

Désavantage corrosif d'un statut : étude de cas sur la COVID-19 et les travailleurs agricoles migrants au Canada

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Résumé

La pandémie de COVID-19 a clairement révélé l'existence de multiples et persistants problèmes relatifs au travail dans bien des territoires. Si le recours à une main-d'œuvre migrante a proliféré dans diverses industries à l'échelle mondiale, la pandémie a révélé l'ampleur particulière du recours aux travailleurs agricoles migrants. Par une approche analytique des politiques, cet article examine le désavantage corrosif produit par l'intersection entre migration et statut de travail pour les ouvriers agricoles migrants. Ce désavantage colore leurs expériences et leur traitement au Canada, que la pandémie a amplifiés. Issue d'une démarche axée sur les capacités, la théorie du désavantage révèle des conditions qui produisent des effets négatifs sur de multiples facettes de la vie des travailleurs et restreignent leur aptitude à faire des choix éclairés quant à leur bien-être. Adoptant la pandémie de COVID-19 comme étude de cas, je soutiens que le statut de travail des ouvriers agricoles migrants et la nature même de la migration créent par leur intersection un désavantage corrosif. Ce qui affecte aussi bien les droits officiels des ouvriers que leur accès pratique aux droits, biens et ressources nécessaires, notamment en ce qui concerne les soins de santé, l'hébergement et les conditions de travail, ainsi que la possibilité d'obtenir justice ou réparation pour les violations de leurs droits.

The Corrosive Disadvantage of Status: A Case Study on COVID-19 and Migrant Agricultural Workers in Canada

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Abstract

The COVID-19 pandemic brought into sharp relief many enduring labour issues across a range of jurisdictions. While migrant labour has proliferated among many industries around the globe, the extent of and reliance on migrant agricultural work, in particular, was laid bare during the pandemic. Adopting a policy analysis approach, this article examines the corrosive disadvantage produced by the intersection of the migration and labour statuses for migrant agricultural workers, which shapes their experiences and treatment in Canada and which was amplified during the pandemic. Flowing from the capabilities approach, the theory of disadvantage uncovers conditions that produce negative impacts in multiple areas of an individual's life and constrains their ability to make valuable choices about their well-being. Drawing on the COVID-19 pandemic as a case study, I argue that the nature and intersection of migration and labour statuses for migrant agricultural workers produce a corrosive disadvantage, one that impacts both formal entitlements and practical access to necessary rights, goods and resources, including in relation to health care, housing, and working conditions, and their ability to seek legal recourse or remedy for rights violations.

Introduction

The COVID-19 pandemic highlighted the precariousness of work and legal gaps for workers in many industries across the globe. Issues attending seasonal and agricultural migrant labour were rendered particularly visible in light of the vital role migrants play in food production and processing systems and the impact of closed and severely restricted borders in the initial months of the pandemic in 2020 (ILO, 2020b: 1). This article draws on the experience of migrant agricultural workers in Ontario, Canada,

during the COVID-19 pandemic as a case study through which to illustrate the entrenched issues these workers face and which are a direct result of the legal regulation of this form of labour.

Demand for migrant agricultural labour has grown significantly in recent decades (Dauvergne and Marsden, 2014; Ruhs and Martin, 2008), both in countries with established programs, such as Canada (Lenard and Strachle, 2012; Preibisch and Hennebry, 2012), the United States (Calavita, 1992) and across the European Union (ILO 2020b: 1), and through the creation of new programs in New Zealand, Australia (Brickenstein, 2015; Gibson and McKenzie, 2014) and the Republic of Korea (ILO 2020b: 1). Agricultural labour migration programs are often highly regulated by national governments (ILO, 2016; Kuptsch, 2015: 353-354), including with respect to recruitment and travel and conditions of work, wages and living. Many programs operate with similar features that constrain migrant agricultural workers' migration and labour statuses, such as through the adoption of closed work permits and temporary migration permits tied to the seasonal nature of agricultural industries (Hastie, 2019a; ILO, 2020b).

In Canada, as elsewhere, issues regarding the regulation and experience of migrant labour in agriculture were exacerbated by the pandemic, while at the same time highlighting the essential and skilled nature of this work (Falconer, 2020; Larue, 2020; Isaac and Elrick, 2020; Triandafyllidou and Nalbandian, 2020; Neef, 2020; ILO, 2020b). The trajectory of events, outbreaks and regulatory responses to COVID-19 in relation to migrant agricultural labour evidenced a much greater concern for preserving their essential labour to Canada's economy than for protecting the health and welfare of the workers (Triandafyllidou and Nalbandian, 2020: 6-7; Neef, 2020; Weiler et al, 2020; Stevenson and Shingler, 2020), a trend similarly documented in other jurisdictions that rely heavily on migrant agricultural labour (ILO 2020b: 2-3). While Canada was quick to re-open the border to migrant workers in March 2020, the health and well-being of migrant workers was neglected and subject to differential standards from Canadian citizens and permanent residents (Kaushal, Hastie and Eeg, 2020; Lowrie, 2020; Migrant Workers Alliance for Change, 2020; Stevenson and Shingler, 2020; Auditor General of Canada, 2021). In fact, federal health minister Patty Hajdu called the mistreatment of migrant workers during COVID-19 a "national disgrace" and has publicly called for reforms

to Canada's temporary migrant worker programs (Johnson, 2020).

As a “crisis” or “emergency,” the COVID-19 pandemic has, in many ways, been framed as unique and exceptional (Kaushal, Hastie and Eeg, 2020). However, as this article demonstrates, much of what the pandemic has revealed in terms of the regulation and treatment of migrant agricultural workers is not unique or exceptional; rather, it has brought into clear focus long-standing issues. Existing research has consistently documented abuse of workers under the Temporary Foreign Workers Program [TFWP] and Seasonal Agricultural Workers Program [SAWP] in Canada, including in relation to wage violations, misinformation about rights and entitlements, exposure to safety risks, inadequate living conditions and denial of medical care (Faraday, 2012; Nakache and Kinoshita, 2010; Hastie, 2017; Preibisch, 2012; Cundal and Seaman, 2012: 206-207; Tungohan, 2018: 246). Unionization, historically seen as a means to improve working conditions, is often formally or practically out of reach for migrant agricultural workers (Vosko, 2014; Vosko, 2016; Vosko, 2018; Smith, 2018; Tapia and Isben, 2018; Hastie, 2019b; Hastie and Farrant, 2021). Rights violations and abuses are similarly documented in respect of migrant agricultural workers in other countries (Hastie, 2019a; ILO 2020b). These issues were, in many ways, amplified during the COVID-19 pandemic, and the visibility of migrant workers during this pandemic also brought these issues into greater public focus.

As I examine in this article, the pandemic has brought into sharp relief the corrosive disadvantage produced by the intersection of *migration* and *labour* statuses for migrant agricultural workers. This concept of corrosive disadvantage (Wolff and de-Shalit, 2007) follows from the capabilities approach, a theory of justice that asks not just whether rights, goods and resources are distributed *equally* to members in society, per the model of distributive justice (Rawls, 1999), but whether they are distributed *fairly*, meaning that each individual has the necessary quality and quantity of rights, goods and resources to do and be what they have reason to value (Sen, 1999; Sen, 2009; Nussbaum, 2011). Rather than looking at distribution as the key metric, the capabilities approach looks at what an individual can do and be with the bundle of goods, resources and rights that they possess (Sen, 1999; Sen, 2009). This process of converting rights, resources and goods into “beings” and “doings” (also called “functionings”) is at the heart of the capabilities approach (Sen,

1999; Sen, 2009). This, in turn, requires paying attention to the “social, political, legal and other contexts in which an individual must navigate choice, and to how those contexts may constrain or deprive her of some quantity or quality of choice in converting the resources and goods she possesses into valued doings or beings” (Hastie, 2017: 25). The quantity and quality of choice, or opportunity, that flows from the bundle of goods, rights and resources an individual possesses represents the “capabilities,” or freedoms, an individual has to achieve desired functionings. Thus, the contexts or conditions that deprive an individual of some quantity or quality of choice or opportunity — capability deprivation — may place them in a position of “disadvantage” (Wolff and de-Shalit, 2007: 36-37). In this way, the capabilities approach and concept of disadvantage look more deeply and critically at the notion of “choice” as *viable* options, not only those that ostensibly exist.

The concept of “disadvantage” provides a framework through which to understand those capabilities that are particularly critical for advancing well-being (Wolff and de-Shalit, 2007: 8-9). Taking the capabilities approach as a starting point for their theory, Wolff and de-Shalit focus on understanding and analyzing the conditions necessary not only to achieve functionings but also to *sustain* them. From this perspective, identifying conditions that create “exceptional risk and vulnerability” is integral, as those are conditions of disadvantage (Wolff and de-Shalit, 2007: 9). In other words, one hallmark of disadvantage is being exposed to or forced to take risks that an individual wouldn’t otherwise have, due to limited or no reasonable alternatives (Wolff and de-Shalit, 2007: 66-67). The consequence of this is the creation or perpetuation of “insecure functionings” (Wolff and de-Shalit, 2007: 73) and production of “corrosive disadvantage,” which is a disadvantage to one functioning that spreads negative effects beyond its own domain and into other areas of functioning (Wolff and de-Shalit, 2007: 121). In other words, corrosive disadvantage identifies those (deprived) capabilities and functionings that produce negative ripple effects in additional areas of an individual’s life. As this article examines, the allocation and intersection of migration and labour statuses for migrant agricultural workers produce a corrosive disadvantage, one that impacts their work, health, material living conditions and overall well-being. While this article draws on Canada as a case study, similar regulatory features and problematic practices are

documented in many other jurisdictions (ILO, 2020b).

This article draws on the case study of migrant agricultural workers in Ontario, Canada, during the COVID-19 pandemic through which to illustrate how the regulation of this work produces corrosive disadvantage. This article is based on publicly available secondary sources, including news reports, NGO reports developed through engagement with migrant workers during the pandemic and official government reports. Sources were identified through key word and general searches and updated throughout 2020 and 2021. As Ontario is the province with the largest intake of migrant agricultural workers and the number of available public sources for this jurisdiction much greater, it was ultimately determined to focus on this province as the case study jurisdiction for this article, though the findings and conclusions reached are broadly applicable to the regulation of migrant work across Canada and internationally in jurisdictions with similar regulatory features.

This article proceeds in four parts. Section 1 sets out key aspects concerning the regulation of migrant labour in Canada. Section 2 then provides a brief review of the events and policies enacted in relation to migrant agricultural workers in the wake of the COVID-19 pandemic. Building on this case study, sections 3 and 4 demonstrate how the intersecting nature of migrant agricultural workers' migration and labour statuses produces corrosive disadvantage for their ability to achieve well-being and just conditions during their time in Canada. These sections examine how the impact of workers' migration and labour statuses created issues for migrant agricultural workers in Canada during the COVID-19 pandemic in relation to both formal entitlements and practical access to necessary rights, goods and resources, including in relation to health care, housing and working conditions, and their ability to seek legal recourse or remedy for rights violations. Ultimately, this article aims to demonstrate how the functioning of status for migrant agricultural workers produces significant negative consequences and results in systemic injustice, not only during the COVID-19 pandemic, but rendered acutely visible by it. This, in turn, assists in laying a foundation from which further conversation and movement towards just conditions for migrant workers in Canada and internationally can take place.

Regulating Migrant Agricultural Work in Canada

Migrant agricultural worker programs in Canada have existed in some form since at least the 1960s (Lenard and Straehle, 2012; Hastie, 2019b). Today, two programs are used to recruit and employ migrant agricultural workers: the Temporary Foreign Workers Program (TFWP) and the Seasonal Agricultural Workers Program (SAWP). As immigration programs, the TFWP and SAWP are formally administered by Canada's federal government, although responsibility for enforcement of labour and employment standards, occupational health and safety laws, housing standards and health care rests with individual provinces under Canada's federalist structure. These two programs further sit alongside other immigration programs for both temporary and permanent relocation to Canada, such as for international students, refugee claimants and family members of Canadian citizens and residents, and the International Mobility Program, which provides an expedited vehicle for recruitment of foreign workers with specific eligibility requirements (Marsden, Tucker and Vosko, 2021; Chartrand and Vosko, 2020). Unlike other labour migrants, migrant agricultural workers do not have the ability to use their work experience to permanently immigrate to Canada.

Today, the SAWP brings in more than 40,000 migrant agricultural workers each year (Vosko, Tucker and Casey, 2019: 232), and close to 100,000 migrant workers arrive annually under the TFWP for labour in various industries (Chartrand and Vosko, 2020: 98-99). Migrant workers account for a high percentage of the workforce in agriculture across Canada: 41 per cent in Ontario and 30 per cent in each of BC, Quebec and Nova Scotia (Lu, 2020). Workers in agriculture and other low-wage migrant labour industries in Canada are racialized within the Canadian landscape, which has been linked to patterns of systemic discrimination and exploitation (Smith, 2015; Chartrand and Vosko, 2020; Sharma, 2006; Satzewich, 1991). Among the top countries of citizenship of migrant workers in Canada (including under both the TFWP and SAWP) are the Philippines, Mexico, Jamaica and Guatemala, the latter three of which are SAWP participants (IRCC, 2019).

Under the TFWP, workers may come to Canada for a defined period of time to labour in various jobs, including agriculture. Employers under the TFWP must apply to the federal government for a Labour Market Impact Assessment (LMIA) to hire the worker

by demonstrating a labour shortage and lack of available citizen or resident workers (Marsden, Tucker and Vosko, 2021: 78-79). A foreign worker is then recruited and applies for a temporary work permit and an immigration permit (Nakache and Kinoshita, 2010; Faraday, 2012; Hastie, 2017), each also under the purview of Canada's federal government. Work permits under the TFWP are typically issued for a two-year period and are renewable, though no pathway for permanent immigration exists for lower-skilled jobs, such as in agriculture. Importantly, the immigration and work permits issued to foreign workers under the TFWP are formally separate in Canada, meaning that if a TFWP worker loses their job, they may validly remain in Canada for the duration of their immigration visa period, although they may not take up new employment without first applying and receiving a new, valid work permit (Nakache and Kinoshita, 2010; Hastie, 2017). Although the TFWP does not require an employer to provide workers with accommodation, this is a common arrangement, especially for agricultural workers, aligning with international trends in this regard (ILO, 2016).

Under the SAWP, migrant agricultural workers are recruited in their home countries for work in Canada each season, up to eight months per year. The SAWP runs on the basis of bilateral agreements between Canada and sending country governments. SAWP workers are assigned to a particular employer and may be "recalled" by their employer to return the next season (Hennebry and Preibisch, 2010; Hastie, 2017; Faraday, 2012; Vosko, Tucker and Casey, 2019: 232; Basok and George, 2020). This "recall" system gives employers in Canada significant power over workers as ongoing employment each season is dependent on the employer's desire or decision to name a worker for return. In addition, workers under SAWP generally live and work on the employer's property/farm, providing an employer with significant physical control over workers' movements (Hennebry, 2012: 10). No option for permanent immigration exists under SAWP.

Under each of the TFWP and SAWP, the migration status of workers is temporary and contingent. While not formally tied to employment status under the TFWP, the nexus between employment status and migration status remains significant in practice. Moreover, work permits are "closed" under these programs, meaning that an individual may only work in the job, at the location and for the employer listed on their work permit (*Immigration and Refugee*

Protection Regulations: s185(b); Nakache and Kinoshita, 2010: 17-18; Hastie, 2017: 31). Changing jobs, locations or employers is a lengthy and arduous process (Nakache, 2013: 78; Nakache and Kinoshita, 2010: 17-18; Hastie, 2017: 31). SAWP workers face even greater constraints as their labour and migration statuses are tied and their ability to change employers not practically available. In addition, because agricultural workers under both the TFWP and SAWP tend to live and work on the employer's property, their labour status impacts their ability to reside in Canada in a practical sense, while also giving their employer significant power and control over their movements and living conditions.

The manner in which migration and work permits are extended under Canada's TFWP and SAWP have been critiqued as creating significant dependence on an employer and a power imbalance in the employment relationship (Hastie, 2017: 32; Marsden, 2012: 217; Marsden, 2011: 51; Hennebry, 2012; Binford, 2009: 507; Satzewich, 1991; Basok, 2002; Sharma, 2012: 36). The temporal, geographic and relational constraints imposed by these permits, coupled with the difficulty of changing employers or jobs, has led some to characterize the permit system as "bonded" in nature and as the "baseline of precariousness" for migrant workers (Marsden, 2011: 50; Faraday, 2012: 61).

In addition to the impact of migration status, the status of agricultural work under provincial labour and employment laws creates further disadvantage for migrant agricultural workers. Differential rights and exclusion from employment and labour laws exist for specific jobs, notably in the agriculture industry, which is occupied primarily by racialized migrant workers (Fudge and MacPhail, 2009: 131; Faraday, 2012; Cundal and Seaman, 2012: 206; Vosko, Tucker and Casey, 2019). This means that migrant agricultural workers are subject to fewer or lower rights and standards at work than migrant and resident workers in other industries or jobs. For example, agricultural workers are often subject to different regulations regarding wages and working hours under provincial employment laws (Faraday, 2012; Hastie, 2017).

In addition, agricultural workers in Ontario and Alberta are also excluded from unionization under provincial labour law (*Labour Relations Act*: s3[b.1]; *Farm Freedom and Safety Act*). In Ontario, workers instead may collectively organize in the workplace under the *Agricultural Employees Protection Act [AEPA]*, although

this statute was designed expressly to maintain the exclusion of agricultural workers, a largely racialized population, from access to meaningful labour rights (Hastie and Farrant, 2021: 10; Hastie, 2017; Tucker, 2012: 30-56; Barrett, 2012; Walchuk, 2016). Migrant agricultural workers face substantial barriers to unionization in most provinces, even where they are ostensibly entitled to do so, due to the ways in which migration and labour statuses constrain workers' power (Vosko, 2014; Vosko, 2016; Vosko, 2018; Hastie, 2019b). Thus, unionization, historically seen as a vehicle through which to improve working conditions collectively, is practically out of reach for migrant agricultural workers in many settings.

The result for migrant agricultural workers is thus both fewer formal entitlements and rights under law due to their labour status (as agricultural workers) and heightened constraints and difficulty in asserting the legal rights they do possess in practice, due to the nature of their migration status, discussed above. As such, both the migration status (as temporary and contingent) and labour status (as agricultural workers subject to differential standards and exclusions under provincial labour and employment laws) of migrant agricultural workers impact their formal entitlement and practical access to rights, goods and resources necessary to ensure just conditions for their work, health and living situation in Canada. Even where workers have existing legal rights and entitlements, the manner in which migration and labour statuses are allocated “creates a barrier to effective conversion of formal rights into substantive realization of just conditions of work in practice” (Hastie, 2017: 32). As such, these statuses work both independently and in concert to create a situation of heightened vulnerability for migrant agricultural workers. In this way, the migration and labour statuses of migrant agricultural workers can be seen to create disadvantage, constricting the ability of migrant workers to possess and convert capabilities into valuable functionings, or in other words, to have a set of viable options from which to make choices in respect of their own interests and well-being. As the next sections demonstrate, the intersection of these statuses produces corrosive disadvantage for migrant agricultural workers, the consequences of which have been acutely illustrated during the COVID-19 pandemic.

COVID-19 and the Regulation of Migrant Agricultural Work in Canada

The COVID-19 pandemic in Canada unfolded in a manner similar to that of many countries in early March 2020. Following a series of identified cases, border closures were enacted as an early measure in attempt to contain the virus and prevent widespread circulation within the country (Kaushal, Hastie and Eeg, 2020). The earliest border closure measures in Canada made few exceptions for entry. Notably absent from these exceptions were provisions to allow entry for migrant workers. Canada was quick to act in response to labour shortages during the COVID-19 pandemic to facilitate renewed entry for low-wage migrant workers, especially in agriculture and food processing, given what was being labelled as their “essential” and, in many ways, irreplaceable labour in the food supply chain (Falconer, 2020; Larue, 2020; Isaac and Elrick, 2020; Triandafyllidou and Nalbandian, 2020: 6; Lupton, 2020; Dubinski, 2020a; Haley et al, 2020; Hastie, 2020; Weiler et al, 2020).

Canada’s response to the COVID-19 pandemic and in relation to migrant agricultural workers must be understood in light of the stratified responsibility under the federalist division of powers under Canada’s constitution. While the recruitment and authorization of workers (to travel to Canada and work in Canada) under each of the TFWP and SAWP are within the jurisdiction of the federal government in Canada, responsibility for enforcement of labour and employment laws, including occupational health and safety, rests with each individual province (Marsden, Tucker and Vosko, 2021: 82-83). However, in the absence of information-sharing agreements, provinces may not know the location of migrant workers within their territory. While some provinces have introduced legislation that requires employers of migrant workers in the province to register with relevant authorities, this is not yet consistent across Canada.

Compounding issues regarding the divided jurisdiction of federal and provincial governments, complicated regulatory structures regarding health, housing and employment standards at the provincial level may have operated to further inhibit inspection and enforcement regimes. For some issues, such as those falling within the body of employment standards legislation (i.e., wages, hours of work and related matters), no pro-active inspection or enforcement regimes exist, meaning that workers must file a legal complaint when their rights have been violated in order to remedy the

situation. This is widely documented as especially problematic for migrant agricultural workers in Canada (Hastie, 2017). Regulatory bodies governing health care are typically divided regionally within a province, which may produce inconsistent standards, and enforcement may be similarly hampered by a lack of information about the location of workers and resources for proactive inspection.

The quick reopening of Canada's international borders to migrant agricultural workers was not initially accompanied by specific guidelines to ensure the health and safety of those workers and prevent transmission of COVID-19, and this led to early outbreaks of COVID-19 amongst migrant agricultural workers, who often live and work in tight quarters. As a result, whether and how migrant workers would be required to quarantine on arrival to Canada, for example, was evidently unclear, despite general rules requiring international travelers to quarantine for 14 days on arrival to Canada (Kaushal, Hastie and Eeg, 2020). This was further complicated by the fact that agricultural workers generally live in shared housing accommodations.

Notable outbreaks amongst migrant agricultural workers in Ontario in the weeks that followed the border re-opening highlighted the disparate treatment of these workers in the absence of clear cooperation between federal, provincial and regional authorities and specific rules and support regarding quarantine, living arrangements and occupational health and safety measures. In Ontario, jurisdictional responsibility for health and housing inspections has been delegated to regional health authorities (*Health Protection and Promotion Act*; Ontario Ministry of Health, 2021; Ontario Ministry of Health, 2020), creating the potential for variation in response across the province. Moreover, entitlement to public health care services for migrant workers is restricted (Doyle, 2020).

In June 2020, the Ontario government created assessment and isolation centres for migrant agricultural workers in the Windsor-Essex region (CBC News, 2020b), which intakes a substantial number of migrant agricultural workers in the province. The government also increased its testing efforts amongst migrant agricultural workers following growing case numbers within that population, including creating mobile units to administer tests at farm sites across the province (Jeffords, 2020). Support teams to coordinate and monitor housing conditions and food supplies were also created (Wilhelm, 2020). Finally, in July 2020, Southwestern

Public Health, which is responsible for a region in Ontario that employs a significant number of migrant agricultural workers, issued a health order requiring 22 measures to be implemented at farm sites, including in relation to physical distancing, accommodation standards, screening requirements and access to information (Versolatto, 2020). However, as discussed later, significant concerns and failures regarding these responses were documented.

Provincial efforts were further supported at the federal level. New regulations introduced in late April 2020 required employers of temporary foreign workers to provide separate accommodations for arriving workers during their 14-day isolation or quarantine and to pay them wages during that period “substantially the same as those set out in the offer of employment,” with penalties for non-compliance (*Regulations Amending the Immigration and Refugee Protection Regulations (Emergencies Act and Quarantine Act)*: ss 6(2), 7(2), 14). The federal government further provided financial support to employers to cover the costs associated with required self-isolation for migrant workers on arrival to Canada (Shingler, 2020; Larue, 2020). Employment and Social Development Canada (ESDC) further committed funding and support for enhanced inspections and improvements for housing in response to noted outbreaks (ESDC, 2020). Yet, as discussed below, significant failures were found in this regard as well.

The series of events and policies, and timing of them, that accompanied the border re-opening to migrant agricultural workers evidenced a greater concern for the use of their labour than for safeguarding their health and well-being, lending weight to critiques of Canada’s SAWP and TFWP that suggest the programs create second-tier status for migrant agricultural workers. As noted earlier, the concept of disadvantage aims to identify conditions that require particular populations to take on heightened risk or which exacerbate vulnerability (Wolff and de-Shalit, 2007). The status of migrant agricultural workers can be seen as creating disadvantage by subjecting migrant agricultural workers to differential standards under law and treatment in practice, requiring them, in effect, to take on additional risks and experience particular vulnerabilities that Canadian and resident workers did not face during the COVID-19 pandemic. As the following sections unpack, this creates corrosive disadvantage for migrant agricultural workers in respect of their living and working conditions, as well as their ability to seek legal

recourse or remedy for rights violations.

The Impact of Status on Entitlement and Access to Adequate Living and Working Conditions

Despite the institution of rules regarding quarantine and other health and safety requirements for migrant workers in Canada during the COVID-19 pandemic, multiple reports surfaced that such rules were not being followed, particularly in the agricultural sector (Migrant Workers Alliance for Change, 2020; Bogart, 2020; Auditor General of Canada, 2021). Overcrowded accommodations, a lack of personal protective gear, pressure by employers and use of agencies to move workers between workplaces were all reported as contributing to the spread of COVID-19 amongst migrant workers (Doyle, 2020; Larsen, 2020; UFCW, 2020). Moreover, a lack of enforcement and accountability measures were noted as barriers to employer compliance (Luck, 2020; Bogart, 2020; D'Amore, 2020; Auditor General of Canada, 2021; Triandafyllidou and Nalbandian, 2020: 6).

While issues regarding non-compliance, overcrowding, a lack of sanitary conditions and pressure from employers are not new (Cundal and Seaman, 2012: 208; Hennebry and Preibisch, 2010: 30-31; Perry; Horgan and Liinamaa, 2017: 722; Salami, Meharali and Salami, 2015), they took on heightened significance during COVID-19, given that such conditions create an environment where transmission of the virus could take place with relative ease (Doyle, 2020; ILO, 2020a: 4). This related, particularly, to the inability of workers to maintain proper physical distancing. For example, as federal health minister Patty Hajdu remarked, “All the PPE in the world will not protect you if you are sleeping in a bunkhouse that is housing 12 to 15 people” (Ansari, 2020). Contrary to the risks evidenced by Minister Hadju’s statement, migrant agricultural workers may have faced increased density in housing during the COVID-19 pandemic. A report published by a migrant worker advocacy group in Ontario documented that migrant agricultural workers were being housed in increasing numbers following a quarantine period “because social distancing at work is not required for individuals who live together” and this therefore “maximize[s] productivity” (Migrant Workers Alliance for Change, 2020: 21). Concerns regarding accommodation and overcrowding were also raised by Canada’s Auditor General in a report concerning migrant

agricultural workers and COVID-19 (Auditor General of Canada, 2021: 38).

The Auditor General's report also identified numerous concerns and shortcomings in ESDC's inspections processes undertaken in 2020 and 2021. The report identified problems in 88 per cent of quarantine inspections in 2021 and 73 per cent in 2020 (Auditor General of Canada, 2021: 17) and also commented on under-performance and problems with other inspections, including in relation to isolation and COVID-19 outbreaks and general program compliance. The report concluded that "the department's inspection provides little assurance that employers complied with the requirements to protect temporary foreign workers during quarantine" (Auditor General of Canada, 2021: 17) and during isolation periods required during outbreaks (Auditor General of Canada, 2021: 20-22).

Migrant agricultural workers also reported consistent issues accessing health information and services, both due to the difficulty of visiting off-property locations and delays in obtaining requisite health access documents from the Canadian government (Migrant Workers Alliance for Change, 2020: 13). There was a further report that some migrant workers were denied COVID-19 testing when it was requested (D'Amore, 2020). Language barriers for agricultural workers also remained a notable challenge during COVID-19 (Migrant Workers Alliance for Change, 2020: 13), which further inhibits workers' ability to access information and services. Moreover, inattentiveness to the schedule and practicalities of agricultural work has been suggested as creating limited access to available services (CBC News, 2020b).

As with other facets of their experience and treatment, issues regarding access to health care were not new during the COVID-19 pandemic, though they were sharply illustrated and took on greater urgency. Research commonly documents multiple challenges for migrant workers accessing health care and medical treatment (Hennebry, McLaughlin and Preibisch, 2016; Hennebry, Preibisch and McLaughlin, 2012; Hennebry and Williams, 2015; McLaughlin, Hennebry and Haines, 2014; Cajax and Cohen, 2019; Cole et al, 2019; Salami, Meharali and Salami, 2015; Haley et al, 2020; Vahabi and Wong, 2017; Vahabi, Wong and Lofters, 2018). Relatedly, migrant workers have been found to experience significant obstacles accessing the procedures required to make a

Workplace Safety and Insurance Board claim in Ontario or other compensatory mechanisms (Basok and George, 2020; Hennebry and Preibisch, 2010: 30-31; McLaughlin, Hennebry and Haines, 2014). These obstacles include language barriers, an insufficient understanding of the process to submit such a claim and, often, a fear of employment-based repercussions, such as not being “named” to return under the SAWP program (Basok and George, 2020: 57; Hennebry and Preibisch, 2010: 26, 30; Hennebry and Williams, 2015). Compounding the existing barriers in accessing health-related information and services, a lack of sick day entitlements and pay, coupled with fears of deportation or termination, further constrains the ability for migrant workers to protect their health and create additional disincentives to seek health care and services (Migrant Workers Alliance for Change, 2020: 13-15; Caregivers Action Centre, 2020: 31).

The allocation of migration status as temporary and labour status as contingent and closed, discussed in section 1, produces a corrosive disadvantage for migrant agricultural workers’ capabilities in relation to their living and working conditions. The intersection of their migration and labour statuses constrains their ability to choose their living arrangements and subjects them to overcrowded and substandard living conditions that other workers in Canada are generally not subjected to. As discussed in this section, that, in turn, enhances risks to workers’ health and safety, which was amplified during the COVID-19 pandemic. For example, estimates from April to July 2020 found that over 1000 migrant agricultural workers in Ontario had tested positive for COVID-19, a rate of infection that greatly surpassed transmission in the general population of Ontario in the same time period (Vosko and Spring, 2021). Moreover, the requirement for an employer to provide accommodations not only means that workers often live in cramped and unsanitary housing but that they live on an employer’s property. This has been found to significantly constrain workers’ ability to access services and assistance, due to the extent of control employers have over workers’ movements, discussed in section 1, and which was amplified during the COVID-19 pandemic. Further, the contingent and temporary nature of workers’ migration and labour statuses creates additional disincentives to seeking health care or medical treatment for an injury or condition, due to fears of deportation, loss of earnings and other repercussions. In other words, migrant agricultural workers

may perceive few viable options to protect their health and well-being because the bundle of rights, goods and resources they possess is diminished due to the regulatory features of the SAWP. In turn, this negatively impacts workers' ability to convert those capabilities into valuable functionings — to “do and be” healthy, secure and well at work.

As discussed at the outset of this article, a hallmark of “disadvantage” is being exposed to or forced to take risks that an individual wouldn't otherwise have due to limited or no reasonable alternatives (Wolff and de-Shalit, 2007: 66-67). Migrant agricultural workers in Canada were forced to accept heightened risks of COVID-19 transmission due to the living and working conditions imposed by the legal frameworks governing the migration programs (SAWP and TFWP) and agricultural work under provincial employment laws. Moreover, migrant agricultural workers would likely see few or no reasonable alternatives in light of the widely perceived risks of job loss and deportation associated with voicing a complaint, examined further in the next section. Thus, the nature and intersection of migration and labour statuses for migrant agricultural workers create corrosive disadvantage by constraining not only their migration and work options but also producing negative consequences in respect of their living conditions, health and safety, each of which was acutely illustrated during the COVID-19 pandemic.

The Impact of Status on Asserting Rights and Obtaining Remedies

Existing literature confirms a strong correlation between the hesitancy of migrant workers to assert their legal rights or seek remedies and the precariousness associated with migrant workers' labour and migration statuses under Canada's TFWP and SAWP (Faraday, 2012; Nakache and Kinoshita, 2010; Marsden, 2012; Hennebry, 2012; Hennebry and Preibisch, 2010: 25; Hastie, 2017; Tungohan, 2018; Wright, Groutsis and van den Broek, 2017). While migrant workers may know their rights or be aware of rights violations occurring in respect of their working and/or living conditions, they may choose not to complain to their employer or seek legal recourse because doing so is perceived to put their labour or migration status in jeopardy. The hesitancy to voice complaints is particularly problematic given that the available legal mechanisms

for enforcing rights and obtaining remedies are complaints-driven, meaning that if a migrant worker does not complain, they often have no practical access to enforcing their rights (Faraday, 2012; Nakache and Kinoshita, 2010; Fudge and MacPhail, 2009; House of Commons, 2016: 25-26). As such, for many migrant workers, they may face an unreasonable choice between complaining and losing their job and status in Canada or tolerating unlawful working conditions.

Issues concerning migrant workers' ability to assert their rights or voice a complaint were heightened during the COVID-19 pandemic, as were the potential consequences of not doing so given the potentially life-threatening risk posed by COVID-19. In at least one reported case, a migrant worker was fired after speaking with the media about health and safety concerns over SAWP workers' living and working conditions, at a farm that subsequently experienced an outbreak of COVID-19 affecting more than 190 workers and leading to one death (*Luis Gabriel Flores v Scotlynn Sweetpac Growers Inc*, 2020; Dubinski, 2020b). Mr. Flores, a SAWP worker from Mexico, brought his case to the Ontario Labour Relations Board, which found that his dismissal was unlawful and awarded damages (*Luis Gabriel Flores v Scotlynn Sweetpac Growers Inc*, 2020). The conditions Mr. Flores reported experiencing, both to the media and in the legal decision, are widely documented for migrant agricultural workers across Ontario and Canada (Migrant Workers Alliance for Change, 2020), yet most will be unable or unwilling to vocalize these concerns to their employer or a third party or seek legal remedy due to the risk of losing their job, as Mr. Flores did.

Pre-existing hesitancy amongst migrant workers to resist unlawful conditions or voice complaints was compounded by enhanced employer surveillance during the COVID-19 pandemic. Employer control over workers is a widely documented concern for various migrant worker populations, notably agricultural workers, who tend to live and work on an employer's property (Vahabi and Wong, 2017; Vahabi, Wong and Lofters, 2018). Concerns about exposure to COVID-19 led some employers to impose severe restrictions on workers. For example, an Ontario report documented that a group of migrant agricultural workers were "forced to sign an agreement saying they would not leave the bunkhouse" (Migrant Workers Alliance for Change, 2020: 22). Other reported measures included instituted curfews and prohibition against guests on

the property (Migrant Workers Alliance for Change, 2020: 22). While some restrictions may have arisen in response to public health orders, others appear to have been instigated by individual employers (Campbell, 2020). These increased restrictions during the COVID-19 pandemic exacerbated the vulnerability of migrant agricultural workers by further isolating workers and increasing the level of perceived control and power employers possessed.

Further compounding the above issues, each of which reflect potential violation of employment, housing and other legal rights, is the persistent enforcement gap that exists in respect of Canada's low-wage labour migration problems. A lack of proactive enforcement and inspection is another longstanding challenge and one that has been expressly and closely linked to the maltreatment of migrant workers in Canada (Marsden, Tucker and Vosko, 2021). In the context of COVID-19, ongoing enforcement gaps created acute risks for workers, placing them at heightened risk of both transmission and exposure to COVID-19 and the enduring abuses commonly noted in respect of migrant workers' experiences in Canada, such as in relation to wage theft, employer control, threats and other abuses, which were also reported and, in some cases, exacerbated during the pandemic (Migrant Workers Alliance for Change, 2020: 22-23; Caregivers Action Centre, 2020: 16-17).

A lack of proactive monitoring and inspection has been consistently raised as a concern, both before and during COVID-19. For example, no employer violations were documented amongst agricultural employers from March to June 2020, although during this period farm inspections were conducted remotely and with notice (Ansari, 2020). In addition, a report released in July 2020 found that the federal government allowed employers to submit old housing inspection reports in their application process, rather than conducting new inspections (Baum and Grant, 2020). Moreover, the Auditor General's report, discussed in the previous section, noted serious shortcomings with numerous inspection processes. The lack of enforcement — real or perceived — of the limited regulations attending the TFWP and SAWP and in response to COVID-19 has the potential to exacerbate an existing culture of noncompliance by employers, placing workers at increased health risks for the benefit of Canada's economy.

While tragic, it is perhaps unsurprising that COVID-19 outbreaks amongst migrant agricultural workers continued

throughout the 2020 season (Lale, 2020; CBC News, 2020c; Kelly, 2020; Barker, 2020; CBC News, 2020d), given the many issues documented in this and the previous section, the lack of proactive enforcement of standards and the reluctance of workers to instigate complaints processes. For example, by July 2020, more than 600 migrant agricultural workers in Southwestern Ontario had tested positive for COVID-19 and three had died (Doyle, 2020: 820). The total number of reported COVID-19 cases amongst migrant agricultural workers in Ontario rose to 1300 by the end of August 2020 (Pazzano, 2020). COVID-19 outbreaks and cases amongst migrant agricultural workers continued into the 2021 season, with Public Health Ontario documenting at least 3056 cases from April 2020 to June 2021 and five additional deaths between March and June 2021 (Vosko and Springer, 2021).

The allocation of migration status as temporary and contingent and labour status as closed creates corrosive disadvantage over workers' abilities to voice concerns, assert the rights they are entitled to and therefore achieve just conditions of work during their time in Canada. The extent of power and control employers are perceived to have by virtue of the manner in which status is allocated to migrant agricultural workers in Canada creates few or no reasonable alternatives — viable options — for workers but to submit to employer demands. This is, as discussed earlier, a hallmark of “disadvantage.” Voicing concerns, asserting rights or seeking remedies are each commonly perceived by workers to place their status and continued participation in the programs in jeopardy. Thus, the regulatory features of the SAWP further constrain the quantity and quality of the goods, rights and resources (capabilities) migrant agricultural workers possess as well as their ability to convert those into valuable functionings (doings and beings) in relation to their work and time in Canada. Thus, their functioning of being a worker is deeply insecure, and the choice to exercise a capability, such as asserting their legal rights in the workplace, is perceived to place other important capabilities — such as the opportunity to continue to work in Canada — at unreasonable risk.

The allocation and intersection of statuses create corrosive disadvantage for migrant agricultural workers by unreasonably constraining their ability to navigate choice with respect to the legal rights they formally possess in a number of areas, including not only work and immigration but also health and living conditions.

As such, migrant agricultural workers in Canada are forced to take on heightened risks and then rendered exceptionally vulnerable due to the limited viable options they have to mitigate those risks, such as through voicing a complaint or seeking legal remedy to enforce the rights and standards they are entitled to. This impacts not only their ability to reside and work in Canada but the conditions of work, health, living arrangements and, thus, overall well-being. As with the previous section, this corrosive disadvantage was not produced by the COVID-19 pandemic, though it was in many ways exacerbated and rendered acutely visible by the pandemic.

Conclusion

The COVID-19 pandemic brought into renewed and sharper focus long-standing concerns and issues regarding the regulation of migrant agricultural labour in Canada. While increasing the visibility of this population and public understanding of the essential nature of their work, the pandemic also laid bare the enduring challenges that migrant workers often face and which, in many cases, were exacerbated during this period.

This article discusses how the allocation and intersection of migration and labour statuses produce a corrosive disadvantage for migrant agricultural workers, limiting both their formal entitlement and practical access to the necessary rights, goods and resources to have just conditions of work under Canada's TFWP and SAWP, as well as their ability to voice concerns, assert rights and seek remedy for violations of those rights. The consequences of this were brought into sharp relief during the COVID-19 pandemic, resulting in significant outbreaks amongst migrant agricultural workers. Yet, the documented challenges facing migrant workers in Canada during the COVID-19 pandemic have also produced many renewed calls for reforms to the regulation of migrant labour, such as increased inspection and enforcement of rules, open work permits and access to permanent residency (Migrant Workers Alliance for Change, 2020; Caregivers Action Centre, 2020). Both the features and challenges associated with the regulation of migrant agricultural in Canada are not unique, and the concerns and conclusions demonstrated in this article, as well as recommendations for reform, could apply broadly to many jurisdictions around the globe that have created similar programs (ILO, 2020b).

Reforms to end the temporary nature of migration status and

closed nature of labour status would work to significantly ameliorate the corrosive disadvantage created under current regulatory regimes. An open work permit and permanent or open-ended immigration permit would enhance migrant agricultural workers' capabilities and functionings by creating greater and more secure space in which workers could exercise choice free from the additional negative consequences they currently face. This would impact not only their ability to assert rights in the workplace, but also in respect of their living conditions and health and safety. The attention given to the plight of migrant agricultural workers in Canada during the COVID-19 pandemic may represent a critical turning point and moment for reform to these programs. As this article has suggested, reforms to status are integral if these programs are to produce effective positive change for migrant agricultural workers in Canada and internationally.

Endnotes

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2. For a discussion of these two approaches to justice, see: Brighthouse.
3. Constitution Act, 1867.
4. For example, differential regulations exist for both agricultural workers and domestic workers, though these exceptions are formally determined by occupation and not the citizenship status of the worker. See: Employment Standards Act 2000, Parts VII, VIII, IX, X, XI; O Reg 285/01 made under the Employment Standards Act 2000, sections 2(2), 4(3), 8, 9, 24-27, cited in Faraday, 2012: n232; Agricultural Employees Protection Act; Labour Relations Act, s 3(b.1); and BC's Employment Standards Regulation, sections 18, 34.1, 40.1, 40.2.
5. The Constitution Act, 1867 divides responsibility for making and enforcing laws between the federal and provincial governments in various areas (ss 91-92). For example, while the federal government is responsible for immigration, provincial governments are responsible for labour and employment laws for industries falling under their jurisdiction, which includes agriculture.
6. For example, of the three provinces that intake the largest numbers of

- migrant agricultural workers – BC, Ontario, and Quebec – only BC has legislation that requires employers to register with the province (Temporary Foreign Worker Protection Act).
7. Canada’s quarantine orders are contained in a number of orders-in-council: Minimizing the Risk of Exposure to 2019–nCoV Acute Respiratory Disease in Canada Order; Minimizing the Risk of Exposure to COVID-19 Coronavirus Disease in Canada Order; Minimizing the Risk of Exposure to COVID-19 Coronavirus Disease in Canada Order (Persons Not on Government Flight); and Minimizing the Risk of Exposure to COVID-19 in Canada Order (Mandatory Isolation) No 4.

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