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Migrant Care and Farm Workers, Canadian Law, and Unfree Labour

ASSOCIATION FOR THE RIGHTS OF HOUSEHOLD WORKERS - ARHW

ASSOCIATION POUR LA DÉFENSE DES DROITS DU PERSONNEL DOMESTIQUE - ADDPD

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ABOUT THE ARHW/ADDPD

The Association for the Rights of Household 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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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 unsupervised, crops were unattended, and the elderly and those with disabilities left unassisted.

Today, much is written about the ongoing care and agricultural ‘crisis’, in which Global North countries face continuous labour shortages in both 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 care work and agricultural sector. 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 provide labour for these two sectors.²

However, despite the use of immigration to increase the supply of workers, labour shortages have always persisted. One problem was the retention of workers, 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 have rather incorporated a myriad of ‘employer-tying’ policies, providing Canadian households and farms with a seemingly unending supply of ‘unfree’ labour.

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 a labour relationship. However, unfree labour may occur even when an individual enters into a labour relationship voluntarily:

[T]he 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 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.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

¹ Audrey Macklin, “On the Inside Looking in: Foreign Domestic Workers in Canada” in Wenona Giles & Sedef Arat-Koç, eds, *Maid in the Market* (Halifax: Fernwood Publishing, 1994)13 at 15.

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)53 at 57 [Arat-Koç].

³ Robin John Anderson, “Domestic Service: The YMCA and Women’s Employment Agencies in Vancouver, 1898 – 1915 (1992) 25:50 *Social History* 307 at 312 - 313.

⁴ Stephanie Barrientos, Uma Kothari & Nicola Phillips, “Dynamics of Unfree Labour in the Contemporary Global Economy” (2013) 49:8 *Journal of Development Studies* 1037 at 1038 – 1039.

20th 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.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 residency⁶, 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 care workers and agricultural workers from predominantly white to include persons of colour.⁷

These measures, in particular the issuance of employer-tied work permits 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. Employer-specific work permits leave a worker without the ability to earn a livelihood should they lose or quit their job. Employer-based access to legal status renewal means workers' ability to continue legally residing and working in the country is dependant on their employer, leaving their job puts their legal status at risk. Similarly, workers who have access to permanent residence status through employer nomination programs or work experience pathways are extremely reluctant to disrupt the employment relationship since doing so will delay, or even jeopardize, their access to permanent residence status. Finally, policies that allow employers to remove the worker from the country and/or block their readmission produce strong incentives for workers to maintain the employment relationship at all costs - particularly since traditional protections against reprisals, such as those provided by provincial labour standards laws, have proved almost completely ineffective at sanctioning employers who remove and blacklist workers that have tried to assert their rights.

In 2014, the federal government removed the requirement that migrant care workers reside with their employer, although live-in arrangements are still permitted. However, the federal Caregiver Program still incorporates two employer-tying policies - these workers are still issued employer-specific work permits and 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

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.

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.

⁷ Arat-Koç, *supra* note 2 at 54; Abigail B. Bakan & 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) 29 at 33-34; Patricia M. Daenzer, *Regulating Class Privilege: Immigrant Servants in Canada, 1940s-1990s* (Toronto: Canadian Scholars' Press, 1993).

determined by their employer (which typically means residing at their workplace and employer's place of residence).

While the use of one employer-tying policy is often enough to prevent a worker from leaving their employer, governments tend to use multiple measures that operate in different ways but that are mutually reinforcing.⁸ In the case of the federal Caregiver Program, the two remaining policies have been referred to as a 'carrot and stick' combination.⁹ 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, guaranteed 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 (SAWP), 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.

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.

⁹ Abigail B. Bakan & Daiva Stasiulis, "The Political Economy of Migrant Live-in Caregivers: A Case of Unfree Labour?" in Patti Tamara Lenard & Christine Straehle eds, *Legislated Inequality: Temporary Labour Migration in Canada* (Montreal: McGill – Queen's University Press, 2012) at 204.

FUNDAMENTAL RIGHTS IN CANADA

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.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'.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.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.¹³

The first step in establishing a section 7 violation requires demonstrating that there is a 'sufficient causal connection' between the state action or law and the limit on life, liberty or security of the person. This standard does not require that the state action be the only or even 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.¹⁴

Secondly, laws or state actions that interfere with life, liberty or security of the 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.¹⁵ If this is established, the 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 such limit is demonstrably justified in a free and democratic society.

The test for what constitutes a reasonable limit according to 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

¹⁰ *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 at 202.

¹¹ *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, at para 65 [G. (J.)]; *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84 at para 77 [Gosselin].

¹² *G. (J.) supra* note 11 at para 58; *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9 at paras 17 – 18, 1 S.C.R. 350.

¹³ *Chaoulli v. Quebec (A.G.)*, 2005 SCC 35 at paras 124 and 194-199 [Chaoulli].

¹⁴ *Bedford v. Canada (A.G.)*, 2013 SCC 72 at para 76 [2013] 3 SCR 1101 [Bedford].

¹⁵ *Ibid* at paras 96 – 109.

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 in 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.¹⁶ As such, there exists a precedent in another national jurisdiction that employer-tying policies deprive migrant workers of their fundamental right to liberty and security of the 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 life, liberty or security of the person in an arbitrary, overbroad or grossly disproportionate manner would necessarily also fail one or more of the three elements of the Oakes test.¹⁷

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

¹⁷ Hamish Stewart, "Bedford and the Structure of Section 7" (2015) 60:3 McGill LJ 575 at 588 – 589.

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 of 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.¹⁸ 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'.¹⁹

However, liberty in section 7 'is not synonymous with unconstrained freedom'.²⁰ 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.²¹ 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 the 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;
- the 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.²²

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 status, 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 guaranteed²³).

Employment-based access to permanent residence status 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

¹⁸ *R. v. Vaillancourt*, [1987] 2 S.C.R. 636; *R. v. Swain*, [1991] 1 S.C.R. 933; *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625 at paragraph 64; *R. v. Demers*, 2004 SCC 46 at para 30, [2004] 2 S.C.R. 489; *R. v. Heywood*, [1994] 3 S.C.R. 761 at 789.

¹⁹ *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844 at para 66; *Association of Justice Counsel v. Canada (Attorney General)*, 2017 SCC 55 at para 49.

²⁰ *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 at para 155 [*Edwards Books*].

²¹ *R. v. Malmø-Levine*; *R. v. Caine*, [2003] 3 SCR 571 at paras 86-87; *R. v. Clay*, [2003] 3 S.C.R. 735 at para 32.

²² *In B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 at paras 83 - 85.

²³ Obtaining another work permit requires securing a position with an employer who has been authorized by the government to hire a foreign temporary worker. The authorization process can take many weeks. 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 'The Right to Security of Person'.

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.

"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"

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

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 taxation²⁸ 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.

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.³⁰ Despite a very clear prohibition against slavery and involuntary servitude, the abolition of slavery in the United States led to the proliferation of a wide variety of laws and

²⁴ See generally Mandana Vahabi & Josephine Pui-Hing Wong, "Caught between a rock and a hard place: mental health of migrant live-in caregivers in Canada." (2017) 17:498 BMC Public Health [Vahabi & Wong].

²⁵ *Edwards Books supra* note 20 at para 155; *Walker v. Prince Edward Island*, [1995] 2 S.C.R. 407; *Prostitution Reference - Reference re: Criminal Code*, section 193, paragraph 195.1(1)(c) (*Man. C.A.*), [1990] 1 S.C.R. 1123 at page 1179.

²⁶ *Gosselin supra* note 11 at para 80; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at 1003.

²⁷ *R. v. Neale*, 1986 ABCA 169 (CanLII) at para 23.

²⁸ *Country Wide Plumbing & Heating Ltd. v. Canada*, 2006 TCC 101; *R. v. Grabowsky*, 2006 ABCA 254.

²⁹ *Gresham v. Gresham*, 1988 CanLII 5230 (SK CA).

³⁰ US Const amend XIII, s. 1.

practices in southern states designed to hold freed black people in a system of unfree labour.³¹ 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.³²

Notably, in the 1944 case of *Pollock v. Williams*, the right to quit (and change employers) was emphasized as integral to the 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.³³

Importantly, Thirteenth Amendment jurisprudence did not just elaborate which rights are implied by the right to 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.³⁴ 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':³⁵

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.³⁶

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'.³⁷

The parallel 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 is 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'

³¹ William Cohen, "Negro Involuntary Servitude in the South, 1865-1940: A Preliminary Analysis" (1979) 42:1 The Journal of Southern History 31.

³² James Gray Pope, "Contract, Race, and Freedom of Labor in the Constitutional Law of "Involuntary Servitude"" (2010) 119:7 Yale L.J. 1474 at 1478 [Pope].

³³ *Pollock v. Williams* (1944), 322 US 4 (United States Supreme Court).

³⁴ *Shaw v. Fisher* (1920) 102 S.E. 325, 113 S.C. 287 [*Shaw*].

³⁵ Pope *supra* note 32 at 1531.

³⁶ *Shaw supra* note 34.

³⁷ Pope *supra* note 32 at 1518.

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 has 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'³⁸ was characterized as originating 'in the freedom and dignity of the human being'.³⁹ 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.⁴⁰

Two years later, the Court reaffirmed that restrictions on the right to resign were incompatible with the rights to liberty and to dignity. In the 2006 case of *Kav LaOved*, the issuance of employer-specific work authorizations 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 value of the employment contract and the basic purpose of the employment contract in guaranteeing the economic survival, dignity and liberty of the worker.⁴¹

As in Canada, migrant workers in Israel were able to change employers if they applied to have their permit amended. While there are some technical differences between the 'change of employer' procedure that was available in Israel and the one here in Canada⁴², by design they followed the same principle, workers could continue to reside in the country but they could not legally work until their request to change employers was processed. Importantly, the Court stated that this specific aspect of the 'change of employer' procedure made the entire procedure incapable of negating the violation of the right to resign. Since workers were not authorized to work until they had been issued a new work permit, it imposed a '*work or starve*' situation on the worker:

³⁸ *Kav LaOved supra* note 16 at 290.

³⁹ H CJ 8111/96 *New Federation of Workers v. Israel Aerospace Industries Ltd* at 595-597.

⁴⁰ *Ibid.*

⁴¹ *Kav LaOved supra* note 16 at 288 – 289.

⁴² The 'change of employer' procedure in Israeli required workers to file a request before leaving an employer and provide a reason for the change. However, the Court focused its analysis on the effect of the loss of the authorization to work.

[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).⁴³ (emphasis added)

As such, the effects of the employer-specific work permit were considered wholly incompatible with workers' rights to liberty and dignity. Vice-President Emeritus M. Cheshin, in his concurring reasons, concluded that the policy created 'a modern form of slavery'.⁴⁴

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 permits and employment-based access to permanent residence status should be acknowledged as state restrictions on the right to resign and change employers, 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.

⁴³ *Ibid* at 301.

⁴⁴ *Ibid* at 314.

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.⁴⁵ 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.⁴⁶ 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.⁴⁷

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.⁴⁸

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.⁴⁹

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.⁵⁰ The ease at which workers can lose their status and become irregular cultivates conditions in which their risk of experiencing human trafficking is greatly increased.

⁴⁵ See e.g. *Carter v. Canada (Attorney General)*, 2015 SCC 5 [Carter]; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519; *R. v. Morgentaler*, [1988] 1 S.C.R. 30 [Morgentaler]; A.C. Manitoba (Director of Child and Family Services), 2009 SCC 30.

⁴⁶ *R. v. Monney*, [1999] 1 S.C.R. 652 at para 55; *Chaoulli supra* note 13; *R. v. Parker*, 49 O.R. (3d) 481 (C.A.)

⁴⁷ *Bedford supra* note 14; *R. v. Michaud*, 2015 ONCA 585.

⁴⁸ *Ibid* at para 89.

⁴⁹ *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 at para 97 – 106.

⁵⁰ *Kav LaOved supra* note 16 at 296 – 299.

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.'⁵¹ 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.⁵²

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.'⁵³ 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'.⁵⁴ 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.⁵⁵

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 acted as 'an impediment to laying charges and securing convictions for human trafficking under the Criminal Code'.⁵⁶ 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.⁵⁷

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 Beatson, Hanley and Ricard-Guay, who studied 36 cases of labour trafficking, involving an estimated 243 victims, over a period of 15 years in Canada.⁵⁸ This framework posits labour trafficking as existing 'within a matrix of exploitation and coercion'.⁵⁹

Similar to the Court's finding in *Kav LaOved*, it is well documented that workers arrive in Canada and discover that the job they were promised no longer exists ('released upon arrival'), either because the employer's need for the worker legitimately expired during the delay between the job offer and the arrival of the worker or because the job offer was fraudulent.⁶⁰ Regardless of the reason, the result is that the

⁵¹ Criminal Code, RSC 1985, c C-46, s 279.04(1).

⁵² Jesse Beatson et al, "The Intersection of Exploitation and Coercion in Cases of Canadian Labour Trafficking" (2017) 26:1 Journal of Law and Social Policy at 142 [Beatson et al].

⁵³ UN General Assembly, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000.

⁵⁴ Convention concerning Forced or Compulsory Labour, 28 June 1930, 39 UNTS 55 at 58 (entered into force 1 May 1932).

⁵⁵ *United States v. Kozminski*, 487 U.S. 931 (1988).

⁵⁶ Lindsay E. Burgess, "Prosecuting Human Trafficking Offences in Canada: An Analysis of the Provisions of the Immigration and Refugee Protection Act and the Criminal Code, 2014, at 19.

⁵⁷ Beatson et al, *supra* note 52 at 142 - 143.

⁵⁸ *Ibid* at 137.

⁵⁹ *Ibid* at 145.

⁶⁰ Elsa Galerand, Martin Gallié & Jeanne Ollivier Gobeil, "Domestic Labour and Exploitation: The Case of the Live-In Caregiver Program (LCP) in Canada", SAC - PINAY Research Report, January 2015

worker arrives in Canada, saddled with thousands of dollars of debt and is legally prohibited from working. Needing to satisfy their debt, sustain themselves, and send remittances home to their families, workers will inevitably accept any legal job offered no matter the substandard conditions and, until then, engage in irregular employment, either for the placement agency or arranged by them, sometimes even for the original employer⁶¹:

Workers, pressed by financial need and pressure from the agency, will take the risk of working these jobs under the table. In at least two of these cases, the agency managed the workers wages and took a cut of 20%.⁶²

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.⁶³ 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.⁶⁴ As one study stated 'recruitment agencies not only exploit financial need but exacerbate it'.⁶⁵

This engagement in irregular work makes workers vulnerable to threats of arrest and deportation. These types of threats have been recognized as constituting a 'menace of penalty'⁶⁶ or a threatened use of legal coercion.⁶⁷ 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.⁶⁸ 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'.⁶⁹ 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.

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)

Workers' dependency on recruiters and employers for the consolidation, renewal or regularization of their status leads not only to labour exploitation, but also financial exploitation. Often, workers do not only see their documents confiscated, movements restricted and monitored, but also have their earnings controlled

⁶¹ Fay Faraday, "Profiting from the Precarious: How Recruitment Practices Exploit Migrant Workers" (Toronto: George Cedric Metcalf Charitable Foundation) 2014 at 39 [Faraday, "Profiting from the Precarious"].

⁶² Lindsey Larios et al. "Recruiting Migrant Careworkers: The exploitation of financial need, immigration precarity, and relationship" Draft Paper presented to Centre for Immigration Policy Evaluation (CIPE/CEPI) Workshop Series on October 11, 2018 (Concordia University) (Unpublished) at 14 [Larios].

⁶³ *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 but two had paid recruitment fees.

⁶⁴ *Ibid* at 13.

⁶⁵ *Ibid* at 14.

⁶⁶ *Siliadin v France* [2006] 43 EHRR 16, 73316/01, [2005] ECHR 545, [2005] 20 BHRC 654 at para 183.

⁶⁷ *United States v. Calimlim*, 538 F.3d 706 (7th Cir. 2008).

⁶⁸ Faraday, "Profiting from the Precarious", *supra* note 61 at 34.

⁶⁹ *Kav LaOved supra* note 1616 at 286.

or completely withheld to satisfy their debt, and are coerced into signing abusive contracts with either the recruiter or employer for housing⁷⁰, loans, processing of immigration papers, job placement services, etc.

Violence, or threats of violence, might, and often do accompany these other coercive methods.⁷¹ 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.⁷²

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. Consequently, 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 Beatson, Hanley and Ricard-Guay noted in their study on labour trafficking, not one of the cases surveyed involved Canadians or permanent residents, and that was not 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.’⁷³

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 US Supreme Court 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.

⁷⁰ Larios *supra* note 62 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.

⁷¹ Beatson et al, *supra* note 52 at 155.

⁷² For example, see *PN v. FR and another (No. 2)*, 2015 BCHRT 60 [PN].

⁷³ Beatson et al. *supra* note 52 at 154.

Juan and Rodrigo attribute headaches, but also burns in the throat and skin irritations, to pesticides they breathe in during their working days. According to Rodrigo, even if they complain to their supervisors, they demand that they continue to work.

Mexican workers say they are victims of abuse on Canadian Farms, September 13, 2018 (CBC News)

Research shows that migrant workers often experience the **healthy immigrant effect**.⁷⁴ They arrive in Canada perfectly healthy (a requirement for immigration and work permits) but experience a progressive decline in health as they work 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.⁷⁵

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.⁷⁶ Studies on migrant farm workers reveal that the long hours, unreasonable productivity targets, poorly maintained equipment and inadequate personal protective equipment lead to poor occupational health among workers.⁷⁷

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.⁷⁸

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

⁷⁴ Bukola Salami, Salima Meherali & Azeez Salami, "The health of temporary foreign workers in Canada: a scoping review" (2015) 106:8 Can J Public Health e546 [Salami, Meherali & Salami]; Kerry Preibisch & Jenna Henneby, "Temporary migration, chronic impacts: International migrant worker health in Canada" (2011) 183:9 Can Med Assoc J. 1033; Pysklywee et al, "Doctors within borders: meeting the health care needs of migrant farm workers in Canada" (2011) 183:9 Can Med Assoc J 1039.

⁷⁵ Salami, Meherali & Salami *ibid*; Preibisch *ibid*; Pysklywee et al *ibid*; Gerardo Otero & Kerry Preibisch, "Farmworker Health and Safety: Challenges for British Columbia" 2010 (British Columbia: WorkSafeBC).

⁷⁶ Salami, Meherali & Salami *ibid* at e548.

⁷⁷ *Ibid*.

⁷⁸ Tanya Basok & Danièle Bélanger, "Migration Management, Disciplinary Power, and Performances of Subjectivity: Agricultural Migrant Workers' in Ontario" (2016) 41:2 Canadian Journal of Sociology at 156.

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.⁷⁹

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 endure the personal respondent's repeated invitations for her to have sex with him and his sexual touching of her thighs, breasts and buttocks.⁸⁰

This case is exceptional for being brought at all, as employer-tying policies also create barriers for the enforcement of rights. As will be further discussed in the section '**Access to Justice**', workers may be removed from the country before they have time to seek assistance, learn about their legal rights or file a complaint.⁸¹ 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.⁸²

Employer-tying Policies and State-Imposed Psychological Harm

Security of the person is also engaged when a state action has 'serious and profound effect on a person's psychological integrity'.⁸³ 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'.⁸⁴ 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'.⁸⁵

⁷⁹ Salami, Meherali & Salami *supra* note 74 at e584.

⁸⁰ *O.P.T. v. Presteve Foods Ltd.*, 2015 HRTO 675 (CanLII) at 221.

⁸¹ Fay Faraday "Made in Canada: Decent work or entrenched exploitation for Canada's migrant workers?" (Toronto: Metcalf Foundation), 2016 at 52.

⁸² Susan Noakes (CBC News), "Sex abuse case highlights vulnerability of workers on visas", June 30, 2015, online at: <https://www.cbc.ca/news/business/sex-abuse-case-highlights-vulnerability-of-workers-on-visas-1.3129909>.

⁸³ *G.(J.) supra* note 11 at paras 59 – 60.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

In cases where section 7 has been engaged on the basis of psychological integrity, symptoms that have been present are worry,⁸⁶ stress,⁸⁷ anxiety,⁸⁸ stigmatization and the disruption of family life,⁸⁹ depression, exacerbation of a pre-existing condition, onset of mental illness, anger, cognitive disturbance, perceptual distortion, obsessive thoughts, paranoia, psychosis, suicidal thoughts, insomnia.⁹⁰ 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.

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.⁹¹ 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?⁹²

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:

[R]unning 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.⁹³

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*:

⁸⁶ *Chaoulli supra* note 13.

⁸⁷ *G.(J.) supra* note 11; *Ibid.*; *Carter supra* note 45.

⁸⁸ *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2018 BCSC 62 [BC Civil Liberties]; *G.(J.) supra* note 11; *Chaoulli supra* note 13.

⁸⁹ *G.(J.) supra* note 83.

⁹⁰ *British Columbia Civil Liberties Association supra* note 8888.

⁹¹ *G.(J.) supra* note 11.

⁹² *Morgentaler supra* note 45 at 173.

⁹³ *Carter supra* note 45 at 14.

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 (...) ⁹⁴

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 ⁹⁵ and human rights advocates, and workers themselves, ⁹⁶ 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 *nervios* ⁹⁷ 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. ⁹⁸ 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'. ⁹⁹ 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. ¹⁰⁰



Migrant caregivers wear robot masks at a Toronto protest in May 2018 to state that they aren't robots and call on the government to give them permanent residency. Image credit CBC.

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'. ¹⁰¹

Unlike migrant farm workers, who are generally unable to ever qualify for permanent status, migrant care workers do have limited access to permanent residency. This possibility to apply for permanent residency

⁹⁴ *Kav LaOved supra* note 16 at 314.

⁹⁵ UFCW Canada, *The Status of Migrant Farm Workers in Canada* 2015 at 1.

⁹⁶ Stephanie Mayell, *Up-rooted lives, Deep-rooted Memories: Stress and Resilience among Jamaican Agricultural Workers in Southern Ontario* (Thesis submitted for Degree Master of Arts, McMaster University, 2016) [unpublished] at 34 [Mayell].

⁹⁷ *Nervios*, or "attack of nerves" is a cultural-bound syndrome common among the Latin American community with symptoms similar to anxiety.

⁹⁸ Salami, Meherali & Salami *supra* note 74 at e548.

⁹⁹ Avis Mysyk, Margaret England & Juan Arturo Avila Gallegos, "Nerves as embodied metaphor in the Canada/Mexico Seasonal Agricultural Workers Program" (2008) 27:4 *Medical Anthropology* 383 at 383.

¹⁰⁰ Mayell *supra* note 96 at 64.

¹⁰¹ Vahabi & Wong *supra* note 24.

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.¹⁰² 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.¹⁰³

Additionally, employment-based access to permanent residency is on its own a source of considerable stress and uncertainty for these workers.¹⁰⁴ 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.¹⁰⁵

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

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid*; *Care Worker Voices for Landed Status and Fairness*, November 2018 Report.

¹⁰⁵ Salami, Meherali & Salami *supra* note 74.

ACCESS TO 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.¹⁰⁶ 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.¹⁰⁷

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’.¹⁰⁸

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.¹⁰⁹ 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.¹¹⁰ In this case, hearing fees equivalent to one month’s income for the complainant were considered to prevent access in a manner inconsistent with s. 96 of the *Constitution Act, 1867* and the underlying principle of the rule of law.¹¹¹

EMPLOYER-TYING POLICES AND ACCESS TO THE COURTS

While the Canadian government might proudly proclaim ‘Temporary foreign workers: Your rights are protected’¹¹², 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 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

¹⁰⁶ *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59 at para 39, [2014] 3 SCR 31 [*Trial Lawyers Association*].

¹⁰⁷ *Ibid* at para 35.

¹⁰⁸ *Ibid* at para 38.

¹⁰⁹ *Ibid* at paras 52 - 55.

¹¹⁰ *Ibid* at paras 44 – 49.

¹¹¹ *Ibid* at para 64.

¹¹² Employment and Social Development Canada, Temporary foreign workers: Your rights are protected. Available online at: <https://www.canada.ca/en/employment-social-development/services/foreign-workers/protected-rights.html>

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, 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.¹¹³

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 *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]**¹¹⁴

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

¹¹³ See for example: The Alberta Federation of Labour, *Temporary Foreign Workers: Alberta's disposable workforce*, November 2007; Migrant Workers Centre, *Envisioning Justice for Migrant Workers: A Legal Needs Assessment*, March 2018.

¹¹⁴ *Fraser v. Canada (Attorney General)*, 2005 CanLII 47783 (ON SC) at paras 116 – 119.

rights, especially the fear of reprisals in the form of forced repatriation and future blacklisting from the employment program in Canada.¹¹⁵ In 2013, the Ontario Human Rights 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.¹¹⁶

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]¹¹⁷

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, 1867*.

¹¹⁵ *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 paras 174 and 177.

¹¹⁶ *Monrose v. Double Diamond Acres Limited* (2013), HRTO 1273 (Human Rights Tribunal of Ontario) at paras 11, and 55, 58-59, 61.

¹¹⁷ *Trial Lawyers Association supra* note 106 at para 40.

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 for 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 *Charter* challenge, finding an individual who can commit to the long and resource intensive experience of constitutional litigation.

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 the 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.