

A large flock of colorful birds, possibly doves, is flying against a clear blue sky. The birds are in various stages of flight, with wings spread, and are scattered across the entire frame. They have vibrant plumage in shades of red, yellow, green, and blue.

# ENSURING MIGRANT WORKER FAIRNESS

*Response to the Changing  
Workplaces Review Special  
Advisors' Interim Report*

**Migrant Workers Alliance  
for Change**



*September, 2016*

The Migrant Workers Alliance for Change (MWAC) is a migrant workers' rights coalition headquartered in Ontario. Established in 2007, MWAC is led by migrant worker groups and supported by community, provincial and national organizations. The Migrant Workers Alliance for Change includes individuals as well as Alliance for South Asian Aids Prevention, Asian Community Aids Services, Butterfly (Asian and Migrant Sex Workers Support), Caregiver Connections Education and Support Organization, Caregivers Action Centre, FCJ Refugee House, Fuerza Puwersa, GABRIELA Ontario, IAVGO Community Legal Clinic, Income Security Advocacy Centre, Justice for Migrant Workers, Migrante Ontario, No One Is Illegal – Toronto, Northumberland Community Legal Centre, OHIP For All, PCLS Community Legal Clinic, SALCO Community Legal Clinic, Students Against Migrant Exploitation, Social Planning Toronto, UFCW, UNIFOR, Workers Action Centre and Workers United. Member organizations of MWAC work primarily with racialized and low-waged migrant workers doing organizing and advocacy work as well as providing legal, employment and health related services.

MWAC is also a founding member of the Coalition for Migrant Worker Rights Canada (CMWRC), the representative body of migrant workers in the country.

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# Introduction

The Migrant Workers Alliance for Change (MWAC) welcomes the Changing Workplaces Review (CWR) and the chance to respond to the Special Advisors' Interim Report. Given the make-up of our coalition and our member organizations, our submissions here focus on the issues and options most relevant to the lives of low-waged, so-called 'low skilled' migrant workers and their families. More specifically, we focus here on the context and changes with the greatest potential impact on Ontario migrant workers in the Caregiver Program (formerly Live-in Caregiver Program), the Seasonal Agricultural Workers Program (SAWP, now in its 50<sup>th</sup> year), the Agricultural Stream, and the Stream for Low-Wage Positions.

In addition to setting out guiding principles, the changing contexts of workers and workplaces, and legislative histories, the Advisors' Interim Report generally focuses on reviewing options for changing or maintaining the Ontario Labour Relations Act (OLRA) and the Employment Standards Act (ESA). The Advisors' work is guided by competing demands to recognize dignity and decency at work balanced against the need to strengthen and support businesses seeking flexibility in order to maintain their competitiveness. This competition runs through the Advisors' guiding principles, where they are seeking to level the playing field while also noting that smart regulation is not 'one size fits all'.

The Advisors also look to other jurisdictions in Canada (other provinces and the federal government), the United States, the United Kingdom, and the European Union, but are aware of avoiding a statutory 'race to the bottom'. They also note their desire to achieve stability in bringing change to these two statutes (OLRA; ESA), particularly having a reasonable likelihood of both legal and political sustainability over subsequent governments.

Given the hundreds of submissions and presentations that they received in their consultations, the Advisors seem keenly aware of the changing contexts of work in Ontario, Canada, and the world. Their focus on precarious jobs and vulnerable workers (both defined broadly) is integrated with discussion about workplace pressures like globalization, technological change, and the shift from manufacturing to service industries. In turn, they note how such pressures fissure workplaces and increase the participation of women, older workers, and new immigrants in workforces. They specifically note the added vulnerabilities faced by new immigrants due to language barriers, lower unionization rates, fear of reprisals, and a general lack of economic integration.

The over-representation of women, recent immigrants, and less educated workers also overlaps with the Advisors' interpretation of vulnerability as including different types and

categories of jobs (e.g. low-income full-time, part-time, temporary, seasonal, solo, and multiple job holders).

Although not specifically mentioning migrant workers in their introduction or guiding principles, the Advisors also mention seasonal work in agriculture as one of the areas where precarious work and vulnerable workers can be found.

Given these early acknowledgments of the role and impact of globalization, immigration, race, gender, education, and non-standard classes of jobs, we were hopeful that low-waged migrant workers would figure prominently in the Advisors' analysis and options for changing Ontario's labour and employment laws. Initially, there was an impulse to separate migrant workers' concerns from the questions at the core of this Review.<sup>1</sup> At the outset, the Advisors suggested that migrant work in Ontario fell outside the mandate of this Review, supposedly being left to a separate process at the provincial level. As far as we are aware, no such separate process has taken place or is currently being planned in Ontario.

However, as the rest of these submissions highlight, there are a number of instances

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<sup>1</sup> For ease of reference, we are including our original submissions to the Changing Workplaces Review (CWR) as an addendum to these submissions on the Interim Report.

where certain options put forward by the Advisors can further migrant workers' access to decent work. At the same time, we must reiterate that any labour law reform in Ontario must account for the specific vulnerabilities of migrant workers, and that the final report should respond to the key reforms initially proposed by migrant worker groups.

Ultimately, Ontario's labour and employment laws will be judged by how well they protect the workers least well-off within their jurisdiction. The particular vulnerabilities faced by migrant workers stem from the intersection of their precarious immigration status (triangulated between employers, recruiters, and immigration authorities) with their social and workplace locations (e.g. racialized, gendered, so-called 'low skilled' workers in low-waged, non-unionized sectors that are rife with legal exemptions). Specific legal and policy changes must be made at provincial, federal, and intergovernmental levels to address these vulnerabilities and their root causes.

As seen below, there remains a long way to go before migrant workers are seen as Ontarians, too, worthy of the same dignity and respect as the people they feed, care for, and serve on a daily basis in this province even while supporting their families abroad.

The remainder of these submissions discuss the Advisors' proposed options for change that most impact migrant workers. First, we emphasize the need for immediate inclusion and potential broader-based bargaining of migrant workers under the LRA. Second, we assess the Advisors' options for migrant workers' inclusion under the ESA, which requires explicit recognition that their working lives are always characterized by vulnerability within triangular (usually quadrangular) relationships with employers, recruiters, and immigration authorities. To this end, our submissions are geared to statutory reforms that lay the groundwork for the greater protection and power of migrant workers with the knowledge that federal immigration laws cast a large shadow over such protection and bargaining.

# Summary of recommendations

## Labour Relations Act

### Coverage & exclusions in the LRA

1. MWAC supports the option to eliminate the LRA exclusion of domestic workers employed in a private home and institute meaningful, non-Wagner Act models of collective bargaining.
2. MWAC also supports the option to eliminate the LRA exclusions for agricultural and horticultural sectors and to repeal the Agricultural Employees Protection Act.
3. MWAC supports amending the definition of “bargaining unit” to allow for workplaces with only one employee.
4. MWAC emphasizes that these changes can only be a starting point to meaningful participation by migrant agricultural workers and caregivers as part of a continuing process.
5. MWAC supports the option to enact legislation protecting ‘concerted activity’ along the lines set out in the United States NLRA.

### Broader-based bargaining structures



6. MWAC supports the recommendations by the Workers' Action Center (WAC) and Parkdale Community Legal Services (PCLS) on broader-based bargaining, including the recommendation to provide a legislative framework that enables and supports collective organizing, representation and bargaining for workers in particularly vulnerable and precarious work (including, but not limited to, migrant farmworkers and caregivers/ domestic workers). This framework must mitigate the power imbalances that exist for these vulnerable workers (immigration rules, isolation, nature of the work, employer-provided housing, etc.). Elements of this framework would include:
- Designating an employer entity that is the counterpart in bargaining;
  - Ensuring a strong floor of rights from which to bargain by revoking all exemptions and special rules from core employment standards;
  - Recognizing the triangular relationship involved in some employment relationships through recruitment agencies (migrant workers) and employment agencies;
  - Addressing challenges in the caregiving and migrant farmworker sectors through relevant

enforcement and labour inspection strategies; and,

- Developing the capacity to enhance protection for social security and group benefits coverage and entitlement.

## Employment Standards Act

### Scope, coverage, exemptions and liability in the ESA

7. MWAC supports the WAC and PCLS recommendation to amend the ESA to make companies jointly and severally liable for the ESA obligations of their contractors, subcontractors, and intermediaries.
8. MWAC supports the WAC and PCLS recommendation to create a joint employer test similar to the policy developed by the U.S. Department of Labour.
9. MWAC also supports the WAC and PCLS recommendation to repeal the "intent of effect" requirement in Section 4 of the ESA 'related employer' provision.
10. MWAC urges the Advisors to recommend that agricultural workers should be immediately entitled to all of the following ESA provisions: minimum



wage (including abolishing payment by piece rate), overtime, vacation and holiday pay, hours of work, daily and weekly/bi-weekly rest periods, eating periods, and time off between shifts.

11. MWAC also urges that the Advisors specifically recommend bringing the ESA in line with the federal caregiver program and prohibit deductions for room and board for caregivers who still live in their employer's property, as well as strengthening protections for hours of work, vacation, personal emergency leave (repealing small business exemption), and instituting paid sick days.

#### Termination, wrongful dismissal, and wrongful repatriation

12. MWAC supports the option to require employers to provide notice of termination (or pay) based on the total length of an employee's employment for workers with recurring periods of employment, including migrant agricultural workers (i.e., add separate periods of employment together as is done for severance pay).
13. MWAC also supports the WAC and PCLS recommendation that the three-month eligibility requirement for termination notice be eliminated so

that all workers employed for less than a year would be entitled to one week's notice of termination (or pay).

14. MWAC supports the option to provide just cause protection for all employees.
15. MWAC also supports the option to provide migrant workers with just cause protection (adjudication), which must also be expedited *and* prioritized before any requirement to leave Canada. This option is also related to our recommendation on open permits accompanying workers' complaints (see below).

#### Triangular relationships and regulating recruitment agencies

16. MWAC insists that strategic enforcement of Ontario employment standards for workers in triangular relationships requires a systematic approach to regulating the recruitment and charging of fees to migrant workers. This systematic approach should sit within the Ministry of Labour and should include: compulsory licensing and publication of recruiters, the use of financial bonds, compulsory registration of employers, joint and several liability between recruiters and employers, mandatory reporting of recruiter supply chains in Canada and

abroad, mandatory and detailed reporting of recruiters' business and financial information, explicit recruiter liability for actions further down the recruiter's supply chain, and (among others) cross-jurisdictional information sharing to enhance protection.

### Strategic enforcement and cultures of compliance

17. Along with the WAC and PCLS, MWAC rejects the option of expanding the mandate of JHSC to include the ESA. Problematic for all non-unionized workers, such an option would be particularly problematic for migrant caregivers and agricultural workers due to the barriers in making claims and reprisal threats.
18. MWAC supports the recommendation of the WAC and PCLS to establish a robust model of strategic enforcement to create compliance through: joint and several liability that compels lead companies to comply with the ESA throughout the supply chain; expanding the definition of employee to include all dependent workers (contractor); consistent and effective deterrence (monetary penalties) for violations that are made public; and, effective protection of workers from employer reprisals.

19. MWAC supports increased inspections in workplaces where migrant and other vulnerable and precarious workers are employed.

20. While MWAC supports proactive enforcement of migrant workers' minimum standards of employment, we also emphasize that migrant workers' precarious immigration status and tied work permits must be considered in order for such enforcement to be strategic.

Strategic enforcement must also include development of an effective communication strategy to inform undocumented residents about their ability to make claims and access rights regardless of their immigration status (including informing relevant immigration and settlement service providers). The Ministry of Labour should develop and communicate its specific protocols to ensure that information is not shared with federal immigration enforcement authorities to the detriment of workers.

## Barriers to making claims & protection from reprisals and repatriation

21. MWAC supports the WAC and PCLS recommendations to:
  1. remove the self-help provision from the ESA;
  2. establish formal anonymous and third party complaints provisions;
  3. establish a reverse onus on employers to disprove the complaint against them; and,
  4. provide legal support to workers filing ESA claims.
22. MWAC supports the option to expedite reprisal investigations and decisions with ESOs, but insists (along with the WAC) that *all* reprisal claims be expedited rather than limiting to urgent cases like termination and failure to return from leave.
23. MWAC also supports the call to include the option for interim reinstatement in cases of termination, as well as the provision of legal support to workers making anti-reprisal claims.
24. MWAC also insists that the ESA explicitly prohibit the repatriation or deportation of workers who have filed complaints.

25. Similarly, MWAC insists that an open work permit program must be created for migrant workers making complaints against employers and recruiters to offset reprisals and the threats and realities of repatriation (potentially under a new Canada-Ontario Immigration Agreement). These permits should not be made discretionary and will require active cooperation and advocacy between the provincial and federal governments.
26. MWAC further supports changes in policy and practice that will facilitate the workers' rights of undocumented workers and reduce the fear of reprisals like detention or deportation. Workers must be informed that they do not need to share their home address when filling out forms, but can instead use the mailing addresses of advocate or support organizations. Workers must also always have the ability to participate in meetings over the phone (and not in person) when employers may be present. Currently, ESO's have discretionary ability to allow off-site meetings, but often workers are rightly fearful of sharing their status with ESOs. All workers should be able to participate in meetings off-site to reduce fears of employer reprisals through federal authorities. Finally, for workers who continue complaints even after leaving Canada, ESOs must communicate with workers in their

preferred language and with due consideration to time differences. Failure to use interpretation in emails and calls, or consider time differences, will otherwise result in the abandonment of these claims.

27. MWAC urges the Advisors to address these issues in this Review since there is no separate process for reviewing the experiences of migrant workers. Furthermore, all of the available federal and provincial processes outside of the CWR have been characterized by the exclusion and sidelining of the low-wage migrant workers at the heart of our coalition.

# I. The Labour Relations Act

## I.a. Ending exclusion

After discussing the purpose and legislative history of the OLRA, the Advisors discuss the scope and coverage of the Act, which does not apply to domestic workers in private homes, agricultural workers, and horticultural workers (among others).

Some of the employers' reasons cited by the Advisors for the exclusion of these workers include the intimate social bond formed between domestic workers and their employers, as well as the uniqueness of agricultural and horticultural work (e.g. seasonal work, variable climates, perishable products, and the continuous care required to

ensure the life and safety of plants and animals). Of course, the supposedly unique characteristics of caregiver and agricultural work, whether being considered 'one of the family' or under the lens of the 'family farm', have both been thoroughly debunked.<sup>2</sup>

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<sup>2</sup> See, for example, Abigail Bakan and Daiva Stasiulis, eds., *Not one of the family: foreign domestic workers in Canada* (Toronto: University of Toronto Press, 1997); Fay Faraday, Judy Fudge, & Eric Tucker, eds., *Constitutional labour rights in Canada: farm workers and the Fraser case* (Toronto: Irwin Law, 2012).

The options put forward by the Advisors for these two groups of workers include maintaining the status quo or providing access to collective bargaining by:

1. Eliminating the exclusion of domestic workers employed in a private home and instituting meaningful, non-Wagner Act models of collective bargaining<sup>3</sup>;
2. Eliminating the LRA exclusions for agricultural and horticultural sectors under the LRA and repealing the Agricultural Employees Protection Act (AEPA).<sup>4</sup>

**MWAC supports the option to eliminate the LRA exclusion of domestic workers employed in a private home and institute meaningful, non-Wagner Act models of collective bargaining. MWAC also supports the option to eliminate the LRA exclusions for agricultural and horticultural sectors and to repeal the Agricultural Employees Protection Act.**

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<sup>3</sup> See below for discussion of broader-based bargaining models and, more generally, see Sara Slinn, *Collective Bargaining* (Toronto: Ontario Ministry of Labour, 2015) (prepared for the Ontario Ministry of Labour to support the Changing Workplaces Review); Intercede and International Ladies Garment Workers' Union, *Meeting the Needs of Vulnerable Workers: Proposals for Employment Legislation and Access to Collective Bargaining for Domestic Workers and Industrial Homeworkers* (1993).

<sup>4</sup> For further discussion on the inadequacies see MWAC Submissions to the CWR (May 2015).

Both of these options are necessary in order to allow migrant workers the chance to access constitutionally-protected rights to meaningful collective bargaining.

**With respect to caregivers, and as noted by the Workers Action Center and PCLS, pursuing this option for domestic workers also entails amending the definition of “bargaining unit” to allow for workplaces with only one employee.**

As noted below, pursuing meaningful, non-Wagner Act models of collective bargaining for caregivers necessarily requires the participation of migrant caregivers in the creation and development of these models. Without such participation, any broader-based bargaining models would lack both legitimacy and effectiveness.

Along these lines, any recommendations by the Advisors can only be a starting point to meaningful participation by migrant caregivers as part of a continuing process that outlasts this Review.<sup>5</sup>

In terms of migrant agricultural workers, Ontario lags behind the entire country as the only Canadian jurisdiction where farmworkers lack the right to unionize and bargain

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<sup>5</sup> See submissions by Fay Faraday on this point.

collectively (excluding farms in Quebec with less than three full-time employees).

While we have already stated our support for including agricultural and horticultural work in the LRA, we must also emphasize our opposition to the continued operation of the AEPA as well as any return to the ALRA. As noted by the WAC and others, the severe limitations and various exceptions of these two pieces of legislation underscore the need to move beyond superficial inclusion and paper rights.

Instead, and as noted by Fay Faraday in her submissions, the conditions of migrant work will improve only by increasing opportunities for collective action that is backed up by enforceable rights. Furthermore, the provision of such opportunities and rights cannot take place in a vacuum; the particular barriers of precarious immigration status and triangular relationships that face migrant workers must be addressed directly.

Finally, we also note that the Advisors put forward the option for concerted activity in non-unionized workplaces as a means for collective action in excluded or hard-to-organize sectors and workplaces. **MWAC supports the option to enact legislation protecting concerted activity along the lines set out in the United States NLRA.**<sup>6</sup>

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<sup>6</sup> See CWR, *Interim Report* at 130, 133.

### *I.b. Broader-based Bargaining: Making It Possible*

The Advisors note that meaningful collective bargaining will look different for domestic workers (caregivers) largely employed individually in private homes. Since at least 1993, various options have been debated in relation to what effective collective bargaining and representation would look like for caregivers, including migrant workers. Although set out in much greater detail in Professor Sara Slinn's research report commissioned for the Review,<sup>7</sup> the Advisors also devote a section to the issue of broader-based bargaining.

Each of the proposed models have their benefits and advantages, but we agree with the Workers' Action Center (WAC) submissions that it remains too soon to see what will substitute for the Wagner Act model in this sector (among others). Instead, it is important that the government create the conditions for migrant caregivers to organize themselves. As we have noted in our previous submissions here and beyond, the minimum standard and starting point for such collective action would be permanent resident status on these workers' arrival to Canada. Short of this standard, migrant caregivers will need to be included with the OLRA, the definition of

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<sup>7</sup> See Slinn 2015 at 90-95.



'bargaining unit' must be amended, and some form of sectoral bargaining will be necessary.

**In preparing for the models of bargaining yet to come, we adopt the relevant WAC and PCLS submissions on this point:**

- Expand the recognition of who is an employee entitled to engage in collective bargaining by removing statutory exclusions (e.g. agricultural and domestic workers);
- Expand the recognition of who the employer is through the recognition of joint employers;
- Enable workers to organize and bargain collectively from multiple locations with the same employer/franchisor. Additional units would be brought under the initial agreement with a union or council of unions;
- Enable organizing and collective bargaining on a multi-employer and/or sectoral basis. Empower the Ontario Labour Relations Board (OLRB) to require employers in the same sector to bargain together in a council where the workplaces have been organized.
- **Provide a legislative framework that enables and supports collective organizing, representation and bargaining for workers in particularly vulnerable and precarious work (including, but not limited to, migrant farmworkers and**

**caregivers/domestic workers).** This framework must mitigate the power imbalances that exist for these vulnerable workers (immigration rules, isolation, nature of the work, employer-provided housing, etc.). Elements of this framework would include:

- Designating an employer entity that is the counterpart in bargaining;
- Ensuring a strong floor of rights from which to bargain by revoking all exemptions and special rules from core employment standards;
- Recognizing the triangular relationship involved in some employment relationships through recruitment agencies (migrant workers) and employment agencies;
- Addressing challenges in the caregiving and migrant farmworker sectors through relevant enforcement and labour inspection strategies; and,
- Developing the capacity to enhance protection for social security and group benefits coverage and entitlement.

**In addition to the above principles, it is imperative that the Advisors and government understand the isolation faced by workers in these sectors, especially migrant caregivers working alone in private homes. This understanding can only come through direct and ongoing consultation with caregivers and caregiver groups. The**

recent story of the forced failure of caregiver Teta Bayan's attempt to testify at the federal HUMA review of the Temporary Foreign Worker Program (TFWP) shows the obstacles to such consultation.<sup>8</sup> However, caregivers and their allies remain steadfast in having their voices heard in the programs that bear their names; the Advisors should recommend that the Ontario government do the same in fashioning broader-based bargaining for caregivers jointly with caregivers themselves.

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<sup>8</sup> See online

(<http://www.theglobeandmail.com/opinion/i-was-bumped-from-speaking-to-the-house-i-need-to-say-this-migrant-workers-need-better-rights/article30128081/>). See also  
(<http://www.theglobeandmail.com/news/politics/commons-scuffle-robs-nanny-of-chance-to-speak-on-temporary-foreign-worker-law/article30098362/>).

## II. The Employment Standards Act

As mentioned at the start of these submissions, we focus our feedback to the Advisors here on those Employment Standards Act (ESA) changes and options most relevant to migrant workers. As a general matter, we endorse the much more detailed submissions of the Workers' Action Center (WAC) on those employment standards not discussed in detail here, which still all play an important role in the lives of migrant workers.<sup>9</sup>

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<sup>9</sup> See *Workers' Action Center & Parkdale Community Legal Services, Building Decent Jobs from the Ground Up: Responding to the Changing Workplaces Review Special Advisors' Interim Report* (September 2016).

**As well, we emphasize throughout the importance of recognizing the triangular relationships that characterize migrant workers' lives and the need to prioritize labour and employment rights over immigration status.**

### *II.a. Joint & several liability of multiple employers*

Early in their discussion of the ESA, the Advisors note the fundamental importance of determining who the employers are and who ought to be held liable for ensuring

compliance with minimum employment standards. In their discussion of the fissuring of employment through subcontracting, outsourcing, franchising, and using temporary help agency (THA) workers, the Advisors recognize that “assigning liability to the higher level entities could well cause them to change their strategies with the effect of improving the compliance rates by subordinate employers further down the supply chain”<sup>10</sup>. After reviewing the situation in other jurisdictions, as well as submissions made to them, the Advisors present a range of options for addressing the issue of shared liability and responsibility by lead companies for non-compliance by subcontractors or employers down the chain.<sup>11</sup> Generally, and without going into greater detail here, we support the submissions of the Workers Action Center and PCLS on this matter.

More specific to migrant workers and, in particular, farm workers, **MWAC supports the recommendation to amend the ESA to make companies jointly and severally liable for the ESA obligations of their contractors, subcontractors, and intermediaries. MWAC also supports the recommendation to create a joint**

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<sup>10</sup> CWR, *Interim Report* at 149 (the quotation concludes, “... or change the economic model so that compliance with minimum terms and conditions of employment is attainable by the business performing the service or providing the goods.”).

<sup>11</sup> See CWR, *Interim Report* at 153 (eight options).

**employer test similar to the policy developed by the U.S. Department of Labour. MWAC also supports the recommendation to repeal the “intent of effect” requirement in Section 4 of the ESA ‘related employer’ provision.**

Making and following these recommendations will help provide a further avenue of redress to migrant workers (in agricultural and other sectors) who sometimes must labour on a leased or sub-contracted basis without recourse to lead employers and companies when violations occur.

## **II.b. Ending exemptions**

MWAC appreciates the Advisors’ emphasis on the universality of the Employment Standards Act (ESA) versus the many targeted, if not justified, exemptions from its minimum standards. On this matter, they note that there are more than 85 exemptions and special rules under the ESA, with only 29% of low-income workers fully covered by overtime provisions under the Act. The Advisors also state that they will likely recommend a review process to address exemptions on a piecemeal basis rather than wholesale elimination of the exemptions. They note that the full participation of worker representatives will be required for such a review. However, they do identify three categories of exemptions for going forward:

- 1) exemptions that can be eliminated without further review (i.e. IT workers, pharmacists, managers & supervisors, residential care workers, residential building supervisors, janitors, caretakers, students under 18 receiving special minimum wage, liquor servers, and students exempt from the three-hour reporting rule);
- 2) exemptions that they recommend keeping in place (i.e. public transit, mining and mineral, live performance, film and TV, auto manufacturing, and ambulances); and,
- 3) the vast majority of remaining exemptions that should be reviewed on a case-by-case basis following the existing special industry rules (SIRs) process, a new statutory process, or sectoral orders for extending certain collective bargaining agreements at the Ontario Labour Relations Board (OLRB).

Unfortunately, the work of migrant caregivers and agricultural workers falls under this last category supposedly requiring further review (e.g. exemptions for domestic workers employed by the householder, and a longer list of agricultural exemptions that includes farm employees in primary production, harvesters of fruit, vegetables or tobacco, and horticultural work).

It is not clear on what standard the continuing exemption of these workers would be justified, especially given all the previously mentioned pressures of globalization, lack of

collective representation, low levels of pay, precarity of the work, risk in the workplaces, vulnerability of the jobs, and social location of the workers.

As mentioned in our original submissions to the Advisors, under immigration law, migrant workers are on tied work permits that restrict them to working for one employer, at a specified workplace, doing only one kind of work. Their labour market mobility ranges from very limited to none. Correspondingly, migrant workers are under constant scrutiny and have been described as being under permanent recruitment or always auditioning for the chance to stay and work. This scrutiny begins from the moment workers seek or are recruited for jobs from abroad, in their application to employers, application for work permits (and employers' applications for labour market impact assessments, formerly opinions, on their behalf), and performance of their work in the hopes of returning another season or, now more rarely, applying for permanent residency within Canada.<sup>12</sup>

As further detailed below in the section on reprisals, migrant workers have very limited collective voice at work and cannot be realistically expected to contract for or

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<sup>12</sup> For greater detail on this process, and the 'churning' of migrant workers' lives for Canadian convenience, see the three Metcalf Foundation reports on migrant work written by Fay Faraday from 2012 to 2016 (i.e., *Made in Canada*, *Profiting from the Precarious*, and *Canada's Choice*).

complain about minimum employment standards in a context where more than 90% of Canadian workers complain only after being terminated or securing new job.

Given their closed, tied work permits and hopes to return in subsequent seasons or continue working towards permanent residency applications, migrant workers do not enjoy the limited luxury of complaining about basic employment standards. Put briefly, migrant workers cannot 'vote with their feet' when they experience workplace violation, never mind contract substitution and substantial changes in wages and working conditions.

Whether under the existing SIRs process, or a new statutory process reviewing exemptions,<sup>13</sup> we can see no basis for the continued exemption of migrant workers from minimum employment standards meant to establish a floor for all workers in Ontario. **More specifically, we urge the Advisors to recommend that agricultural workers should be immediately entitled to all of the following ESA provisions: minimum wage (including abolishing payment by piece rate), overtime, vacation and holiday pay, hours of work, daily and weekly/bi-weekly rest periods, eating periods, and time off between shifts.**

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<sup>13</sup> Here we endorse the submissions by the Workers' Action Centre on a new statutory process for reviewing the category of continuing exemptions.

Having been in existence for the past 50 years, there is no time to waste in bringing migrant agricultural workers under the full protection of the ESA now. As discussed below in the sections on enforcement and reprisals, this extension of minimum standards on paper will require even greater political will to achieve on the ground. But further delays in ending these exemptions prevent even the appearance of decency and dignity in these workplaces.

**MWAC also urges that the Advisors specifically recommend bringing the ESA in line with the federal caregiver program and prohibit deductions for room and board for caregivers who still live in their employer's property, as well as strengthening protections for hours of work, vacation, personal emergency leave (repealing small business exemption), and instituting paid sick days.**

More generally, we support the wider recommendations in the Workers Action Center and PCLS submissions on working conditions and minimum standards, as well as the original submissions of the Caregivers Action Centre and Justice for Migrant Workers.<sup>14</sup>

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<sup>14</sup> See Submission by the Caregivers' Action Centre (Sept. 18, 2015) to Ontario's Changing Workplaces Review Consultation Process. See also Submission by Justice for Migrant Workers (Sept.

## *II.c. Termination and protection against wrongful dismissal & repatriation*

Although discussed at greater length in the Interim Report, we focus here on a few key issues with respect to the termination and protection of migrant workers against wrongful dismissal and wrongful repatriation.

First, the Advisors note the requirement that employers must provide written notice of termination or pay instead of such notice (or a combination of the two) for most workers who have been continuously employed for 3 months. The notice, or pay, is meant to give workers the chance to start trying to find new employment. However, as with the other employment standards, not all workers qualify for this entitlement. For instance, seasonal migrant workers are exempt from termination notice (or pay) because their recurring periods of employment are routinely separated by more than 13 weeks.

For this reason, **MWAC supports the option to require employers to provide notice of termination (or pay) based on the total length of an employee's employment for workers with recurring periods of employment (i.e., add**

**separate periods of employment together as is done for severance pay).**

As stated by the Advisors, if an employer dismisses a seasonal employee during the season, the employee could be entitled to notice based on his/her entire period of employment (not just the period worked that season).<sup>15</sup> As noted by the WAC, recommending this option would enable migrant agricultural workers to accumulate their separate, but repeated, terms of employment for the purposes of termination notice (or pay).<sup>16</sup> It is important to remember the precarious immigration status of migrant farm workers in accessing these entitlements, including that they are subject to the pressures of permanent recruitment from employers and consulates between seasons.

In addition to its other recommendations, we also support the WAC and PCLS recommendation that the three-month eligibility requirement for termination notice be eliminated so that all workers employed for less than a year would be entitled to one week's notice of termination (or pay).

Second, as noted by the Advisors, employers in Ontario have the general ability to dismiss non-unionized workers for any reason provided that they give the above-mentioned notice of termination or pay in lieu of such notice. In contrast, almost all collective

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18, 2015) *"Demanding dignity: how Ontario can undertake reforms to end the vulnerabilities of migrant workers"*.

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<sup>15</sup> CWR, *Interim Report* at 231.

<sup>16</sup> WAC, *Building Decent Jobs* at 37.



agreements have 'just cause' provisions that allow workers to contest their discharge; Nova Scotia, Quebec, and the federal level also have unjust dismissal protection that lets workers contest their termination (with possible reinstatement).<sup>17</sup> In this section of their interim report, the Advisors contemplate statutory unjust dismissal protection in Ontario to help prevent arbitrary and unfair terminations, enhance job security, and potentially provide for reinstatement (which is not available under common law if workers are ever able to afford going to court to exercise their rights).

Specifically, the Advisors also briefly noted some of the pressures on seasonal agricultural workers who "are often threatened with dismissal and with being sent home," noting advocates' suggestions for an expedited process for migrant workers "who are particularly vulnerable to unilateral employer action and - in the absence of an expedited adjudication process - may otherwise be required to leave Canada before a complaint of unjust dismissal is heard".<sup>18</sup>

On this issue, the Advisors laid out the options of: maintaining the status quo; implementing just cause protection for migrant workers together with an expedited adjudication to

hear unjust dismissal cases; or providing just cause protection (adjudication) for all employees covered by the ESA.

**MWAC supports the option to provide just cause protection for all employees,** but also insist that this option be read in light of our submissions and the more extensive WAC submissions on employees that should be covered by the ESA.

**Following from this option, MWAC also supports the option to provide migrant workers with just cause protection (adjudication), which must also be expedited and prioritized before any requirement to leave Canada.**

As noted in the section below on reprisals, there are two very large risks for any reforms of labour and employment law in the context of migrant workers. First, the failure to prioritize labour and employment law and rights over immigration status will terminate any chance at achieving a culture of compliance in these sectors. Second, the failure to acknowledge the wider, triangular and quadrangular relationships at play (between migrant workers and employers, recruiters, and immigration authorities) will render piecemeal<sup>19</sup> reforms ineffective at best.

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<sup>17</sup> See also recent decision of *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29 (unjust dismissal under Canada Labour Code).

<sup>18</sup> CWR, Interim Report at 234.

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<sup>19</sup> Those lacking federal coordination and collaboration over issues like open work permits in cases of workplace violations or unjust dismissal.

At worst, they will further push migrant workers' lives and experiences 'underground' even as the rest of the province enjoys the fruits of their labour.

### *II.d. Regulating recruitment and the triangulation of temporary migrant workers*

Following from the need to prioritize workers' rights over immigration status and recognize how migrant workers are triangulated between employers, agencies, and immigration authorities, we were hopeful after seeing the Advisors' discussion of temporary help agencies (THAs) in their interim report.

The Advisors note the rising use of THAs that recruit and post assignment workers to client companies, with the majority of the sector made up of lower-skilled and lower-wage workers.<sup>20</sup> Of particular importance here, the Advisors also emphasize the complexities that arise from the triangular relationship between assignment workers, client companies, and THAs. They also heard submissions from worker groups about the fundamentally vulnerable experiences of assignment workers, including: lower pay; difficulty understanding and exercising employment rights; vulnerability in making complaints; increase risk of injury on the job-site; job instability;

deterioration of health; unpredictable hours and income insecurity; and barriers to permanent employment.<sup>21</sup>

The Advisors also recognized that THAs charge assignment workers with fees to access employment, which are prohibited under Ontario's ESA as well as Manitoba's Worker Recruitment and Protection Act. In contrast, the Advisors note that (among other points) the employer and agency submissions stressed that THAs provide advantages to immigrants by allowing the evaluation of credentials, the development of Canadian experience, and the formation of networks with potential employers.<sup>22</sup> Among the options for addressing THAs, the Advisors note the potential to require licensing of THAs and to expand joint and several liability to client companies for all violations.

Given all of this background discussion to THAs, it is unclear why the issue of migrant worker recruitment and fees is presently missing from their Review. Despite the Advisors' findings of vulnerability in triangular relationships (including the payment of prohibited fees), passing mention of the Manitoba Worker Recruitment and Protection Act, and brief mention by agencies of permanent immigrants, migrant workers' ongoing struggles with recruiters and recruitment fees are still sidelined in

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<sup>20</sup> CWR, *Interim Report* at 235.

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<sup>21</sup> CWR, *Interim Report* at 250.

<sup>22</sup> CWR *Interim Report* at 251.

discussions about reforming Ontario's labour and employment laws. We are hopeful that the recommendations in the final report will fill this gap and include comprehensive, compulsory recruiter regulations.

As noted in our original submissions to the Review, migrant workers in low-waged jobs on temporary work authorization are paying up to an equivalent of two years' salaries in fees in their home countries to unscrupulous recruiters and agencies to work in Ontario. To pay these fees, entire families go into debt. Often when workers arrive here, work conditions and wages are not as they were promised or agreed to (sometimes including recruitment and travel to jobs that do not exist).<sup>23</sup>

With families back home in debt, workers are afraid to complain about ill treatment by bad bosses here. In some cases when workers complained about recruitment fees, they faced abuse and deportation. Recruiters have been known to punish entire communities by blacklisting their ability to come to Canada.

Employers pass the buck to recruiters in Canada, who in turn claim that recruiters in sending countries are the real culprits. For all of these reasons, and for the reasons recognized by the Advisors in the context of THAs, Ontario needs effective enforcement

tools to hold recruiters and employers accountable.

In 2009, members of the Migrant Workers Alliance for Change succeeded in lobbying the provincial government to pass the Employment Protections for Foreign Nationals Act (EPFNA) that prohibited recruitment fees and the seizure of identity documents from caregivers. In November 2014, the Stronger Workplaces for a Stronger Economy Act extended EPFNA protections to all migrant workers, filling in part of the legislative gap. This protection came into effect in November 2015.

However, two-thirds of the caregivers surveyed by the Caregivers Action Centre after EPFNA came into force reported paying fees averaging \$3,275. Between 2010 to 2013, only \$12,100 in illegal fees was recovered under EPFNA. As with other employment standards, EPFNA is a weak legislative tool because it relies heavily on worker complaints rather than proactive enforcement.

In May 2015, it was revealed that Imelda "Mel" Fronda Saluma, 46, was behind a massive scam in Ontario that bilked more than \$2.3 million from 600 prospective Filipino migrants. While charges have been laid against this recruiter, no money has been recovered for the workers who paid her and, in fact, many of them have been banned by

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<sup>23</sup> See, e.g., Faraday, *Profiting from the Precarious* ('release on arrival').

Immigration Canada from applying for new permits.

Protecting Ontario workers without full immigration status requires legislation that is designed with a view to ending the practice of migrant workers paying fees to work in Ontario.

**MWAC insists that strategic enforcement of Ontario employment standards for workers in triangular relationships requires a systematic approach to regulating the recruitment and charging of fees to migrant workers. This systematic approach should sit within the Ministry of Labour and should include: compulsory licensing and publication of recruiters, the use of financial bonds, compulsory registration of employers, joint and several liability between recruiters and employers, mandatory reporting of recruiter supply chains in Canada and abroad, mandatory and detailed reporting of recruiters' business and financial information, explicit recruiter liability for actions further down the recruiter's supply chain, and (among others) cross-jurisdictional information sharing to enhance protection.**

As noted by Fay Faraday in the Metcalf Report, Profiting from the Precarious, specific measures to this end would include:

a) Require compulsory licensing of all recruiters working in Ontario and require a financial bond

Currently anyone can recruit migrant workers in Canada or abroad, charge them large fees, and either put them in contact with a Canadian employer or walk away without actually providing the job they promised. To counter the abuses inherent in this system:

- All recruiters, specifically recruiters of low-waged migrant workers, in Ontario must be licensed.
- The list of licensed recruiters should be easily accessible online to migrant workers around the world.
  - Licensing should include a financial bond.
- Penalties should be put into place for unlicensed recruiters and recovered monies should be directed to workers who are misled by them.

b) Require compulsory registration of all migrant worker employers in Ontario

Employers choose which recruiters they work with, and are often aware of the fees being made by migrant workers overseas or in Ontario. As such, an effective recruitment regulation process requires knowing which employers hire migrant workers in the province. Currently, Ontario depends on the federal government's willingness to share

information about employers that hire migrant workers. A compulsory and robust employer registration system is required for effective recruiter regulation.

c) Hold recruiters and employers jointly financially liable for violating labour protections

This practice is already the law in Manitoba and other provinces and ensures that responsibility for violations is not passed on to recruiters abroad.

- Employers should be held accountable for working with appropriate recruiters (who should be licensed in Ontario) to ensure that migrant workers do not face fees. This practice ensures predictability and certainty for employers, recruiters and migrant workers.

Legislation to protect migrant workers from exploitation by recruiters and employers must be proactive and meet international and domestic best practices represented by Manitoba's Worker Recruitment and Protection Act and the enhancements developed in Saskatchewan and Nova Scotia.

We support the recommendations in the Metcalf Foundation report, *Profiting from the Precarious*, including that other specific enhancements to the Manitoba model be adopted in Ontario:

- mandatory reporting of all individuals and entities that participate in the recruiter's supply chain in Canada and abroad;
- mandatory reporting of detailed information regarding a recruiter's business and financial information in Canada and abroad as developed in Nova Scotia's legislation;
- explicit provisions that make a licensed recruiter liable for any actions by any individual or entity in the recruiter's supply chain that are inconsistent with the Ontario law prohibiting exploitative recruitment practices;
- explicit provision that makes it an independent offence for an employer to engage the services of a recruiter who is not licensed under the legislation;
- explicit provisions that make an employer and recruiter jointly and severally liable for violations of the law and employment contract;
- protections against the broader range of exploitative conduct prohibited in Saskatchewan (i.e., distributing false or misleading information, misrepresenting employment opportunities, threatening deportation, contacting a migrant worker's family without consent, threatening a migrant worker's family, at s. 22 of FWRISA); and
- provisions allowing for information sharing that enhance cross jurisdictional enforcement of protections against exploitative recruitment practices, including information sharing with other ministries or agencies of the provincial

government, department or agencies of the federal government, departments or agencies of another province or territory or another country or state within the country as developed in Saskatchewan's legislation.

**This recruitment regulation system should sit within the Ministry of Labour,** which has the expertise and the legal status to enforce employment standards, ensure that migrant workers are not charged fees, and that their rates of pay and conditions of work meet Ontario's minimum standards. Adopting the recommendations above also fits with the Advisors' desire to move away from a complaints-based system and encourage top-of-industry, supply chain regulation. As seen in the discussion below, the failure to proactively regulate recruitment and license recruiters would spell the early death of any effort to achieve a culture of compliance in the context of migrant work in Ontario.

### *II.e. Cultivating cultures of compliance and strategic enforcement*

*"Multiple factors contribute to non-compliance with employment standards. Achieving a higher level of compliance will not likely occur merely by amending the legislation or by increasing penalties for non-compliance. There needs to be improved education and outreach to achieve better understanding of workplace rights and obligations. Employees*

*must be able to assert his/her workplace rights without fear of reprisal and the process to access those rights must be fair and effective."*

*"To create a culture of workplace compliance with the ESA, it is necessary to find ways to bring greater responsibility for compliance directly into the workplace itself. Rather than leaving it only to government to carry out inspections to test if there is compliance, and rather than leaving it only to employees to file complaints with the government (which mostly occurs only after they are no longer employed), we will consider a new system in which responsibility is placed directly on employers and employees to increase awareness and compliance."<sup>24</sup>*

A key aspect of the Advisors' desire to create a culture of compliance is the extension of OHSA's internal responsibility system (IRS) and joint employer and employee health and safety committees to an expanded ESA Committee with workplace jurisdiction over minimum employment standards.

The Advisors suggest both basic and enhanced models for such an ESA committee, with the main difference being the enhanced committee's ongoing duty to monitor compliance and authorization to seek and receive information on ESA matters (in addition to the basic committee requirements

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<sup>24</sup> CWR, Interim Report at 269.

of meeting and reviewing employer compliance audits).<sup>25</sup>

**Along with WAC & PCLS, MWAC rejects the option of expanding the mandate of JHSC to include the ESA.**

**Problematic for all non-unionized workers, such an option would be particularly problematic for migrant workers.** Similar to the EPFNA and the complaints-based approach of the ESA, this development would unrealistically place the burden of compliance almost entirely on the backs of migrant workers. It would do little to create a culture of compliance, advance strategic enforcement, achieve greater awareness, or make employers more responsible for compliance.

Instead, and solely in the short term, it seems to serve only the goal of acknowledging limited resources in the complaints and enforcement context. Rather than pursuing internal responsibility and expanded joint committees, **MWAC supports the recommendation of the WAC and PCLS to establish a robust model of strategic enforcement to create compliance through: joint and several liability that compel lead companies to comply with the ESA throughout the supply chain; expanding the definition of employee to include all dependent workers (contractor); consistent and effective**

**deterrence (monetary penalties) for violations that are made public; and, effective protection of workers from employer reprisals.**<sup>26</sup>

The interim report also discusses the issue of strategic enforcement, noting that only 2500 of 400,000+ Ontario workplaces are inspected every year (0.6% of workplaces). The Advisors seek to find the best way to use limited enforcement resources, especially where proactive inspections might lead to longer wait times for reactive investigations of workers' claims (though they also note that resources are currently skewed in favour of more reactive processes). Given the resource challenges and fissuring of workplaces, the Advisors note a variety of ways forward toward more strategic enforcement, including through small claims court, the OLRB, some form of simplified, expedited dispute resolution with little to no investigation, and more top-of-industry regulation of the entire supply chain of work. They mention the need to move away from complaints-based enforcement to more strategic proactive investigations based on geography or industry.

Part of this discussion also mentions recommendations to focus on migrant and other vulnerable status workplaces, specifically to "increase inspections in workplaces where migrant and other vulnerable and precarious

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<sup>25</sup> CWR, *Interim Report* at 271.

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<sup>26</sup> See WAC, *Building Decent Jobs* at 51.



workers are employed".<sup>27</sup> **MWAC supports increased inspections in workplaces where migrant and other vulnerable and precarious workers are employed.**

As seen in the results of two recent simultaneous blitzes by Ministry of Labour employment standards officers focusing on young workers and temporary foreign workers, there were very high rates of employer non-compliance that point to larger problems in these workplaces.<sup>28</sup>

**However, while we support proactive enforcement of migrant workers' minimum standards of employment, we must also again emphasize that migrant workers' precarious immigration status and tied work permits must be considered in order for such enforcement to, in fact, be strategic.** Otherwise, increased workplace inspections might lead to adverse consequences for migrant workers, including the prospect that their tied work permits authorizing one job, at one location, with one employer would no longer be valid.<sup>29</sup> Further jeopardizing

migrant workers' precarious status within the country is not a strategic way to improve migrant workers' rights within the province.

Strategic enforcement must also include **development of an effective communication strategy to inform undocumented residents about their ability to make claims and access rights regardless of their immigration status (including informing relevant immigration and settlement service providers).** The Ministry of Labour should develop and communicate its specific protocols to ensure that information is not shared with federal immigration enforcement authorities to the detriment of workers.

As noted above and below, strategic enforcement of migrant workers' rights necessarily includes acknowledgment of their temporary immigration status and carefully prioritizing their rights at work in light of that status and potential migration debts and fees.

On this note, the HUMA committee's report on its miniature review of the TFWP recommends that Employment and Social Development Canada (ESDC) increase on-site labour inspections to ensure compliance and enforcement. It remains to be seen whether these efforts will take place, whether they will be made with the participation of migrant workers, and whether there will be effective

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<sup>27</sup> CWR, *Interim Report* at 285.

<sup>28</sup> See "Blitz Results: Young Workers and Temporary Foreign Workers" (Sept. 30, 2016) for period from May 2 to June 30, 2016 (online: [www.labour.gov.on.ca/english/es/topics/proactiveinspections.php](http://www.labour.gov.on.ca/english/es/topics/proactiveinspections.php)).

<sup>29</sup> This point is even more important for those who are working without immigration status or are 'in between' status.

intergovernmental coordination that prioritizes migrant workers' labour and employment rights over their precarious immigration status.

## *II.f. Making claims and providing protection against reprisals, including wrongful repatriation & deportation*

*"We regard as critically important that there be a respect by all Ontarians for the laws of the workplace, and that we as a society recognize the importance of compliance with the law. We need to foster a culture where compliance with minimum terms and conditions of employment – together with respect for the rights of employees to organize and to bargain collectively – is widespread. Rules that are easy to understand and administer, and that provide workplace parties with compliance tools, together with enforcement that is consistent, are key to achieving these objectives."*

*"In the absence of respect and general compliance with the laws governing the workplace, together with a meaningful ability to enforce those laws and to gain access to justice, the passage of laws by itself is relatively meaningless. There is probably nothing that causes more long term disrespect for the law than laws which are widely*

*disregarded, exist only on paper and have no meaningful impact on people's lives."*<sup>30</sup>

Migrant workers' abilities to make claims are of paramount importance in a non-unionized system driven by employee complaints. As noted by the Advisors, the 2010 addition of a requirement that workers approach employers directly (the 'self-help' provision) has likely contributed to a significant decline in worker claims in recent years. In addition to other factors reviewed in the interim report, the need to raise issues with employers and provide their names can act as barriers to workers contemplating making a claim.

In this context, the Advisors set out various options for addressing such barriers, including maintaining the status quo, removing the self-help provision, allowing anonymous claims with disclosure of the alleged facts, allowing confidential claims with disclosure of the alleged facts, and allowing third party claims (with disclosure of the alleged facts).

**On these issues, MWAC supports the WAC and PCLS recommendations to: remove the self-help provision from the ESA; establish formal anonymous and third party complaints provisions; establish a reverse onus on employers to disprove the complaint against them; and, provide legal support to workers filing ESA claims. These changes**

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<sup>30</sup> CWR, Interim Report at 13-14.

would allow members of our coalition to bring claims on behalf of workers, make submissions on alleged violations and the need for full inspections without implicating individual migrant workers, and allow workers to individually raise issues for inspection with the ability to shield their identity to a certain extent.

Related to making claims, the Advisors also addressed an essential issue for migrant workers in their section on reprisals by employers against workers for exercising their rights under the ESA (e.g. threats, penalties, discipline, intimidation, termination). They also note that there is a reverse onus in reprisal proceedings, where the burden is on the employer to show that such threats or penalties were not made against the worker.

Although not in relation to migrant workers, the Advisors are also aware of the issue of reprisals in triangular contexts when they note that temporary help agencies' assignment workers are protected from reprisals from both agencies and clients. As mentioned above, migrant workers are often in triangular and quadrangular relationships between themselves, employers, recruiters and agencies, and, of course, the government (sometimes their own, as well as immigration authorities in Canada).

Correspondingly, they and their families are potentially subject to reprisals in all of these different relationships and it is imperative that

those who benefit from their work recognize this reality through effective ESA protection and intergovernmental advocacy (through political channels and agreements like the upcoming new Canada-Ontario Immigration Agreement).

In their interim report, the Advisors note that reprisal claims are currently not given priority at the Ministry of Labour (MOL), with an average of 90 days passing before assignment to investigation and then an average of 51 days before the conclusion of investigations. They note that reprisal claims make up 12% of all claims made by workers under the ESA (largely dealing with termination), with only 20% of these reprisal claims leading to a finding of contravention. In concluding these claims, most workers do not seek reinstatement and many claims are settled or withdrawn during the process.

In this context, the Advisors set out options to: maintain the status quo; require an expedited process with employment standards officers (ESOs) in urgent cases like termination (or failure to reinstate after a leave); and requiring expedited reviews of reprisal decisions at the OLRB where workers seek reinstatement.

**MWAC supports the option to expedite reprisal investigations and decisions with ESOs, but insists (along with the WAC & PCLS) that *all* reprisal claims be**

expedited rather than being limited to urgent cases like termination and failure to return from leave. MWAC also supports the call to include the option for interim reinstatement in cases of termination, as well as the provision of legal support to workers making anti-reprisal claims. **Most importantly in the context of migrant workers, MWAC also insists that the ESA explicitly prohibit the repatriation or deportation of workers who have filed complaints. Similarly, MWAC insists that an open work permit program must be created for migrant workers making complaints against employers and recruiters to offset reprisals and the threats and realities of repatriation (potentially under a new Canada-Ontario Immigration Agreement). These permits should not be made discretionary and will require active cooperation and advocacy between the provincial and federal governments.**

MWAC further supports changes in policy and practice that will facilitate the workers' rights of undocumented workers and reduce the fear of reprisals like detention or deportation. **Workers must be informed that they do not need to share their home address when filling out forms, but can instead use the mailing addresses of advocate or support**

**organizations. Workers must also always have the ability to participate in meetings over the phone (and not in person) when employers may be present.** Currently, ESO's have discretionary ability to allow off-site meetings, but often workers are rightly fearful of sharing their status with ESOs. **All workers should be able to participate in meetings off-site to reduce fears of employer reprisals through federal authorities. Finally, for workers who continue complaints even after leaving Canada, ESOs must communicate with workers in their preferred language and with due consideration to time differences.** Failure to use interpretation in emails and calls, or consider time differences, will otherwise result in the abandonment of these claims.

Ultimately, enhancing the working conditions of migrant workers will require moving beyond individual ESA actions and entitlements and starting the process of reforming the LRA towards collective action, organizing, representation, and bargaining led by migrant workers themselves. Enhancing collective power in these ways, and in recognition of the specific immigration ties of migrant workers, should also support other systemic, top of industry efforts like the proactive regulation and compulsory licensing of recruiters.

# Conclusion

MWAC reiterates that it makes the most sense to include migrant workers at the core of the Changing Workplaces Review process. Put briefly, there are no other viable processes. The exemption of migrant workers' realities from a once-in-a-generation review of Ontario labour and employment laws would be a huge missed opportunity, especially where the Advisors otherwise put so much emphasis on changing workplaces, vulnerability from triangular relationships, and strategic enforcement and compliance. Further, and despite promises to the contrary about other processes, the newly-released provincial Ministry mandate letters do not mention any separate review process for migrant workers. In fact, all of the available federal and

provincial processes outside of the CWR have been characterized by other priorities and exclusions, such as:

- the attempted exclusion of migrant workers from federal HUMA committee's miniature review of the TFWP,<sup>31</sup>

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<sup>31</sup> See e.g. Teta Bayan's story and statement in the *Globe and Mail* (online: <http://www.theglobeandmail.com/opinion/i-was-bumped-from-speaking-to-the-house-i-need-to-say-this-migrant-workers-need-better-rights/article30128081/>). See also: <http://www.theglobeandmail.com/news/politics/commons-scuffle-rops-nanny-of-chance-to-speak-on-temporary-foreign-worker-law/article30098362/>.

- the federal recommendation to expand the SAWP without concrete proposals to address abuses of workers,<sup>32</sup>
- the emphasis on so-called 'high skill' immigration at the federal immigration level (to the exclusion of MWAC member migrant workers who are primarily low-waged),<sup>33</sup>
- the continued problems and inadequacies of Ontario's protections and regulation of recruitment fees and agencies,<sup>34</sup> and,
- the continued emphasis on 'high skill' immigration at the provincial level, whether in the Ontario immigration strategy, Ontario Immigration Act, or at the Ontario Ministries of Citizenship & Immigration or Economic Development & Growth<sup>35</sup>.

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<sup>32</sup> See HUMA TFW report, *List of Recommendations* at 35 and following (e.g. *Recommendations* 6-8, 12) .

<sup>33</sup> See HUMA TFW report. See also IRCC mandate letter.

<sup>34</sup> See e.g. Faraday, *Profiting from the Precarious* (Metcalf Foundation). More recently, see also the 2016 Ontario Ministry of Citizenship and Immigration Mandate Letter and the absence of this issue within this mandate. Apart from mentioning the ineffective EPFNA, the issue of systematic and proactive regulation of recruitment (including compulsory licensing) is also absent from the 2016 Ontario Ministry of Labour Mandate Letter.

<sup>35</sup> See Ontario's *Immigration Strategy*; Ontario Immigration Act; 2016 Ontario Ministry of Citizenship and Immigration Mandate Letter. See also MWAC *Response to proposed regulations under Ontario Immigration Act* (Dec. 2015).

**We think that it is imperative that the Ministry of Labour show leadership in relation to migrant workers' experiences and, specifically, on the issue that labour and employment rights should trump precarious immigration status. There is no better place to recommend such leadership than the CWR and the Advisors' recommendations here.**

Absent leadership at other levels of government, the problems related to a lack of permanent immigration status will continue to mount for an Ontario whose legal infrastructure is ill-equipped to address them. Without action on this fundamental issue, migrant workers will not be free to speak and act on their working conditions on an equal footing with their fellow Ontarians.

MWAC is mindful that the Advisors are seeking to respond to Ontario's changing workplaces with recommendations that are politically and legally sustainable. We urge you to also consider the pressures being placed upon migrant workers and the long-term consequences of excluding their lived experiences from the bulk of your final recommendations. We urge you to remember the words of the migrant workers who came and spoke to you during your consultations. Ultimately, there will be lasting impacts on migrant workers and their families, as well as other Ontarians and Canadians, if we continue

to cultivate cultures of non-compliance in the homes, fields, and businesses of Ontario.

For ease of reference, we are including our original submissions to you below.



## Appendix A: Migrant Workers Alliance for Change submissions to Changing Workplaces Review, September 2015

### 1. Introduction

The Migrant Workers Alliance for Change (MWAC) is a migrant workers' rights coalition headquartered in Ontario. Established in 2007, MWAC is led by migrant worker group and supported by community, provincial and national organizations. The Migrant Workers Alliance for Change includes Alliance of South Asian Aids Prevention, Asian Community Aids Services, Caregivers Action Centre, Fuerza Puwersa, Industrial Accident Victims' Group of Ontario, Justicia for Migrant Workers, KAIROS, Legal Assistance of Windsor, Migrante Ontario, No One Is Illegal – Toronto, Parkdale Community Legal Services, Social Planning Toronto, South Asian Legal Clinic of Ontario, Unifor, United Food and Commercial Workers, Workers United and the Workers' Action Centre.

Member organizations of MWAC work primarily with racialized and low-waged migrant workers providing legal, employment and health related services, as well as doing advocacy work.

## 2. Migrant Workers in Ontario

In 2013, there were 91, 697 people in the Ontario labour force on work permits in 2013 (39, 526 in the Temporary Foreign Workers Program and 52, 171 on the International Mobility Program). In addition, many of the 84, 804 international students in the province, and thousands of refugee claimants were also on work permits while an estimated 200,000 workers in the province had no immigration status.

Migrant workers in the Temporary Foreign Workers Program are in three categories: Caregiver Program (LP) (formerly the Live-In Caregiver Program (LCP)), Seasonal Agricultural Workers Program (SAWP) and the Temporary Foreign Workers Program (TFWP).

Ontario residents in the LCP work largely inside the home of their employers taking care of children, the elderly and people with disabilities, the new CP started in November 2014, which has removed the live-in requirement - it is unclear how many workers are actually living out. Ontarians in SAWP work on farms across the province. Low-waged residents in the TFWP are engaged in agriculture, food processing and packaging, hospitality, food sector and manufacturing.

These migrants are on **tied work permits**, which means:

- Their employers must apply for a Labour Market Impact Assessment (LMIA) which costs them \$1,000 to show that no other Canadian citizen or permanent resident can suitably do the job. These costs are generally downloaded to the workers.
- They are only allowed to work for a single employer who is listed on their permits.
- If they are laid off and work in the agriculture sector, they are almost immediately deported.
- If they are in another sector, they have 90 days to find a new employer willing to pay a \$1,000 processing fee and have the government process their papers. Most can't do so.
- Work authorization permits are time-limited, anywhere from a few weeks to four years - most workers have permits for 8 months to 1 year, which need to be renewed annually.
- Workers in the LCP/CP are able to apply for permanent residency provided they can maintain a working relationship with the employer for two years, meet high requirements and be part of a small quota. Low-waged workers in the other two programs cannot apply for permanent residency federally. While some provincial programs for permanent residency exist in other provinces, Ontario bars low-waged workers
- High waged earners in the TFWP (paid ~\$21/hour) may be able to apply for permanent residency through the Ontario Provincial Nominee Program or the Federal Express Entry Program provided

they can meet high requirements, and in the case of Federal programs if they have an employment offer.

Migrant workers on open permits, in the International Mobility Program (IMP), have time-limited work authorization permits, usually for 1 year. These are generally speaking non-renewable. Employers for workers in the IMP do not have to apply for LMIA. Work permits in the IMP also do not list an employer, this means that workers have more workplace mobility, and that it is harder to identify industries they are in. Low-waged and racialized workers that our member organizations have come in contact with through these programs are working in agriculture, restaurants, janitorial services, construction, and, in limited cases, in manufacturing. These workers face similar occupational exclusions from the Employment Standards Act (ESA) as other workers. As they are in Ontario for only one year, and have limited access to workplace rights or immigration information, these workers are just as unwilling to speak out about employers breaking labour law as migrant workers on closed permits. Most workers on these permits cannot apply for permanent residency status, and where it is possible, access to permanent residency is limited and employer dependent.

Migrant workers on open work permits who are on student visas or asylum seekers are often low-waged and racialized. In many cases, the students are in Ontario to attend a one-year English as a Second Language (ESL) program, and are working in industries similar to workers in the International Mobility Program. Many asylum seekers and Ontarians working and on study permits are not granted permanent residency, and are in essence short-term workers in the province.

Finally migrant workers with no immigration status or undocumented workers make up a significant part of Ontario's low-waged, racialized, and part-time work force. With no immigration status, workers have a difficult time finding employment, and are similarly vulnerable to coercion and abuse and live in fear of deportation when they speak out.

Comprehensive academic studies have shown that migrant workers in these programs have restrictions on labour mobility (Nakache, 2013), profound difficulty enforcing contracts and workplace rights (Faraday, 2012 and 2014), compromised health status (McLaughlin and Henneby, 2013, etc), psychological impacts (Saad, 2013) including from family separation, linguistic and cultural barriers (Nakache & Kinoshita 2010), lack of access to settlement services (ibid), heightened risk of abuse due to legal/economic vulnerability (Fraser 2009), and barriers to freedom of association and meaningful voice (Faraday, Fudge, & Tucker 2012; Fudge, 1997).

### 3. Ontario has a critical role to play

While the decision to issue these migrants temporary work authorizations rather than permanent status lies with the federal government, the restrictions on access to social entitlements and protections is a result of provincial laws and regulations. Ontario has the power to enact laws and regulations that will ensure that migrant workers in the province live with basic dignity and access to rights.

The first section of these recommendations emphasizes changes that need to take place within the context of the *Changing Workplaces Review*, while the second section highlights some directions for an overall review of all Ontario laws with a view to ending exclusions of Ontarians without permanent residency from basic protections.

In light of the vast numbers of migrants on temporary permits, a comprehensive review of Ontario's laws and regulations is urgent and necessary, especially dealing with labour, WSIB, housing, healthcare, social assistance, post-secondary education and other provincial programs. Building on the policies enacted by municipalities in Toronto and Hamilton, it is important that Ontario seriously consider becoming a Sanctuary Province, where all services and rights are accessible to migrants without full immigration status.

### 4. Recommendations for Changing Workplaces Review

Migrant worker members that MWAC works with have identified *three key issues* that determine their work-life in Ontario. These are:

- **Fewer Rights:** Exemptions from protections on the basis of occupation disproportionately impact migrant workers. Migrant workers generally experience a lower floor of basic rights and entitlements as a result of their particular vulnerability to deportation and abuse.
- **Fear:** Being tied to a single employer who may control housing, ability to return to work in Canada, and/or ability to apply for permanent resident status, makes it extremely difficult to assert rights in a complaints-based framework. Specific changes are required to ensure that migrant workers can assert their rights and receive support when their rights are violated.
- **Forced to pay for work:** Migrant workers pay thousands of dollars to recruiters to come work in Ontario. To do so, many arrive in Canada with great debt that serves as a coercive and silencing force on migrant workers' ability to assert rights. A comprehensive recruiter regulation program is needed, with proactive provincial enforcement and a pan-Canadian system to avoid any gaps.

## 4.1. From fewer rights to full protections

"The government should encourage that workers are not scared. They should say whatever the problem, come right away to us. Because as an employee I am scared of the government, and I am scared that if I complain, I will get deported."

- Maria, a Filipina Live-In Caregiver, in Toronto.

### a) No ESA exemptions for migrant workers

A significant proportion of Ontario's food is grown, processed and packaged by racialized men and women from Latin America, the Caribbean and South-East Asia, many of whom are migrant workers. Agriculture specific ESA exemptions mean that many migrant workers are working long hours, without breaks, public holidays and weekends. Migrants in agriculture are forced to speed up their work at various stages in the production cycle, without adequate remuneration.

- The ESA exemptions for agricultural workers (including Farm Employees, Harvesters, Flower Growers, and those engaged in processing, packing or distribution of fresh fruit or vegetables) should be removed. These exemptions result in a confusing patchwork of rights and entitlements and a lack of protection for migrant agricultural workers under basic ESA standards. This contravenes the purpose of the ESA to establish a floor of minimum standards for *all* workers.
- Agricultural workers should be entitled to all of the following ESA provisions: minimum wage, overtime, vacation and holiday pay, hours of work, daily and weekly/bi-weekly rest periods, eating periods and, time off between shifts.

### b) Access to termination and severance pay for seasonal agricultural workers

Many agricultural workers return year after year to work for the same employer, often for contracts of 6-8 months. In the event of a termination, these seasonal workers face barriers accessing termination and severance pay that acknowledges their actual years of employment, as the break in employment between contracts may be longer than 13 weeks.

- The ESA should be amended so that seasonal migrant workers can access termination and severance pay that recognizes their years of service and the continuity of an employment relationship with the same employer.

- Migrant workers should be considered to be on a temporary lay-off between their yearly contracts with the same employer, up to a period of 35 weeks.
- The ESA should recognize the service seasonal agricultural workers provide to Ontario. Should a migrant worker change employers, the ESA should require that the new employer recognize the time the migrant worker worked for previous employers, similar to existing provisions for continuity of employment when there is a change in building service providers under Section 10 of the ESA.

### **c) Prohibition of changes that lower wages or terms and conditions of employment**

While migrant workers come to Ontario under programs that provide employment contracts, many employers reduce wages, benefits and working conditions once the worker arrives. Some agricultural workers for example, are switched between hourly wages, or paid by piece work numerous times during the length of a contract. Caregivers often find themselves being loaned' out to other families by their employers, or being asked to do cooking and cleaning work not outlined in the terms of the contract. Being on tied work permits, many migrant workers lack labour market mobility and do not have the same option to quit their jobs or even get a second job when there is a substantial change in wages and working conditions. This lack of remedies for constructive or unfair dismissal requires specific changes including:

- A prohibition on changes that lower wages and working conditions of employment.
- Amend the ESA to prohibit piece rate wage regime in agriculture
- Workers should be entitled to *the greater of* the number of hours actually worked per week, or the number of hours specified in the contract. Where a worker has fewer hours than those promised in the contract, workers should be able to claim the difference in salary through an employment standards complaint.
- Employers who reduce wages and working conditions provided in an employment contract or agreement must also be assigned a penalty.

### **d) Model contracts**

In order to ensure that migrant workers in Ontario are receiving fair working conditions that are consistent with the ESA and other legislation (such as the Convention Concerning Decent Work for Domestic Workers), the Ministry of Labour should provide comprehensive standard contracts for migrant workers under each stream in the Temporary Foreign Worker Program. These contracts should be executed in Ontario and registered by employers, along with any contracts signed during

the immigration process, with the Employment Practices Branch. A copy of all employment contracts must be provided to the signatory migrant worker.

### **e) Industry specific regulations for agriculture**

There is an urgent need for industry-specific regulations for agriculture to ensure migrant agricultural workers have access to bathrooms in the fields, clean drinking water, and regular breaks. Not doing so means that these basic requirements for decent work are missing from migrant worker workplaces. In addition, agriculture-specific hazards such as confined spaces, prolonged exposure to pesticides and exposure to extreme heat and weather must be addressed in regulations targeted to agricultural work<sup>36</sup>.

### **f) Decent Income**

Migrant workers in the homes of their employers, or working in factories and farms, are often working 60 to 70 hour weeks while getting a fixed monthly cheque in the range of \$1,200. Working away from families, in physically strenuous conditions, and lack of adequate wages to properly feed and nourish themselves makes migrant workers far more susceptible to mental and physiological ill health. More needs to be done to ensure that Ontario workers on work permits can get basic hours and wages protections. This includes:

- The ESA should provide for an eight-hour day and a 40-hour workweek. Employees should have the right to refuse work beyond 40 hours. Overtime at time and a half should be paid (or taken as paid time off in lieu) after 40 hours. No overtime exemptions or special rules. Right to refuse should be connected to issue of reprisals, immigration status, and reverse onus in complaints of reprisals by migrant workers.
- Repeal overtime exemptions and special rules.
- Bring the ESA in line with the federal caregiver program and prohibit deductions for room and board for live-in caregivers.
- Repeal overtime averaging provisions in the ESA.
- Permits for overtime in excess of 48 hours per week must be reviewed.
- In addition to an unpaid, half-hour lunch break, two paid breaks, such as a coffee break, should be provided by the employer.

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<sup>36</sup> All agriculture related deaths must be followed by a mandatory Coroner's Inquest.

- Increase paid vacation entitlement to three weeks per year. After five years of service, increase vacation to four weeks of paid vacation per year.
- Repeal exemptions from public holidays and public holiday pay.
- All workers should receive a written contract on the first day of employment setting out terms and conditions, including expected hours of work.
- All employees shall accrue a minimum of one hour of paid sick time for every 35 hours worked. Employees will not accrue more than 52 hours of paid sick time in a calendar year, unless the employer selects a higher limit. For a full-time 35-hour per week employee, this works out to approximately seven paid sick days per year.
- Raise the minimum wage to \$15 per hour in 2015.

## 4.2. From Fear to Fairness

"You as a farm worker you do like 60 hours a week. What it comes down to it, you are doing overtime, you don't get overtime. You are doing all of the stuff because there is no rule or there is no law there for we to get that. You don't have no holiday, no time off, no day off. You have to do it. That is what the system is set up for we and it's not right."

- Chris, a Jamaican farmworker under the Seasonal Agricultural Workers Program, in Leamington.

### a) Increase proactive enforcement

Resources should be devoted to emphasize proactive enforcement of employment standards and health and safety in sectors and workplaces employing migrant workers.

- The Ministry of Labour should work with workers' advocates and community organizations to identify where violations are occurring and identify what investigative strategies will best uncover employer tactics to evade or disguise violations and to build trust with workers and avoid reprisals.
- Establish a formal anonymous and third party complaint system. To make employment standards enforcement and legal remedies accessible to current employees, inspection initiated after a formal anonymous or third party complaint is filed should aim to detect and assess monetary (e.g., unpaid wages, overtime pay, public holiday pay, vacation pay, etc.,) and non-monetary violations (e.g., hours of work, breaks, agreements etc.,), remedy violations with orders to pay for all current employees, and bring the employer into compliance for the future. Institute an appeal process if a proactive inspection is not conducted. Make the report of the proactive inspection



available to all employees. The officer's decisions could be appealed either by employees or the employer.

- Provide anti-reprisals protection to those workers whose workplace is subject to proactive inspection.
- A complaint brought forward by a third party (for example a worker advocate or community stakeholder) should automatically trigger an inspection.
- The inspection team should collaborate with the worker advocate or third party in determining investigative strategies. Reporting tools to third-party complainants should also be developed.
- When migrant workers, worker advocates, and community organizations bring forward individual ESA (or Occupational Health and Safety Act, OHSA) complaints and there are confirmed violations, the Ministry of Labour should expand investigations to the entire workplace and carry out ongoing follow-up to ensure compliance. This expanded investigation should be accompanied with anti-reprisals and transitional protections if the workplace is shut down.

## **b) Publicize employers with confirmed violations**

Employers or recruiters found in violation of ESA and related legislation should be clearly identified on the Ministry of Labour website and other relevant provincial and federal websites (e.g. ESDC; CIC; consulates). This will serve as a disincentive to employers and an education tool for workers. A bi-annual report on enforcement activities should also be issued by the Ministry of Labour.

## **c) Strengthening anti-reprisal protection for migrant workers**

Employers are able to immediately deport seasonal agricultural workers who try to enforce workplace rights. We have heard many reports of employers threatening other migrant workers with deportation or contacting immigration authorities, even when they do not have the authority. This intimidation and very real ability to repatriate workers leads to substantial barriers to enforcing employment standards. To address these barriers, we recommend that the Ministry of Labour should institute the following:

- Expedited process: Develop an expedited process for investigating ESA (and OHSA) claims for all migrant workers.
- Protections from repatriations: The ESA must be strengthened to ensure that workers rights are protected against repatriations or when repatriations take place.
- The anti-reprisals provisions of the ESA (and OHSA) should explicitly prohibit an employer from forcing "repatriation" on an employee who has filed an ESA (or OHSA) complaint. Where there is

a finding of reprisal, provisions would be made for transfer to another employer or where appropriate reinstatement.

- Open-work permits: Create an open work permit program for migrant workers with workers' rights complaints against employers and recruiters to off-set reprisals and repatriation threats. The now discontinued *Alberta Open Work Permit Pilot Project, Agreement for Canada-Alberta Cooperation on Immigration (Annex B, 2009)* was such a pathway. However, the Alberta TFW Advisory Office had to make recommendations for the issuing of work permits. This is a barrier to access for workers at risk of reprisals. Open work permits for workers should instead be streamlined, and worker complainants at the Ministry of Labour should have immediate access to open work permits. If the permit is made discretionary, expedited mechanisms for appeals should be instituted. This program would require active cooperation and advocacy between Ontario and the federal government.

#### **d) Extend time limitations for filing an ESA claim.**

Migrant workers on tied work permits may be living in housing provided by the employer, which may in fact be required by the conditions of their permits. Given the specific realities facing migrant workers, and the difficulty of speaking out, the time limitation on filing an ESA claim for migrant workers should be extended to 5 years.

#### **e) Expanding voices for migrant workers**

Experience demonstrates that the most effective enforcement of human rights, health and safety and employment standards occurs when workers are part of a union and are able to exercise their rights through a collective agreement and the grievance and arbitration process. However, migrant workers face substantial barriers in exercising their right to collectively bargain and unionize.

The Ontario Labour Relations Act, 1995, S.O. 1995, c. 1, Sch. A, by operation of s. 3(a) and (b.1) does not apply to either:

1. "a domestic employed in a private home" or
2. "an employee within the meaning of the Agricultural Employees Protection Act, 2002."

The first restriction effectively bars Caregivers, most of whom are migrants, from being able to unionize in Ontario.

As such, it is important that the OLRA be revised to:

- Ensure that live-in caregivers must have the same rights to collectively bargain and unionize as other Ontario workers.
- Grant Agricultural workers the same rights to collectively bargain and unionize as other Ontario workers (including repealing the AEPA – more on that below).
- Address the specific barriers to collective bargaining and unionizing under migrant worker programs, and to address the newer and older forms of labour organization, such as sectoral bargaining, in order to remove barriers to workers' collective rights (including consultation with community stakeholders).
- Include adequate information and accountability processes to end the practice where employers insist that their migrant worker employees are not able to unionize.

### **Access to collective bargaining for migrant workers**

In 2015, the Supreme Court of Canada confirmed that the *Charter of Rights and Freedoms* guarantees protection for effective and meaningful collective bargaining for all workers in Canada. Those entitlements and guarantees apply to all individuals working in Canada, regardless of their immigration status.

Under the *Charter's* protection for freedom of association, workers are entitled to protections that ensure they can democratically choose their bargaining agent.<sup>37</sup> They are entitled to legislative support and protection for a collective bargaining process that allows them "to exert meaningful influence over working conditions through a process of collective bargaining conducted in accordance with the duty to bargain in good faith".<sup>38</sup> That collective bargaining process must be attuned to and redress the power imbalance between employers and employees.<sup>39</sup> The *Charter* also guarantees protection for the right to strike as an "indispensable component" and "essential part of a meaningful collective bargaining process."<sup>40</sup> Where the right to strike is limited, "it must be replaced by one of the meaningful dispute resolution mechanisms commonly used in labour relations."<sup>41</sup>

Migrant workers lack adequate, constitutionally-compliant protection for the right to bargain collectively. In fact, two of the largest groups of migrant workers in the province are explicitly

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<sup>37</sup> *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1

<sup>38</sup> *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 at para. 71-72

<sup>39</sup> *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 at para. 71-72, 80

<sup>40</sup> *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4 at para. 3

<sup>41</sup> *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4 at para. 25, 60, 92-94

excluded from the right to unionize under the *Labour Relations Act*. Migrant caregivers are entirely excluded from legislative protection for the right to bargain collectively. Agricultural workers are subject to the entirely inadequate *Agricultural Employees Protection Act*. And many other migrant workers are employed in sectors where the power imbalance between employers and workers is very great and so rights to unionize are difficult to exercise in practice.

### **Repeal the *Agricultural Employees Protection Act* and give agricultural workers protection for real and robust collective bargaining rights**

The *AEPA* fails to give agricultural workers meaningful and effective protection for the right to bargain collectively. The legislation provides that agricultural workers can form an employees' association and can have a "reasonable opportunity" to make representations to employers, which employers must either listen to or read, and which the Supreme Court has said employers must "consider" in good faith.<sup>42</sup> But despite being in place for more than a decade, there is no record of any employee associations in the province that have succeeded in negotiating any agreements with employers under this legislation.

In light of the Supreme Court of Canada's 2015 trilogy, the *AEPA* would very likely fail to comply with the new constitutional standard for protection for freedom of association.<sup>43</sup> In particular:

- The *AEPA* fails to protect workers' choice of their union representative. There is no protected process by which workers can democratically choose their representative and no mechanism to ensure that an association legitimately holds (and over time continues to hold) a mandate to represent the workers. Instead the *AEPA* enables employers to subvert workers' democratic choice of representative by recognizing multiple employee associations – a tactic that since the 1930s has been known to facilitate employer influence over employee associations and foster company unions at the expense of independent unions. The *AEPA* also requires associations to identify the specific employees who are its supporters, leaving those workers extremely vulnerable to intimidation and dismissal.
- The *AEPA* fails to protect a meaningful and effective process of collective bargaining. Stated at its highest, the *AEPA* only provides a truncated opportunity for employees to present submissions that an employer must "consider". Even the making of these submissions is constrained by the legislation. The *AEPA* restricts when employees can make representations to employers, based on criteria which are meant to preserve employer convenience, power

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<sup>42</sup> *Ontario (Attorney General) v. Fraser*, 2011 SCC 20.

<sup>43</sup> The 2015 trilogy has extended *Charter* protection for collective bargaining well beyond the 2011 *Fraser* case which reviewed the *AEPA* and the 2015 trilogy has also expressly departed from some of its statements in *Fraser*.

and privilege. To this end, s. 5(3) of the AEPA states that the following “considerations are relevant” to determine whether employees have had a “reasonable opportunity” to make submissions:

- The timing of the representations relative to planting and harvesting times.
- The timing of the representations relative to concerns that may arise in running an agricultural operation, including, but not limited to, weather, animal health and safety and plant health.
- Frequency and repetitiveness of the representations.
- Further, the AEPA fails to protect meaningful and effective collective bargaining because there is no obligation to bargain and make best efforts to reach an agreement. There are none of the supports that are available to other workers to support collective bargaining (i.e. conciliation, first contract arbitration). There is no protection for an enforceable collective agreement and no grievance procedure. There is no protection for union security. Agricultural workers are denied access to a tribunal with labour relations expertise and labour-management representation to enforce their labour rights. Instead the AEPA is enforced by the Agriculture Food and Rural Affairs Tribunal that has no history of labour relations engagement and expertise.
- Finally, the AEPA fails entirely to provide any protection for the right to strike or other meaningful dispute resolution mechanism commonly used in labour relations in Canada.

To be clear, the objective at this point is not to rehabilitate the AEPA. It is simply flawed legislation that cannot be retrofitted to support real collective bargaining rights. The AEPA must be repealed and agricultural workers must be given robust, meaningful rights of collective bargaining like other Ontario workers covered by the *Labour Relations Act*.

### **Other migrant workers need access to sectoral bargaining**

Caregivers are expressly excluded from the *Labour Relations Act*. Further, because they are typically employed singly in individual employers’ homes, they cannot access the LRA’s standard model of organizing which is based on bargaining units with multiple employees. These workers need access to a sectoral platform for collective bargaining. Recommendations for such a model of sectoral bargaining were made in the 1993 report by Intercede (an organization of live-in caregivers) and the International Ladies Garment Workers’ Union: *Meeting the Needs of Vulnerable Workers: Proposals for Employment Legislation and Access to Collective Bargaining for Domestic Workers and Industrial Homeworkers* and remain relevant today. Importantly, the model for broader based bargaining that would provide real protection for these workers must recognize their isolation. It

cannot be dependent upon workers first accessing a bargaining unit under the existing *LRA* as such a model would continue to leave these workers unprotected.

Other migrant workers – and workers with secure immigration status – who are employed in highly precarious sectors would also benefit significantly from broader based bargaining models and this is a principle the Special Advisors should endorse.

#### **4.3. Recruitment: From ‘forced to pay’ to ‘work without fees’**

“I paid \$1500 in Honduras to come work here in Canada. Here I worked in an unsafe job at a mushroom farm for a year to be able to pay back that debt. On top of that, my employer regularly stole my wages and I couldn’t file a claim with the Ministry or I would have been fired and sent back home.”

- Juan Miguel, a Honduran Temporary Foreign Worker in Southern Ontario

Migrant workers in low-waged jobs on temporary work authorization are paying up to an equivalent of two years’ salaries in fees in their home countries to unscrupulous recruiters and agencies to work in Ontario. To pay these fees, entire families go into debt. Often when workers arrive here, work conditions and wages are not as they were promised or agreed to.

With families back home in debt, workers are afraid to complain about ill treatment by bad bosses here. In some cases when workers complained about recruitment fees, they faced abuse and deportation. Recruiters have been known to punish entire communities by blacklisting their ability to come to Canada.

Employers pass the buck to recruiters in Canada, who in turn claim that recruiters in sending countries are the real culprits. Ontario needs effective enforcement tools to hold recruiters and employers accountable.

In 2009, migrant worker members of the Migrant Workers Alliance for Change succeeded in lobbying the provincial government to pass the Employment Protections for Foreign Nationals Act (EPFNA) that banned charging recruitment fees, and the seizure of documents from caregivers. In November 2014, the Stronger Workplaces for a Stronger Economy Act extended EPFNA protections to *all* migrant workers, filling in part of the legislative gap. This protection comes into effect this November.

However, two-thirds of the caregivers surveyed by the Caregivers Action Centre after EPFNA came into force reported paying fees averaging \$3,275. Between 2010 to 2013, only \$12,100 in illegal fees was recovered under EPFNA. EPFNA is a weak legislative tool because it relies heavily on worker complaints rather than proactive enforcement.

In May 2015, it was revealed that Imelda “Mel” Fronda Saluma, 46, was behind a massive scam in Ontario that bilked more than \$2.3 million from 600 prospective Filipino migrants. While charges have been laid against this recruiter, no money has been recovered for the workers who paid her and, in fact, many of them have been banned by Immigration Canada from applying for new permits.

Protecting Ontario workers without full immigration status requires legislation that is designed with a view to ending the practice of migrant workers paying fees to work in Ontario. Specific measures to this end include:

**a) Require compulsory licensing of all recruiters working in Ontario with a financial bond**

Currently anyone can recruit migrant workers in Canada or abroad, charge them large fees, and either put them in contact with a Canadian employer or walk away without actually providing the job they promised. To counter the abuses inherent in this system:

- All recruiters, specifically recruiters of low-waged migrant workers, in Ontario must be licensed.
- The list of licensed recruiters should be easily accessible online to migrant workers around the world.
- Licensing should include a financial bond.
- Penalties should be put into place for unlicensed recruiters and recovered monies should be directed to workers who are misled by them.

**b) Require compulsory registration of all migrant worker employers in Ontario**

Employers choose which recruiters they work with, and are often aware of the fees being made by migrant workers overseas or in Ontario. As such, an effective recruitment regulation process requires knowing which employers hire migrant workers in the province. Currently, Ontario depends on the federal government’s willingness to share information about employers that hire migrant workers. A compulsory and robust employer registration system is required for effective recruiter regulation.

### **c) Hold recruiters and employers jointly financially liable for violating labour protections**

This practice is already the law in Manitoba and other provinces and ensures that responsibility for violations is not passed to recruiters abroad.

- Employers should be held accountable for working with appropriate recruiters (who should be licensed in Ontario) to ensure that migrant workers do not face fees. This practice ensures predictability and certainty for employers, recruiters and migrant workers.

Legislation to protect migrant workers from exploitation by recruiters and employers must be proactive and meet international and domestic best practices represented by Manitoba's Worker Recruitment and Protection Act and the enhancements developed in Saskatchewan and Nova Scotia. We support these recommendations in the Metcalf Foundation report, *Profiting from the Precarious*, including that other specific enhancements to the Manitoba model be adopted in Ontario:

- mandatory reporting of all individuals and entities that participate in the recruiter's supply chain in Canada and abroad;
- mandatory reporting of detailed information regarding a recruiter's business and financial information in Canada and abroad as developed in Nova Scotia's legislation;
- explicit provisions that make a licensed recruiter liable for any actions by any individual or entity in the recruiter's supply chain that are inconsistent with the Ontario law prohibiting exploitative recruitment practices;
- explicit provision that makes it an independent offence for an employer to engage the services of a recruiter who is not licensed under the legislation;
- explicit provisions that make an employer and recruiter jointly and severally liable for violations of the law and employment contract;
- protections against the broader range of exploitative conduct prohibited in Saskatchewan (i.e., distributing false or misleading information, misrepresenting employment opportunities, threatening deportation, contacting a migrant worker's family without consent, threatening a migrant worker's family, at s. 22 of FWRISA); and
- provisions allowing for information sharing that enhance cross jurisdictional enforcement of protections against exploitative recruitment practices, including information sharing with other ministries or agencies of the provincial government, department or agencies of the federal



government, departments or agencies of another province or territory or another country or state within the country as developed in Saskatchewan's legislation.

This recruitment regulation system should sit within the Ministry of Labour that has the expertise and the legal status to enforce employment standards, ensuring that migrant workers are not charged fees, and that their rates of pay and conditions of work meet Ontario's minimum standards.

## **5. Lifting the floor.**

More needs to be done to improve labour laws for all Ontario workers, with or without full immigration status. We need decent, permanent, well-paid work for all. This means a \$15 minimum wage, paid sick days, vacation days and overtime pay. It means equal rights for temporary agency and other precarious workers.

To this end, we endorse all the recommendations from our member organization Workers Action Centre's report *Still Working on the Edge, 2015*, attached as an addendum to this submission.

## **6. Towards comprehensive reforms for migrant workers**

### **6.1. Strengthening Health and Safety protections**

#### **a) Industry specific regulations for agriculture**

There is an urgent need for industry-specific regulations for agriculture to ensure migrant agricultural workers have access to bathrooms in the fields, clean drinking water, and regular breaks. In addition, agriculture-specific hazards such as confined spaces, prolonged exposure to pesticides and exposure to extreme heat and weather must be addressed in regulations targeted to agricultural work. All agriculture related deaths must be followed by a mandatory Coroner's Inquest.

#### **b) Eliminate the exclusion of domestic workers from Occupational Health and Safety Act (OHSA)**

This exclusion, in addition to compromising the health and safety of a significant percentage of the Ontario workforce, is discriminatory and has an adverse effect on workers in the Live-In Caregiver or Caregiver program, many of whom are racialized women. This is even more important in the current

work environment where many Caregivers are involved in elderly care, and responsible for lifting and moving their employers.

### **c) Broader review of OHSA in regards to migrant work**

With migrant workers now entering many different arenas of work, regulations must be modernized with a view to protecting vulnerable workers in those industries, including consultations from workers and community organizations.

## **6.2. Workplace Safety and Insurance Board (WSIB)**

### **a) Provide fair access to Loss of Earning benefits for migrant workers**

Under 'deeming' practices, migrant workers are deemed 'fit to work' at jobs in Ontario (such as gas station attendant) and taken off WSIB after they have been repatriated to home countries where no such jobs exist. Deeming practices for workers abroad must be stopped. The government should commit to working with migrant workers and their advocates to determine how best to update the Workplace Safety and Insurance Act (WSIA) to provide fair and appropriate Loss of Earning benefits for migrant workers. Migrant workers must also be able to access retraining programs that are available to other Ontario workers. These changes should be part of a broader effort to ensure portable social benefits for all migrant workers with precarious or permanently temporary status.

## **6.3. Access to health services**

Migrant workers' employers are meant to be responsible for providing healthcare for the first three months.

a) Eliminate the three-month waiting period that serves as a key barrier to ensuring public health standards are met for migrant workers.

b) Migrant workers are facing unreasonable delays in getting their applications for health status processed even after the three-month period, sometimes waiting the entire length of their contract to receive healthcare. Regulations to ensure consistent and timely access, i.e. immediate access to health care, must be developed.

c) Migrant workers, particularly those that are forced to leave abusive employers, fall out of status, or are in between work permits or employers for months at a time. Though federal law does not deny healthcare on the basis of immigration status, provincial legislation does. Workers are able to access life-saving and emergency services at cost, but can't access preventative care, leading to greater financial burden on public services and public health concerns. Migrant workers should be granted access to health services regardless of their immigration status.

#### **6.4. Changes in the Canada-Ontario Immigration Agreement (COIA)**

The temporary foreign worker program needs fundamental reforms to address workers' precarious immigration status and permit workers to access basic employment rights. The Ministry of Labour should work with the federal government to develop changes that would address the barriers workers face in accessing employment rights.

a) Expand the Provincial Nominee Program (PNP) to give pathways to permanent residency to migrant workers deemed 'low-skilled'. Workers living without precarity are more likely to establish community ties, and invest in their workplaces and communities resulting in overall improvement of public life. This also creates a reliable workforce and reduces continuous training costs that employers must incur as a result of a transitional workforce.

b) Create an open work permit program for migrant workers with workers' rights complaints against employers and recruiters to off-set reprisals and repatriation threats. The discontinued *Alberta Open Work Permit Pilot Project, Agreement for Canada-Alberta Cooperation on Immigration (Annex B, 2009)* was such a pathway. However, the Alberta TFW Advisory Office had to make recommendations for the issuing of work permits. This was a barrier to access for workers at risk of reprisals. Open work permits for workers should instead be streamlined, and worker complainants at the Ministry of Labour should have immediate access to open work permits. If the permit is made discretionary, expedited mechanisms for appeals should be instituted.

c) Establish a moratorium on repatriations of migrant workers with ongoing workers' rights complaints.

d) Develop comprehensive information-sharing processes between the federal and provincial government to ensure protections for migrant workers (like Manitoba has with Canada) in consultation with community organizations. Community advocates must have the right to know and access the information on employers and workers shared between the federal and provincial

governments. The overriding priority of such information-sharing processes should be the protection of workers and the enforcement of labour, employment, and human rights laws, including the guarantee of anti-reprisal and transitional protections for workers. The information sharing agreement should specifically bar sharing of worker immigration status or other identifying information from the province to the Federal government.

## **6.5 Access to safe and decent housing**

Ontario regulates allowable room and board to be deducted for Live-in Caregivers but is silent on regulations to ensure adequacy of such provisions. Further, the ESA is silent on other workers under the TFWP that are often required to live in their employer's accommodation and have rents and other housing fees deducted from their wages. Many migrant workers' housing (including farm workers) is currently excluded from the Ontario Residential Tenancies Act. These gaps in protection result in unsafe, crowded and unsanitary living conditions for many migrant workers. Housing guidelines are inadequate and outdated and enforcement is not consistent or effective.

### **a) Regulate migrant housing and develop comprehensive enforcement of regulations**

The Ministry of Labour should explore the possibility for regulations on migrant worker housing to be developed under the ESA given the provision of housing by employers and the close proximity to migrant workers' job sites. At a minimum, existing housing guidelines for agricultural workers must be replaced with updated and enforceable regulations in consultation with migrant workers and community stakeholders and with the relevant Ontario ministries. Housing regulations for migrant workers in other streams must also be developed.

### **b) Proactive Enforcement Strategy**

A proactive enforcement strategy must reflect the realities facing migrant workers and their fears of reprisal for speaking out about housing conditions. . Fines for violations, damages for workers in substandard housing, multiple inspections per year and anonymous complaints are key components of a proactive enforcement strategy.

### **c) Provide access to rent geared to income housing for migrant workers**

Currently, the Ontario Housing Services Act restricts rent geared to income housing to citizens, refugees and permanent residents. Removing immigration status as a barrier to accessing social housing will strengthen the ability of workers in coercive employment arrangements to seek support, and assert rights without fear.

## **6.6. Ontario Works (OW) and Ontario Disability Support Program (ODSP)**

a) Many workers that are unable to access WSIB because of deeming or other regulatory issues turn to ODSP for support. However, OW and ODSP are based on residency in Ontario, which effectively bars migrant workers after they have been repatriated. As with WSIB and EI, inclusion under OW and ODSP should be a priority to ensure that migrant workers receive the full social wage and portable social benefits even after leaving Canada. Immigration status as a barrier to accessing OW and ODSP should be removed.