher. As such, restrictions on these workers’ ability to change employers constitute state coercion to remain in the employment relationship, or more plainly put, places these workers in a condition of involuntary servitude.

THE RIGHT TO RESIGN (AND CHANGE EMPLOYERS)

In Israel, the right to resign and change employers have been held as flowing from the right to liberty and dignity. This is significant considering that ‘freedom of occupation’ is also constitutionalized in Israel.

In the 2004 case of New Federation of Workers v. Israel Aerospace Industries Ltd ‘the liberty of the worker and his natural right not to be compelled, or restricted, in an employment contract to an employer against his will’37 was characterized as originating ‘in the freedom and dignity of the human being’.38 As such, while the right to ‘choose one’s employer’ is protected by ‘freedom of occupation’, the Court was clear that it was also based in the fundamental rights to liberty and dignity:

The liberty of the worker to choose his employer is derived from the right to liberty, which is enshrined in the Basic Law: Human Dignity and Liberty, and from the value of human dignity, which is the foundation of the aforesaid Basic Law.39

Two years later, the Court reaffirmed that restrictions on the right to resign were incompatible with fundamental liberty and dignity. In the 2006 case of Kav LaOved, the issuance of employer-specific work permits to migrant workers was found to constitute an unjustifiable restriction on their right to resign:

The restrictive employment arrangement therefore associates the act of resignation — a legitimate act and a basic right given to every employee — with a serious sanction. There can be no justification for this. Imposing a sanction in the form of the loss of the permit to reside in Israel on a person who wishes to terminate an employment relationship is tantamount to an effective denial of the freedom to resign. Associating the act of resignation with a serious resulting harm is equivalent to denying the individual of the possibility of choosing with whom to enter into a contract of employment, and compelling a person to work in the service of another against his will. This not only violates the right to liberty, but it creates a unique legal arrangement that is by its very nature foreign to the basic principle of employment law, the moral

36 Pope supra note 31 at 1518.
37 Kav LaOved supra note 16 at 290.
38 HCJ 8111/96 New Federation of Workers v. Israel Aerospace Industries Ltd at 595-597.
39 Ibid.
value of the employment contract and the basic purpose of the employment contract in guaranteeing the economic survival, dignity and liberty of the worker.\textsuperscript{40} Importantly, the Court stated that the availability of a ‘change of employer’ procedure did not negate the restriction of the right to resign, since workers were not authorized to work until they had been issued a new work permit, imposing a ‘work or starve’ situation on the worker:

\textit{[A]n application to change employer involves, according to the procedure, the loss of the permit to work in Israel for an unknown period: the procedure states that in the interim period between finishing work for the original employer and changing over to the new employer, the worker will receive a B/2 residence permit. This permit is a temporary residence permit (which is usually given for visits of tourists), and it does not allow a person to work lawfully. It is not clear, therefore, how the worker is supposed to support himself in this interim period, and especially why his legitimate request to change employers should result in the loss of the permit to work in Israel for an unknown period (since the procedure does not stipulate a binding time limit for processing the request to change employers).}\textsuperscript{41}

As such, the effects of the employer-specific work permit were considered wholly incompatible with workers’ right to liberty and dignity. Vice-President Emeritus M. Cheshin, in his concurring reasons, concluded that the policy creates ‘a modern form of slavery’.\textsuperscript{42}

**EMPLOYER-TYING POLICIES AND THE RIGHT TO LIBERTY**

Whether we approach the right to change one’s employer through the lens of the right not to be held in involuntary servitude or the liberty-implied right to quit one’s employer, there is a strong case to be made that this right is central to personal autonomy, constituting a ‘decision of fundamental personal importance’ and should therefore fall under the protection of the Charter pursuant to the section 7 liberty interest.

Furthermore, employer-specific work permit and employment-based access to permanent residence should be acknowledged as state restrictions on the right to resign, since they are shown to replicate the effects of similar or analogous state practices that have been found in other jurisdictions to impede workers’ ability to meaningfully exercise that fundamental right.

\textsuperscript{40} Kav LaOved supra note 16 at 288 – 289.
\textsuperscript{41} Ibid at 301.
\textsuperscript{42} Ibid at 314.
SECTION 4

THE RIGHT TO SECURITY OF THE PERSON

In Canada, security of the person has been broadly interpreted to include both a physical and psychological aspect. Laws or state actions that interfere with an individual’s control over their bodily integrity have been found to constitute violations of the right to security of the person, such as prohibitions against assisted-suicide, abortion regulations, or the imposition of unwanted medical treatment.\(^{43}\) Security of the person will be engaged when a state action has the likely effect of seriously impairing a person’s physical or mental health.\(^{44}\) Additionally, state actions that increase the risk of harm to individuals have been found to constitute deprivations of the right to security of the person.\(^{45}\)

As discussed in the section ‘Fundamental Rights in Canada’, there must be a ‘sufficient causal connection’ between the deprivation and the law or state action. A security of the person claim may still be successful even if non-governmental actors contribute to the harm. In *Bedford*, the Court found that criminal laws that prevented sex workers from taking precautions could still be considered state deprivations of security of the person even though the direct source of harm came from those who abused and attacked the workers:

> It makes no difference that the conduct of pimps and johns is the immediate source of the harms suffered by prostitutes. The impugned laws deprive people engaged in a risky, but legal, activity of the means to protect themselves against those risks. The violence of a john does not diminish the role of the state in making a prostitute more vulnerable to that violence.\(^{46}\)

Similarly, the Court rejected the arguments of the government in *PHS Community Services Society* that the negative health risks that drug users would suffer if a safe injection site was closed would result from drug use and not state action.\(^{47}\)

EMPLOYER-TYING POLICIES AND INCREASED RISKS OF HARM: HUMAN TRAFFICKING

In the *Kav LaOved* case, the Supreme Court of Israel found that employer-specific work permits caused major harm to workers by greatly increasing the chance that these workers become ‘illegal aliens’ - for reasons beyond their control and often without their knowledge.\(^{48}\) The ease at which workers can lose


\(^{45}\) *Bedford* supra note 14; R. v. Michaud, 2015 ONCA 585.

\(^{46}\) *Ibid* at para 89.


\(^{48}\) *Kav LaOved* supra note 16 at 296 – 299.
their status and become irregular fosters conditions in which their risk of experiencing human trafficking is greatly increased.

Before explaining how employer-tying policies facilitate the human trafficking of migrant workers, it is necessary to note that human trafficking, as it is defined in the Canadian Criminal Code, is of limited value when it comes to identifying and understanding how the trafficking of migrant workers occurs in practice.

The Criminal Code defines exploitation as occurring when the accused engages in conduct that, in all the circumstances, could reasonably be expected to cause the other person to believe that their safety or the safety of a person known to them would be threatened. As many others have observed, this is a stricter standard for trafficking than the one established in the Palermo Protocol, which sets out the internationally accepted definition for human trafficking.

The Palermo Protocol does not define ‘exploitation’, but instead provides an open-ended list of examples that includes, at a minimum, ‘the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.’ Forced labor is defined in international law as ‘all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily’. In the United States, courts have ruled that the term ‘involuntary servitude’ includes a condition of servitude in which the victim is forced to work for the defendant by the use or threatened use of legal coercion.

In contrast, the higher requirement of ‘fear for safety’ on the part of the survivor is determinative for establishing the presence of exploitation in Canadian law - exploitation being a necessary component of the human trafficking offense. As noted by others, this strict framing of exploitation has been characterized as an impediment to laying charges and securing convictions for human trafficking under the Criminal Code. In the context of the labor trafficking of migrant workers, it ignores the reality that those who coercively exploit migrant workers have little need to resort to threats of violence but can simply rely on debt bondage or threats of deportation as equally effective means of compulsion.

As such, the following comments regarding the trafficking of migrant workers see the labour trafficking of these individuals through the analytical framework developed by researchers Jesse Beatson, Jill Hanley and Alexandra Ricard-Guay, who studied 36 cases of labour trafficking, involving an estimated 243

49 Criminal Code, RSC 1985, c C-46, s 279.04(1).
52 Convention concerning Forced or Compulsory Labour, 28 June 1930, 39 UNTS 55 at 58 (entered into force 1 May 1932).
55 Beatson et al, supra note 50 at 142 - 143.
I came in to Canada on October 9, 2015. I was looking forward to working as a caregiver for an elderly woman. But when I landed at the airport, my agent was there. She told me that I didn't have a job. The employer had hired another caregiver. I was shocked. The agent made me pay $4,000 for her arranging the job and getting the LMIA and work permit. I only found out later that my job was with her mother-in-law. I feel she used me and took my money.

Rosalie, quoted in Care Worker Voices for Landed Status and Fairness (2018 Report)

At this point, the conditions for labour trafficking are optimal.

Securing a new work permit requires securing a new Canadian employer, which private recruiters are happy to arrange, for additional fees of course. This increases the debt owed by the worker, which increases the need to continue working, which diminishes their capacity to resist the demands of either the recruiter or the employer. As one study stated ‘recruitment agencies not only exploit financial need but exacerbate it'.

The workers engagement in irregular work makes them vulnerable to threats of arrest and deportation. These types of threats have been recognized as constituting a ‘menace of penalty' or a threatened use of legal coercion.

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56 Ibid at 137.  
57 Ibid at 145.  
61 Ibid at 12: Despite being expressly illegal in Canada, recruitment fees charged to workers are the norm. A survey of almost 200 case files of migrant caregivers revealed that all by two had paid recruitment fees.  
62 Ibid at 13.  
63 Ibid at 14.  
coercion. Deportation is an especially frightening prospect for migrant workers who paid recruitment fees because currency conversion and the lower salaries available back home mean it would take the entire wages earned over two to three years to pay off the debt. As the Court recognized in Kav LaOved, early deportation before debts are paid off “is an action that deals mortal blow to the worker and his dependants”. This is especially true when workers have mortgaged their own property or that of their family back home to finance their transportation and recruitment costs.

The dependency of workers on recruiters and employers for the consolidation, renewal or regularization of their status leads not only to labour exploitation, but also financial exploitation. Workers often not only see their documents confiscated, movements restricted and monitored, but also have their earnings controlled or completely withheld to satisfy their debt, and are coerced into signing abusive contracts with either the recruiter or employer for housing, loans, processing of immigration papers, job placement services, etc.

Violence, or threats of violence, might, and often do accompany these other coercive methods. Threats of punitive actions from immigration officials and police are used not only to extract labor from them, but also serve to keep them from seeking assistance. Financial exploitation, indebtedness, physical and social isolation, fear of arrest and deportation are tools used by traffickers to close off avenues of exit for the victim.

Fraud and deception about steps taken to regularize immigration status may be used to keep the worker in a position of “illegality”. This strategy maintains and the intensifies the precarity of the worker and keeps them dependent. Sometimes the worker might not even be aware that they are without status until they are arrested and deported by border authorities. And so the effects of employer-tying policies are doubly egregious, by operation they expose workers to a higher risk of trafficking, and their enforcement punishes those who have been victimized.

The role of employer-tying policies in creating opportunities for exploitation and coercion cannot be understated. As Jesse Beatson, Jill Hanley and Alexandra Ricard-Guay noted in their study on labour trafficking, not one of the cases surveyed involved Canadians or permanent residents, and that was not

65 United States v. Calimlim, 538 F.3d 706 (7th Cir. 2008).
66 Faraday supra note 59 at 34.
67 Kav LaOved supra note 16 at 286.
68 Larios supra note 60 at 18: Of the 18 casefiles in which workers described not having employment on arrival, despite paying fees and signing a contract, ten of these workers, who found themselves with no place to live due to these unexpected circumstances, lived in accommodations provided by a single agency. Seven of these casefiles describe migrant workers sleeping on the floors of the agency offices for a number of weeks, and in one case nine workers living in these conditions for five months. Workers had to share pillows and blankets and were instructed not to leave or talk to each other. During this time, they were instructed to clean the agency buildings without compensation. In each case, the workers were then pressured to sign a long-term lease for an apartment in a building owned by the agency. Some casefiles indicate that workers were not given time to read the lease, did not fully understand what the document meant, and were refused a copy of the lease when they requested it. Living conditions in these apartments were poor and overcrowding was the most common complaint, with several casefiles indicating up to 30 women living in an apartment at a given time.
69 Beatson et al, supra note 50 at 155.
70 For example, see PN v. FR and another (No. 2), 2015 BCHRT 60 [PN].
because they limited their search to migrant workers, which they conclude 'provides a clear indication of the degree to which precarious status makes people vulnerable.'

By increasing migrant workers vulnerability to human trafficking, employer-tying policies should be considered as state violations of workers’ fundamental right to security of the person.

However, even when workers maintain their legal status, employer-tying policies still constitute a major source of harm to their physical and mental health.

**EMPLOYER-TYING POLICIES AND INCREASED RISKS OF HARM: SERIOUS IMPAIRMENT TO PHYSICAL HEALTH**

Recall that in the landmark American case of Pollack v. Williams, the Supreme Court of the United States observed that the right to change employers was a worker’s main defense against ‘oppressive hours, pay, working conditions, or treatment’ and that without this right, ‘there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work’.

The working conditions and treatment of migrant farm and care workers in Canada attest to the truth of this observation.

Research evidence shows that migrant workers often experience the healthy immigrant effect. They arrive in Canada perfectly healthy (a requirement for immigration and work permits) but experience progressive health decline as they worked in Canada. This health decline was found to be associated with interpersonal and structural challenges specific to their jobs, including a lack of freedom to choose or change employers, unsafe working conditions (e.g., long work hours, lack of job safety training, and repetitive injuries), substandard living conditions, (e.g., overcrowding, poor housing, and limited access to healthy food) and fear of deportation.

The dependency and precarity created by employer-tying policies inhibits workers’ ability to complain. Fear of losing one’s job or being deported leads to self-silencing – workers do not exercise their right to refuse unsafe work. Studies on migrant farm workers reveal that the long hours, unreasonable

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71 Beatson et al. *supra* note 50 at 154.
73 Salami *ibid*; Preibish *ibid*; Pysklywee *ibid*; Otero, G. and Preibisch, K. *Farmworker Health and Safety: Challenges for British Columbia*. 2010.
74 Salami *ibid* at e548.
productivity targets, poorly maintained equipment and inadequate personal protective equipment lead to poor occupational health among workers.  

The detrimental effect of employer-tying policies can produce working conditions so dismal that it pushes workers into abandoning their legal status in order to protect their lives or integrity:

Marianita is a Mexican woman who was employed through SAWP to work in Canada as a seasonal worker for six years. Over the six years she witnessed sexual harassment, unhealthy working conditions, and was asked to perform extra-contractual duties (e.g. clean her owner’s house). She complained to the Mexican consulate and the Mexican Ministry of Labour but each of her complaints was ignored. During the last season she was treated unfairly by the supervisor. The supervisor assigned lighter duties to women who were willing to have sexual relations with him. But Marianita ignored his sexual advances and as a result was always asked to perform heavier tasks. Additional, Marianita was often hazardous work activities without adequate protection. When she attempted to question his practices, the supervisor would assign her work that was even heavier. Exasperated by the situation, she deserted her employer and began to work without authorization.

Of course, workers that escape horrible conditions by abandoning their legal status live under the constant threat of arrest and deportation. As such, employer-tying policies force workers into choosing between the preservation of their legal status and their physical/psychological integrity.

When workers are obligated by the state to reside at the place chosen by their employer, they face additional risks for their security, including inadequate housing conditions, harassment, violence and food scarcity:

Challenges with sanitation include lack of bathroom facilities at the workplace, lack of hand washing facilities, lack of clean drinking water, overcrowded housing, poorly ventilated rooms, living in close proximity to pesticides, and lack of laundry and washing facilities.

The major inequality in bargaining power between employers and employer-tied workers pose a specific problem for women migrant workers in all sectors - increased vulnerability to sexual harassment and assault. This was acknowledged in 2015 by the Human Rights Tribunal of Ontario in the case of O.P.T. v. Presteve Foods Ltd:

As a result of the nature of the temporary foreign worker programs in Canada, M.P.T. worked under the ever-present threat of being sent back to Mexico if she did not do what she was told, which was made explicit to her by the [employer] and which ultimately was acted upon by him in a discriminatory manner. Due to the power and authority that the personal respondent wielded over her, M.P.T. was required to

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75 Ibid.
77 Salami supra note 72 at e584.
endure the personal respondent's repeated invitations for her to have sex with him and his sexual touching of her thighs, breasts and buttocks.\textsuperscript{78}

This case is exceptional for being brought at all, as employer-tying policies also create barriers for the enforcement of rights. Workers may be removed from the country before they have time to seek assistance, learn about their legal rights or file a complaint.\textsuperscript{79} In this particular case, had it not been for the involvement of migrant advocacy groups and a union, these women would have never been able to seek redress for the abuse they suffered.\textsuperscript{80}

\textbf{EMPLOYER-TYING POLICIES AND INCREASED RISKS OF HARM: SERIOUS IMPAIRMENT TO PSYCHOLOGICAL HEALTH}

Security of the person is also engaged when a state action has 'serious a profound effect on a person’s psychological integrity'.\textsuperscript{81} The first step requires establishing that the psychological harm is state-imposed. Not every state action that causes psychological harm will constitute a violation. Secondly, in order to be considered serious, the psychiatric harm 'need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety.'\textsuperscript{82} The effects of the state action are assessed on an objective basis, 'with a view to the impact on the psychological integrity of a person of reasonable sensibility.'\textsuperscript{83}

In cases where section 7 has been engaged on the basis of psychological integrity, symptoms that have been present are worry,\textsuperscript{84} stress,\textsuperscript{85} anxiety,\textsuperscript{86} stigmatization and the disruption of family life,\textsuperscript{87} depression, exacerbation of a pre-existing condition, onset of mental illness, anger, cognitive disturbance, perceptual distortion, obsessive thoughts, paranoia, psychosis, suicidal thoughts, insomnia.\textsuperscript{88} Research demonstrates that employer-tied migrant workers in Canada commonly experience many of these symptoms and directly associate them to their incapacity to leave inadequate, substandard, or inhumane work arrangements.

\begin{quote}
“\textit{I experience sexual harassment by my employer. I couldn’t leave them immediately because of the time frame that I was given by the government about the 24 months of work and the need to be completed before the end of the 2019 of November to apply for Permanent residence}”
\end{quote}

Celia, quoted in Care Worker Voices for Landed Status and Fairness (2018 Report)

\begin{footnotes}
\textsuperscript{78} O.P.T. v. Presteve Foods Ltd., 2015 HRTO 675 (CanLII) at 221.
\textsuperscript{79} Fay Faraday “Made in Canada: Decent work or entrenched exploitation for Canada’s migrant workers?” (Toronto: Metcalf Foundation), 2016 at 52.
\textsuperscript{81} New Brunswick (Minister of Health & Community Services) v. G. (J.), [1999] 3 SCR 46, 1999 CarswellNB 305 at paras 59-60. [G.(J.)]
\textsuperscript{82} \textit{Ibid.}
\textsuperscript{83} \textit{Ibid.}
\textsuperscript{84} Chaoulli c. Québec (Procureur général), 2005 SCC 35 [Chaoulli]
\textsuperscript{85} G.(J.) supra note 81; \textit{Ibid.: Carter supra} note 43.
\textsuperscript{86} \textit{British Columbia Civil Liberties Association v. Canada (Attorney General),} 2018 BCSC 62; \textit{G.(J.) supra note 81; Chaoulli supra note 84}.
\textsuperscript{87} G.(J.) supra note 81.
\textsuperscript{88} \textit{British Columbia Civil Liberties Association supra note} 86.
\end{footnotes}
The Court’s insistence that not every state action that causes psychological harm will constitute a deprivation of security of the person suggest that there is something qualitative about the type of state interference that ascends to the level of a section 7 infringement. State removal of a child from a parent through custody proceedings has been held to constitute a serious interference with the psychological integrity of the parent. Justice Wilson, the only woman on the bench at the time Morgentaler was decided, argued that any state interference with a women’s decision to terminate a pregnancy would infringe the right to security of the person, even if it did not cause harmful delays and uncertainty:

In essence, what it does is assert that the woman's capacity to reproduce is not to be subject to her own control. It is to be subject to the control of the state. She may not choose whether to exercise her existing capacity or not to exercise it. This is not, in my view, just a matter of interfering with her right to liberty in the sense (already discussed) of her right to personal autonomy in decision-making, it is a direct interference with her physical "person" as well. She is truly being treated as a means - a means to an end which she does not desire but over which she has no control. She is the passive recipient of a decision made by others as to whether her body is to be used to nurture a new life. Can there be anything that comports less with human dignity and self-respect?

While Justice Wilson alone acknowledged that state interference in a matter of such personal importance necessarily entails psychological harm, the Court in Carter recognized the harmful impact of state actions which removes decision-making power over questions of fundamental importance:

[Running through the evidence of all the witnesses is a constant theme - that they suffer from the knowledge that they lack the ability to bring a peaceful end to their lives at a time and in a manner of their own choosing.

While these decisions involve state interference in medical decision-making and individual's control over their bodily integrity, there are parallels to be drawn with employer-tying policies. As discussed in the section 'The Right to Liberty', employer-tying policies deprive workers of their fundamental right to resign, which in turn removes any control they may have over their working and living conditions in Canada. The effect of restrictive employment arrangements was described in the following fashion by Vice-President Cheshin in Kav LaOved:

The foreign worker has changed from being a subject of the law — a human being to whom the law gives rights and on whom it imposes obligations — into an object of the law, as if he were a kind of chattel. The arrangement has violated the autonomy of the workers as human beings, and it has de facto taken away their liberty. According to the restrictive arrangement, the foreign workers have become work machines (...)

Vice-President Cheshin’s language echoes that of Justice Wilson in Morgentaler, that employer-tying policies infringe so deeply upon the autonomy of the individual that the worker becomes a means to an
end. In Canada, labour\textsuperscript{93} and human rights advocates, and workers themselves,\textsuperscript{94} have decried the manner in which the Temporary Foreign Worker Program treats migrant workers more like disposable commodities than human beings – with unsurprising consequences for the mental and emotional health of these workers.

A 2007 study identified \textit{nervios}\textsuperscript{95} symptoms in migrant farm workers. Factors contributing to poor mental health were poor working conditions, poor working relations, communication barriers, loneliness, competition among colleagues, injustices and powerlessness, as well as, poor nutrition, insufficient sleep, stressful and unsafe working conditions, and abuse.\textsuperscript{96} Mexican migrant farm workers describe the distress caused by their experience in Canada as ‘nerves’ – a metaphor for the breakdown in self/society relations and the lack of control over their bodies.\textsuperscript{97} Similarly, Jamaican migrant farm workers use the idiom of stress/pressure to describe the mental health issues arising from the structural powerlessness brought upon by their restricted agency in Canada.\textsuperscript{98}

A study on migrant care workers also revealed similar findings, the majority complained of experiencing anxiety, insomnia, and depression. Many workers reported a decline in health since their arrival in Canada – with their bodies reacting negatively to the ongoing stress. Some indicated that poor working conditions, emotional and physical abuse on the job and feeling unable to resist or stop the abuse had negative effects on their mental health – leading to a prolonged sense of despair, alienation and powerlessness. Most lived in constant fear of losing their jobs. Some reported that ‘they were treated like an object to be shared and used at the whim of their employers.’\textsuperscript{99}

Migrant care workers, unlike most farm workers, have a limited access to permanent residency. The possibility to apply for permanent residency after accumulating a certain amount of employment experience imposes serious psychological harm on these workers.

The hope of obtaining permanent residency and reuniting with family can be a source of resilience for these workers as they cope with damaging mental health effects caused by their employer-tied,
precarious migration status. However, the end goal of achieving permanent residency also encourages care workers to stay in conditions that other migrant workers would have escaped by abandoning their legal status. It similarly reinforces employers' ability to exploit and abuse workers:

Under this immigration requirement, the employers were given more implicit power to violate their agreements to provide fair, safe, and ethical working conditions because they are aware of the temporary migrant caregivers’ desperation for permanent residency and family reunification.

Additionally, employment-based access to permanent residency is on its own a source of considerable stress and uncertainty for these workers. Workers can fail to accumulate the necessary 24 months for a wide-range of reasons beyond their control (death of an employer, job loss, release upon arrival, immigration fraud, sickness). It’s a particularly devastating experience for workers that have endured exploitation and abuse in order to secure access to permanent residency and reunite with their children but fail to accumulate in time the necessary work experience or have their applications rejected based on education/language requirements or medical inadmissibility.

This synthesis only covers three ways that employer-tying policies could be considered as state deprivations of migrant workers’ right to security of the person: increased risk of harm, serious impairment of physical health and state-imposed serious psychological stress. Other possible deprivations could be established, for instance, on the basis that employer-tying policies prevent or delay workers from being able to access medical treatment.

Importantly, these examples demonstrate that the right to resign and change employers is not just integral because it embodies important, but abstract, concepts like dignity and personal autonomy but also because it is fundamental to an individual’s control over their bodily integrity.

\[100\] Ibid.
\[101\] Ibid.
\[102\] Ibid; Care Worker Voices for Landed Status and Fairness, November 2018 Report.
\[103\] Salami supra note 72.
SECTION 5

THE RIGHT TO ACCESS JUSTICE

In the 2014 case of Trial Lawyers Association of British Columbia v. British Columbia (AG), the Supreme Court of Canada held that section 96 of the Constitution Act, 1867 provided some degree of constitutional protection for access to justice.\(^{104}\) The wording of Section 96 deals only with appointment of judges but has been interpreted as protecting the core or inherent jurisdiction of the superior courts from interference or encroachment by federal or provincial legislature. Since resolving disputes and deciding questions of public and private law are ‘the hallmark of what superior courts exist to do’, measures that prevent some individuals from bringing their issues to the court impinge on the core jurisdiction of the superior courts.\(^{105}\)

The connection between section 96 and access to justice was held to be further supported by considerations relating to the rule of law. In the 1988 case of B.C.G.E.U. v. British Columbia (AG) the Court affirmed that access to the courts is essential to the rule of law, with the Chief Justice at that time observing that ‘[t]here cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice’.\(^{106}\)

In Trial Lawyers Association of British Columbia, a provincial hearing fee scheme, imposed pursuant to the province’s jurisdiction over the administration of justice, was found to be unconstitutional on the basis that a significant percentage of the population could not afford the fees without experiencing undue hardship and forgoing reasonable expenses.\(^{107}\) The Court ruled that provinces can impose hearing fees, but those fees must respect the right of individuals to access to courts of superior jurisdiction.\(^ {108}\) In this case, hearing fees that were equivalent to one months’ income for the complainant were considered to prevent access in a manner inconsistent with s. 96 of the Constitution Act, 1967 and the underlying principle of the rule law.\(^{109}\)

EMPLOYER-TYING POLICIES: RESTRICTIONS ON ACCESS TO THE COURTS

While the Canadian government might proudly proclaim ‘Temporary foreign workers: Your rights are protected’\(^ {110}\), nothing could be farther from the truth in practice. As noted in Trial Lawyers Association of British Columbia, there can be no rule of law without access to the courts – and the negative effect of employer-tying policies on migrant workers’ access to the courts has been extensively documented and repeatedly flagged as a concerning aspect of Canada’s temporary foreign worker program.

As discussed in the section ‘The Right to Liberty’, employer-tying policies are restrictions on migrant workers’ liberty-implied right to resign and change employers. As common sense would dictate, workers who pursue legal action against an employer usually wait to do so after they have left the employment in

\(^{105}\) Ibid at 35.
\(^{106}\) Ibid at 38.
\(^{107}\) Ibid at 52.
\(^{108}\) Ibid at 48 – 49.
\(^{109}\) Ibid at 64.
question and secured work elsewhere. Since the employer-specific work permit interferes with workers’ ability to freely change employers, migrant workers who access the courts cannot do so without considerable sacrifice – as losing or leaving their job automatically results in the loss of their authorization to work for an unknown period of time (and potentially permanently). This deprives them of the financial resources required to cover basic needs. For workers that must reside at a place chosen by their employer, leaving one’s job to pursue a legal action additionally entails the loss of housing. In this context, workers will forgo pursuing legal action because they are dependant on employers for legal status, legal status renewal, readmission to the country and/or access to permanent residency.

Moreover, employers’ (and implicitly recruiters’) control over these aspects mean workers, at least if hired under the Seasonal Agricultural Worker Program, may be repatriated before they can even explore their legal options. Physical removal and exclusion from the country is a strategy used by employers to prevent workers from enforcing their rights. The threat of retaliation is so effective that many workers will refrain from even seeking information about their rights.\footnote{See for example: The Alberta Federation of Labour, \textit{Temporary Foreign Workers: Alberta’s disposable workforce}, November 2007; Migrant Workers Centre, \textit{Envisioning Justice for Migrant Workers: A Legal Needs Assessment}, March 2018.}

It has been already been acknowledged by Canadian courts and tribunals that workers face obstacles in accessing the courts that are created by employer-tied legal status and work authorizations. In particular, in 2005, the United Food and Commercial Workers Union Canada, and its director Michael Fraser, were granted public interest standing to challenge the exclusion of SAWP workers from some benefits under the \textit{Employment Insurance Act}. In its decision to grant standing, the Court acknowledged that - precisely because of the fear of legal sanctions if they seek justice—SAWP workers were not in a position to access the country’s courts:

In sharp contrast to refugees, foreign migrant agricultural workers are not a group who are readily and actively accessing the courts. Foreign migrant agricultural workers have been wholly absent from the Canadian constitutional landscape. Indeed, the UFCW contends, and the A.G. did not dispute, that they have not in fact initiated any court challenges or any constitutional challenges. This is not a surprise given the realities of their social condition. I have no hesitation in finding that the position of SAWP workers on the outer margins of Canadian society constitutes a significant barrier to their participation in this litigation. [...] I am satisfied that there is sufficient evidence before me to establish that SAWP workers have told the UFCW that they fear participating in this application. Indeed, I accept that this accounts for the lack of any more direct evidence before me about their concerns. While this might present problems when this application is heard on its merits, it is no basis to refuse to grant the UFCW public interest standing. Nor am I persuaded that the SAWP workers’ fears of reprisal are irrational and should therefore be discounted or ignored. First, I would note that the A.G. did not take issue, in any way, with the suggestion that some SAWP workers have been treated badly by their farmer-employers and their home consulates. This alone provides a rational basis for fear on the part of them all. [...]The proper question at this stage is whether their fear, rational or otherwise, will prevent them from participating in this application. On the material before me, I am satisfied that the answer to this question is yes. Therefore, I find that there is no other reasonable and effective manner in which the issue may be
brought before a court. As a result, for all of these reasons, I conclude that the UFCW has satisfied the third branch of the test for public interest standing in Canadian Council of Churches. [Emphasis added]112

In a 2010 decision confirming Quebec agricultural workers’ fundamental right to unionize, references were made to the difficulties employer-tied migrant workers have in securing the judicial enforcement of their rights, especially the impact of worker’s fear of reprisals in the form of forced repatriation and future blacklisting from the employment program in Canada.113 In 2013, the Ontario Human Right Tribunal also accepted evidence that workers’ fear of legal sanctions might—even if it should not—negatively impact not only their own but also other migrant workers and family members’ capacity to obtain a judgement against an employer through the courts:

[T]hat migrant workers are exceptionally vulnerable workers and will have difficulty vindicating their rights in the workplace and elsewhere as a consequence of their unique vulnerability. I also accept her evidence that as a consequence of their unique vulnerability migrant workers rarely seek to vindicate what rights they have for fear of repatriation or not being asked to return in subsequent years. […] Of some concern is the lack of corroborating evidence of either monkey comment although several individuals might have heard them (…). In considering whether I should draw an adverse inference as urged on me by the respondents I have taken into account the uncontroversial proposition advanced by Ms. Basok, that these workers are in a uniquely vulnerable position. I accept the evidence of the applicant that the potential witnesses were reluctant to come forward for fear of the consequences. This is … a … recognition that such fears would not be surprising in this group of workers. I decline to draw any inference from the failure of the applicant to produce any corroborating witness.114

In Trial Lawyers Association of British Columbia, the Chief Justice noted the connection between access to the courts and the rule of law:

In the context of legislation which effectively denies people the right to take their cases to court, concerns about the maintenance of the rule of law are not abstract or theoretical. If people cannot challenge government actions in court, individuals cannot hold the state to account — the government will be, or be seen to be, above the law. If people cannot bring legitimate issues to court, the creation and maintenance of positive laws will be hampered, as laws will not be given effect (…) [Emphasis added]115

The lived realities of migrant workers are a testimony to the truth of this observation. Without the ability to access the courts, the rights they have on paper mean nothing in practice. The effect of employer-tying policies is to substantially interfere with migrant workers’ right to access the courts and in doing so, they fundamentally undermine the rule of law in Canada, in a manner that cannot be considered consistent with section 96 of Constitution Act, 1967.

113 Travailleurs et travailleuses unis de l'alimentation et du commerce, section locale 501 c. L’Écuyer, 2010 QCCRT 191 (CanLII), <http://canlii.ca/t/29bw0>, at para. 174 and 177.
115 Trial Lawyers Association of British Columbia supra note 104 at 40.
CONCLUSION

As demonstrated in this synthesis, there are a myriad of ways that the employer-tying policies incorporated into Canada’s temporary foreign worker programs restrict workers’ constitutionally protected rights in the country.

Despite an overwhelming consensus among researchers, advocates, and workers themselves that these policies are a key factor in the systemic abuse and exploitation that has become the defining feature of Canada’s temporary labour migration programs, policymakers have failed to implement meaningful reforms that would enable migrant workers to exercise their fundamental right to freely change employers.

For this reason, the ARHW has decided that it is necessary to launch a constitutional challenge to the Canadian government’s authority to adopt and implement employer-tying policies. In light of recent developments in Canadian constitutional law, the time to concentrate on a legal action has never been better. Importantly,
recent expansions to the definition of public interest standing mean that challenges no longer require a private claimant. This overcomes one of the more serious problems of mounting a legal action that challenges policies restricting access to justice for a specific group of individuals.

As part of the ARHW’s ‘Break the Chains’ legal action project, our organization mobilizes and coordinates experts, legal professionals, community organizers, and workers towards pursuing a constitutional challenge to secure judicial recognition of the right to freely change employers not just for migrants but for all workers. On the long term, such action is necessary to force governments to fundamentally reconfigure their temporary foreign worker programs as free labour supply measures.

As shown in this synthesis, two key elements for a strong constitutional case are present in the context of a challenge to employer-tying policies - robust legal arguments and an extensive evidentiary record. Together, we can put an end to state-imposed employer-tying employment arrangements in Canada, an important first step towards temporary labour migration programs across the world that are not a "form of modern slavery" but fair, just, and humane.