ASSOCIATION POUR LES DROITS DES TRAVAILLEUSES.RS DE MAISON ET DE FERME
ASSOCIATION FOR THE RIGHTS OF HOUSEHOLD AND FARM WORKERS

Prohibition to change employers for (im)migrant workers: A Constitutional challenge[1]

Many foreign workers are admitted into Canada as permanent residents. Others are admitted on open work permits, which provides them with the right to change employers. However for a majority of foreign workers, despite these options, the Canadian government prohibits, formally, the switching of employers.

A worker, on an employer-specific work permit, only has the right to work in Canada for one specific employer, there is no right to work for anyone else. The worker does not have the right to change employer, if they work for an employer other than the one authorized on the permit, the worker is then in violation of the conditions of their stay and as such subject to deportation.

Because they impose a restriction on changing employers, we refer to them as restrictive permits or closed permits. Closed work permits are typically valid between 6 months and 2 years and are renewable. Some foreign workers have seen renewed their permits, yes, for more than 25 years in a row.

The federal government imposes this restriction on changing employers, by applying two principal legal sanctions. The first is the revocation of the right to work in the country, and secondly, the threat of deportation. In other words, if a worker resigns and leaves their authorized employer, their right to work in the country is automatically revoked. The federal government also penalizes, in the same manner, the worker who is fired by their employer, or if the employment ends for any other reason. If they arrive in Canada and their employer has disappeared. If there is a bankruptcy. If their employer dies. If the employer is found non-compliant or excluded from the program, the worker automatically loses their right to work in the country.

[1] Text of a public lecture given by Eugénie Depatie-Pelletier, M.Sc.LL.D., Executive director, at the Université Laval on April 28, 2022 on the international day of health and safety at work, 30 min, accessible online: https://youtu.be/sUW9FENLw7I .

Foreign workers can work in Canada for Canadian employers, or for non-canadian employers, like a foreign company or for example a diplomat or a foreign student. If the worker is tied to a non-Canadian employer, in addition to the revocation of the right to work, the government also automatically considers the worker subject to deportation.

The risk of losing the right to work, and the right to reside in the country, reduces the capacity of the worker to quit and exercise their rights.

This is a problem.

Employment law presumes, between employer and employee, a power imbalance in favor of the employer. This system of law also presumes the capacity of an employee to quit, and as such be able to enforce the respect of their rights, including in front of the tribunals. However, when the capacity to quit is reduced, the existing power imbalance tilts drastically further in favor of the employer. An employer that faces little or no risk of their employees quitting, or faces little or no risk of facing legal complaints in the case of abuse, has little or no incentive to respect the rights of the worker or standards set by employment law.

For a sociological perspective, by restricting workers' capacity to quit, the state is ensuring a pool of workers, unfree and often silenced. For a legal perspective, policies that restrict workers' capacity to quit have been recognized as imposing a legal condition of servitude. Notably, the American Supreme Court has confirmed that a negation of the right to change employers has precisely the effect of placing a worker in a condition of servitude.

Unfeedom within the labour market, or the legal condition of servitude, dramatically impacts for the worker the exercise of their rights. On many levels.
Over the last two decades, the conditions for workers tied to an employer have been documented and regularly denounced by various UN agencies. A monitoring office of the American State department now also confirms, every year in its annual report, that workers on employer-tied status are among persons the most at risk in the world of becoming victims of human trafficking.

In addition, two human rights NGOs, Human Rights Watch in New York and Amnesty International, in London, have published since 2000 more than 50 reports on the human rights violations of migrant workers tied to their employers.

So what are we talking about exactly?

Typically, the non-payment for hours worked, or wage theft. Very common also is inadequate or non-existent measures for the protection of health and safety. It can also be a question of scheduling. Work days of 16 hours, 18 hours, even 24 hours. 7 days out of 7. 365 days a year. Other times, it is work days without any breaks, which includes enough time to visit the restroom or to eat enough. It can be an employer who demands a pace of work that is excessive and leads to injuries. It can also be that the jobsite does not have drinkable water, toilets or shelter from lightning. In other words, we are talking about working conditions that lead to, in a systemic manner, the deterioration of health, the development of illnesses, work accidents, sometimes fatal. Often, the demands of the employer restrict movement outside the workplace, preventing access, when needed, to community support or necessary medical treatment.

When describing their situation, certain workers express living in a state of extreme and permanent anxiety, caused by the fear of losing their legal status to work. Others have affirmed that it destroys their self-esteem, to feel considered in this country, and I quote, like an animal, like a prisoner, like a slave.

Others among them endure personal violence, constant psychological harassment, physical attacks, sexual assault.

We are talking about conditions, individual and collective, that are very problematic, and happen too often. Inhumane.

More precisely, what the Canadian social science confirms is that the negation of the right to quit and change employers has 4 principle effects on the worker. First, it leads to restrictions on the physical liberty, on the liberty of movement, of the worker. Second, it leads to a reduction in the capacity to make

fundamental choices, like the choice of where one lives, whether to have a roommate or live with a partner, the choice to continue a pregnancy. Third, the employer-tied legal status increases, for the worker, the risk of deterioration of their health, their mental health and their physical health. And finally, it constitutes a general obstacle to the exercise of rights, to the right of access to justice in the country.

So, as a society, what do we do?

At DTMF, we have, over decades, tried to educate political decision-makers about this problem and possible solutions. In particular, we have tried to educate the teams of federal ministers of immigration and employment. With dozens of other NGOs, community groups, workers' unions, we have been able to get 2 parliamentary committees to understand the problem. These two house of commons' committees, recommended, in 2009 and again in 2016, ending immediately, the use of closed work permits. In 2019, the federal government admitted that there was a problem. That, yes, closed work permits do make workers vulnerable to abuse.

The Canadian government is, today, perfectly aware of the impacts of the condition of servitude. Moreover, the government also knows of alternative measures to manage labour shortages by migrant and immigrant labour. The federal government knows that these alternatives exist because they already use them. We already offer permanent residence status. We already offer open work permits based on quotas, that are annual and predetermined, to workers with different qualifications. In Quebec, it is, in particular, young adults from France who are given access to the labour market as free foreign workers. They have access to a job market that favors having, or at least seeking out, decent working working conditions. They are recognized a freedom within the labour market, and that could easily be the rule, rather than an exception reserved for privileged foreign workers.

A general policy that would assure, in Canada, a free labour market where employers face healthy competition when it comes to the recruitment and retention of employees. A general policy that would confirm that our society take seriously human rights. A general policy that would ensure that the state

respect the dignity of all workers in the country, even those that are here on temporary legal status.

The Canadian government is aware of the serious impacts and it is aware of the alternatives. But it chooses to maintain closed work permits. It even reaffirmed this a couple weeks ago. In fact, it has instead implemented a series of reforms, cosmetic and with insignificant efficiency in terms of reducing abuse. While yes certain of these recent measures are essential, minimum, are basic. Like funding for community support, or online information available in different languages. But all these measures that are designed to reduce the abuse of migrants leave, intact, their employer-tied legal status. And therefore does nothing to change their reduced capacity to quit, demand the respect of their rights and access to justice in the country.

Truthfully, the government's position is not surprising. It is a continuation of a long tradition. Indeed, and here I would like to digress a little, it has been the case, since the very beginning of New France, that certain individuals have been recruited from abroad by agents for the benefit of employers here, who were contracted into service for a predetermined amount of time.

And yes, it's true that the prohibition against changing employers was applied in a different manner. In the past, the unauthorized changing of an employer was sanctioned by imprisonment, by a branding of the fleur-de-lys on the shoulder, and/or, if the employer wanted it, by peace officers who would return the disobedient worker back to the employer.

When slavery was legal, including in New France and English Canada, the preference for purchasing enslaved persons slowly overtook the tendency of having indentured workers. However, particularly in the United States, when slavery was abolished, Florida, South Carolina, Alabama, Missouri, in fact all the southern confederate states, were extremely creative in maintaining, for their employers, the supply of unfree workers.

Prison for quitting before the end of the work contract. Prison for a worker who owed a debt towards their employer. And this is what did employers; they would give advances at the beginning to ensure that the indebted worker, who

had accepted the advance, could not quit without risking imprisonment. Prison was also for people who had no work contract, who were called vagabonds. And then there was access to convicts, who were only permitted to work for the specific employer who covered their jail bond. There were even penalties, like we have now in Canada, for employers who stole from another employer a worker already under contract.

However, because the American constitution protected at the time not only the right to liberty or freedom to pursue happiness, but also specifically the right not to be held in servitude, all these systems, of unfree labour, at the beginning of the 20th century, were contested in court and declared to be unenforceable in a free society.

Unfortunately, during the second world war, governments resumed, as a form of war measures, to reduce the capacity of certain workers to quit, in particular in the agricultural industry. At the end of the war, for instance in the United States, the government, notably, did not just conserve a labour system of unfree non-citizen workers. It even delegated the management of that system to coalitions of employers. And Canadian agricultural employers were jealous. But in 1966, the Canadian state also reconsolidated its own admission system for foreign workers tied to an employer, initially for the Ontario agricultural sector, and then in '73 for all employers in every sector of the economy.

Today, the government no longer has to threaten prison or the forced return to the employer. Nope. Instead, we use the threat of losing the right to work, and possibility of deportation. And therefore, much like in the 17th century, our workers today under employer-tied status seek to avoid legal sanctions. Rarely quitting their job, or risking the exercise of a right that could disrupt the employment relationship. Employers back in the 17th century appreciated systems of unfree labour. Our employers today appreciate them just as much.

In short, we have today, on one side, employers very appreciative of being able to access a system of unfree labour. On the other side, a government that has for more than 400 years assured for the benefit of these employers, at minimum the maintenance of such a system, or as today, its expansion.

So let's ask the question again: in this historical and political context, what is to be done?

Well the history of law teaches us one of the ways to dismantle, in a sustainable fashion, a system of unfree labour, and perhaps the only way to do so, other than a civil war, is to challenge it in court.

In fact, the contemporary version of unfree labour, foreign workers tied to their employers, has already been subject to a challenge in front of a court. In Israel. In an unanimous judgment, the Israeli Supreme Court, declared in 2006 that the closed work permit system was unconstitutional and unenforceable. Because it violated, in an unjustified manner, the fundamental rights of liberty, and of dignity, of the human beings residing within the national territory. In this decision, black on white, it referred to employer-specific work permits as the base of a "modern form of slavery."

Here in Canada, we also have a constitution that allows for the invalidation of state actions that violate, without sufficient justification, a fundamental right or liberty. For both citizens and non-citizens. And, these constitutional rulings, are, effectively, the only way to have recognized, in a lasting manner, the fundamentally problematic aspect of the law.

Lasting, yes, we want something that will last, since even if the federal government today decides to replace all closed permits with open permits, there is no guarantee that the next government will not put back the closed work permit. As it happened in 2016, in the UK. But, if a group of judges affirms the unconstitutionality of the measures prohibiting the change of employer, NO future government will be able to implement them, without automatically, at least, creating a conflict, a real legal, political and social conflict.

And indeed, since the adoption of the Canadian Charter, several constitutional challenges have been an effective and lasting vehicle for the advancement of rights for people marginalized by the State. The right to change one's place of residence. Medical assistance in dying. Medical marijuana. Abortion. These are examples of rights that were recognized as fundamental through constitutional challenges. Specifically, they are legal battles won under the constitutional right

to liberty and security of the person. It is on the basis of this right in particular that restrictions on changing employers must be declared invalid and unenforceable, because it implicitly protects the right to change employers and the right to not be held in a condition of servitude.

What foreign workers experience in our country, especially in the domestic work sector and the agricultural industry, are not simple "breaches of labour law" by some bad employers. It is not only work contracts not being respected. It is not only difficult or dangerous working conditions, or unpaid hours. It is not only economic exploitation of people newly arrived in the country who have limited knowledge of their rights. It is not only a discriminatory migration regime that only gives open worker permits to workers of certain countries favoured by Canada. It is a system, imposed by the state, that unjustifiably restricts workers' fundamental right to security, physical and psychological, the fundamental right to access to justice, and the fundamental right to liberty.

Workers's unfreedom within the labour market creates a system that imposes also on employers a power that is very tempting to use, to extract, illegally, the maximum from an employee, as fast as possible, regardless of the consequences for the body, spirit or family of the worker. It creates a system that provides to all affected employers, not only obedient employees, and as such flexible to the extreme, but also workers that are disposable at will. Who can be, with relative ease, removed from the legal labour market in case of disobedience, complaint, work accident or professional illness, or even inconvenient parenthood.

It creates a system where abuse can, and does, become the norm. A system that prevents the worker from exercising, in general, their rights. A labour system that escapes the application of the rule of law. That we cannot justify in a society that considers itself free. A system, in Canada, unjustifiable.

The Canadian constitutional protections and jurisprudence are clear. And today, thanks to grassroot activists, empirical researchers, journalists, we now have sufficient evidence to go to court.

We must respect the human dignity of all household workers, or all farm workers, even if they are employed under the status of foreign worker. It is time to evaluate, out in the open, the costs, human and social, associated with maintaining a system where workers are held in a condition of servitude.

A constitutional challenge has the potential to bring about a paradigm change, significant and lasting. It is necessary. The legal basis, arguments and evidence are clear. Sufficient funds will be found. We will fight and, sooner or later, since truth is on our side, we will win. And finally have governments recognize as fundamental the right to quit and change employers. For all.