Commission des droits de la personne et des droits de la jeunesse Québec

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# SYSTEMIC DISCRIMINATION TOWARDS MIGRANT WORKERS

## SUMMARY

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This is a summary of *La discrimination systémique à l'égard des travailleuses et travailleurs migrants*, adopted at the 574th meeting of the Commission, held on December 9, 2011, by Resolution COM-574-5.1.1

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*We asked for workers. We got people instead.*
**Max Frisch**

## INTRODUCTION

This document is a summary of an opinion entitled *La discrimination systémique à l'égard des travailleurs migrants* (Systemic Discrimination Towards Migrant Workers) which examines many of the conditions of the stay of migrant workers in order to identify elements of systemic discrimination, a form of discrimination prohibited under the Charter of Human Rights and Freedoms[1]. In order to do this, the Commission des droits de la personne et des droits de la jeunesse (hereinafter "the Commission") took a systemic approach in searching for a set of facts that, when combined, create discrimination, rather than searching for a single cause of discrimination.[2] We will try to illustrate how the set of facts, when combined, produce and maintain a disproportionate effect of exclusion towards migrant workers. This exercise will enable us to verify the existence of systemic discrimination towards them.

Since 2005, the Commission has intervened on many occasions in favour of migrant workers through human rights educational activities, cooperation and by representations to various forums.

Since November 2008, the Commission has been working with the long-standing *Comité interministériel permanent sur la protection des travailleurs étrangers temporaires peu spécialisés*. Under the direction of the Ministère du Travail du Québec, this committee was created as part of one of the components of the government's intervention strategy for labour, whose purpose is to [TRANSLATION] "protect low-skilled temporary foreign workers recruited

1 R.S.Q., c. C-12, (hereinafter "the Charter" or "the Québec Charter").

2 *Commission des droits de la personne et des droits de la jeunesse* c. *Gaz Métropolitain inc.*, 2008 QCTDP 24, par. 67 (hereinafter "Gaz Métropolitain (TDP) ") cited in *Gaz Métropolitain Inc. c.* Commission des droits de la personne et des droits de la jeunesse, 2011 QCCA 1201 (CanLII), par. 47 (hereinafter "Gaz Métropolitain (CA)").

abroad by establishing information and support mechanisms to ensure their protection against abuse and exploitation".[3]

In addition, the Commission receives complaints from migrant workers against their employers. In this regard, it should be noted that, considering the growing number of migrant workers, few complaints have been received. Ten complaints of discrimination from workers in the Canadian Live-In Caregiver Program have been received and processed, while seven migrant workers have filed a discrimination complaint. Some of these files are still under investigation.

## PART I:
## MIGRANT WORKERS

### 1 THE MIGRANT LABOUR CONTEXT

By "migrant workers" we mean foreign workers coming to Canada who have a work permit, but without permanent resident status. We include in our definition workers who will have access to permanent resident status after a period of temporary residence.[4] However, our definition excludes more qualified workers.[5]

To obtain a work permit, migrant workers must meet certain requirements set out by various sub-programs, which are part of Canada's immigration program. In matters of immigration, legislative jurisdiction is shared; however, federal provisions take precedence over those of the provinces.

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3 See: Work Plan of component V of the *Stratégie d'intervention en matière de mobilité de la main-d'œuvre*, adopted by the Conseil des ministres on December 19, 2007.

4 Some candidates from other provinces, as live-in caregivers, are entitled to permanent residency after a period of temporary residency. Since the Québec Charter does not apply to them, they are not included in our definition.

5 Our analysis excludes migrants who have access to the "Canadian experience" program because they are "more qualified and less vulnerable": OFFICE OF THE AUDITOR GENERAL OF CANADA, *REPORT OF THE AUDITOR GENERAL OF CANADA TO THE HOUSE OF COMMONS*, Chapter 2: Selecting Foreign Workers Under the Immigration Program, Ottawa, 2009, p. 38, par. 2.108.

Canada's immigration program provides three broad categories of immigrants: "economic" immigrants, family reunification immigrants and refugees.

The formalities of entry and selection of immigrants vary from one category to another, and sometimes even within the same category. However, foreigners are all subjected to the same inadmissibility provisions.

Some foreigners stay in Canada without being established there. They are visitors and other temporary residents, including migrant workers. Temporary residents who want to study or work in Canada must have a permit to that effect.[6] Some foreigners are exempted from the requirement to have a work permit.[7] Temporary residents must "leave Canada by the end of the period authorized for their stay".[8]

6 *Immigration and Refugee Protection Act,* SC 2001, c. 27, s. 20 (hereinafter the "IRPA"); *Immigration and Refugee Protection Regulations* , SOR/2002-227 (Can. Gaz. II), s. 196 and 199 (hereinafter "IRPR").

7 IRPR, *id.*, s. 186.

8 *Id.*, s. 183 (1)a).

SUMMARY OF CANADA'S IMMIGRATION PROGRAM
ACCESSIBLE TABLE

| CATEGORY OF INDIVIDUALS ADMITTED IN CANADA | SUB-CATEGORIES | PROGRAMS | CRITERIA SELECTION | INADMISSIBILITIES | STATUS UPON ENTRY |
|---|---|---|---|---|---|
| Immigrants | Refugees | CR | Selected based on their need for protection | Same for all | PR* |
| | | PNP | | | |
| | Family class | Not applicable | Selected on the basis of their relationship with a Canadian citizen | | PR |
| | Economic immigration | SW | Selected on the basis of their ability to become economically established in Canada | | |
| | | I | | | |
| | | SE | | | |
| | | PN | | | |
| Migrant workers | Temporary foreign workers program | LICP | Selected by employers | | TR |
| | | SAWP | | | |
| | | PP | | | |
| | | CE | | | |
| Visitors | Not applicable | Not applicable | No selection | | TR |

**Programs**

SW = Skilled workers
I = Investors
SE = Self-employed
PN = Provincial nominees

LICP = Live-In Caregiver Program
SAWP = Seasonal Agricultural Workers Program
PP = Pilot Project for Occupations Requiring Lower Levels of Formal Training
CE = Canadian experience
CR = Convention Refugees
PNP = Persons in need of protection

**Status upon entry**

PR* = Permanent residence
TR = Temporary residence
* = Refugee claimant status and eventually permanent resident status

In Québec, when an employer wants to hire a temporary foreign worker, the employee and the employer must first sign an employment contract that becomes effective once the administrative requirements are met. This employment contract will be useful in assessing the job offer to obtain a Labour Market Opinion. This assessment is carried out jointly by Service Canada and the Ministère de l'Immigration et des Communautés culturelles. The job offer must have a positive or neutral effect on the labour market in order to be approved.[9] Since April 2011, the Québec and federal governments also verify that the job offer is genuine: specifically verifying whether or not the employment contract comes from an employer who has violated previous employment contracts or labour law.[10] If both levels of government agree to issue a favourable Labour Market Opinion, the Ministère de l'Immigration et des Communautés culturelles will assess the application for a certificate of acceptance from Québec. If the certificate is granted, the employee submits an Application to Apply for a Work Permit to Citizenship and Immigration Canada, and an application for Temporary Resident Visas if the employee is not a citizen of a State whose nationals are exempted from a visitor's visa in Canada. Upon his entry to Canada, a border officer will verify that the temporary worker meets the eligibility criteria.

Canada's Temporary foreign workers Program is divided into three sub-programs: the Live-In Caregiver Program, the Seasonal Agricultural Workers Program and the Pilot Project for Occupations Requiring Lower Levels of Formal Training.

### *Live-In Caregiver Program*

> "The Live-In Caregiver Program helps Canadians hire foreign workers to live in their home and provide child care, and home support for the elderly and persons with disabilities."[11]

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9 IRPR, supra, note 6, s. 199; *Regulation respecting the selection of foreign nationals*, RRQ, c I-0.2, r 4, s. 50 as cited by QUÉBEC, MINISTÈRE DE L'IMMIGRATION DES COMMUNAUTÉS CULTURELLES , *Guide to Immigration Procedures*, component 4: Temporary stay in Québec, Chapter 2: Temporary worker, updated in July 2009, p. 8.

10 *Regulations Amending the Immigration and Refugee Protection Regulations,* SOR/2010-172 (Canada Gazette II and *Règlement modifiant le règlement sur la sélection des ressortissants étrangers*, (2011) 143 G. O. II, 1213.

11 CANADA, HUMAN RESOURCES AND SKILLS DEVELOPMENT CANADA, "Live-in Caregiver", [online]. http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/ei_tfw/lic_tfw.shtml

The caregiver must therefore work in a private home and reside there. Live-in caregivers can obtain permanent residency after 24 months or 3,900 hours of work with a maximum of 390 hours of overtime. Since April 1, 2010, their work permit can be valid for a maximum period of four years and three months.[12]

### *Seasonal Agricultural Workers Program*

The Seasonal Agricultural Workers Program, which is the result of bilateral treaties signed by Canada and 11 other States[13], is described by Human Resources and Skills Development Canada as follows:

> "The Seasonal Agricultural Worker Program allows for the organized entry of foreign workers into Canada to meet the temporary seasonal needs of agricultural producers during peak harvesting and planting periods, when there are traditionally shortages of qualified Canadian workers."[14]

Under this sub-program, foreign agricultural workers must work at least 240 hours in six weeks. They can stay in Canada for a maximum of eight months.

### *Pilot Project for Occupations Requiring Lower Levels of Formal Training*

The Pilot Project for Occupations Requiring Lower Levels of Formal Training is open to workers under levels C (high school diploma) or D (job-specific training) of the National Occupational Classification[15] with insufficient avenues for immigration.[16] It is not exclusive to agricultural

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12 *Regulations Amending the Immigration and Refugee Protection Regulations* , SOR/2010-78m (Canada Gazette II).

13 These States are: Jamaica, Barbados, Trinidad and Tobago, Antigua, Dominica, Grenada, St. Kitts, St. Lucia, Saint Vincent, Montserrat and Mexico.

14 CANADA, HUMAN RESOURCES AND SKILLS DEVELOPMENT CANADA , "Seasonal Agricultural Workers", [online]. http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/ei_tfw/saw_tfw.shtml (Consulted on April 7, 2010).

15 CANADA, HUMAN RESOURCES AND SKILLS DEVELOPMENT CANADA *National Occupational Classification*, Ottawa, Human Resources and Skills Development Canada, 2007.

16 Delphine NAKACHE and Paula J. KINOSHITA, "The Canadian Temporary Foreign Worker Program: Do Short-Term Economic Needs Prevail over Human Rights Concerns? ", May 2010, *IRPP Study* n° 5, 12, p. 35.

workers. Their work permits can be valid for a maximum of two years. The Pilot Project was launched in 2002 and amended in 2007[17]. It is still a pilot project to this day.

As far as we know, there is virtually no data regarding the specific working conditions of these workers under the pilot project who are not part of the agricultural component. However, they only represented 8.5 % of all migrant workers who came to Québec in 2010.

[17] *Id.*, p. 5.

OVERVIEW OF SUB-PROGRAMS ALLOWING THE ARRIVAL OF MIGRANT WORKERS
ACCESSIBLE TABLE

| SUB-PROGRAM | COMPONENT | FIELD | AGREEMENT BETWEEN CANADA AND ANOTHER STATE | RESTRICTIONS ON WORK PERMITS | MAXIMUM DURATION OF WORK PERMITS | OBLIGATION TO LIVE WITH THE EMPLOYER | ACCESS TO PERMANENT RESIDENCY | NUMBER OF INDIVIDUALS ENTERING OR RETURNING TO QUÉBEC IN 2010 * |
|---|---|---|---|---|---|---|---|---|
| Live-In Caregiver Program | n/a | Domestic work | No | Caregivers must obtain a new work permit to change employer | 51 months | Yes | After 3,900 hours of work | 407 |
| Seasonal Agricultural Workers Program | n/a | Agricultural Work | Yes | The transfer must be authorized by the employer, the representative of the foreign government, and HRSDC | 8 months | Employers must provide free accommodation | n/a | 2,609 |
| Pilot Project for Occupations Requiring Lower Levels of Formal Training | Agricultural Stream | Agricultural Work | No | Workers must obtain a new work permit to change employer | 24 months | Employers must provide accommodation or help the worker find one | n/a | 3,121 |
| | Other low-skilled workers | Other | No | | | | n/a | 567 |

* Data provided by Citizenship and Immigration Canada and the Ministère de l'Immigration et des Communautés culturelles, June 2011.

Migrant workers encounter common problems resulting from the context in which they come and work in Québec. Among these difficulties, is their vulnerability as workers in a State where they only have a temporary status.

This vulnerability is the result of a system which contributes to the failure to respect the fundamental rights and freedoms of migrant workers. This is not an inherent characteristic of these people.

In addition to working in a country where they do not have permanent status, the majority of migrant workers[18] hold jobs that have historically kept the persons holding them in vulnerable positions.[19]

## 2 THE COMMISSION'S JURISDICTION OVER MIGRANT WORKERS

This section summarizes the Commission's findings in its opinion, *L'applicabilité de la Charte des droits et libertés de la personne aux travailleurs migrants* (The applicability of the Charter of Human Rights and Freedoms to migrant workers).[20]

In Québec, the objective of the Charter is the protection of human rights and freedoms. It affects "those matters that come under the legislative authority of Québec".[21] The issue of jurisdiction over migrant workers essentially arises in terms of the division of legislative powers between the federal and provincial governments. In addition to immigration and labour, the jurisdiction over foreigners must be examined.

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18 In 2010, 91.5 % of migrant workers entered Québec as agricultural workers or live-in caregivers: Data provided by Citizenship and Immigration Canada and the Ministère de l'Immigration et des Communautés culturelles, June 2011.

19 See on vulnerability: *CSN* v. *Québec (A.G.)*, 2008 QCCS 5076; INTERNATIONAL LABOUR OFFICE, *International Migration: A Rights-Based Approach*, International Labour Office, Geneva, 2010, p. 95; *Dunmore* v. *Ontario (A.G.)*, 2001 CSC 94, par. 41; Harry W. ARTHURS, *Labour Standards Review. Fairness at Work: Labour Standards for the 21st century*, Gatineau, Human Resources and Skills Development Canada, 2006, p. 243 and following; OFFICE OF THE AUDITOR GENERAL OF CANADA , supra note 5, par. 2.108.

20 COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE, *L'applicabilité de la Charte des droits et libertés de la personne aux travailleurs migrants*, M[e] Marie Carpentier, (Cat. 2.197.14), 2010.

21 Charter, supra at note 1, s. 55.

Courts have found that, as a rule, provinces have legislative powers in labour law, while federal jurisdiction in the matter is an exceptional one.[22]

In immigration matters, provinces may legislate as long as their laws are not incompatible with federal laws.[23] Constitutionally, the extent of incompatibility required is significant.

The Québec Charter therefore applies in the field of Immigration to Québec's responsibilities as defined under the Canada-Québec Accord Relating to Immigration and Temporary Admission of Aliens.[24] It concerns the determination of the number of immigrants Québec wishes to receive; the selection of candidates destined to Québec, with the exception of refugees and persons who are part of the family class; the management of sponsorship undertakings; and the integration of immigrants.[25]

The Québec Charter also applies, in matters of temporary immigration, when Québec's consent is required. For example, when Canada [TRANSLATION] "issues a work permit and [admits] temporary workers when the employment in question is subject to the availability of Canadian workers […]".[26] It does not apply to solely federal responsibilities, particularly with respect to the criteria allowing persons to enter and stay in the country, or their status.[27]

Determining the status of persons falls under the federal government's jurisdiction.[28] Although migrant workers do not have citizenship or permanent resident status, they are still protected by

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22 *Four B Manufacturing v. United Garment Workers*, [1980] 1 S.C. R. 1031, 1045

23 *Id.*

24 (Gagnon-Tremblay-McDougall Accord), February 5, 1991.

25 QUÉBEC, MINISTÈRE DE L'IMMIGRATION ET DES COMMUNAUTÉS CULTURELLES, *L'immigration : Partage des responsabilités Québec-Canada. Statut des personnes se trouvant au Québec. Catégories d'immigration. Consultation 2008-2009*, Québec, 2007, p. 3.

26 *Id*.

27 *Constitution Act, 1867*, (UK) 30 & 31 Victoria, c 3, s. 91 (25).

28 *Id.,* "Naturalization and Aliens".

the Charter[29] because provinces have some latitude in determining who is covered by their legislation.[30]

Moreover, contrary to that of the Canadian Charter, the scope of the Québec Charter is not limited to the public sphere.[31] It can apply to the Québec government's actions as well as to the actions of various players from the private sector. Furthermore, some provisions of the Québec Charter have primacy over other laws.[32] Recognition of an infringement of a right guaranteed by the Charter shall give rise to the termination of the infringement and to compensation.[33] If the infringement concerns a legislative provision, it may be declared inoperative.

## PART II:
## RIGHTS AND FREEDOMS OF MIGRANT WORKERS

### 1 LEGAL FRAMEWORK OF DISCRIMINATION TOWARDS WORKERS

### 1.1 International law

Among the international instruments in force in Canada, the International Bill of Human Rights protects the fundamental civil, cultural, economic, political and social rights of all individuals. The Bill contains the Universal Declaration of Human Rights[34], the International Covenant on Civil and Political Rights[35], the International Covenant on Economic, Social and Cultural

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29 *Id.*, p. 521-522.

30 Henri BRUN and Christian BRUNELLE, « Les statuts respectifs de citoyen, résident et étranger à la lumière des chartes des droits », (1988) 29 *C. de D.* 689, 726.

31 BRUNELLE, CHRISTIAN, « Les domaines d'application des Chartes des droits » in BARREAU DU QUÉBEC (dir.), *Droit public et administratif*, Collection de droit 2010-2011, vol. 7, Cowansville, Éditions Yvon Blais, 2009 at p. 33.

32 Charter, supra note 1, s. 52.

33 *Id.*, s. 49.

34 Resolution 217 A (III), Official document. G.A. UN, 3 rd Sess., Supp. no. 13, p. 17, UN Doc. A/810 (1948).

35 December 16, 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47 (entered into force in Canada on March 23, 1976).

Rights[36] and three optional protocols.[37] Other multilateral treaties in force in Canada offer protection for migrant workers.[38]

Canada has not adhered to specific conventions on migrant workers.[39] However, judges in Canada and Québec have numerous international law sources on which [TRANSLATION] "to base arguments justifying the legitimacy of a Canadian democratic order based on human rights"[40] including those of migrant workers.[41]

In 2007, the Supreme Court of Canada reaffirmed that "it is a well-established principle of statutory interpretation that legislation will be presumed to conform to international law".[42] In addition, notwithstanding its ratification or incorporation, courts can use international law as a source of interpretation.[43]

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36 December 16, 1966, 993 U.N.T.S. U.N.T.S. 3, Can T.S. 1976 No. 46 (entered into force in Canada on August 19, 1976).

37 *Optional Protocol on Civil and Political Rights,* December 16, 1966, 999 U.N.T.S. 171 Can. T.S. 1976 No. 47 (entered into force in Canada on August 19, 1976); *Second Optional Protocol on Civil and Political Rights*, December 15, 1966, 1642 U.N.T.S. 414 Can. T.S. 2006 No. 25 (entered into force in Canada on November 25 2006); *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* December 10, 2008 (not signed by Canada).

38 *Convention on the Elimination of All Forms of Discrimination against Women,* December 18, 1979, 1249 U.N.T.S. 13 Can. T.S. 1982 No. 31 (entered into force in Canada on January 9, 1982); *International Convention on the Elimination of All Forms of Racial Discrimination* March 7, 1966, 660 U.N.T.S. 195 Can. T.S. 1970 No. 28 (entered into force in Canada on November 13, 1970); *Convention on the Rights of the Child*, November 20, 1989, 1577 U.N.T.S. 3 Can. T.S. 1992 No. 3 (entered into force in Canada on January 12, 1992); *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime* November 15, 2000, 2237 U.N.T.S. 319 Can. T.S. 2002 No. 25 (entered into force in Canada on December 25, 2003).

39 *Migration for Employment Convention (Revised), (No. 97)* 1949; *Migrant Workers (Supplementary Provisions) Convention, (No. 143)* 1975; *Domestic Workers Convention, (No. 189)* 2011 (all three conventions are from the International Labour Organization); *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,* December 18, 1990, G.A. Res. 45/158 (annex), 30 I.L.M. 1521 (1991).

40 Houle,FRANCE, « La légitimité constitutionnelle de la réception directe des normes du droit international des droits de la personne en droit interne canadien », [2004] 45 *C. de D.* 295, p. 320.

41 "We argue that there is ample international law setting out the basic rights of migrants even though the principal migrant-centric instruments are not widely ratified. Failures in protecting migrant rights arise from the lack of implementation of these standards at the national level." Martin, SUSAN and Abimourched ROLA, "Migrant Rights: International Law and National Action", (2009) 47:5 *International Migration* 115, p. 115.

42 *R.* v. Hape, 2007 SCC 26, paragraphs 53 and 56.

43 HOULE, F., supra, note 40, p. 314.

## 1.2 Systemic discrimination

The right to equality is inscribed in section 10 of the Charter of Human Rights and Freedoms. Discrimination exists where the following is established:

> "(1) the existence of a distinction, exclusion or preference;
>
> (2) which is based on one of the grounds listed in the first paragraph of section 10 of the Québec Charter;
>
> (3) and which has the effect of nullifying or impairing the right to full and equal recognition and exercise of a human right or freedom."[44]

The Québec Court of Appeal recently demonstrated how to prove systemic discrimination:

> "Evidence of systemic discrimination thus rests essentially on a set of facts, such as institutional policies, decision-making procedures, behaviours and attitudes that, in an often apparently unconscious and innocuous way, have and maintain, when combined, disproportionately exclusionary effects on members of groups contemplated by the prohibition of discrimination."[45]

Statistical evidence is not essential to establishing systemic discrimination, even less so when it affects the totality of individuals with the same characteristics. However, whether a discriminatory measure is voluntary or not is not as relevant as its consequences when establishing systemic discrimination.[46]

Migrant workers are a relatively homogeneous group with characteristics included in the prohibited grounds of discrimination – in this case, ethnic or national origin, race, social condition, language and, in the case of live-in caregivers, sex. These grounds constitute the second part of the test used in establishing discrimination. The following sections will show that this group is the subject of several exclusions, distinctions and preferences (the first part of the

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44 *Forget* v. *Québec (Attorney General)*, [1988] 2 S.C.R. 90, par. 10; *Ford* v. *Québec (Attorney General)*, [1988] 2 S.C.R. 712, par. 82;*Devine* v. *Québec (Attorney General)*, [1988] 2 S.C.R. 790, par. 33; *Commission scolaire régionale de Chambly* v. *Bergevin*, [1994] 2 S.C.R. 525, 538.

45 Gaz Métropolitain (TDP), supra note 2, par. 67 cited in Gaz Métropolitain (CA), supra note 2, par. 47. See also the definition of systemic discrimination in COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE, *Profilage racial et discrimination systémique des jeunes racisés : Rapport de consultation sur le profilage racial et ses conséquences*, Eid, Paul, Magloire, Johanne, M[e] Michèle Turenne, 2011, p. 13-14.

46 *CN* v. *Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114, 1139.

test), that impair the full and equal exercise of the rights and freedoms of its members (third part of the test). The demonstration of each of these situations establishes the existence of systemic discrimination towards them.

## 2 IMMIGRATION STATUS AND ITS CONSEQUENCES ON THE RIGHTS AND FREEDOMS OF MIGRANT WORKERS

### 2.1 The status of migrant workers

Persons present in Canada are likely to have one of three kinds of status, depending on their circumstances: they are either foreign nationals, permanent residents, or citizens. In principle, they have the same rights and obligations, regardless of their status.[47] Indeed, every human being who is physically present in Canada is subject to the law.[48]

However, the Canadian Charter of Rights and Freedoms does differentiate among citizens, permanent residents and foreign nationals in election matters, with respect to freedom to move and gain a livelihood, as well as in language matters.[49] The Supreme Court has refused to consider the distinctions based on these provisions regarding the right to equality guaranteed under section 15 of the Canadian Charter.[50] In other words, if even the Canadian Charter makes a distinction, there is no need to wonder about the infringement of the right to equality. Thus, [TRANSLATION] "full equality between individuals only exists when 'citizenship' is a common feature."[51]

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47 BRUN, H., and BRUNELLE, C., supra note 30, 690.

48 *Singh* v. *Minister of Employment and Immigration,* [1985] 1 S.C.R. 177, par. 35; *Suresh* v. *Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, par. 44.

49 *Canadian Charter of Rights and Freedoms*, Part I of *The Constitution Act of 1982* [Schedule B to the *Canada Act 1982* ( (UK), 1982, c 11)], s. 3, 6 and 23.

50 *Charkaoui* v. *Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350, par. 129, referring to *Canada (Minister of Employment and Immigration)* v.*Chiarelli*, [1992] 1 S.C.R. 711.

51 GAUDREAU, Julie, « Quel droit à l'égalité pour les non-citoyens? Réflexion inspirée de l'affaire Charkaoui », (2008) 49:2 *C. de D.* 205, p. 226.

Migrant workers are neither Canadian citizens nor permanent residents; they only have a temporary resident status. They do not enjoy the right to move and earn a livelihood[52] and have problems in being accompanied by their family. In effect, they are not entitled to the family reunification program[53] and have difficulty showing authorities that they are able to provide for their family[54], a requirement that migrant workers must meet if they want to be accompanied by their relatives.

If, because of their immigration status, foreign nationals are not always able to invoke the right to equality granted by the Canadian Charter of Rights and Freedoms, it is not the case under the Québec Charter. Indeed, the latter does not make any distinction between citizens or permanent residents and other persons when referring to entitlement to rights and freedoms. In fact, the only distinction lies between natural persons ("every human being") and legal persons (included in "every person"). It therefore seems clear that foreign nationals can benefit from the rights guaranteed by the Québec Charter.[55]

### 2.2 Restricted work permit

Under the Immigration and Refugee Protection Act[56]and the Immigration and Refugee Protection Regulations[57], migrant workers must have a permit to work in Canada and in Québec. This work permit binds the worker to a single employer and to a single employment.

Migrant workers who wish to carry on an employment other than the one indicated on their work permit or who wish to change employers, whether they lost their job for reasons beyond their control or whether they left voluntarily, must obtain a new work permit.[58] Signing an employment

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52 *Canadian Charter of Rights and Freedoms*, supra note 49, s. 6 (2).

53 IRPA, supra note 6, s. 13(1).

54 NAKACHE, D, and KINOSHITA, P.J., supra note16.

55 BRUN, HENRI, TREMBLAY, GUY,and BROUILLET, EUGÉNIE, *Droit constitutionnel*, 5e édition, Cowansville, Éditions Yvon Blais, 2008, p. 159.

56 Supra note 6, s. 30.

57 Supra note 6, s. 196 and 199.

58 Through the Seasonal Agricultural Workers Program, workers can be transferred from one employer to another. However, the move must be pre-approved in writing by HRSDC/Service Canada. HUMAN RESOURCES

(…suite)

contract without a prior work permit can deprive the worker of his right to work.[59] The period that elapses between the two permits often places workers in a precarious financial situation[60], leaving them at the mercy of unscrupulous employers. Moreover, by terminating the employment relationship, migrant workers also lose their housing, which increases their vulnerability.

Yet, [TRANSLATION] “the freedom to resign is fundamental. It marks the difference between slavery and the contemporary conception of work”[61].

In addition to compromising their freedom, restricted work permits, because they are imposed only on migrant workers, are likely to jeopardize their right to fair and reasonable conditions of employment which have proper regard for their health, safety and physical well-being.[62]

Accordingly, the Commission fully agrees with the recommendation of the Standing Committee on Citizenship and Immigration to creating sector-based work permits by province.[63] This would allow migrant workers to change employers more easily and, therefore, allow them to refuse unacceptable working conditions more easily. This would also prevent that the loss of the job not bring about the loss of the work permit.[64]

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AND SKILLS DEVELOPMENT CANADA, “Temporary Foreign Worker Program”, [online]. http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/sawp.shtml (Consulted on February 4, 2011).

59 BERNSTEIN, Stéphanie, "Au carrefour des ordres publics : l’application des lois du travail aux travailleurs et travailleuses ne détenant pas de permis de travail valide en vertu de la *Loi sur l’immigration et la protection des réfugiés*" in BARREAU DU QUÉBEC (dir.), *Développements récents en droit du travail 2009*, Cowansville, Éditions Yvon Blais, 2010, 239.

60 CANADA, HOUSE OF COMMONS, *Temporary foreign workers and non-status workers*, Report of the Standing Committee on Citizenship and Immigration, 2nd session, 40th Parliament, May 2009, p. 27 (hereinafter "Tilson Report"), cited by NAKACHE, D. and KINOSHITA, P.J. , supra note 16, 18.

61 FABIEN, Claude, "La rupture du contrat par volonté unilatérale en droit québécois" (2006) *R.G.D.* 85, 91.

62 Charter, supra note 1, s. 46.

63 Tilson Report, supra note 60, recommendation 20.

64 COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE, *Notes de présentation aux audiences pan canadiennes du Comité permanent des Communes sur la Citoyenneté et l’Immigration*, Marc-André Dowd and Carole Fiset, (Cat. 2.600.224), 2008, p. 6.

## 2.3 Residency Obligation

Live-in caregivers are more affected by one particular issue since, as their name suggests, they are obliged to live with their employer.[65]

In the case of the Seasonal Agricultural Workers Program, according to the standard agreement signed between the worker's country of origin and Canada[66], employers are obliged to provide free living accommodation and meals at reasonable cost, or to furnish the necessary cooking facilities if the worker decides to prepare his or her own meals.

In reality, given the geographical situation of farms, away from urban centres, agricultural migrant workers are practically forced to reside in accommodations provided by their employer.

However, this residency obligation imposed upon migrant workers is likely to compromise several of their fundamental rights, such as mobility rights, freedom of association and the right to privacy.[67]

Moreover, residing in housing provided by the employer makes it all the more difficult for migrant workers to exercise their right to freedom, the free disposition of their property, and to respect of the inviolability of the home.[68] The exercise of freedom of association[69] is also restricted by the presence of this perpetual proximity[70], even more so when one considers the relative isolation, both social and geographical, in which migrant workers are placed because of this residency obligation.

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65 IRPA, supra note 6, s. 113.

66 HUMAN RESOURCES AND SKILLS DEVELOPMENT CANADA, *Agreement for the Employment in Canada of Commonwealth Caribbean Seasonal Agricultural Workers -2011*, (01-2011) (hereinafter "HRSDC-Caribbean"); HUMAN RESOURCES AND SKILLS DEVELOPMENT CANADA, *Agreement for the Employment in Canada of Seasonal Agricultural Workers from Mexico-2011* , (01-2011) (hereinafter "HRSDC-Mexico").

67 COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE, supra note 64, p. 4.

68 Charter, supra note 1, s. 1, 6 and 7.

69 *Id.*, s. 3.

70 BLACKETT, Adelle, "Making Domestic Work Visible: the Case for Specific Regulation", Labor Law and Labor Regulations Program Working Papers No. 2, International Labour Organization, Geneva, 1988 at p. 3.

Finally, the continuous physical availability of the workers makes the distinction between their private life and their professional life difficult, thus complicating the calculation of overtime.[71]

The residency obligation, like restricted work permits, is imposed only on migrant workers, and likely to compromise their right to fair and reasonable conditions of employment which have proper regard for their health, safety and physical well-being.[72]

Although a large number of agricultural employers are concerned with preserving the dignity of the workers that they are lodging, others are not concerned with the quality of housing they provide to agricultural migrant workers. The same applies to those who employ live-in caregivers.

### 2.4 The justification for the status of migrant workers

Although, economically speaking, the temporary foreign worker program will eventually yield more profits than costs[73], the Commission has stated on a number of occasions that assistance to a particular industry should not justify violation of rights guaranteed under the Charter.[74]

The governments of Canada and Québec are trying to ensure "that employers are not seeking to replace Canadians with [temporary foreign workers]".[75] However, the vulnerability in which temporary foreign workers find themselves exerts a downward pressure on the working conditions of all workers from their respective sectors.[76]

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71 INTERNATIONAL LABOUR OFFICE, *Report IV (1): Decent Work for domestic workers*, International Labour Conference, 99th Session, fourth item on the agenda, Geneva, 2010, par. 166.

72 Charter, supra note 1, s. 46.

73 ELGERSMA, Sandra, *Temporary Foreign Workers*, Ottawa, Parliamentary Information and Research Service, PRB 07-11F, 2007, p. 5-6.

74 COMMISSION DES DROITS DE LA PERSONNE, *Commentaires sur le projet de loi n$^{o}$* 126 : Loi sur les normes du travail, (Cat. 2.412.27.1), March 1979, p. 10; COMMISSION DES DROITS DE LA PERSONNE, *Conformité avec la Charte des droits et libertés de la personne du projet de loi : Loi modifiant les normes du travail*, M$^{e}$ Maurice Drapeau, (Cat. 2.412.27.2), novembre 1990, p. 9.

75 *Government of Canada Response to the Report of the Standing Committee on Citizenship and Immigration: "Temporary Foreign Workers and Non-Status Workers"*, [online]. http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4017803&File=0&Mode=1&Parl=40&Ses=2&Language=E (Consulted on January 24, 2011).

76 This observation was made by Holley regarding the American program, which, we believe, has deficiencies similar to Canada's program. HOLLEY, Michael, "Disadvantaged by Design: How the Law Inhibits Agricultural

(…suite)

Given the possible effects of distortions on the labour market due to the hiring of temporary foreign workers[77] and the vulnerability in which they find themselves, it is important that they be hired based on the fact of a necessity, to be specific, a genuine labour shortage. In other words, to justify the hiring of migrant workers, shortage of workers should be the result of a lack of available labour rather than a lack of interest due to unsatisfactory working conditions.[78] The Commission questions the methods used to assess the labour shortage, as have several witnesses appearing before the Standing Committee on Citizenship and Immigration[79] Moreover, if the quantitative shortage of labour persists, Québec should consider establishing a permanent immigration program.

The Canadian government has attempted to ensure that resorting to migrant workers is only done temporarily.[80] However, instead of making the employers bear responsibility for the temporary character of the program, it has imposed it on the workers by requiring a 48-month qualifying period after four years of uninterrupted service.[81]

The Commission is of the opinion that the temporary foreign worker program compromises the rights of migrant workers.

## 3 ELEMENTS OF SYSTEMIC DISCRIMINATION DERIVING FROM JURISDICTION OVER SOCIAL PROTECTION AND LABOUR LAW

### 3.1 Exclusion from social protection

Guestworkers from Enforcing Their Rights", (2000-2001) 18 *Hofstra Labour and Employment Law Journal* 575, 618.

77 ELGERSMA, S., supra note 73, p. 5-6.

78 GOMEZ, Tatiana, "Low-skilled temporary work and non-access to permanent residence: Policy Brief", *Focal*, June 2011 at p. 4.

79 Tilson Report, supra note 60, p. 21.

80 *Regulatory Impact Analysis Statement*, (2010) 144 Canada Gazette II, p. 1522

81 IRPR, supra note 6, s. 200 (3)g)(i).

The status of migrant workers can complicate the determination of their domicile, residence or other eligibility criteria for state services. Also, the notion of “residence”, which is different from the notion of “permanent residence”, varies according to the context or the law, and is sometimes not defined.[82]

The exclusion from social protection based on a prohibited ground of discrimination is likely to compromise several rights guaranteed by the Charter, namely the right to life and inviolability, the right to the safeguard of dignity, the right to free public education, and the right to measures of financial assistance.[83]

In Québec, migrant workers do not have access to Legal Aid[84], social assistance[85], or to a parental insurance plan.[86] Concerning eligibility to public education, school boards have discretion to decide whether to charge children of migrant workers.[87] In order to have access to a dwelling in low rental housing, an applicant must be a permanent resident, and must reside in Québec for at least 12 months[88], which excludes migrant workers.

As for the health insurance provided by the Régie de l'assurance maladie du Québec, people not residing in Québec must wait three months before becoming eligible.[89] Migrant workers who are in Québec under the Seasonal Agricultural Workers Program are exempt from this waiting period in accordance with international agreements. Under the standard agreements proposed by the Ministère de l’Immigration et des Communautés culturelles for the Pilot Project for Occupations Requiring Lower Levels of Formal Training and the Live-in Caregiver Program,

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82 COMMUNITY LEGAL SERVICES OF POINT-SAINT-CHARLES AND LITTLE-BURGUNDY, *Immigration Status and the Access to Social Benefits and Programs: Guide for Community Workers*, Montreal, 2010, p. 27.

83 Charter, supra note 1, s. 1, 4, 40 and 45.

84 *Legal Aid Act*, RSQ, c A-14. In fact the Act is silent with regards to immigration status and requires only that a person reside in Québec in order to be eligible. “[…] [O]nly people in Québec on a temporary basis may not be eligible for Legal Aid due to their immigration status”, COMMUNITY LEGAL SERVICES OF POINT-SAINT-CHARLES AND LITTLE-BURGUNDY, supra note 82.

85 *Individual and Family Assistance Act*, RSQ, c A-13.1.1, s. 26 (eligibility for citizens and permanent residents).

86 *Act respecting Parental insurance*, RSQ, c A-29.011 s. 3.1.

87 COMMUNITY LEGAL SERVICES OF POINT-SAINT-CHARLES AND LITTLE-BURGUNDY supra note 82, p. 56.

88 *By-law respecting the allocation of dwellings in low rental housing* , RRQ, c S-8, r. 1.1.1., s. 14.

89 *Health Insurance Act*, RSQ, c A-29, s. 5.0.1; *Regulation respecting eligibility and registration of persons in respect of the Régie de l'assurance maladie du Québec*, A-29, r 0.01, s. 4 and 4.2 . (4).

employers of workers in Québec must provide them with insurance coverage during this waiting period.[90] However, the insurance coverage is connected to the validity of the work permit, which is connected to the employment contract. Therefore, in the event of termination of employment, workers are no longer protected.[91]

In addition, contrary to immigrants, migrant workers have limited access to services supporting immigration such as French courses, which are only offered part-time.[92] Yet, these courses could help them get accepted as independent workers and ease their integration after attaining permanent residence.

### 3.2 Exclusions in the labour context

The exclusion from protection in the context of labour, based on the prohibited grounds of discrimination, potentially compromises the freedom of association, the right to dignity, and the right to fair and reasonable conditions of employment which have proper regard for health, safety and physical well-being.[93] This exclusion is also likely to violate the prohibition against stipulating a clause involving discrimination in a juridical act, the prohibition practising discrimination in conditions of employment or in the establishment of categories of employment, and the obligation to grant equal salary for equivalent work.[94]

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90 See: MINISTÈRE DE L'IMMIGRATION ET DES COMMUNAUTÉS CULTURELLES, MINISTÈRE DE L'IMMIGRATION ET DES COMMUNAUTÉS CULTURELLES, *Contrat de travail type pour les professions peu spécialisée qui relèvent du programme Projet pilote relatif aux professions exigeants un niveau réduit de formation (niveaux c et d)*, A-0700-BF (2011-04), clauses 19 and 20 and MINISTÈRE DE L'IMMIGRATION ET DES COMMUNAUTÉS CULTURELLES, *Contrat de travail type d'une aide familiale résidante*, A-0700-AF (2011-04), clauses 22 and 23. This contractual obligation imposed on employers is not a statutory protection, which is independent from the action of a third party. The Commission des droits de la personne et des droits de la jeunesse is currently assessing the compliance of this waiting period with the provisions of the *Charter of Human Rights and Freedoms.*

91 See, regarding access to health care for non-insured persons: ROUSSEAU, Cécile, and others, "Health care access for refugees and immigrants with precarious status: Public health and human right challenges" (2008) 99:4 *Canadian Journal of Public Health* 290.

92 MINISTÈRE DE L'IMMIGRATION ET DES COMMUNAUTÉS CULTURELLES, "Home: French language: Glossary", [online]. http://www.immigration-quebec.gouv.qc.ca/en/french-language/glossary.html (Consulted on July-24-11).

93 Charter, supra note 1, s. 3, 4 and 46.

94 *Id.*, s. 13, 16, and 19.

In its assessment of exclusion of domestic workers from the universal occupational health and safety regime[95], which particularly affects persons who work in Québec under the Live-in Caregiver Program, the Commission came to the conclusion that this exclusion constitutes discrimination based on sex, social condition, ethnic origin or race. This discrimination nullifies or compromises these workers' rights to safety and integrity, to dignity, their right not to be discriminated against in establishment of their category of employment, and to their right to fair and reasonable conditions of employment which have proper regard for their health, safety and physical well-being.[96]

As for farm workers, they have been excluded from a part of the application of the Act respecting labour standards since its adoption in 1979. Although their fate has since improved; farm workers and employees assigned to canning, packaging and freezing fruit and vegetables during the harvesting period are not subject to the a regular work week, regarding the calculation of overtime.[97] Also, their weekly day of rest may be postponed to the following week with the farm worker's consent.[98] Moreover, workers assigned mainly to non-mechanized operations relating to the picking of raspberries or strawberries are still not covered by regulations concerning minimum wage.[99]

Furthermore, farm workers, like caregivers, are excluded *de facto* from protection of the Labour Code[100], which governs collective labour relations.

The Supreme Court recently ruled on the constitutionality of an Ontario labour relations law governing labour relations in agriculture, which provided a specific regime for farm workers.[101]

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95 *Act respecting industrial accidents and occupational diseases*, RSQ, c A-3.001; *Act respecting Occupational health and safety,* RSQ, c S-2.1.

96 COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE, *La conformité de l'exclusion du domestique et du gardien de la protection automatique de la Loi sur les accidents du travail et les maladies professionnelles à la Charte des droits et libertés de la personne*, M[e] Christine Campbell, (Cat. 2.120-2.68), 2008.

97 *Act respecting labour standards*, RSQ, c N-1.1, s. 54 (5) and (7).

98 *Id.*, s. 78.

99 *Regulation respecting labour standards*, RRQ, s. 4.1. However, it is provided that workers assigned exclusively to non-mechanized operations relating to the picking of raspberries or strawberries will receive the minimum wage from 2014.

100 RSQ, c C-27

The majority concluded that the legislation did not contravene the freedom of association guaranteed under the Canadian Charter of Rights and Freedoms.[102] However, the majority refused to rule on the discriminatory nature of the legislation. They stated that the parties presented insufficient evidence to that effect, and that the claim would be premature.[103] In addition, the arguments in that decision, that employment status is not regarded as an analogous ground under the Canadian Charter of Rights and Freedoms[104], are not relevant with respect to the Québec Charter as it includes the ground of "social condition".

Moreover, it is possible that workers from both programs are hired on the same farm, with different working conditions for equivalent work, because of the standard contracts imposed or suggested according to the programs. The Commission is of the opinion that in order to avoid discrimination in employment, employers should not make a distinction based on national or ethnic origin, or on immigration status in employment contracts.

## 4 OTHER SYSTEMIC OBSTACLES

Some "organizational models" and some "institutional practices", coupled with the legislative exclusions we have just examined, exacerbate the effect of systemic discrimination towards migrant workers.

First, the rights protection mechanisms provided by the Charter of Human Rights and Freedoms, the *Act respecting labour standards*[105] and the Act respecting industrial accidents and occupational diseases[106], among others, are not adapted to the reality of migrant workers because they do not guarantee that the worker will be authorized to stay in Québec if a conflict

101 *Ontario (Attorney General)* v. *Fraser, Ontario (Attorney General) v. Fraser*, 2011 SCC 20.

102 Supra note 49, s. 2(d).

103 *Ontario (Attorney General)* v. *Fraser*, supra note 101, par. 116.

104 *Id.*, par. 295 (Justice Rothstein) and paragraph 315 (Justice Deschamps).

105 Supra note 97.

106 Supra note 95.

arises with the employer associated with his or her permit.[107] As such, the number of complaints filed with the Commission does not reflect the number of potentially discriminatory situations observed in the field.

In addition, the Commission is concerned that, due to the lack of recourse in cases of repatriation following a decision by the employer, the consulate of the country of origin, or the Border Services Agency[108], the right of migrant workers "to a public and fair hearing by an independent and impartial tribunal"[109] could be compromised.

The Commission is also concerned by the fact that the recruitment of foreign workers is not regulated. As such, unscrupulous individuals or organizations whose independence and impartiality may be questionable, can take advantage of the vulnerability in which migrant workers find themselves to serve their purposes.[110]

These elements contribute to maintaining the severe vulnerability in which migrant workers find themselves.

## CONCLUSION AND RECOMMENDATIONS

The selection of candidates immigrating to Québec must comply with the principles set forth in the Charter of Human Rights and Freedoms, as it falls within provincial jurisdiction. The same goes for all of the working conditions of migrant workers, including their contract of employment, unless they are employed in a company whose activities fall within federal legislative jurisdiction.

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107 DEPATIE-PELLETIER, Eugénie, "Normes du MICC pour l'embauche de travailleurs étrangers temporaires (ou comment éviter l'application des lois du travail au Québec en 2011)", in 66e congrès des relations industrielles de l'Université Laval, *Immigration et travail : s'intégrer au Québec pluriel*, Cahier du participant, Québec, May 2 and 3, 2011, p. 74 to p. 77.

108 HANLEY, Jill, "Social condition of SAWP agricultural workers as it influences their relationship with their employer", November 2008 [Not published], par. 20.

109 Charter, supra note 1, s. 23.

110 Tilson Report, supra note 60, p.35 -36.

Migrant workers are a relatively homogeneous group with common characteristics that correspond to the grounds of discrimination prohibited under the Charter, in this case, ethnic or national origin, race, social condition, language and, in the case of live-in caregivers, sex.

Moreover, the immigration status of migrant workers, being that of a foreigner, in addition to restricting their freedom of establishment and their access to the family class program, forces them to hold a work permit restricted to a single employment and to a single employer, and compels them to live with their employer. The restricted work permit infringes on the right to freedom and the right to fair and reasonable conditions of employment which have proper regard for their health, safety and physical well-being. As for the residence obligation, it compromises several of their fundamental rights and freedoms such as mobility rights, freedom of association, the right to dignity, the right to privacy, the free disposition of property, the right to respect of the inviolability of the home, and the right to fair and reasonable conditions of employment which have proper regard for their health, safety and physical well-being.

In pursuing our systemic analysis, we have examined the legislative regime governing migrant workers and identified the exclusions that compromise the workers' right to equality. These exclusions are often related to the migrant workers' difficulty to establish residence. As regards to social protection, we noted exclusions with respect to legal aid, social assistance, public education, parental insurance, low rental housing, medical insurance and francization. With respect to labour, we noted exclusions regarding labour standards, occupational health and safety, and unionization. Similarly, because employers are reluctant to standardize their contracts within their businesses, the ambiguous nature of the farm workers' employment contracts benefiting from various programs compromises their right to equality.

Finally, there are other systemic obstacles that prevent the full realization of migrant workers' rights. Current institutional structures constitute a major obstacle, as they cannot guarantee that migrant workers will not be returned to their country of origin if they file a complaint. Also, the Seasonal Agricultural Workers Program does not provide for a review process in case of repatriation by the employer, the consulate of the country of origin or the Canada Border Services Agency. Finally, the recruitment of migrant workers is not regulated, therefore, recruiters can engage in dubious practices with impunity.

Our analysis shows the severe vulnerability in which migrant workers find themselves. The situation is even more difficult for women.[111] Yet, these persons are part of the social fabric and contribute to the country's economic health, in the same way as permanent residents or Canadian citizens. It results, among other issues, in an imbalance in the labour market[112] benefiting employers and the State, with no relation to the inherent qualities of the workers concerned.[113]

Finally, it should be noted that institutional structures are a major obstacle to the filing of complaints because they do not protect against removals.

Following its analysis, the Commission has concluded that all migrant workers are subject to systemic discrimination. The situation therefore calls for a systemic intervention requiring, among other things, that stakeholders, both institutional and private, review its practices.

The Commission issues the following recommendations:

- That the Government of Québec exercise its legislative authority in immigration to limit the use of migrant workers by establishing permanent immigration programs intended for them, which take in account the real problems of labour shortage.

Failing which, or in the meantime, the Commission recommends:

- That the Ministère de l'Immigration et des Communautés culturelles only accept workers holding sector-based work permits by province;
- That the Ministère de l'Immigration et des Communautés culturelles no longer accept workers who are obliged to live with their employer, and that it prohibit employers from including such clauses in contracts that are binding on the migrant workers.

111 INTERNATIONAL LABOUR OFFICE, supra note 19, p. 77.

112 ALBOIM, Naomi & MAYTREE, *Adjusting the Balance: Fixing Canada's Economic Immigration Policies*, Toronto, 2009, [online]. http://www.maytree.com/wp-content/uploads/2009/07/adjustingthebalance-final.pdf (Consulted on February 10, 2010), p. 39.

113 BAINES, Donna, & SHARMA, Nadita, "Migrant Workers as Non-Citizens: The Case against Citizenship as a Social Policy Concept" [2002] 69 *Studies in Political Economy* 75, p. 92.

Moreover, it is imperative that Québec amend its legislation and programs to eliminate elements of systemic discrimination. Therefore, the Commission recommends:

- That the Government of Québec ensures, in accordance with the Charter of Human Rights and Freedoms, that the recognition of workers' rights in its legislation does not depend on their immigration status;
- That the Government of Québec revise the relevant legislation so that migrant workers have equal access to social protection, as well as the protection of labour law;
- That the Government of Québec confer on the Ministère de l'Immigration et des Communautés culturelles, and the Ministère du Travail, in accordance with their respective powers, the mandate to exercise sufficient supervision with respect to the protection of the rights of migrant workers;
- That the Government of Québec amend the Act respecting Labour Standards regarding minimum housing conditions to protect the quality of life and the dignity of agricultural foreign workers and domestic workers;
- That the Government of Québec impose a legislative framework on recruitment activity of migrant workers;
- That the Government of Québec mandate an existing public institution to render decisions in disputes, liable to result in repatriation, between a migrant worker and an employer.

SUMMARY OF CANADA'S IMMIGRATION PROGRAMS

**CATEGORY OF INDIVIDUALS ADMITTED IN CANADA**

1. **Immigrants – Sub-category: Refugees**

- Program: Convention refugees – Person in need of protection
- Selection criteria: Selected on the basis of their need of protection
- Inadmisibilities: Same for all categories
- Status upon entry: Permanent residence

2. **Immigrants – Sub-category : Family class**

- Program: Not applicable
- Selection criteria: Selected on the basis of their relationship with a Canadian citizen
- Inadmissibilities: Same for all categories
- Status upon entry: Permanent residence

3. **Immigrants – Sub-category : Economic immigration**

- Program: Skilled workers – Investors – Self-employed – Provincial nominees
- Selection criteria: Selected on the basis of their ability to become economically established in Canada
- Inadmissibilities: Same for all categories
- Status upon entry: Permanent residence

4. **Migrants workers**

- Programs: - Live-In Caregiver Program – Seasonal Agricultural Workers Program – Pilot Project for Occupations
  Requiring Lower Levels of Formal Training – Canadian experience
- Selection criteria: Selected by employers
- Inadmissibilities: Same for all categories
- Status upon entry: Temporary residence

5. **Visitors**

- Program: Not applicable
- Selection criteria: No selection
- Inadmissibilities: Same for all categories
- Status upon entry: Temporary residence

## OVERVIEW OF SUB-PROGRAMS ALLOWING THE ARRIVAL OF MIGRANT WORKERS

1. **Live-In Caregiver Program**

- Field: Domestic work
- Agreement between Canada and another State: No (no agreement)
- Restrictions on work permits: Caregivers must obtain a new work permit to change employer
- Maximum duration of work permits: 51 months
- Obligation to live with the employer: Yes
- Access to permanent residency: After 3,900 hours of work
- Number of individuals entering or returning to Québec in 2010*: 407

2. **Seasonal Agricultural Workers Program**

- Field: Agricultural Work
- Agreement between Canada and another State: Yes
- Restrictions on work permits: The transfer must be authorized by the employer, the representative of the foreign government, and HRSDC
- Maximum duration of work permits: 8 months
- Obligation to live with the employer: Employers must provide free accommodation
- Access to permanent residency: Not applicable
- Number of individuals entering or returning to Québec in 2010*: 2,609

3. **Pilot Project for Occupations Requiring Lower Levels of Formal Training (Agricultural Stream)**

- Field: Agricultural Work
- Agreement between Canada and another State: No
- Restrictions on work permits: Workers must obtain a new work permit to change employer
- Maximum duration of work permits: 24 months
- Obligation to live with the employer: Employers must provide accommodation or help the worker find one
- Access to permanent residency: Not applicable
- Number of individuals entering or returning to Québec in 2010*: 3,121

4. **Pilot Project for Occupations Requiring Lower Levels of Formal Training - Other low-skilled workers**

- Field: Other (other fields)
- Agreement between Canada and another State: No
- Restrictions on work permits: Workers must obtain a new work permit to change employer
- Maximum duration of work permits: 24 months
- Obligation to live with the employer: Employers must provide accommodation or help the worker find one
- Access to permanent residency: Not applicable