SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-06-001263-231

DATE: September 13, 2024

PRESIDED BY: THE HONOURABLE SILVANA CONTE, J.S.C.

ASSOCIATION FOR THE RIGHTS OF HOUSEHOLD AND FARM WORKERS
Applicant
And
BYRON ALFREDO ACEVEDO TOBAR
Designated Member
v.
ATTORNEY GENERAL OF CANADA
Defendant

JUDGMENT[1]

OVERVIEW

[1] Applicant seeks authorization to institute a class action against the Government of Canada on behalf of:

JC 0BR4

> Any person who (a) on or after April 17th, 1982, worked in Canada as a foreign national (i.e. without being a Canadian citizen or a permanent resident of Canada at the time, and including a stateless person) and (b)(i) was issued a work permit

[1] La traduction de ce jugement suivra dans les meilleurs délais.

> conditional on engaging in work for a specific employer or group of employers or at a specific employer workplace location or group of locations; or (ii) was allowed to work without a work permit as a result of being employed by a foreign entity on a short-term basis or as a result of being employed in a personal capacity by a temporary resident, including a foreign representative

[2] For clarity, Applicant advised the Court that the word "foreign entity" does not include an embassy, a high commission, a consulate, the United Nations, its agencies or an international organization of which Canada is a member.

[3] The proposed class action seeks a declaration that sections 185(b), 186(a), 186(b), 187(1), 187(3), 200(1)(c)(ii.1), 200(1)(c)(iii), 200(5) and 203 of the *Immigration and Refugee Protection Regulations* (**IRPR**)[2] are unconstitutional and of no force or effect and in violation of sections 7, 12 and 15 of the *Canadian Charter of Rights and Freedoms* (**Charter**). These provisions relate to the closed work permits for temporary foreign workers or "employer-tying measures" which require them to work only for the employer(s) specifically identified in or associated with the work authorization which, in turn, renders the foreign workers vulnerable to abuse or exploitation by these employers.

[4] Applicant also seeks compensatory and punitive damages under section 24(1) of the Charter as well as compensatory damages under article 1457 C.C.Q and *Crown Liability Proceedings Act*[3].

[5] The Attorney General of Canada (**AGC**) argues that the Application does not satisfy the criteria set out in paragraphs 575(1), 575(2) and 575(4) CCP in that:

5.1. there are no allegations of commonality amongst the work experiences of all temporary foreign workers;

5.2. the alleged facts do not justify the conclusions sought*;* and

5.3. the Applicant cannot adequately represent all the foreign temporary workers, but only the ones as per its interest and competence.

[6] In the alternative, the AGC submits that the proposed class should be narrowed to those temporary foreign workers who were and/or are employed under the Primary Agriculture Stream of the Temporary Foreign Worker Program (**TFW Program**) and caregiver workers under the Low-Wage Stream of the TFW Program, with the latest starting point of September 14, 2017 (maximum limitation period of 6 years from the date of service) until the institution of the proceedings on September 14, 2023.

LEGISLATIVE FRAMEWORK

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2 SOR/2002-227.

3 *Crown Liability and Proceedings Act*, RSC 1985, c. C-50.

[7] The *Immigration and Refugee Protection Act* (**IRPA**) and the IRPR set out the conditions applicable to all foreign nationals seeking entry to Canada, including temporary foreign workers.

[8] Foreign nationals may not work in Canada unless authorized to do so by a work permit or by the IRPR[4] .

[9] The temporary labour migration streams are grouped under two umbrella programs, namely, the Temporary Foreign Worker Program (**TFW Program**) and the International Mobility Program (**IMP**).

[10] The TFW Program , which is in issue, allows "employers to hire foreign workers to fill temporary jobs when qualified Canadians are not available"[5]. It consists of the following Streams:

10.1. High-wage: includes positions with wages at or above the provincial or territorial median hourly wage; high-wage positions will not necessarily fall under this stream if they meet the criteria for the other Streams;

10.2. Low-Wage: positions with wages below the provincial or territorial median hourly wage. This Stream is mainly utilized for food processing, accommodations and food services sectors, but includes other sectors, such as home caregivers.

[11] A Labour Market Impact Assessment (LMIA) is required under the TFW program which assesses whether the employment of the foreign national is likely to have a neutral or positive effect on the labour market in Canada and confirming that no Canadians or permanent residents are available to do the job.

[12] A positive LMIA is always required, in addition of a positive job offer genuineness assessment, to be authorized to hire a temporary foreign worker under the TFWP.

[13] The TFWP is administered by ESDC and IRCC. ESDC is responsible for issuing the LMIA to the employer.

[14] IRCC is responsible for assessing the genuineness of the offer of employment. Once a positive LMIA and a positive job offer genuineness assessment have been issued to the employer or group of employers, the temporary foreign worker can apply for a work permit, a process for which IRCC is responsible.

[15] The IMP allows employers to hire temporary foreign workers where there are broader economic, cultural or other competitive advantages for Canada or reciprocal benefits enjoyed by Canadians and permanent residents.

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4 IRPA s. 30; IRPR, s. 196.

5 Exhibit P-1.

[16] Under the IMP, the employer must submit an offer of employment and be issued a positive job offer genuineness assessment by IRCC before the temporary foreign worker can apply for a work permit . The IMP lets employers hire temporary workers without an LMIA.

[17] Work permits are either open, restricted or closed.

[18] An open work permit allows the temporary foreign worker to work for any employer in Canada, subject to restrictions applying generally to all work permits.

[19] A restricted work permit allows the temporary foreign worker to work for any employer under certain other conditions, such as specific occupations.

[20] A closed work permit allows the temporary foreign worker to work in Canada according to the specific conditions on the work permit, including working only for a specific employer or group of employers (employer-tying measures)[6].

[21] A work permit issued under the TFWP will be a closed work permit. The employer or group of employers who obtained the positive LMIA will be specifically designated on the work permit.

[22] Indirect employer-tying measures further restrict temporary foreign workers' ability to change employers by restricting their capacity to accept an alternative offer of employment once they are already in Canada[7].

[23] The TFWP and the IMP are subdivided in several streams with diverse requirements and operating procedures which includes, the Seasonal Agricultural Worker Program (**SAWP**) where the employers can hire temporary foreign workers from participating countries for a maximum period of 8 months for activities related to on-farm primary agriculture[8].

[24] Under the SAWP , the Government of Canada imposes a standard, non-modifiable contract of employment to the temporary foreign worker[9].

HISTORY OF PROVISIONS

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6 Exhibit P-4.
7 Subparagraph 200(1)(c)(ii.1) and subsection 200(5) of the IRPR.
8 Exhibit P-5.
9 Exhibit P-6.

[25] Employer-tying measures were first built into the initial iteration of the SAWP in 1966, which provided for the hiring of temporary agricultural workers from Jamaica.

[26] In 1973, the Government of Canada introduced its first comprehensive regulatory framework governing the entry of temporary workers in Canada specifically based on specific employers' labour market needs: the Non-Immigrant Employment Authorization Program (NIEA).

[27] The basic features of the SAWP and NIEAP still exist in the modern-day TFWP: among other things, workers are bonded to a specific employer and hiring is limited by various requirements for employers, including a requirement to demonstrate labour market needs.

[28] The NIEAP was gradually updated over the years, and it eventually became known as the TFWP.

[29] From 1973 until the adoption of the current IRPR in 2002, the regulatory language used to provide for employer-tying measures remained for all intents and purposes the same.

[30] The Government of Canada consolidated in 2014 all non-TFWP streams into the current-day IMP.

[31] The amendments to the IRPR that came into effect in December 2013, were adopted to protect foreign nationals. These amendments were intended to improve the protection of temporary foreign workers. They addressed concerns related to exploitation and abuse (physical, sexual, psychological, and financial) [10].

[32] Two different House of Commons Standing Committees, namely the Standing Committee on Citizenship and Immigration (CIMM) in 2009 and the Standing Committee on Human Rights, Skills, Social Development and the Status of Persons with Disabilities (HUMA) have called for the elimination of employer-specific work permit requirements from the temporary foreign worker regimes, as appears from the reports entitled "Temporary Foreign Workers and Non-status Workers" (CIMM, May 2009)[11] and "Temporary Foreign Worker Program" (HUMA, September 2016)[12] .

[33] The Government of Canada has acknowledged, on repeated occasions, that employer-tying measures involve an inherent power imbalance conducive to the abuse and ill-treatment of migrant workers.

[34] In 2019, the Government of Canada amended the IRPR to introduce a program allowing migrant workers demonstrably experiencing abuse or at risk of experiencing

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10 Regulations Amending the Immigration and Refugee Protection Regulations, SOR/2013-245.
11 Exhibit P-14.
12 Exhibit P-15.

abuse to apply for open work permits upon meeting specific conditions. In the context of those regulatory amendments, the Government of Canada underlined the risk for abuse faced by foreign workers on employer- specific permits[13]:

> Migrant workers on employer-specific in Canada are only authorized to work for the employer named on their permit, making it inherently difficult for them to change jobs. While most employers are committed to proper treatment of their workers, the power imbalance created by this dynamic, favours the employer and can result in a migrant worker enduring situations of misconduct, abuse or other forms of employer retribution. This is compounded by other potential factors facing migrant workers, including language barriers and the costs involved in navigating the complex legal recourse mechanisms.
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> […][T]he analysis also confirms that this type of work permit can create some conditions under which risks of abuse could be higher. Among these conditions are the structural and financial barriers to mobility for migrant workers experiencing abuse, or at risk of abuse, related to their employment (e.g. by a business owner, a supervisor, a recruiter, or other party).

[35] The recent regulatory amendments of 2022 were also aimed at strengthening the protection of the temporary foreign workers' rights and to improve employer compliance against mistreatment and abuse by employers[14].

[36] The Union Nations Special Rapporteur has recently described the Temporary Foreign Worker Program as a “breeding ground for contemporary forms of slavery”[15].

FACTS

[37] The facts contained in paragraphs 90, 93-139 of the Application are deemed to be true.

[38] Essentially, the designated member, Mr. Acevedo Tobar, originally from Guatemala, obtained a first closed work permit valid from November 2014 to October 2016 under the Agricultural stream of the TWFP working in a poultry catching business based in Granby, in the province of Québec.

[39] Mr. Acevedo alleges that he was required to work every night from Monday to Friday, starting at or around 7 PM, with an average of 12 hours each night and only three pauses of 10 minutes. He was also expected to catch up to 40 000 chickens per night, at a rate of five chickens in each hand for every catch. He was frequently underpaid or paid late.

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13 Regulatory Impact Assessment Statement on the Regulations Amending the Immigration and Refugee Protection Regulations, SOR/2019-148, Exhibit P-16.

14 Regulations Amending the Immigration and Refugee Protection Regulations, SOR/2022-142.

15 Exhibit P-19.

[40] Mr. Acevedo alleges that he did not receive appropriate training for the job; was forced to work in dangerous work sites, without appropriate winter clothing, masks, gowns or boots, and often forced to work in blazing heat or in extreme cold. He lived with coworkers in cramped lodgings assigned by his employer, where they would sleep in bunk beds, without any privacy.

[41] Mr. Acevado feared that complaining could lead to being fired, threatening his status in Canada, his ability to obtain a renewal of his permit (including as a result of blacklisting), his ability to earn a living and his longer-term project of immigrating to Canada permanently.

[42] Mr. Acevedo incurred a back injury which granted him sick leave, but his employer frequently accused him of faking, of lying and of taking advantage of the situation not to work. Mr. Acevedo was completely demoralized and felt worthless. Mr. Acevedo employer eventually told him that they had had enough and required him to be assessed by a private doctor. This doctor prescribed a progressive return to work.

[43] His contract was not renewed when it ended. Mr. Acevedo was told by his employer that if he left now, they would sponsor him again in six months – which they never did. He was given and required to sign a document stating that he was leaving of his own will and would not blame his employer.

[44] From 2017 to 2019, Mr. Acevedo worked for another employer on three other “closed” work permits under the Agricultural stream of the TFWP, working with cows on the farm. He was not given training and was frequently hit by the animals, splitting wood for the wood-burning stove, repairing the artesian well and other construction work, often without appropriate equipment.

[45] Mr. Acevedo was regularly overworked and often did not have adequate breaks or time to eat lunch. He either had one day off per week or none. He experienced colossal stress. While Mr. Acevedo’s salary was supposed to be paid on a bi-weekly basis, it was frequently paid late, up to several weeks after the due date.

[46] Throughout his second employment Mr. Acevedo was subject to psychological harassment by his employer and the latter’s wife, including aggressive behavior, homophobic and racial slurs, rants against the incompetence of migrant workers, and humiliating and degrading comments.

[47] Mr. Acevedo suffered from this abuse. He grew discouraged and anxious and regularly cried when he was by himself. He saw himself growing accustomed to being insulted and mistreated and his suffering was exacerbated by social isolation. Mr. Acevedo was not provided with an access to a telephone line or to Internet and the farm was located in a remote area in the countryside. He had access to a car, but his employers did not allow him to use it for personal purposes (other than travelling between the farm and Mr. Acevedo’s housing).

[48] He considered leaving his job but felt that it was the only way to maintain his right to work in Canada and to avoid jeopardizing his longer-term project of securing permanent resident status in the country.

[49] In 2019, Mr. Acevedo had an accident which aggravated the pain from his 2015 work injury. He asked his employer to take him to the hospital. For several days, his employer refused to do so. He mentioned that the farm would have problems. Instead, he told Mr. Acevedo to take Tylenol and to apply Voltaren. He also pressured him to work, which Mr. Acevedo did until the pain became so severe that he struggled to walk.

[50] Eventually, Mr. Acevedo went to the hospital and discovered that his employer had never completed the formalities required for him to have health insurance. The hospital graciously assumed most of the costs of the tests, and Mr. Acevedo's employer accepted to pay a small portion thereof.

[51] From 2020 to 2022, Mr. Acevedo worked for this third employer on two other closed permits under the Agricultural stream of the TFWP. Mr. Acevedo also experienced, among other things:

> (a) psychological harassment, including manipulative and aggressive behavior and degrading comments;
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> (b) intimidation by an alcoholic coworker, which the employer refused to put an end to despite Mr. Acevedo's request;
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> (c) underpayment for his work, which now involved certain managerial and supervisory duties; and
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> (d) poor living conditions, overcrowding and lack of privacy in employer-provided housing.

[52] While occupying his third employment, Mr. Acevedo reached out to other employers on several occasions, seeking to obtain an offer from them and a new work permit. His efforts were unsuccessful. Other employers would frequently refer to him as "belonging" to the farm which hired him.

ANALYSIS

[53] The Court authorizes a class action and appoints the class member it designates as representative plaintiff if it is of the opinion that the application meets the following criteria set out in article 575 of the *Code of Civil Procedure* (CCP):

> 1) the claims of the members of the class raise identical, similar or related issues of law or fact;
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> 2) the facts alleged appear to justify the conclusions sought;

3) the composition of the class makes it difficult or impracticable to apply the rules for mandates to take part in judicial proceedings on behalf of others or for consolidation of proceedings; and

4) the class member appointed as representative plaintiff is in a position to properly represent the class members.

I. THE ALLEGATIONS APPEAR TO JUSTIFY A DECLARATION THAT THE IMPUGNED PROVISIONS VIOLATE THE CHARTER AND ARE UNCONSTITUTIONAL (ARTICLE 575(2) C.C.P).

[54] The threshold for authorization as set out by the Supreme Court of Canada[16] and Court of Appeal[17] requires that Applicant demonstrate an "arguable" case. The Court does not engage in a review of the merits of the case. The facts alleged in the application are deemed to be true for the purpose of that demonstration, however, opinion and argument are not[18]. Moreover, bare assertions without "some evidence" are insufficient to form an arguable case[19].

[55] At this preliminary stage, the Court's role is simply to filter out frivolous or "untenable claims, sparing unnecessary procedures for the group, the representative, the defendant and the judicial system"[20].

[56] The legal syllogism proposed by the Applicant is the following[21]:

56.1. the regulatory provisions at issue and their administrative context allow for the systemic imposition of "closed" work authorizations on Class Members entering Canada, which prevent them from working for any employer other than the one(s) specifically identified in or associated with the work authorization (referred to herein as "employer-tying measures")1 (paras 44-70 of the Application);

56.2. employer-tying measures harm the Class Members' liberty, autonomy, psychological integrity, dignity, capacity to assert their rights and access justice, increase risks of physical harm and in some cases of death. These harmful impacts breach Class Members' rights to life, liberty and security of the person protected by s. 7 of the Charter in a way that is not in accordance with the principles of fundamental justice (paras 140-155);

56.3. as a result of their harmful impacts, employer-tying measures are also

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16 *Infineon Technologies AG v. Option Consommateurs*, [2013] 3 S.C.R. 600; *Vivendi Canada v. Dell'Anielo*, [2014] 1 S.C.R. 3.

17 *Allstate du Canada, compagnie d'assurances v. Agostino,* 2012 QCCA 678 (CanLII).

18 *Option Consommateurs v. Bell Mobilité*, 2008 QCCA 2201; *Fortier v. Meubles Léon Ltée*, 2014 QCCA 195.

19 *Infineon*, *supra* ft 16 at paras 127 and 134; see also *Charles v. Boiron Canada Inc.*, 2016 QCCA 1716 (CanLII) at para 43.

20 *Infineon, supra* ft 16 at para 11.

21 Paragraph 3 of Applicant's outline of argument.

inherently dehumanizing and intrinsically incompatible with human dignity. They constitute cruel and unusual treatment contrary to s. 12 of the Charter (paras 156-163);

56.4. employer-tying measures continue to be imposed disproportionately on - and their harmful impacts to be felt disproportionately by - minorities characterized by their national or ethnic origin, race and colour. The harmful impacts have the effect of perpetuating the disadvantages to which those minorities have long been subjected, and constitute discrimination contrary to para 15(1) of the Charter (paras 164-168, 176-187);

56.5. the breaches of Class Members' fundamental rights are caused by the Government's employer-tying measures and are not justified in a free and democratic society. Consequently, the regulatory provisions which allow for their imposition must be declared invalid and inoperative (paras 154, 163, 168, 169);

56.6. the breaches of constitutional rights and ensuing harmful consequences must be compensated by an award of damages, which constitutes an appropriate and just remedy in the circumstances under paragraph 24(1) of the Charter (paras 170-175);

56.7. the Government has, for a long time, had knowledge and possessed evidence of the harmful impacts resulting from employer-tying measures. In this context, its persistent reliance on these measures shows a clear disregard for fundamental rights. The Government cannot claim any immunity to defend against the Applicant's claims for Charter damages (paras 176-202);

56.8. the systematic imposition, by servants of the Crown, of employer-tying measures on all Class Members constitutes a fault (in Quebec) or a tort (in common law provinces) which both give rise to the Government's vicarious liability at private law and open the door to an award of compensatory damages on a collective basis. This also constitutes oppressive and unconstitutional action which further renders the Government liable to pay punitive damages (paras 203-218);

56.9. Finally, the claims of the Class Members are not time-barred as a result of their unique vulnerability and, in particular, their restricted capacity to assert their legal rights and to seek redress for violations thereof (paras 226-227).

a. Employer-tying measures violate s. 7 of the Canadian Charter of Rights and Freedoms (Charter)[22]

[22] *The Constitution Act*, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11.

[57] Section 7 of the Charter provides that “everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”.

[58] A claimant under section 7 of the Charter must demonstrate[23]:

58.1. A breach of rights to life, liberty or security of the person where the legislation causes a limitation or negative impact on, an infringement of, or an interference with them or a risk of such a deprivation; and

58.2. The infringement or deprivation of rights does not accord with the identified principles of fundamental justice notably by reason of being arbitrary, overbroad or grossly disproportionate in relation to the State's legislative objectives.

[59] Applicant presents an arguable case that employer-tying measures violate the workers’ right to liberty protected under section 7 in that they restrict temporary foreign workers' freedom of movement and general capacity to make important and fundamental life choices. In *Godbout* v. *Longueuil (City),* [24]Justice Lamer held that state-imposed requirement to reside in a municipality of the employer engages the liberty interest of workers under section 7.

[60] Class Members subject to employer-tying measures automatically lose their capacity to work legally in Canada in the event of termination of their employment, regardless of the reason. This entails a prohibition from earning a livelihood in Canada for an indeterminate period, whereas "recovering the capacity to work legally in Canada is difficult, lengthy and costly [and] highly uncertain[25]. Foreign workers as well as their spouses and children face deportation as a possible consequence of that loss of formal relationship with the specific employer(s)[26].

[61] It is also arguable that employer-tying measures engage the right to both life and security of the person In Applicant’s case, employer-tying measures resulted in, among other things[27]:

61.1. Working 12 hours a night as a poultry-catcher and being paid half the rates that Québécois workers would receive, the whole in squalid working conditions (paras 95-96 of the Application);

61.2. Being forced to work in dangerous work sites and without proper training or proper equipment (para 97);

61.3. Having to work though he was suffering from a herniated disc, because the

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23 *Canadian Council for Refugees v. Canada* (Citizenship and Immigration), 2023 SCC 17, at paras 56-57.

24 *Godbout* v. *Longueil (City),* 1997 CanLII 335 (SCC), [1997] 3 SCR 844 at paras 67-91.

25 Paragraphs 76-77 of the Application.

26 Paragraph 79 of the Application.

27 Paragraph 12 of Applicant’s outline of argument.

doctor hired by his employer refused to prescribe additional tests when he was feeling pain as a result of a work injury (paras 109-114);

61.4. Suffering from exhaustion and experiencing psychological harm as a result of being forced to work continuously (para 121);

61.5. Enduring psychological harassment and social exclusion as a result of his employers insulting him, making him feel worthless and isolating him (paras 124- 125; 138).

[62] In *Kav LaOved Workers' hotline and others* v. *Government of Israel*, [28]the Israeli Supreme Court held that similar restrictive employment arrangements violated the dignity and liberty of the foreign workers.

[63] Applicant's argument that the infringement of section 7 rights is not in accordance with the principles of fundamental justice and contrary to the stated objective of the legislation to "enable labour market protection (ensuring employers seek to hire Canadians or permanent residents) and hold employers accountable by requiring them to abide by program conditions (e.g. wages, working conditions)"[29] is also not frivolous.

[64] It is arguable that it also does not meet the objectives stated in the most recent regulatory amendments of 2022 which aimed" to strengthen the protection of the temporary foreign workers' rights and to improve employer compliance against mistreatment and abuse by employers"[30].

[65] In any event, the justification defence under section 1 requires evidence and cannot be assessed at the authorization stage. "Courts should err on the side of caution and authorise the action where there is doubt as to whether the standard has been met"[31].

b. Employer-tying measures violate s. 12 of the Charter

[66] Section 12 of the Charter provides that "everyone has the right not to be subjected to any cruel and unusual treatment or punishment".

[67] In *R v. Smith*[32], the Supreme Court of Canada stated that "the state has the power to impose a "treatment or punishment" on an individual where it is necessary to do so to attain some legitimate end and where the requisite procedure has been followed. The protection afforded by s. 12 governs the quality of the punishment and is concerned with the effect that the punishment may have on the person on whom it is imposed".

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28 *Kav LaOved Workers' hotline and others v. Government of Israel ,* [2006] 1 IsLR 260.
29 Exhibit P-16 – Regulations amending the IRPR, A.E., p. 448.
30 Paragraph 24 of the AGC's Plan of Argument.
31 *Campeau v. Procureur général du Canada,* 2021 QCCS 843, at para 62.
32 *R. v. Smith (Edward Dewey*), 1987 CanLII 64 (SCC), [1987] 1 SCR 1045 at 1072.

[68] As argued by the AGC the purpose of section 12 of the Charter is “to prevent the state from imposing punishment or treatment that is irrationally imposed, grossly beyond what is required in the circumstances, or would outrage the public conscience or be degrading to human dignity.

[69] A government measure constitutes punishment if: (1) it is a consequence of conviction that forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence, and either (2) it is imposed in furtherance of the purpose and principles of sentencing, or (3) it has a significant impact on an offender's liberty or security interests”[33].

[70] The Impugned Provisions and the administrative actions do not amount to "punishment" under section 12 of the Charter, let alone cruel and unusual punishment.

[71] The Court finds that Applicant does not make an arguable case that employer-tying measures imposed through the Impugned Provisions violate Class Members' right not to be subject to cruel and unusual treatment.

c. Employer-tying measures violate paragraph 15(1) of the Charter

[72] [13] Section 15 of the Charter provides:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[73] A complainant must show that: 1) the law, on its face or in its impact, creates a distinction on the basis of an enumerated or analogous ground; and (2) this distinction imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage[34].

[74] Applicant alleges the following:

> 182. These schemes were justified on the basis that the immigrants of certain races, colours, or ethnic or national origins were considered unable to assimilate to Canada’s climate and society and to be better-suited for “unfree” and low-skilled work, as explained in a 2021 IRCC Publication entitled “Racism, Discrimination and Migrant Workers in Canada: Evidence from the Literature” (at pp. 47-52), a

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33 Paragraphs 72 and 73 of AGC’s plan of argument.

34 R. *v . Sharma*, 2022 SCC 39, at para 28.

copy of which is communicated herewith as Exhibit P-13, and as will be further established at trial.

183. In 1973, the NIEAP was introduced as a comprehensive regulatory framework for temporary foreign workers expressly based on specific employers' labour needs.

184. By design and effect, the NIEAP responded to those needs by admitting low-skilled workers, generally from formerly "non-preferred" countries, as appears from Exhibit P-13 (at pp. 54-55).

185. It too had as a hallmark its use of employer-tying measures.

186. In point of fact, the employer-tying measures used in those schemes represented the continuation of the Government of Canada's previous openly discriminatory immigration criteria.

186.1. This is notably echoed in the May 2024 report of the Standing Senate Committee on Social Affairs, Science and Technology (the "SOCI") entitled "Act Now: Solutions for Temporary and Migrant Labour in Canada", communicated herewith as Exhibit P-19:

Both country of origin and ethnicity were reported as factors by which workforces were segregated and hierarchized. In part, witnesses argued that this may be due to the systemic national and racial hierarchies that have been embedded in Canada's immigration system since it began. The committee heard about instances where employers and workers applied these hierarchies and stereotypes to other workers.

187. As will be established at trial, the discriminatory attitudes underlying the introduction of employer-tying measures led the Government of Canada to disregard the foreseeable harm that they would cause the affected migrant workers.

[75] Applicant has made out a *prima facie case* that the imposition of employer-tying measures through the Impugned Provisions breach Class Members' equality rights and result in adverse impact discrimination for Class Members on the basis of a prohibited ground (national or ethnic origin, race, colour).

[76] There is an arguable case for a section 15 Charter violation.

d. Charter Damages under section 24(1)

[77] The breach of an obligation under section 7 of the Charter gives rise to a recourse under subsection 24(1) which states: "Anyone whose rights or freedoms, as guaranteed by this Charter have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances".

[78] In a recent majority judgment *Doucet-Boudreau v. Nova Scotia (Minister of Education)*[35], the Supreme Court of Canada explained that subsection 24(1) of the Charter commands a broad and purposive interpretation and that the language of this provision appears to confer the widest possible discretion on a court to craft remedies for violations of Charter rights.

[79] The AGC raises two arguments. The first is that the remedies under sections 24(1) and 51(1) cannot be combined. The second is that of absolute immunity in the absence of evidence of bad faith or abuse of power.

[80] The Court adopts the reasoning in *Canada (Attorney General) v. Power*[36], to conclude as follows:

80.1. the availability of a declaration under s. 52(1) cannot absolutely displace a claim for damages under s. 24(1)[37]; and

80.2. while the courts will not award damages for the harm suffered as a result of the mere enactment or application of a law that is subsequently declared to be unconstitutional, the threshold test set out in Mackin[38] makes an exception where the enactment is "clearly unconstitutional", in bad faith or an abuse of power. The threshold to establish that the legislation here is "clearly unconstitutional" in bad faith or an abuse of power is high but not insurmountable[39].

[81] Therefore, the Court finds that at this preliminary stage, while the threshold test is high, there is an arguable case that the employer-tying measures are "clearly unconstitutional" giving rise to a claim for damages under the Charter.

[82] As for punitive damages, the Court on the merits will determine whether there has been a clear disregard of the workers' rights. The *prima facie* evidence regarding the Government's awareness of the harmful impact of the Impugned Legislation and attempts to alleviate same is sufficient to meet the threshold test.

e. Crown Liability under Art 1457 CCQ and Crown Liability Proceedings Act

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35 *Doucet-Boudreau v. Nova Scotia (Minister of Education*), 2003 SCC 62 (CanLII), [2003] 3 S.C.R. 3.
36 *Canada (Attorney General)* v. *Power*, 2024 SCC 26 (CanLII).
37 *Power, supra*, at para 45.
38 Ma*ckin v. New Brunswick (Minister of Finance); Rice* v. *New Brunswick*, 2002 SCC 13 (CanLII), [2002] 1 SCR 405.
39 *Power, supra* ft 36 at para 250.

[83] Section 3 of the *Crown Liability and Proceedings Act* [40]provides that the Crown is liable for damages in respect of damage caused by the fault of its servant for which it would be liable if it were a person.

[84] The Quebec rules respecting civil liability are set out in art. 1457 C.C.Q. and are well known. The Applicant must establish fault, damages and the causal link.

[85] Applicant alleges “systemic negligence” by the Crown’s agents in the issuance of closed permits where none is required or a general disregard of the harmful impacts of issuing same[41].

[86] The allegation of systemic negligence is a conclusion or an opinion that is not supported by facts and cannot be deemed to be true.

[87] In the case of Mr. Acevedo there is no evidence that a closed permits issued to him were not required. There is also no evidence that the agents were negligent in the exercise of their duties by issuing closed permits.

[88] Despite the low threshold, the Court has a role to filter claims that have no reasonable likelihood of success and are unsubstantiated by facts. On the facts before it, the Court finds that Applicant does not have an arguable case to establish systemic negligence by Crown agents.

f. Prescription

[89] The Class period commences on April 17, 1982, the coming in force of the Charter.

[90] Applicant relies on article 2904 CCQ and argues that as the Class Members were in a vulnerable position, it was impossible for the Designated Member and other Class Members to assert their legal rights and to seek redress for the said violations before the institution of these proceedings on September 14, 2023.

[91] The AGC raises a prescription defense and argues that the factual allegations in support of its argument is insufficient. Invoking the common law prescription, the AGC argues that the period for the Class should commence six years from the date of service or September 14, 2017.

[92] The Court finds that it would be premature to determine prescription at this stage. As noted by the Court of Appeal, prescription is essentially a defense that requires factual evidence and is best dealt with on the merits[42]. The allegations of vulnerability and impossibility to act sooner are sufficient at this stage.

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40 *Infineon*, supra, ft 16.
41 Paragraph 208 of the Amended Application.
42 *J.J. v. Oratoire Saint-Joseph du Mont-Royal*, 2017 QCCA 1460 (CanLII), at paras 118-119.

[93] In conclusion, Applicant has demonstrated an arguable case for a declaration that the Impugned Provisions are unconstitutional, a violation of sections 7 and 15 of the *Charter* and a claim for damages under section 24 of the Charter.

II. THE CLAIMS RAISE IDENTICAL, SIMILAR OR RELATED ISSUES (ARTICLE 575(1) C.C.P.)

[94] As stated in *Vivendi*[43], to meet the commonality requirement the Applicant must show that an aspect of the case lends itself to a collective decision and that once a decision has been reached on that aspect, the parties will have resolved a not insignificant portion of the dispute.

[95] Applicant raises the following common or related issues:

(a) Did the imposition of employer-tying measures by the Government of Canada deprive the Class Members of life, liberty or security of the person, as they are understood under section 7 of the Charter?

(b) Did such deprivation fail to accord with the principles of fundamental justice, in violation of section 7 of the Charter?

(c) Did the imposition of employer-tying measures by the Government of Canada subject the Class Members to cruel and unusual treatment, in violation of section 12 of the Charter?

(d) Did the imposition of employer-tying measures by the Government of Canada infringe the Class Members' right to the equal protection and equal benefit of the law without discrimination based on race, national or ethnic origin, or colour, in violation of paragraph 15(1) of the Charter?

(e) Were such violations justified under section 1 of the Charter?

(f) Are the Impugned Provisions unconstitutional and consequently of no force and effect, insofar as they allow the Government of Canada to continue subjecting foreign nationals to direct or indirect employer-tying measures?

(g) Is it appropriate and just to award damages to the Class Members pursuant to paragraph 24(1) of the Charter? If so, what is the appropriate quantum of such damages?

(h) Did the servants of the Government of Canada commit a fault (in Québec) or a tort (in the rest of Canada) by their systemic negligence in imposing employer-tying measures on the Class Members since April 17th, 1982?

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[43] *Vivendi, supra ft 16* at para 58.

(i) Are the Class Members entitled to an award of pecuniary compensatory damages as a result of the employer-tying measures to which they were subjected? If so, what is the total quantum of such damages?

(j) Are the Class Members entitled to an award of non-pecuniary compensatory damages as a result of the employer-tying measures to which they were subjected? If so, what is the total quantum of such damages?

(k) Does the conduct of the Government of Canada justify an award of punitive damages to the Class Members? If so, what is the total quantum of such damages?

(l) What prescription or limitation period applies to the Class Members' claims for damages?

(m) What circumstances common to the Class Members are relevant to the determination of whether the prescription or limitation period began to run and, if so, whether it was suspended or tolled?

[96] The AGC argues that Applicant presumes that temporary foreign workers in all streams of the TFWP, the IMP, and the DWAP have common experiences under employer-specific work permits which is not the case. Alternatively, the AGC seeks to limit the Class to temporary foreign workers in the agricultural stream and home caregivers.

[97] The Court disagrees. There is no requirement that each member of a group be in an identical or even a similar position in relation to the defendant or to the injury suffered only that they be in a sufficiently similar situation such that a common question for which the class action seeks answers can be identified[44]. A declaration that the employer-tying measures are unconstitutional and/or a violation of the Charter would resolve the issue for all members of the Class.

[98] The Court finds that Applicant has met the second criterion and limits the questions to those relating to the issues that have met an appearance of right under article 575 (2) C.C.P.

III. THE RULES OF MANDATE OR JOINDER ARE DIFFICULT OR IMPRACTICABLE (ARTICLE 575(3) C.C.P)

[99] This criterion is not contested.

[100] The Court finds that the composition of the Class, both in number and geographic locations, would make it difficult or impracticable to proceed by way of a mandate or joinder of actions.

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44 *Infineon supra ft 16.*

IV. THE ADEQUATENESS OF THE REPRESENTATIVE OF THE PROPOSED CLASS (ARTICLE 575(4) C.C.P.)

[101] In *Infineon*[45], the Supreme Court of Canada confirmed that an adequate representation requires the consideration of three factors: interest in the suit; competence; and absence of conflict with the group members These factors must be interpreted liberally as no proposed representative should be excluded unless his or her interest or competence is such that the case could not possibly proceed fairly.

[102] The AGC argues that the Applicant's interest and competencies are limited to representing only the temporary foreign workers in agricultural/farm and household/caregiver fields. This argument is tied to their argument under article 575(3) C.C.P.

[103] The Court finds that as the AGC has not shown any conflict of interest that could arise amongst the various streams of temporary foreign workers, Applicant has met the final criterion.

[104] Applicant is a legal person established for a private interest incorporated in 1977 as a non-profit organization[46].

[105] Applicant has collaborated for decades with academic researchers to produce empirical studies, policy evaluations and legal analysis on the impact of Canada's household and farm labour migration programs regarding the systemic barriers to workers' ability to meaningfully exercise their rights in the country, Finally Applicant is represented by experienced counsel.

[106] Therefore, Applicant has sufficient interest and competence to raise the common questions relating the employer-tying provisions for all workers regardless of their stream.

FOR THESE REASONS, THE COURT:

[107] **GRANTS** the Amended Application for Authorization of a Class Action;

[108] **AUTHORIZES** Applicant to institute a class action seeking a declaration that sections 185(b), 186(a), 186(b), 187(1), 187(3), 200(1)(c)(ii.1), 200(1)(c)(iii), 200(5) and 203 of the Immigration and Refugee Protection Regulations, SOR/2002-227 are inconsistent with sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* (the "Charter") and are therefore of no force and effect, as well as an award of damages under paragraph 24(1) of the Charter;

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45 *Infineon*, *supra ft 16* at para 149.

46 Exhibit P-18.

[109] **APPOINTS** the Applicant Association for the Rights of Household and Farm Workers as the representative Plaintiff for the purpose of bringing this class action on behalf of the class described below:

> Any person who (a) on or after April 17th, 1982, worked in Canada as a foreign national (i.e. without being a Canadian citizen or a permanent resident of Canada at the time, and including a stateless person) and (b)(i) was issued a work permit conditional on engaging in work for a specific employer or group of employers or at a specific employer workplace location or group of locations; or (ii) was allowed to work without a work permit as a result of being employed by a foreign entity on a short-term basis or as a result of being employed in a personal capacity by a temporary resident, including a foreign representative.
>
> For clarity the word “foreign entity” does not include an embassy, a high commission, a consulate, the United Nations, its agencies or an international organization of which Canada is a member.

[110] **IDENTIFIES** the main issues to be dealt with collectively as the following:

110.1. Did the imposition of employer-tying measures by the Government of Canada deprive the Class Members of life, liberty or security of the person, as they are understood under section 7 of the Charter?

110.2. Did such deprivation fail to accord with the principles of fundamental justice, in violation of section 7 of the Charter?

110.3. Did the imposition of employer-tying measures by the Government of Canada infringe the Class Members' right to the equal protection and equal benefit of the law without discrimination based on race, national or ethnic origin, or colour, in violation of paragraph 15(1) of the Charter?

110.4. Were such violations justified under section 1 of the Charter?

110.5. Are the Impugned Provisions unconstitutional and consequently of no force and effect, insofar as they allow the Government of Canada to continue subjecting foreign nationals to direct or indirect employer-tying measures?

110.6. Is it appropriate and just to award compensatory and punitive damages to the Class Members pursuant to paragraph 24(1) of the Charter? If so, what is the appropriate quantum of such damages?

110.7. What prescription or limitation period applies to the Class Members' claims for damages?

110.8. What circumstances common to the Class Members are relevant to the determination of whether the prescription or limitation period began to run and, if so, whether it was suspended or tolled?

[111] **IDENTIFIES** the conclusions sought in relation to those issues as the following:

111.1. GRANT the originating application;

111.2. DECLARE that sections 185(b), 186(a), 186(b), 187(1), 187(3), 200(1)(c)(ii.1), 200(1)(c)(iii), 200(5) and 203 of the Immigration and Refugee Protection Regulations, SOR/2002-227 are unconstitutional and of no force and effect;

111.3. CONDEMN the Attorney General of Canada to pay to each of the Class Members, including the Designated Member, damages pursuant to paragraph 24(1) of the Charter, in an amount to be determined;

111.4. CONDEMN the Attorney General of Canada to pay to each of the Class Members, including the Designated Member, pecuniary and non-pecuniary compensatory damages, in an amount to be determined;

111.5. CONDEMN the Attorney General of Canada to pay to each of the Class Members, including the Designated Member, punitive damages, in an amount to be determined;

111.6. ORDER the collective recovery of the damages to be paid to the Class Members by the Attorney General of Canada;

111.7. ORDER the individual liquidation of the Class Members' claims or the distribution of an amount to each Class Member;

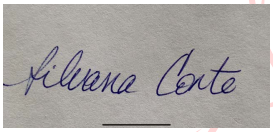
111.8. THE WHOLE, with costs.

[112] **DECLARES** that all Class Members who have not opted-out will be bound by any judgment to be rendered on the class action in the manner provided for by law;

[113] **DETERMINES** that the class action is to be instituted in the judicial district of Montréal;

[114] **CONVENES** the parties to a hearing, at a date and time to be determined with the parties, in respect of the notices to the Class Members required under article 579 of the Code of Civil Procedure, CQLR c. C-25.01 and of the time limit for opting-out of the Class;

[115] **THE WHOLE,** with costs, including the costs of the notices to the Class Members.



Signature numérique de Silvana Conte
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Date of hearing: June 12, 2024