Submissions respecting the Temporary Foreign Worker Program review by the Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities

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I. Introduction

1. The following are submissions from the Community Legal Assistance Society ("CLAS") with respect to the Committee's study of the Temporary Foreign Worker Program ("TFWP").

2. CLAS will focus its comments on the circumstances of migrant workers in the "lowest-wage streams" within the TFWP and other temporary labour migration programs, including the Caregiver Program and the Seasonal Agricultural Worker Program ("SAWP").[1] Migrant workers in each of these programs experience a shared set of vulnerabilities which impose barriers to enforcing legal rights and can lead to significant harm to migrant workers. This brief will examine these vulnerabilities and proposes the following specific recommendations that would eliminate or reduce them and their potential for harm to migrant workers:

1) Grant permanent residency on arrival to migrant workers in the lowest-wage streams;
2) Abolish employer-specific work permits for migrant workers in the lowest-wage streams;
3) Reverse recent changes that are harmful to migrant workers; and
4) Introduce proactive enforcement measures and coordinate with provinces to combat labour exploitation and illegal recruitment practices.

II. Who We Are

3. CLAS is a non-profit organization that has provided free legal services to marginalized people in British Columbia since 1971. CLAS is located in Vancouver, BC but it serves people in all areas of the province. CLAS's mandate is to provide legal advice and assistance, and to use and develop the law, for the benefit of people who are marginalized. CLAS has assisted tens of thousands of British Columbians over the years through law reform, test case litigation, systemic advocacy, delivery of public legal education, summary advice, workshops and representing clients before administrative tribunals and the courts. CLAS is registered as a charity under the *Income Tax Act.*

4. CLAS provides specialized legal services, including to migrant workers, in the areas of employment standards, income security, occupational health and safety, housing, and human rights.

[1] Although the term "migrant worker" can refer broadly to foreign nationals working outside of their country of citizenship (as defined in the *International Covenant on the Rights of All Migrant Workers and Members of their Families)*, the term is used in this brief to refer specifically to low-wage workers in the TFWP, the Caregiver Program, and the SAWP (the "lowest-wage streams").

CLAS advises migrant workers about their rights in these areas and has helped migrant workers in British Columbia to file complaints where they have experienced violations of their rights. CLAS also partners with other organizations which serve migrant workers, including the West Coast Domestic Workers' Association and the British Columbia Federation of Labour, to deliver legal clinics and workshops on employment and human rights to migrant workers throughout the province.

III. Overview of challenges faced by migrant workers in Canada

Vulnerabilities faced by migrant workers

5. Canada has a long history of reliance on migrant labour. Over the last decade, reliance on "temporary" migrant labour, particularly in low-wage sectors such as caregiving, agriculture, hospitality, food services, construction and tourism, has increased significantly.[2] The majority of these workers are from countries in the developing world. They have been recognized by courts and human rights tribunals to be "uniquely" and "especially vulnerable" to abuse and exploitation, resulting in work that is "unfree".[3]

6. This high level of vulnerability is a direct result of the structure of temporary labour migration programs, including the TFWP, the Caregiver Program, and the SAWP, in which workers have a very limited ability to change jobs, even when they face poor working conditions. This places workers in a relationship of extreme dependency on their employers, allowing unscrupulous employers to control and exploit workers. For workers, this can mean having to pay illegal recruitment fees, being forced to work excessive hours without overtime pay, not being paid for hours of work performed and being paid below minimum wage. It can mean being forced to do work that is unsafe and facing the threat of repatriation if injured or sick. It can mean not having privacy in the place where one lives and being subjected to various forms of harassment, including racism and sexual harassment, in the workplace.[4] These are just some examples of the kinds of adverse treatment many migrant workers experience. In our work with migrant workers, CLAS has seen examples of these and many other forms of adverse treatment, many of which can be viewed as forms of labour trafficking.[5]

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[2] Fay Faraday, "Made in Canada: How the Law Constructs Migrant Workers' Insecurity" (Metcalf Foundation, September 2012), ["Faraday"] at p. 10.
[3] See, i.e. *Peart v Ontario (Community Safety and Correctional Services)*, 2014 HRTO 611 ["*Peart*"], at paras 145-146, and 148; *Milay v Athwal,* 2005 BCHRT 2 at para 7; *Mustaji v Tjin,* [1995] BCJ No 39, at para 27; *Dominguez v Northland Properties Corp (cob Denny's Restaurants),* 2012 BCSC 328 at para 263.
[4] Faraday, at pp. 88-94.
[5] West Coast Domestic Workers' Association, "Labour Trafficking & Migrant Workers in British Columbia" (May 2014) ["WCDWA, 2014"], pp. 13-14.

7. The structure of the TFWP means that migrant workers are dependent on their employers for their immigration status, their ability to work and support themselves, their housing and, in some cases, the prospect of remaining in Canada permanently.

8. In general, migrant workers in the lowest-wage streams arrive in Canada with temporary immigration status and closed work permits which tie the worker to a single employer. Having temporary immigration status means that the worker's ability to live and work in Canada, the services they can access, and their long term prospects in Canada, if any, are uncertain and dependent on the continuation of the employment relationship. Migrant workers in some occupations can apply for permanent residency if they meet the requirements of the immigration program in question (which typically involves completion of a certain number of hours of work within a specified time). However, most workers in the lowest-wage streams, including agricultural workers in the SAWP and most low-wage workers in the TFWP, do not have the ability to apply for permanent residency, no matter how long they live and work here.

9. Meanwhile, the closed, or employer-specific, work permit restricts the ability of migrant workers to circulate freely in the labour market. Under this system, a migrant worker cannot change jobs without receiving a new job offer from a prospective employer who has authorization to hire a foreign worker. In order to hire a migrant worker, the prospective employer must apply for a Labour Market Impact Assessment ("LMIA"), a costly and lengthy process. If offered a new job, the migrant worker can then apply for a new work permit, but this process also takes several months. During this time, the worker has very limited means of supporting herself. She is not authorized to work, faces barriers to accessing Employment Insurance ("EI") and is not eligible for social assistance.

10. Closed work permits result in a modern form of indentured labour that, together with inadequate monitoring and enforcement of recruitment practices and labour standards, create the conditions that allow unscrupulous employers and recruiters to abuse workers. In addition, workers may also be dependent on their employer for their housing, especially in the case of caregivers and agricultural workers, resulting in further vulnerability.[6] Together, these elements mean that migrant workers cannot change jobs without jeopardizing their prospects of remaining in Canada, their ability to support themselves and their families abroad and in some cases their housing. In these circumstances, workers can become trapped in abusive employment relationships, performing work that is "unfree".[7]

[6] See the discussion in WCDWA, 2014, at pp. 25-33.
[7] Devyn Cousineau, "At Risk: The Unique Challenges Faced by Migrant Workers in Canada" (November 2014) ["Cousineau"] p. 5.1.9. See also *Peart*, para 145-146 and 148.

Barriers to enforcing legal rights

11. Although migrant workers are, in theory, guaranteed the same basic employment and human rights as other workers in British Columbia, in practice, most migrant workers have no way of enforcing these legal rights.

12. Migrant workers are extremely unlikely to take legal action to enforce their rights, especially before they have obtained permanent residency in Canada (and for many workers, this is not an option). Many workers with temporary immigration status fear that if they raise concerns or make a complaint they will lose their job and their right to live and work in Canada.[8] Similarly, the "naming system" for agricultural workers in the SAWP, where employers name the workers they want to hire back the following year, also makes workers reliant on their employers for future job prospects. Even for workers who are able to find another employer, temporary job loss may mean the worker will have difficulty meeting the requirements to apply for permanent residency, if they are eligible to apply.[9] Employer retaliation is a legitimate fear and has been recognized to be a barrier to migrant workers accessing the justice system.[10]

13. Workers also face very short limitation periods to file complaints to address rights violations. In British Columbia, the limitation period to file an employment standards or human rights complaint can be as short as six months from the date of the contravention.[11] As a result, complaints about unlawful recruitment practices or other forms of labour exploitation seldom proceed because migrant workers will rarely make complaints before they have more secure status in Canada, by which time the limitation period for making a complaint has often expired.[12] Other barriers to the justice system faced by migrant workers include limited access to legal information and representation, social isolation, poor English language skills and the threat of being returned to one's home country. Even in the rare instance where a worker does succeed in filing a complaint, she may find herself back in her home country before the matter is resolved, making it extremely difficult for her to continue to advance the complaint and obtain a meaningful remedy.[13]

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[8] See WCDWA, 2014, at pp. 33-36.
[9] Ibid. For example, caregivers must complete 24 months of work within four years, making interruptions in employment problematic. In addition, new rules introduced by the federal government in November 2014 imposed caps on the number of applications accepted per year.
[10] *Fraser v Canada (Attorney General),* [2005] OJ No 5580 (Ontario Superior Court) at paras 116-117, and 119.
[11] See *Employment Standards Act*, RSBC 1996 c 113, s. 74; *Human Rights Code*, RSBC 1995 c 210, s. 22.
[12] Cousineau, p. 5.1.14
[13] Cousineau, p. 5.1.14

Recommendations for reform

14. The increasing reliance on "temporary" migrant labour in the lowest-wage streams threatens to entrench an underclass of racialized, low-wage workers who do not have equal access to legal protections, who live and work in conditions that are precarious and "unfree", and who have limited to no prospects of permanent residency in Canada.[14] This situation is unacceptable and inconsistent with our societal commitments to equality, dignity, and fairness. However, several changes to the structure of the TFWP and other temporary migration programs can begin to address the harms experienced by migrant workers in the lowest-wage streams.

15. Above all, migrant workers need secure immigration status upon arrival in Canada in order to have equal and meaningful access to legal protections in employment, housing, and human rights. In addition, several immediate and interim changes to the structure of the programs under review, together with more effective enforcement mechanisms, would lessen some of the most critical vulnerabilities and harms experienced by migrant workers.

16. CLAS makes the following specific recommendations:

1) Grant permanent residency on arrival to migrant workers in the lowest-wage streams;
2) Abolish employer-specific work permits for migrant workers in the lowest-wage streams;
3) Reverse recent changes that are harmful to migrant workers; and
4) Introduce proactive enforcement measures and coordinate with provinces to combat labour exploitation and illegal recruitment practices.

IV. Discussion of recommendations

1) Grant permanent resident status on arrival to migrant workers in the lowest-wage streams

17. Migrant workers in the lowest-wage streams should be given the opportunity to immigrate to Canada permanently. Canada's immigration programs and policies have typically made permanent resident status available on arrival to workers who are considered to be "high-skilled" and high-waged. Migrant workers in the lowest-wage streams make important contributions to our economy and community life and should have the option to stay in Canada permanently.

[14] Myer Siemiatycki, "Marginalizing Migrants: Canada's Rising Reliance on Temporary Foreign Workers" *Canadian Issues* (June 1 2010) at 60, cited in Cousineau, at p. 5.1.8

18. Granting migrant workers in the lowest-wage streams permanent residency would reduce the potential for employer abuse, because workers would no longer experience the precariousness associated with temporary immigration status, nor the restricted labour mobility associated with closed work permits. Permanent residency would empower workers to raise concerns about working conditions and leave abusive employment relationships. It would ensure workers have meaningful access to social benefits, such as EI, the Canada Pension Plan ("CPP"), and provincial health care (which can lapse if a worker loses her job) and would eliminate the threat of repatriation in cases of illness or injury. As permanent residents, workers would have a much greater ability enforce their legal rights, as they would be able to do so without fear of losing their ability to support themselves for an extended period of time as well as the threat of repatriation or deportation.

19. Workers should be given permanent resident status on arrival. This is distinct from a "pathway" to permanent residency. As noted above, caregivers and migrant workers in certain occupations can apply for permanent residency after meeting the requirements of certain immigration programs. Among other things, this typically involves completing a certain number of hours of work experience in specific occupations.[15] The existence of such pathways to permanent residence does not eliminate the vulnerabilities and harms experienced by these workers. Instead, these workers remain dependent on their employers while working to qualify for permanent residency, and the worker's long-term prospects for permanent residency remain dependent on the employment relationship, perpetuating the worker's vulnerability.[16]

20. Permanent residency on arrival would also address other challenges faced by low-wage migrant workers, including family separation. Unlike high-wage workers who arrive as permanent residents, low-wage workers cannot bring their loved ones with them and must endure years of separation, which can significantly affect their health and wellbeing.[17] Moving towards a permanent immigration strategy for meeting labour needs in low-wage sectors, together with reforms that would alleviate the impact of rules that unfairly exclude workers and their families for medical and other reasons, would improve justice and fairness in our immigration system as a whole.

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[15] Before qualifying under the PNP, a worker must complete nine consecutive months of work with a single employer and must be nominated by the employer. Caregivers must complete 24 months of employment within four years before they can apply for permanent residency: WCDWA, 2014, p. 33-34. As rules introduced in July 2014 limit the amount of time low-wage workers can work in Canada to four years (after which they leave Canada for at least four years), any gaps in employment can be very detrimental: Cousineau:, p. 5.1.12.

[16] Ibid.

[17] Research indicates that family separation is often perceived as "the most difficult aspect of the migrant worker experience": West Coast Domestic Workers Association, "Access to Justice for Migrant Workers" (July 2013) ["WCDWA, 2013"] pp. 34-36.

2) Abolish employer-specific work permits for migrant workers in the lowest-wage streams

21. Closed work permits are a primary structural feature of the TFWP and other temporary labour migration programs which allow unscrupulous employers and recruiters to abuse workers. Therefore, as an immediate and interim measure, employer-specific, or closed work permits should be abolished and all workers should be issued open or sectoral work permits.

22. Open work permits would greatly reduce the vulnerability of migrant workers to employer and recruiter abuse by allowing workers to move more freely in the labour market. This would afford migrant workers greater freedom to voice concerns about working conditions, leave abusive employment relationships and enforce legal rights.

23. Open work permits are not a complete answer to the harms experienced by workers in the lowest-wage streams. However, this measure, together with other measures described below, would go far towards addressing some of the most critical issues faced by migrant workers who are living and working in Canada under these programs while broader reforms are implemented.

3) Reverse recent changes that are harmful to migrant workers

24. In recent years, the federal government introduced several changes to federal programs and policies that impact migrant workers, including the TFWP, the Caregiver Program, and rules that affect the ability of agricultural workers under SAWP and other migrant workers to access EI. Many of these changes have had a negative impact on workers and should be reversed.

25. In particular, the "4 in, 4 out" rule, which limits the ability of temporary foreign workers to work in Canada to a maximum of four years before they must leave Canada for four years, should be eliminated. In addition, the federal government should reverse the increase in processing fees for LMIAs and the new rules that restrict the issuance of LMIAs in certain circumstances.[18] These changes have negatively impacted workers by further restricting their labour mobility while in Canada. These changes also serve to reinforce the temporariness of workers, when these workers often fill labour market needs that are not temporary. In addition, some employers have responded to the increased costs of obtaining LMIAs by (unlawfully) passing on additional costs to workers.

[18] For instance, these rules prevent LMIAs from being issued in the food, accommodation and retail sectors where the regional rate of unemployment is above 6% and restrict LMIAs for low-wage positions to a duration of one year.

26. The government should also eliminate the recently-imposed caps on the number of applications for permanent residency permitted each year under the Caregiver Program. Instead, the government should reduce processing delays by allocating increased resources for timely processing.

27. Finally, rules that prevent workers in the SAWP and other migrant workers from collecting EI benefits, including special benefits such as parental leave, should be changed. Migrant workers make contributions to the EI system through payroll deductions, and it is unfair that they do not have meaningful, equal access to this social benefit which exists to help workers deal with both unexpected loss of employment as well as times where a worker's ability to earn an income is interrupted due to parenthood or other reasons.[19]

4) Introduce proactive enforcement measures and coordinate with provinces to combat labour exploitation and illegal recruitment practices.

28. Migrant workers face significant barriers to enforcing their legal rights in employment, occupational health and safety, housing and human rights. While most of these areas of law are within provincial jurisdiction, Employment and Social Development Canada ("ESDC") and Immigration, Refugees and Citizenship Canada ("IRCC") share responsibility over the administration of the TFWP and other temporary migration programs. These federal agencies can play a greater role in enforcement. In addition, the federal government should work with provinces to establish and coordinate efforts to combat labour exploitation and illegal recruitment practices.

29. Federal agencies can ensure that employers and recruiters are in compliance with those aspects of the process within federal jurisdiction, including by investigating and monitoring compliance with LMIAs as well as taking a greater role in regulating recruiters, including those operating concurrently as immigration consultants.[20] This could be coordinated with provincial employment standards enforcement to ensure that workers who have been subject to unlawful labour and recruitment practices have meaningful remedies. Since migrant workers face significant barriers to making complaints, any enforcement framework should provide for proactive investigations, especially in high-risk industries, as well as anonymous and third-party complaints.[21]

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[19] See Faraday, pp. 77-78. See also, UFCW, "The Great Canadian Rip-Off! An Economic Case for Restoring Full EI Special Benefits Access to SAWP Workers" (March 2014) at p. 1.
[20] Faraday, pp. 71-73; see also WCDWA, 2014, pp. 38-41.
[21] Faraday, pp. 95-96.

30. Finally, workers whose employers are under investigation or who have made complaints should be protected from retaliation by employers and recruiters, as provincial employment standards laws do not offer effective protection from immigration-related retaliation. These workers should have access to open work permits, assistance with arranging other employment, and assurances that they will not be repatriated or deported during the investigation. Finally, the federal government should, in consultation with migrant worker groups as well as the provinces, support the development of migrant worker centres that would provide services to workers while also serving as accessible complaints offices.[22]

V. Conclusion

31. Migrant workers living and working in Canada make important contributions to our economy, social fabric and community life. However, migrant workers in the lowest-wage streams experience significant vulnerability and precariousness as a result of the structure of these programs and face systemic barriers to enforcement of their legal rights. This results in migrant workers having unequal access to legal protections and decent working conditions in Canada.

32. CLAS has made several recommendations that would begin to address these issues. These recommendations are based on our experience advising and representing migrant workers whose legal rights have been violated. However, there is no substitute for hearing directly from migrant workers who have lived experience of these harms. Therefore, we also urge the Committee to ensure that, to the greatest extent possible, it hears directly from a broad range of migrant workers with lived experience of these programs, as it conducts its study of the TFWP.

33. CLAS would be pleased to answer any questions or provide further information as requested by the Committee.

All of which is respectfully submitted this 27th day of May, 2016.

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[22] Faraday, pp. 97