

Health Issues

Under Canada-Sponsored Migrant Worker Indentureship

*Indentureship - the state of being a servant bound to service for a specified time in return for passage from and return to an economic colony
(adapted from the *Oxford English Dictionary* On-line).

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Introduction

There is evidence that Canada may permit the existence of “third world” working conditions and living conditions for some of our temporary migrant workers. There is also evidence that for others – perhaps a significant number – it permits the existence of working and living conditions that most Canadians would find appalling, and that are certainly far below even the most basic standard we have come to expect in this country.

There is an important additional aspect to the broader issue of living and working conditions for temporary migrant workers that we want to mention briefly at the outset. It relates to the temporary migrant workers exploited in other countries with whom we do business. These are the countries whose products and services we enjoy at a cost substantially lower than it would be under normal production conditions. Some argue that we are exploiting these temporary migrant workers by our purchase of products and utilization of services from those countries.

Thai Fishing Industry

There are two examples we want to mention just briefly – one is the Thai fishing industry, and the other is the World Cup soccer industry.

One of the most extreme examples is that of Thai fishermen. Thailand has a dominant presence in the Southeast Asians fishing sector, earning about \$7 billion annually in exports. Much of the product is destined for North America – to Walmart, Sysco - whose food transport trucks seem to be everywhere here in Vancouver in the early hours of the morning - and Kroger. Thai fish products are also used in a range of well-known canned pet food such as IAMS and Fancy Feast.

The workers on the Thai boats, the fishermen, have been taken from Indonesia, Myanmar, Thailand, Cambodia, and Laos to work under slavery like conditions – deprived of any medical care, force to work without pay, minimal food and water, and inhuman hours.¹

¹ Esther Htusan & Margie Mason, “It was like our lives were already over: Thousands return home after years of slavery on Thai seafood boats”, *Vancouver Sun*, September 17, 2015.

**We are grateful to Dr. Mia Reimers, a third year law student at the University of Alberta in Edmonton, for her excellent research on the Kafala sponsorship system so brutally implemented in Qatar for the world cup construction and to Rowan MacPhail, a fourth year Law & Legal Studies student at Carleton University in Ottawa for her excellent research and drafting this paper. McGrady & Company and Dr. O’Hagan had the benefit of both working with us during the summer, 2015.

World Cup Soccer Industry

The second example I want to briefly mention is the Kafala sponsorship system being used to build facilities for the soccer World Cup in 2022. I will describe it briefly because in a number of dramatic ways it bears some structural resemblance to the system the Canadian government has put in place. The ostensible purpose of the Kafala system is to ensure that foreign migrant workers do not overwhelm the population of national workers. It requires that each worker be sponsored by an employer.

Like our Temporary Foreign Workers program in which the Canadian government is an absentee party when it comes to regulation and enforcement in substance rather than mere word, the Qatar government has delegated control over migrant workers to private interests. Workers are tethered to private employers, unable to change jobs, as here, without the employer's permission. Passports are confiscated even though that is illegal. Employers themselves can make workers illegal because they have the power to cancel residency visas. Huge recruitment fees must be paid by the workers.

The temporary migrant workers in Qatar are from Nepal, India, Sri Lanka, and Bangladesh. The figures in the most recent report are only addressing issues in the Nepalese migrant community. Their 2014 death rate amongst those constructing the building infrastructure for the World Cup is one every 2 days. If the figures from the other nationalities are added in, the expectation is that the figure will be one every day. A number of these are from workplace accidents; others are from sudden cardiac arrest and heart attacks from working long hours and temperatures that regularly exceed 50°C.²

The Qatar migrant worker death rate, much of it is World Cup construction related since 2010, was recently graphically presented in an article from the *Washington Post*, reproduced by Andrew Barr in the *National Post*, May 29, 2015.

² Owen Gibson & Pete Pattison, "Death toll among Qatar's 2022 World Cup Workers revealed", *The Guardian*, December 23, 2014.

An unprecedented death toll in Qatar


 = 1 worker death

London
2012 Olympics


Vancouver
2010 Olympics


South Africa
2010 World Cup


Brazil
2014 World Cup


Sochi
2014 Olympics


Beijing
2008 Olympics


Qatar
2022 World Cup (so far)



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Sources: The Guardian, Building and Wood Workers International, WorkSafe British Columbia, Al Jazeera, The New York Time, International Trade Union Confederation

Final Comments

There are two final comments we want to make in this introduction before proceeding to the substance of the paper. The first is to acknowledge the extraordinary work over many years by some members of the British Columbia academic community. One is Dr. Gerardo Otero, a Professor of International Studies at SFU. His work on the subject of migrant worker rights, particularly health and safety issues, is extraordinary. Others from British Columbia who have written admirably on migrant worker rights include Professor Judy Fudge of the Faculty of Law University of Victoria, and Professor Fiona MacPhail of the University of Northern British Columbia. Another activist who has worked tirelessly and has done extraordinary work is David Fairey, a well-known labour economist. David is our closing speaker tomorrow afternoon.

The second is to acknowledge that this paper is intended to be a survey of health issues and possible remedies, rather than an in-depth analysis of some aspects of the health risks faced by migrant workers. The survey nature of this paper will become evident as our colleagues present their more detailed research-oriented papers.

Who Are Our Temporary Migrant Workers?

Migrant workers, those workers who come to Canada under the Temporary Foreign Workers program, work in Canada for any amount of time between six weeks and four years. Under the Temporary Foreign Workers program, there are four streams under which migrant workers can be granted temporary work visas: the Live-In Caregiver Program, the Seasonal Agricultural Program, low skill occupations, and high skill occupations.³

In 2013, the largest number of Temporary Foreign Workers entering Canada was under the high skill stream (76,324), followed by the Seasonal Agricultural Program stream (41,700), the low skilled stream (38,668), and then the Live-In Caregiver Program (23,848).⁴

It is difficult to know what to make of the policy introduced by the Canadian government effective April 1, 2015, that required any “low skill” temporary migrant worker who has been here for 4 years to leave; and that bars them from re-entry for 4 years – what has been called the 4 in 4 out rule. Some have described it as leading to a mass exodus, others have described it as another smoke and mirrors policy. Tough looking on paper, but with no substance, no reality, and no enforcement - both for lack of will, and for lack of personnel resulting from successive lay-offs in the federal public sector.

They do not take seriously the statements of Immigration Minister, Chris Alexander, when he solemnly intones, “Let there be no mistake: we will not tolerate people going ‘underground’. Flouting our immigration laws is not an option ...”⁵

³ Government of Canada, *Facts and Figures: Immigrant Overview, Temporary Residents* (Ottawa, ON: Government of Canada, Citizenship and Immigration, 2013), 14.

⁴ Government of Canada, *Facts and Figures*, 29.

⁵ Les Whittington & Nicholas Keung, “Temporary foreign workers warned to leave Canada as required” *Toronto Star*, April 1, 2015.

There can be no question however that it has had an unsettling, some have said even terrorizing, impact on the significant component of the temporary migrant work force, who will be intimidated by it and in fact leave.

Although migrant workers come from upwards of 50 countries, they primarily come from the Philippines, Mexico, the United States, Jamaica, India, and Guatemala.⁶

The largest portion of migrant workers are in the age range of 30 to 44, with an approximate 3:1 male to female ratio.⁷

In BC, migrant workers are employed in a wide range of industries. These include, but are not limited to, agriculture, fast food, engineering, the entertainment industry, construction, banks, mining, and hospitality.⁸

Migrant workers have high incidence rates of workplace injuries and illness. In fact, immigrant workers, including temporary foreign workers, are approximately twice as likely to be injured at work than non-immigrant workers. Additionally, migrant workers are less likely to report their injury and make a workers' compensation claim.

Do Migrant Workers Have Access to BC Medical?

Migrant workers who have work permits valid for a minimum of 6 months have access to BC medical services after they have lived in BC for 3 months.⁹ There does not appear to be any available information regarding what percentage of workers reside and work in Canada for longer than 6 months, only that SAWP workers (those with the shortest available work visa) can be granted a work visa for up to 8 months.

According to BC MSP, if a worker's permit is valid for less than 6 months, they must be privately insured for the entire duration of their stay.

Is Private Insurance Comparable?

During the first 3 months of their employment and residence in BC, employers are required to provide private health insurance for migrant workers.¹⁰ According to Professors Otero

6 Government of Canada, *Facts and Figures*, 17.

7 Government of Canada, *Facts and Figures*, 9, 26.

8 Bill Curry, "Everything you need to know about temporary foreign workers," *Globe and Mail*, May 2, 2014; Colin Singer, "Decline in Foreign Worker Approvals To Worsen With Introduction of Harsh Penalties," Monday, July 15, 2015; BC Chamber of Commerce, "Canada's Chambers call on feds to fix air access, TFW program," BC Chamber of Commerce, September 30, 2013; CUPE, "Fact Sheet: Temporary Foreign Workers Program," CUPE, August 28, 2013; Justine Hunter, "B.C. freezes worker-immigration program as backlog grows," *Globe and Mail*, March 31, 2015.

9 Welcome BC, *Welcome to British Columbia: Information for Temporary Foreign Workers* (BC: Welcome BC, 2015), 4; Gerardo Otero and Kerry Preibish, *Farmworker Health and Safety: Challenges for British Columbia* (WorkSafeBC, 2010), 70-73; Anette Sikka, Katherine Lippel, and Jill Hanley, "Access to Health Care and Workers' Compensation for Precarious Migrants in Quebec, Ontario and New Brunswick," *McGill Journal of Law and Health* 5, no. 2 (2011): 209.

10 Canadian Council for Refugees, *Report Card: Migrant workers in British Columbia* (Montreal, QC, Canadian Council for Refugees, 2013), 1; Kerry Preibisch and Jenna Hennebray, "Temporary Migration, Chronic Effects: The Health of

and Preibisch, it is the employers who are required to cover the cost of medical insurance for the first 3 months of employment. Employers are, however, entitled to recoup this fee by deducting one dollar a day from the workers' salaries.¹¹

The private insurance provided to the temporary foreign workers is not comparable to BC's Medical Service Plan. It has been accurately described as "bare-bones protection", charges often must be paid upfront with reimbursement taking up to six weeks, and many first points of medical access (i.e., walk-in clinics) do not accept private health insurance.¹²

During the first 3 months of employment, employers who have hired Temporary Foreign Workers under the low skilled stream must pay for their employees' health insurance.¹³ Under the high skill stream, employers are not required to pay for employees' private health insurance.

Lastly, walk-in clinics are the most available form of health care a migrant worker can access. However, walk-in clinics often lack the specialization and diagnostic tools to diagnose work related injuries.¹⁴

In regards to private health insurance (migrant workers' coverage during their first three months of employment), further barriers exist in addition to the ones discussed above. Under private health care schemes, it is often required that individuals pay for services upfront and they will be reimbursed up to 6 weeks later; this is often a huge deterrent for those seeking medical care.¹⁵ As mentioned above, the insurance that most migrant farm workers receive through private insurance was described as "bare-bones protection" by one Mexican migrant worker.¹⁶

Lastly, as mentioned above, walk-in clinics are the most accessible health service available to migrant workers. But most walk-in clinics do not accept private health care plans.¹⁷ Thus, although migrant workers are legislated to receive MSP 3 months after they arrive in BC, their experiences with the BC MSP are not up to the same standards that most residents experience.

International Migrant Workers in Canada," *Canadian Medical Association Journal* 183, no. 9 (2011): 1036; Otero and Preibisch, *Farmworker Health and Safety*, 70; Sikka, Lippel, and Hanley, "Access to Health Care," 209.

11 Professors Otero and Preibisch, *Farmworker Health and Safety*, 70.

12 Otero and Preibisch, *Farmworker Health and Safety*, 71, 72.

13 Welcome BC, *Welcome to British Columbia*, 4; Government of Canada, *Temporary foreign workers: Your rights are protected* (Ottawa: Government of Canada, Citizenship and Immigration, 2013).

14 Otero and Preibisch, *Farmworker Health and Safety*, 70.

15 Otero and Preibisch, *Farmworker Health and Safety*, 72.

16 Otero and Preibisch, *Farmworker Health and Safety*, 71.

17 Sandra Elgersma, *Immigration Status and Legal Entitlement to Insured Health Services* (Ottawa: Library of Parliament, 2008), 7.

Despite the fact that workers are eligible for MSP after 3 months, Professors Otero and Preibisch found that only 8% of their study sample of agricultural migrant workers were “enrolled in public health care.”¹⁸

Barriers to Achieving Health Care Coverage, Private or Public

Although migrant workers are supposed to have access to medical services, there are many barriers that prevent them from adequately receiving health care – whether it is private health care or BC medical.

While covered under BC’s Medical Services Plan (MSP), migrant workers still do not have the same access to services that most BC residents do. The primary reasons for this are simple – most employers do not bother to inform their employees of this right.

But even when migrant workers are informed of their rights, access is often difficult, or practically speaking, impossible. The obstacles are many:

- ✓ long work hours,
- ✓ language barriers,
- ✓ limited literacy,
- ✓ fear of jeopardizing their employment if they report health concerns to their employer,
- ✓ geographic remoteness of employment locations,
- ✓ lack of transportation, and
- ✓ a lack of understanding of the coverage they receive.¹⁹

In fact, according to a study conducted by Professors Otero and Preibisch in 2010, 74% of surveyed Mexican migrant farm workers in BC said they have a “poor or very poor understanding” of their medical insurance.²⁰

Another aspect that limits migrant workers’ access to health care is their employer. Employers often do not bring workers to a doctor when they report illnesses, occasionally

18 Kerry Preibisch and Gerardo Otero, “Does Citizenship Status Matter in Canadian Agriculture? Workplace Health and Safety for Migrant and Immigrant Laborers,” *Rural Sociology* 79, no. 2 (2014): 191.

19 Otero and Preibisch, *Farmworker Health and Safety*, 30, 66, 70; Janet McLaughlin, “Determinants of Health of Migrant Farm Workers in Canada,” *Health Policy Research Bulletin* 17 (2010): 32; Jaqueline Oxman-Martinez et al., “Intersection of Canadian Policy Parameters Affecting Women with Precarious Immigration Status: A Baseline for Understanding Barriers to Health,” *Journal of Immigration and Minority Health* 7, no. 4 (2005): 247; Michael Pysklywec et al., “Doctors Within Borders: Meeting the Health Care Needs of Migrant Farmworkers in Canada,” *Canadian Medical Association Journal* 183, no. 9 (2011): 1041-42.

20 Otero and Preibisch, *Farmworker Health and Safety*, 70.

retain care cards and/or social insurance cards, and may even repatriate a worker before they can receive health care.²¹

Otero and Preibisch also found that even though employers are required to register employees for BC's MSP after they have been working in Canada for 3 months, many continue to simply provide private health care as it is cheaper than MSP.²²

Families of Migrant Workers

In theory, migrant workers do have the potential opportunity to bring their children with them to Canada for the duration of their stay. However, it can almost never be achieved for those migrant workers in the low-skilled, Agricultural, or Live-In Caregiver streams.²³ Conversely, high-skill migrants are generally able to bring their families with them if they choose.

Although low skilled migrant workers are “not barred” from being accompanied by their families, they are responsible for all travel and accommodation costs, which makes it not feasible for most temporary foreign workers.²⁴ An additional barrier for Live-In Caregivers is that their family members must live with their employer, and therefore, must gain permission from the employer.²⁵ This means that the vast majority of migrant workers leave their children in their origin country to be cared for by relatives – in fact, 95% of SAWP workers have children who they have had to leave in their country of origin while working in Canada.²⁶

Pregnancy

According to the Commission for Labor Cooperation, if a female temporary foreign worker becomes pregnant while working in Canada, she is entitled to continue working for as long as she is able to adequately perform her job.²⁷ Additionally, as long as residency

21 Otero and Preibisch, *Farmworker Health and Safety*, 66; Harsha Walia, “Transient Servitude: Migrant Labour in Canada and the Apartheid of Citizenship,” *Race & Class* 52, no. 1 (2010): 74; David Fairey et al., *Cultivating Farmworker Rights: Ending the Exploitation of Immigrant and Migrant Farmworkers in BC* (Vancouver: Canadian Centre for Policy Alternatives – BC Office, Justicia for Migrant Workers, Progressive Intercultural Community Services, and the BC Federation of Labour, 2008), 55; Aaron Orkin et al., “Medical Repatriation of Migrant Farm Workers in Ontario: A Descriptive Analysis,” *Canadian Medical Association Journal Open* 2, no. 3 (2013): 193.

22 Otero and Preibisch, *Farmworker Health and Safety*, 7, 72, 73.

23 Judy Fudge, *The Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers* (Vancouver, BC: Metropolis British Columbia, 2011), 30, 17.

24 Fudge, *The Precarious Migrant Status*, 30; Judy Fudge and Fiona MacPhail, “The Temporary Foreign Worker Program in Canada: Low-Skilled Workers as an Extreme Form of Flexible Labour,” *Comparative Labour Law and Policy Journal* 31, no. 5 (2009): 123.

25 Government of Canada, *Help Centre: Can my family come to Canada with me if I am a live-in caregiver?* (Ottawa: ON: Government of Canada, Citizenship and Immigration, 2015).

26 Jenna Hennebry, Janet McLaughlin, and Kerry Preibisch, “Out of the Loop: (In)access to Health Care for Migrant Workers in Canada,” *Journal of International Migration and Integration* (2015): 8.

27. Commission for Labor Cooperation, *Guide to Labor and Employment Laws for Migrant Workers* (Washington: Commission for Labor Cooperation, 2000), 26.

requirements are met, pregnant temporary foreign workers are also eligible for EI if they take time off of work during their pregnancy.²⁸

Despite these supposed pregnancy rights, Orkin et al found that temporary foreign workers have been repatriated for becoming pregnant; thus, they were not able to carry their child to term or receive health care or EI benefits in Canada.²⁹

There does not appear to be any oversight to ensure that migrant workers know about their health care rights. For example, when asked about their understanding of their medical insurance, 74% of Mexican agricultural workers said that their understanding was “poor or very poor”.³⁰

Retaliation

Even when medical services are available, 69% of migrant farm workers fear jeopardizing their employment by taking time off work while injured, 42% of Mexican migrant workers believe that their bosses do not do “what is necessary to guarantee the health and safety of his workers,” and that 45% of surveyed migrants were afraid of the repercussions if they reported their concerns to their employers.³¹

Coverage under Workers’ Compensation?

As insurance rates vary greatly depending on the industry and are dependent on many factors, we contacted WorkSafeBC for a specific example of insurance premiums. As many migrant workers work in agriculture, the example discussed relates to berry farming in BC. If a berry farm employs 15 workers, has an annual payroll of \$750,000, has been open since 2012, and had no accidents between 2012 and 2014, their insurance rate in 2016 would be \$1.49 for every \$100 of payroll. Thus, their insurance premium for the 2016 year would be \$11,175.

However, if an accident occurs in 2014 and the employees’ claim costs \$2,000, the employer’s rate would be readjusted to \$1.53 per \$100 of payroll and insurance would then cost \$11,475: a \$300 increase compared to if there had been no accidents.

If the claim for the accident in 2014 actually costs \$10,000 (instead of \$2,000) then the employer’s rate would become \$1.61, raising insurance costs to \$12,075: \$900 more than if no accident had occurred.

28 Commission for Labour Cooperation, *Guide to Labor and Employment Laws*, 27, 28.

29 Orkin et al., “Medical Repatriation,” 195.

30 Otero and Preibisch, *Farmworker Health and Safety*, 70.

31 Preibisch and Otero, “Does Citizenship Status,” 185, 192; Canadian Press, “BC’s migrant workers suffer ill health, poor conditions: Studies,” *Vancouver Observer*, April 18, 2011.

Similar to the situation for migrant workers and health care, migrant workers do have access to workers' compensation, but many barriers prevent workers from being fairly compensated.³²

These obstructions include:

- ✓ language barriers,
- ✓ literacy issues,
- ✓ doctors not knowing that migrant workers are eligible for workers' compensation,
- ✓ fear of losing their job,
- ✓ reluctance to take time off work to make the claim and recover from an injury as it equates to lost wages,³³
- ✓ employers have also been shown to discourage workers from making claims,
- ✓ employers intimidate workers who are considering making claims,
- ✓ they often do not rehire employees who have made workers' compensation claims,³⁴ and
- ✓ finally, if a worker performs a task at the request of their employer that is outside of their job description, they are not eligible for workers' compensation if they are injured during the task.³⁵

These barriers are very effective at limiting workers' compensation claims. In fact, it is estimated that only approximately 10% of the accidents that cause injuries to migrant farm workers are reported to the Workers' Compensation Board.³⁶ Bogyo found that migrant farm workers' claims were one third lower than both other agricultural workers and workers in all industries, despite working in a high risk environment, often with poor conditions and safety precautions.³⁷ It is clear that migrant workers (specifically migrant farm workers) are most likely injured at a rate equivalent or higher than other workers, but for reasons discussed above, are not reporting their accidents and injuries.

32 Otero and Preibisch, *Farmworker Health and Safety*, 75; West Coast Domestic Workers' Association, *Access to Justice for Migrant Workers in British Columbia* (Vancouver: West Coast Domestic Workers' Association, 2013), 33; Workers' Advisers Office, *Temporary Foreign Workers Factsheet* (BC: Ministry of Jobs, Tourism and Skills Training and Responsible for Labour, 2013), 1.

33 Otero and Preibisch, *Farmworker Health and Safety*, 30; West Coast Domestic, *Access to Justice*, 33; Janet McLaughlin, "Falling Through the Cracks: Seasonal Foreign Farm Workers' Health and Compensation Across Borders," *The LAVGO Reporting Service* 21, no. 1 (2007): 9; Tanya Basok, "Canada's Temporary Migration Problem: A Model Despite Flaws," *Migration Policy Institute* (Washington, DC), November 12, 2007; Fairey et al., *Cultivating Farmworker Rights*, 54.

34 Otero and Preibisch, *Farmworker Health and Safety*, 30, 41, 76; Fairey et al., *Cultivating Farmworker Rights*, 29, 54.

35 Preibisch and Hennebry, *Temporary Migration*, 1036.

36 Otero and Preibisch, *Farmworker Health and Safety*, 76.

37 Terrance Bogyo, "WorkSafeBC's Policy, Legislation and Responses to OHS and Newcomer Workers" (paper presented at the IWH Research and Policy Knowledge Exchange Forum on Immigration, Work and Health in British Columbia, Vancouver, BC, February 12, 2009), 37.

Another obstacle in filing for workers' compensation is the applicable knowledge needed to file. 93% of surveyed migrant workers did not know how to file a workers' compensation claim.³⁸

It is estimated that only approximately one quarter of injured migrant workers received workers' compensation for their claims.³⁹ This statistic is from Ontario, but it is likely that the statistic would be similar in BC.

Injury Statistics; Are They Maintained?

As far as we could find, there are no injury statistics kept for migrant workers in BC. The only literature that vaguely discussed migrant workers' injuries was from Ontario which found that between 2001 and 2011, of the 170,215 migrant farm workers who have worked in Ontario, 787 of them (0.46%) were "repatriated for health-related reasons"; but no statistics on injuries were discussed.⁴⁰

We contacted WorkSafeBC, Canadian Agricultural Injury Reporting, Foreign Agricultural Resource Management Services, and the Canadian Centre for Occupational Health and Safety, none of whom kept statistics that differentiate between migrant workers' injuries and permanent residents' injuries.

Although there is no direct number of migrant workers injured, some organizations have estimated the percentage of migrant workers who have been injured in agricultural jobs (but not in any other industry temporary foreign workers work in). For example, one study by McLaughlin and Hennebry estimate the percentage of migrant workers who have been injured on the job to be about 15%, which is a similar finding to a study conducted by Veruzco and Lozano which found that 16.8% of Mexican agricultural migrant workers had been injured at work.⁴¹ A more recent study by Hennebry, however, estimated that injury rates were in the 25% range.⁴²

The World Health Organization estimates that immigrant workers (including migrant workers) suffer from work place injuries at approximately double the rate of other workers.⁴³ Although no exact number can be drawn from these injury estimates, it must be acknowledged that migrant workers do have higher injury statistics than the general population. This may be caused by a multitude of interlocking factors, including higher risk occupations, less safety training, and poor to none enforcement of safety regulations.

38 Canadian Press, "BC's migrant workers."

39 J. McLaughlin and J. L. Hennebry, "Backgrounder on Health and Safety for Migrant Farmworkers in Canada," *Policy Points* 1 (2010): 5.

40 Orkin et al, "Medical Repatriation," 194.

41 McLaughlin and Hennebry, "Backgrounder on Health," 5; Janet McLaughlin, *Migration and Health: Implications for Development: A Case Study of Mexican and Jamaican Migrants in Canada's Seasonal Agricultural Workers Program* (Ottawa, ON: FOCUS, 2009), 4.

42 Jenna Hennebry, "Permanently Temporary? Agricultural Migrant Workers and Their Integration in Canada," *IRPP* 26 (2012): 17.

43 McLaughlin, "Migration and Health," 1.

Absentee Government - No Enforcement of Health and Safety Regulations for Migrant Workers?

Health and safety regulations are rarely enforced in workplaces that hire large numbers of migrant workers. This is primarily due to the complaint-driven nature of the enforcement process.⁴⁴ By requiring migrant workers to lodge a complaint before health and safety standards are enforced, the vulnerable situation migrant workers are in is not acknowledged.⁴⁵ As with workers' compensation claims and illnesses, workers may fear the consequences of making a complaint. Additional issues of this scheme are that it relies heavily on a knowledge of ones' rights in the work place. Government services do not have the capacity to address complaints if they are made in "foreign languages which are not spoken widely in immigrant communities" - all problematic for migrant workers.⁴⁶

Between the period of 1994 to 2001 and the period between 2002 and 2006, inspection reports in BC fell 62%.⁴⁷ New initiatives for inspection in agriculture (an area that employs upwards of 40% of all low skilled migrant workers) were implemented between 2007 and 2009, but were drastically cut in 2010.⁴⁸

A study conducted in Quebec found that less than half of employers who employ temporary foreign workers were observing the legal health and safety requirements.⁴⁹ Furthermore, as Rennie discovered through a request under the *Access to Information Act*, "not one Canadian employer of Temporary Foreign Workers has been inspected to date despite a Conservative government promise to do so".⁵⁰

Sections 217, 217.1, and 219 of the *Criminal Code* may be useful for enforcing employers' responsibility to ensure their workers' safety.⁵¹ There have been a few high profile cases in recent years regarding the liability of corporations for criminal negligence in their employee deaths. These cases include *R. v. Metron Construction Corp.*, 2013 ONCA 541; *R. v. Kazenelson*, 2015 ONSC 3639; *R. c. Transpave Inc.*, 2008 QCCQ 1598; *R. c. Scrocca*, 2010 QCCQ 8218; and *R. v. Katsheshuk Fisheries*, [2014] NJ No. 260.

Metron Construction Corp. was fined \$750,000 for criminal negligence that caused four deaths in 2009. Six workers were on a platform fourteen stories in the air with only two

44 Mark Thompson, "Migrant Workers in Canada: Emerging Policy Issues" (paper presented at the IWH Research and Policy Knowledge Exchange Forum on Immigration, Work and Health in British Columbia, Vancouver, BC, February 12, 2009), 7, 8; Fairey et al., *Cultivating Farmworker Rights*, 6, 23.

45 Fairey et al., *Cultivating Farmworker Rights*, 6.

46 Thompson, "Migrant Workers in Canada," 7, 8.

47 Otero and Preibisch, *Farmworker Health and Safety*, 79, 80.

48 Otero and Preibisch, *Farmworker Health and Safety*, 80.

49 Thompson, "Migrant Workers in Canada," 12.

50 Steve Rennie, "Tory government fails to inspect a single place hiring temporary foreign workers despite promise made last year," *National Post*, June 20, 2014.

51 Leo B. McGrady, Q.C. "Corporate Criminal Negligence: New Ways to Protect Employees' Health and Safety" (Vancouver, BC: February 2006).

restraining devices. The platform collapsed and the four workers who were not strapped in died and one worker who was strapped in incorrectly experienced serious injuries. The court found that Metron had not taken reasonable care to ensure their workers' safety.

Kazenelson was the project manager for Metron during the incident and in 2015 he was found guilty on four counts of criminal negligence causing death and one count of criminal negligence causing bodily harm. His sentence has not been determined.

In 2008, Transpave Inc. was fined \$100,000 for the death of a young employee. The court found that there was a disabled safety device which caused the worker's death. There was no program to ensure that the safety device worked, the safety device had been inactive for 2 years, and the employee did not receive proper training, so he did not know he was in danger. After the accident, Transpave spent \$500,000 on safety improvements and the \$100,000 fine agreed upon by the judge was a joint submission from the Crown and Transpave.

Scrocca was sentenced to a conditional sentence for 2 years less a day to be served in the community for the death of his employee. The brakes on a backhoe did not function properly and lead to this employee's death. Scrocca argued that because he did not have the requisite *mens rea*, he should not be held responsible for the death. The court, however, said the duty of care imposed under s. 217.1 of the *Criminal Code* had been breached by not servicing his equipment, and that was sufficient for a finding of guilt.

In *R. v. Katsheshuk Fisheries* an untrained employee accidentally caused the death of another worker. Katsheshuk Fisheries was then fined \$78,261 for the tragic incident.

These sections have yet to be applied to employers of temporary foreign workers, but they have significant potential as deterrents.

An area of enforcement of regulations that the literature tends to focus on is that of the housing of migrant agricultural workers. The houses that migrant farm workers live in must be inspected only at the beginning of the season, and inspections besides this initial inspection are "rare or non-existent."⁵² As a result, workers live in overcrowded residences, rarely have air conditioning or fans, often do not have access to clean drinking water, and often feel as though their health has been negatively impacted by their living arrangements.⁵³

52 Greg Laychak, "Down on the Farm: Migrant workers unhappy with conditions at Chiliwack operation," *BC Local News*, December 10, 2014; Luis Aguiar, Patricia Tomic, and Ricardo Trumper, "Mexican migrant agricultural workers and accommodations on farms in the Okanagan Valley, British Columbia," *Metropolis British Columbia* 11, no. 4 (2011): 24; Justicia for Migrant Workers, *Housing Conditions for Temporary Migrant Agricultural Workers in BC* (Vancouver: Justicia for Migrant Workers, 2007), 3.

53 Canadian Press, "BC's migrant workers"; Preibisch and Otero, "Does Citizenship Status," 189.

Conclusions

Statutory rights alone are meaningless. In fact, they are probably worse than meaningless, because they raise expectations of enforcement that never materialize, and in the end simply compound the frustration, misery, and loss.

The ideal solution of course is membership in an activist union with a passion and commitment for temporary migrant worker rights, such as UFCW, CUPE, or BCGEU.

In the absence of such membership, or perhaps in addition to it, well-funded nonprofit activist agencies such as Vancouver Community Legal Assistance Society (VCLAS) or Justicia for Migrant Workers (J4MW), or Migrante BC would perform an invaluable role.

Human Rights Complaints⁵⁴

There have been a number of dramatic cases in the past year that support the view that human rights complaints are valuable sources of remedies, and perhaps deterrence.

Here in British Columbia, *PN v FR and another* (Tribunal Member McCreary)⁵⁵ illustrates the point. In the *PN* case, complaints were filed alleging discrimination based on sex, family status, age, ancestry, colour, and place of origin, contrary to section 13. *PN* is a mother from the Philippines. She was hired through an agency to work for the respondent as a housekeeper.

The facts of the case are compelling, as is the decision finding the respondent employer guilty of almost all aspects of the complaints of discrimination (page 25). The abuse is catalogued in chart form from pages 13 to 16 and includes using both the respondent's migrant worker's children to manipulate and harass her.

In the end, the Tribunal ordered almost \$6,000 in lost wages and \$50,000 as damages for injury to dignity, feelings, and self-respect, as well as interest until those sums are paid (page 32).

The difficulty with relying on legal proceedings of this nature is of course that they are costly, time-consuming, require legal counsel as a general rule, often require expert evidence, and an ability to speak English or have access to translation services. Legal counsel in the *PN* case who achieved such a remarkable result was Devyn Cousineau, one of our speakers, who at the time was employed by VCLAS

The second human rights complaint that supports utilization of human rights legislation as a partial solution is that of *O.P.T. and MPT v Pretove Food Ltd.*, 2015 OHRTD No. 682 (M. Hart, Vice-Chair). Again the facts of this case are compelling. It involved allegations

⁵⁴ See Devyn Cousineau and Kaity Cooper, "At Risk: The Unique Challenges Faced by Migrant Workers in Canada", *CLE Human Rights Conference -2014*

⁵⁵ *PN v FR and another* (Tribunal Member McCreary), 2015 BCHRT 60.

from temporary foreign workers employed in a fish processing plant in Wheatley, a small lakeside town in Southwest Ontario.

The allegations involved unwanted sexual solicitations, sexual assaults and touching, a sexually poisoned work environment, discrimination in respect of employment because of sex and reprisal. Virtually all of the allegations were found to have been proven. The remedies ordered included damages of \$150,000 for compensation for injury to OPT's dignity feelings and self-respect, prejudgment interest of almost \$15,000 plus post-judgment interest, \$50,000 plus almost \$5,000 in prejudgment interest were ordered payable to M.P.T.

One of the most interesting aspects of the judgment was the order that the fish processing company must provide any temporary migrant worker with human rights information and training in their native language for a period of 3 years from the date of the decision.

It is also noteworthy that the workers had also organized wildcat strikes in order to obtain the return of their passports. They had worked closely with Justicia for Migrant Workers. That community organization put them in contact with Unifor, prior to the filing of the complaint.

This case also reflects the difficulty with relying on legal proceedings of this nature. The complaint was originally filed in 2012. The proceedings were supported by the union, the CAW, (now UNIFOR), and Justicia for Migrant Workers. It also required expert evidence (paragraph 25) about the nature of foreign worker programs in Canada from Dr. Preibisch, of the University of Guelph, and one of the co-authors of many of the health-related temporary migrant workers studies we have relied on for this paper.

The third and final case we have chosen involved the worst abuse. The human rights case of *Moka Balikama on behalf of all Black workers who work for Khaira Enterprises Ltd. and Khaira Enterprises Ltd., Khalid Mahmood Bajwa and Hardilpreet Singh Sidhu*, 2014 BCHRT 107 (Tribunal Member N. Trerise), is helpful from a number of perspectives. First and foremost, it demonstrates the appalling working and living conditions that may exist in British Columbia for temporary migrant workers. This case involved 55 African workers employed by a Surrey based company on contract to the provincial government.

They complained of these slavery-like conditions:

- No safe drinking water; forced to drink from the nearby creek.
- No toilet facilities at the camp.
- Daily shortage of food and malnourished workers.
- Unsafe food handling; unrefrigerated meats.
- Unsafe transportation of workers and overloaded and unsafe vehicles.
- Underpayment and non-payment of wages.
- Employment standards violations including misrepresentations of hours worked, physical and verbal abuse of workers.
- Workplace racism.

- Death threats to workers.
- Refusal of adequate medical treatment for injured workers.
- Failure to report workplace injuries to the Worker's Compensation Board.

The level of enforcement and oversight by the provincial government appeared to be almost nonexistent as a result of office closures and staff layoffs dating back over 10 years including those in the Golden area where this camp was located.⁵⁶

Damages and interest was awarded totaling an estimated \$700,000.00.

Secondly, the case also demonstrates the unacceptable time required to litigate this type of case. In this complaint the time lapse between the filing and the judgment was about 4 years. The case itself took some 26 days of evidence. Expert evidence was also required. The case was handled on behalf of the complainants by the non-profit BC Public Interest Advocacy Center.

During that entire period of time the workers would have been without their wages from the respondent company, and without any compensation for their psychological and emotional damage. In addition, their families in Africa, whom they were attempting to support by working here in British Columbia, suffered as well but were uncompensated.

Abuse Tracker

An abuse tracker is a publicly funded website, widely publicized, which in its original form tracked all information and documents relating to child abuse by Catholic clergy. It includes a database of the names of all US clergy accused of sexually abusing children and/or possessing child pornography. Links are provided to publicly filed court and mainstream media articles. It can be viewed at this website, bishop-accountability.org, if you wish more information on how it operates.

It provides an interesting model for the publication of names of employers who force temporary migrant workers to work under conditions that violate their human rights and/or provincial employment standards.

Boycotts

Boycotts can be a wonderfully effective tool, though woefully underutilized. They are often combined with corporate campaigns. This website lists successful boycott campaigns from 1986 to 2009, and also offers interesting and helpful advice to those interested in organizing effective boycotts:

<http://www.ethicalconsumer.org/portals/0/downloads/successful%20boycotts.pdf>

For information and advice on corporate campaigns - as practiced by unions, see this very helpful website: https://en.wikipedia.org/wiki/Comprehensive_campaign. The support of

⁵⁶ NUPGE, *Forestry workers abuse connected to BC cutbacks*, August 13, 2010; see also David Ball, "African Tree Planters Win Racial Discrimination Case", *The Tyee*, May 23, 2014.

religious, community, civic, consumer, environmental and other groups must be won and continuously displayed to the employer and the public.

Picketing/Leafletting

These activities are generally quite legal and can be very effective. The only limitation is that if you use picketing, even indirectly, to function as a “picket line”, discouraging workers, suppliers, or trades people from servicing the corporation you are picketing, then it becomes illegal. But if you are simply attempting to apply consumer pressure by providing information, these activities are legal.

Strikes

There have been some recent remarkable successes achieved by striking/protesting migrant workers. Some of the most dramatic examples come from Mexico, in which the workers used tactics learned from their time as temporary workers in the U.S. After 3 months of strikes and protests, berry pickers in Baja California, Mexico won pay increases of up to \$4 a day, social security benefits, and overtime. The organizing skills they utilized were learned on Florida tomato farms, with the assistance of organized labour and community coalitions.

They also benefited from the international boycott of Driscoll’s, a name familiar to all of us here in Vancouver.

Workers from Oaxaca or Guerrero travel to Washington State for the berry season. The Mexican migrant workers are working with their support organization, Families United for Justice, and community groups, to press for better wages and working conditions. They have been engaging in strikes and protests, along with boycotts of major corporations supplied by Driscoll, such as Costco.

Similar actions were taken by migrant workers in Vermont against the state dairy industry and in particular Ben and Jerry’s ice cream shops.⁵⁷

Class Actions⁵⁸

One of the best examples of the use class actions is the Denny’s restaurant action on behalf of 70 temporary foreign workers. It was launched in 2012 against Northland Properties Corporation which operates Denny’s. The case was based on Denny’s failure to provide the promised work, refusal to pay overtime and to cover expenses such as travel fees. It was settled for \$1.3 million. The company also paid the plaintiff’s legal fees, donating

⁵⁷ Sonia Singh, “How Migrant Farmworkers Are Cross – Pollinating Strategies and Winning”, *Labor Notes* July 6, 2015.

⁵⁸ See Leo B. McGrady QC, “Enforcing Employee Rights Through Class Actions” (The Lawyers Weekly, Toronto Ontario: August 2004); “Unions and Class Actions” (Canadian Association of Labour Lawyers, BC Branch, Law Courts Inn, Vancouver, BC: January 16, 2006); “Enforcing Employment Rights With Class Actions”, *Continuing Legal Education Employment Law Conference*, May 12, 2006, Vancouver Canada

\$80,000.00 to a charity of their choice. The filing of the class action is discussed by legal counsel and some of the activists involved on this YouTube clip:

<https://www.youtube.com/watch?v=iYAOEN09-w>

Of particular interest is that the class action was one of a number of strategies developed by the workers and their allies, UFCW Canada, Migrante B.C., Migrante Canada, Agricultural Workers Alliance, Coalition for Migrant Workers Justice, and others. There is some wonderful footage on YouTube of the protest in front of the Robson Street Denny's restaurant by their supporters. The protesters included one of our speakers here, Naveen Mehta from the UFCW Canada.

Class actions have also been filed against a number of major US corporations in connection with the Thai seafood slave labour scandal referred to above. The corporations include Mars Inc., IAMS Co, Proctor and Gamble, Nestles, and Costco.

Future Research

Almost all of the research done on access to health care and workers' compensation in BC has been done on migrant workers taking part in the Seasonal Agricultural Workers Program (SAWP); as a result, the barriers discussed above are barriers that arose from research directed at SAWP workers. In order to fully understand the accessibility of health care and workers' compensation for migrant workers in BC, research on Live-In Caregivers, low skill migrant workers, and high skill migrant workers should be conducted. Additionally, as no statistics were found on injuries amongst migrant workers, a study that examined how often migrant workers in the four different programs (SAWP, Live-In Caregiver, low skill, high skill – including those working in agriculture, hospitality, engineering, etc.) are injured, the medical treatment they receive, and whether or not they reported their injuries to the Workers' Compensation Board would be useful.

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