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The Potential of Human Rights Law to Address the Harms of Labour Exploitation and Human Trafficking

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THE POTENTIAL OF HUMAN RIGHTS LAW TO ADDRESS THE HARMS OF LABOUR EXPLOITATION AND HUMAN TRAFFICKING

I. Introduction

This paper examines the relative effectiveness and advantages that human rights processes, and tribunal hearings, may offer for migrant workers who experience exploitative or abusive treatment during their time in Canada. The genesis of this paper lies in two prominent 2015 decisions of the BC and Ontario Human Rights Tribunals, which awarded substantial damages to migrant workers who had experienced significant exploitation in their working conditions and relationships to their employer. These cases provide a glimpse into the unique vulnerabilities that migrant workers face in their employment in Canada, and the ability for human rights processes to provide remedies where other legal avenues may fail to do so. As this paper explores, the nature and function of human rights tribunals are comparatively better equipped to understand the contextual factors bearing upon migrant workers' experiences and options when faced with exploitative treatment at work. In contrast, other vehicles for legal redress, particularly when claims of 'human trafficking' are explored, are ill-equipped to understand the experience of migrant workers, and to offer an effective remedy.

This paper proceeds in three parts. First, this paper sets out the contextual factors and landscape bearing on the vulnerabilities that migrant workers may experience in relation to their work and time in Canada, and which are inherently connected to the regulatory structure of the Temporary

Foreign Worker Programs (TFWP). This part also explores, briefly, the concept of exploitation at work, and its similarities and distinctions from the legal concept of 'human trafficking'. The second part of this paper outlines and analyzes the problems attending the legal concept of 'human trafficking' and why it is often an ineffective route to addressing migrant worker exploitation, even where such exploitation may fit within the defined elements of this concept. As this part examines, both the positioning of 'human trafficking' as an essentially criminal concept, and its strong association to the notion of sexual exploitation, render it minimally useful for non-sexual labour exploitation and migrant workers as a vehicle for remedy or redress. Finally, the third part of this paper examines the cases of *PN*[1] and *OPT*[2] to establish how and why these cases were successful in the human rights arena. Given many of the co-authors' involvement in the *PN* case, an in-depth examination of that case, and what made it successful, is presented here. A review of the *OPT* decision sheds some light on the similarities between the cases, and potentially the factors contributing to their success, such as the use of expert evidence as a way to contextualize the experience of migrant workers and their vulnerabilities under the TFWP.

Ultimately, this paper seeks to contribute to on-going conversations about migrant worker exploitation, and the urgency of addressing this issue, by outlining and examining the benefits that human rights processes and tribunals can offer. This sets the stage for practitioners to consider the comparative value of these processes in addressing workplace rights issues, and provides a foundation for further cases that may encounter migrant worker exploitation in BC and across Canada.

II. Vulnerability of Migrant Workers

This section sets out the basic regulatory features governing three primary categories of low-wage migrants under the TFWPs: caregivers, agricultural workers, and 'other' low-wage workers. This section then goes on to discuss how these regulatory features create inherent vulnerabilities for migrant workers in their employment relationship, and documents the common forms of exploitative treatment that have been found to consistently occur across Canada. The last part of this section discusses how that exploitative can, and in some cases, does rise to an extreme level that may be akin to 'human trafficking' or 'forced labour'.

A. An Overview of the Low-Wage Streams of the TFWPs

Since 2002, the rapid expansion of Canada's Temporary Foreign Worker Program has seen a notable increase in workers brought in to work in low-wage jobs in a variety of sectors on the basis of labour market needs.[3] Individuals working in the low-wage stream of the TFWP are employed in a number of different jobs in the hospitality, restaurant, tourism, construction, food processing and caregiving sectors. Although the reform to the TFWPs in June 2014 collapsed the formal distinctions and streams of various low-wage work into one "low-wage stream", it is helpful to retain a distinction between three categories of workers who are subject to slightly different regulatory constraints: caregivers; agricultural workers; and, 'other' low-wage workers. This part will provide a brief overview of the regulatory features governing each of these categories.

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1 PN v. FR and another (No. 2), 2015 BCHRT 60

2 O.P.T. v. Presteve Foods Ltd., 2015 HRTO 675

3 See Fay Faraday, Profiting from the Precarious: How recruitment practices exploit migrant workers, (2014) Metcalf Foundation 93.

Workers under the general category of the low-wage stream of the TFWPs may be recruited to work in Canada in any number of jobs, and are often located in industries like food services, retail and hospitality. Migrant workers receive a one-year work permit, which may be renewed up to a total of four years. After four years of participation in the TFWPs, workers under this category are barred from further participation for another four years. Workers under this general stream have no access to permanent residency based on their working experience under the TFWPs. They may attempt to access permanent residency through the Provincial Nominee Program, though their eligibility will differ between provinces.

The Live-in Caregiver Program (LCP) was eliminated in late 2014 with the result that in-home caregivers are now included under the low-wage stream of the TFWP. Unlike other categories of low-wage workers under the TFWPs, caregivers may receive a work permit for two years, renewable up to a total of four years. In-home caregivers are authorized to provide care for children or individuals with high medical needs and are the only class of low-wage temporary foreign workers with a pathway to permanent residence. However, a change brought to the program in 2014 introduced a cap on the number of permanent residence applications that would be processed by Immigration, Refugees and Citizenship Canada (IRCC) each year. To be eligible to apply for permanent residence, caregivers must complete 24 months of work within 48 months of being in Canada.[4] In addition to the TFWP, caregivers also enter Canada through a visa to accompany employers doing business on a temporary basis in Canada, and to work for foreign representatives through the Domestic Worker Accreditation Program.[5]

Agricultural workers are brought to Canada under two labour migration programs: first, workers can and have historically been recruited under the Seasonal Agricultural Workers Program (SAWP), which operates on the basis of bilateral agreements between sending countries (including Mexico, Jamaica, and several other Caribbean countries).[6] The SAWP provides workers with a work permit for up to 8 months per calendar year. There is no overall limit on the number of years of participation under this program. SAWP provides employers with the right to 'call back' workers, meaning that an invitation to return for another season is dependent on a worker's employer. In addition, under SAWP, employers have broad discretion to terminate workers, with the result that workers are often repatriated within a matter of days of termination. Recently, the low-wage stream of the TFWPs created a complementary "primary agricultural" stream that operates independently of SAWP, with the more relaxed requirements that attend the general category as noted earlier. Under the primary agricultural stream, migrant workers may receive an initial work permit for up to two years.

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4 On November 30, 2014, the Live-in Caregiver Program was eliminated. At the same time, two new pathways to permanent residence were introduced: the caring for children and caring for people with high medical needs pathways which are each capped at 2,750 applications that will be processed by IRCC each year. New language and education requirements were introduced and caregivers are now required to undergo a second medical. Caregivers already working in Canada in late 2014 were grandfathered into the LCP and those whose employers' LMIA applications were received by ESDC prior to November 30, 2014 are in the LCP. See http://news.gc.ca/web/article-en.do?nid=898719

5 Caregivers who enter Canada on a business visa or through the Domestic Worker Accreditation Program are not eligible to apply for permanent residence under those Programs or through the TFWP.

6 The SAWP applies to citizens of the following countries: Mexico, Anguilla, Antigua and Barbuda, Barbados, Dominica, Greneda, Jamaica, Montserrat, St. Kitts-Nevis, St. Lucia, St. Vincent and the Grenadines, and Trinidad and Tobago. See: http://www.esdc.gc.ca/en/foreign_workers/hire/seasonal_agricultural/overview.page

B. Structural Vulnerabilities under the TFWPs

Structural aspects of each of these streams of the TFWPs contribute to worker vulnerability. To hire a migrant worker under the TFWPs, employers are required to obtain a positive Labour Market Impact Assessment (LMIA) from Employment and Social Development Canada (ESDC). With the LMIA, job offer and employment contract in hand, workers then apply to IRCC for a visa to enter Canada and a time-limited work permit that authorizes them to work for a single employer.[7] The employer-specific work permit means that migrants' authorization to work is limited to a single employer, at a single location, and in a single job. Workers who want to change employers, locations, or job categories (even if with the same employer and at the same location), technically require a new work permit, using the approval process set out above. These employer-specific work permits restrict labour mobility and although workers have an ostensible ability to change employers, in practice they face significant barriers in doing so.[8]

In addition to their reliance on a particular employer for continued employment and income, migrant workers are frequently reliant upon their employers for their housing. Under the SAWP, employers are required to provide migrant workers with housing either on the farm or off-site. Employers of workers in the low-wage stream must ensure that suitable, affordable housing is available to the worker or provide housing. Caregivers under the low-wage stream have the option to live-in or live-out of the home of the employer whereas caregivers under the Live-in Caregiver Program are required to continue to live-in if they wish to apply for permanent residence under the LCP.[9] While migrant workers are not required to live in accommodations provided by the employer, many feel compelled to do so as a condition of employment, particularly in situations where rent is paid to the employer. Workers may also feel physically and socially isolated, particularly where housing is tied to employers.[10]

Migrant workers have limited or no access to permanent residence through their participation in the TFWPs. Currently, there are no pathways to permanent residence through the TFWPs in the agriculture stream or the low-wage stream, with the exception of the caregiver pathways. The BC Provincial Nominee Program (PNP) provides limited access to permanent residence for entry level or semi-skilled workers in a limited number of occupations according to labour market needs.

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7 As of January 1, 2017 workers under the SAWP will apply for a work permit from IRCC whereas previously, their employers made this application to ESDC on their behalf. See: http://www.cic.gc.ca/english/work/permit-agriculture.asp?_ga=1.158320830.528604219.1478037469.

8 With the exception of the SAWP, to change employers, workers must receive a new job offer from an employer, employment contract and LMIA in order to apply for a new work permit. Employers must apply for the LMIA, which takes several months, and then the worker must apply for a new work permit, which takes an additional two to four months. During this time, workers are not able to work and are not eligible to apply for social assistance. Additionally, TFWs face barriers to accessing Employment Insurance benefits. For workers under the SAWP, changing employers requires written approval from their employer, Employment and Social Development Canada and the foreign government representative in Canada.

9 Employers who provide live-in caregivers with housing must ensure that certain requirements relating to privacy and security are met. For live-out caregivers, employers must ensure that suitable, affordable housing is available. Caregivers under the low-wage stream no longer pay room and board if they live-in, whereas caregivers under the Live-in Caregiver Program may have room and board deducted from their salary. See http://www.esdc.gc.ca/en/foreign_workers/hire/caregiver/requirements.page. See also http://www.cic.gc.ca/english/resources/tools/temp/work/permit/caregiver.asp.

10 West Coast Domestic Workers Association, Labour Trafficking & Migrant Workers in British Columbia, (2014) 25-33.

Under the PNP, workers must be nominated by an employer who has made an indeterminate offer of full-time employment. The ability to obtain permanent residence status is contingent upon maintaining employment with the sponsoring employer throughout the PNP and permanent residence processes.[11]

With the exception of the SAWP, in order to be linked with an employer in Canada, migrant workers have little choice but to use the services of third party recruiters. Worker vulnerability is exacerbated by the practice of recruiters routinely charging workers thousands of dollars in illegal recruitment fees, often for jobs that are different than promised or that do not exist at all.[12] SAWP workers are recruited by government brokers to whom they are also compelled to pay recruitment fees.[13] To pay these fees, migrant workers may often borrow money from lenders or private parties, which not only increases their debt on entry into Canada, but can operate to create situations of debt bondage in some cases.[14] Despite the fact that charging such fees is unlawful under most provinces' employment standards legislation, these amounts are difficult to recuperate. For example, in BC there is a 6-month limitation period for filing employment standards complaints, and this process would be complicated by the fact that fees are most often paid to recruiters outside of Canada, which may mean that the province lacks jurisdiction to hear and decide such a complaint.[15]

Fraudulent recruitment practices can compromise a worker's immigration status in Canada if a worker is coerced into engaging in work outside the conditions of their work permit. In these situations, workers lose their legal status to remain in Canada and become inadmissible. Migrant workers are particularly vulnerable if the job they were promised in Canada does not exist upon arrival, as "recruiters can control newly arrived workers through a mix of tactics including threats of deportation and promises of regularization of immigration status."[16] Employers may also demand that workers perform unauthorized work as a condition of continued employment.

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11 With the exception of the Northeast Development Region of BC, the eligible occupations include jobs in tourism and hospitality, long-haul trucking and food processing. See British Columbia Provincial Nominee Program, Skills Immigration and Express Entry BC Program Guide, 26 online: https://www.welcomebc.ca/getmedia/14a55c84-1301-4959-8a5d-888785a2ac2a/BC-PNP-Skills-Immigration-and-Express-Entry-BC-Program-Guide.aspx.

12 See supra note 3 at 32-37 and supra note 10 at 38-41.

13 Supra note 3 at 35-36.

14 See supra note 3 at 36-37. The US Department of State refers to debt bondage as "traffickers or recruiters who unlawfully exploit an initial debt assumed, wittingly or unwittingly, as a term of employment. Debts taken on by migrant laborers in their countries of origin, often with the involvement of labor agencies and employers in the destination country, can also contribute to a situation of debt bondage. Such circumstances may occur in the context of employment-based temporary work programs in which a worker's legal status in the destination country is tied to the employer and workers fear seeking redress." See US Department of State, Trafficking in Persons Report June 2016 31, online: http://www.state.gov/documents/organization/258876.pdf.

15 A class action has been filed in BC on behalf of workers who paid substantial recruitment fees to secure low-wage jobs working at Mac's convenience stores, only to arrive in Canada and discover those jobs did not exist. A certification hearing is scheduled for April 2017.

16 Kaity Cooper and Jodie Gauthier, "Bringing up B.C.: The negative impacts of the Temporary Foreign Worker Program on vulnerable workers and proposals for regional action" (Simon Fraser University, Conference on Temporary Migrant Workers 2015) 7.

C. The Impact of Structural Vulnerabilities in Facilitating Exploitation of Migrant Workers

The combination of precarious status under the employer-specific work permit system, time-limited work permits, limited access to permanent residence status, and recruitment debt, creates an environment in which migrant workers may be particularly vulnerable to labour exploitation. Precarious status, in light of the other identified factors above, exacerbates power imbalances between employers and workers with the result that workers are highly dependent on their employers not only for their job, but often their practical ability to remain in Canada. This dependency fosters environments in which unscrupulous employers and recruiters may exploit migrant workers by requiring the payment of illegal fees, increased hours of work, refusing to pay wages or overtime contrary to the *Employment Standards Act*, and making other demands that violate employment, human-rights, and related laws.

Employers have been found to "use the threat of job loss, deportation, and criminalization (through perceived or real breaches of the terms of their work permit) to create unfree labour relations in which workers are afraid to leave an exploitative employer."[17] In some cases, this exploitation may approach a severe level akin to what may generally be referred to as 'human trafficking' or forced labour, in that migrant workers perceive that they have no practical alternative but to submit to the demands of their employer. While not all exploitation constitutes labour trafficking or forced labour, links between the abusive treatment of migrant workers and these concepts continue to arise in literature and policy documents. For example, a report commissioned by Public Safety Canada found that migrant workers may come within the definitional parameters of trafficking where they are recruited through deception about their employment, and controlled to the extent that they feel they "cannot leave the situation without fear of some form hardship caused by the migration."[18] Another report commissioned by Public Safety Canada, focused on labour trafficking, found that it is difficult to provide a "guarantee to victims that their coming forward to denounce a serious crime will not result in their deportation or attract other sanctions."[19] Consequently, trafficked individuals are highly unlikely to come forward with a complaint against recruiters or employers.

Migrant workers and other individuals with precarious immigration status have further been identified as being among the most vulnerable of workers to labour trafficking in British Columbia.[20] Research has shown that individuals trafficked for forced labour often enter Canada through legal means, but experience exploitative employment relationships that "[become] coercive because of their precarious migrant status, which leaves them open to threats and intimidation."[21]

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17 Kendra Strauss and Siobhan McGrath "Temporary migration, precarious employment and unfree labour relations: Exploring the continuum of exploitation in Canada's Temporary Foreign Worker Program" (2016) Geoforum 21 online: https://www.researchgate.net/publication/294577489_Temporary_migration_precarious_employment_and_unfree_labour_relations_Exploring_the_'continuum_of_exploitation'_in_Canada's_Temporary_Foreign_Worker_Program.

18 Anette Sikka, "Labour Trafficking in Canada: Indicators, Stakeholders and Investigative Methods" Public Safety Canada (2013) 9.

19 See Yvon Dandarand and Vivienne Chin, "Uncovering Labour Trafficking in Canada: Regulators, Investigators, and Prosecutors" Public Safety Canada (2014) 5

20 Ibid and supra note 18 at 10.

21 Supra note 17 at 22.

This is echoed in the US State Department's 2016 Trafficking in Persons Report, which found the following:

> "Labor trafficking victims include foreign workers from Eastern Europe, Asia, Latin America, and Africa who enter Canada legally, but are subsequently subjected to forced labor in a variety of sectors, including agriculture, construction, food processing plants, restaurants, the hospitality sector, or as domestic servants, including in diplomatic households."[22]

These consistent links between migrant worker exploitation and concepts of 'human trafficking' and forced labour are important because, as the next section will establish, it is in fact very difficult to bring these experiences within the domestic legal parameters of Canada's criminal and immigration offences against human trafficking. Yet, the discursive and research linkages establish that severe exploitation is not, perhaps, an uncommon phenomenon amongst migrant workers in Canada. This helps establish the urgency of finding appropriate pathways to offer remedy and redress for migrant workers facing severe exploitation, something which, as this paper discusses later, may be better located within human rights processes.

III. Human Trafficking in International and Canadian Law

This section takes up the task of examining the legal definitions of human trafficking, and establishing why these are ineffective pathways towards addressing migrant worker exploitation. In addition to the definitional ambiguities that will be explored below, the nature and function of criminal law and criminal law-like measures are ill-equipped to acknowledge, understand, and remedy the particular harms experienced by migrant workers in exploitative working relationships. This section begins by exploring the international legal definition of human trafficking as a guiding instrument that provides a broader understanding of the potential elements of this phenomenon and what it might capture. However, as that international legal instrument was developed in a context addressing criminal activities, and was heavily influenced by debates surrounding sex work and sexual exploitation, and given that Canada has enacted specific domestic offences to address human trafficking, its guidance is of limited value.

A. International Legal Definition

Human trafficking is defined in the international Protocol to Prevent, Suppress and Prevent Trafficking in Persons, Especially Women and Children.[23]

> Art 3 (a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

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22 US Department of State, Trafficking in Persons Report June 2016 123, online: http://www.state.gov/documents/organization/258876.pdf

23 2237 UNTS 319.

The definition encompasses three primary components:

(1) an *act* (recruitment, transportation, transfer, harbouring or receipt of persons);

(2) a *means* (the threat or use of force or other forms of coercion, abduction, fraud, deception, the abuse of power or of a position of vulnerability, or the giving or receiving of payments or benefits to achieve the consent of a person); and,

(3) a *purpose* of exploitation (the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs).

The *Protocol* also specifically states (art 3(b)) that the consent of a person to the intended exploitation is irrelevant where a listed *means* was employed. This means that where, for example, an individual ostensibly agrees to exploitative conduct because of threats, coercive conduct, or deception on the part of the trafficker, that evidence of consent is irrelevant. The listed *means* in the *Protocol* identify the kinds of conduct that interfere with free and informed choice; so, an individual who consents to do something as a result of that conduct is not freely consenting.

The *Protocol* definition thus presents some potentially attractive features, given its breadth of possible application and its understanding of the various means – both obvious and subtle – that may unduly influence an individual's perception of choice. However, the *Protocol* remains rooted in a context centred on addressing criminal activity, evidenced for example by its sole obligation on states to criminalize human trafficking in all its forms.[24] Further, secondary literature has established that much of the debate and discussion surrounding the development of the international legal definition centred on the issue of sexual exploitation and sex work. This may further limit its usefulness as a broader guiding instrument. While, for example, the *Convention Concerning Forced or Compulsory Labour* provides an arguably more appropriate guiding instrument in defining labour exploitation, it does not have a concrete counter-point in the Canadian context, but the concept of human trafficking does, and as the previous section discussed, has been discursively linked to migrant worker exploitation, making an examination of this concept a more urgent issue to address for present purposes.

B. Canadian Laws on Trafficking in Persons

Canada incorporated the international *Protocol* into domestic legislation first through the *Immigration and Refugee Protection Act*[25] (*IRPA*) in 2001, and later in the *Criminal Code*[26] in 2005.

Under *IRPA*, human trafficking is defined as:

> 118. (1) No person shall knowingly organize the coming into Canada of one or more persons by means of abduction, fraud, deception or use or threat of force or coercion.
>
> (2) For the purpose of subsection (1), "organize", with respect to persons, includes their recruitment or transportation and, after their entry into Canada, the receipt or harbouring of those persons.

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24 See ibid at article 5.

25 SC 2001, c27.

26 RSC 1985, c C-46.

This offence of human trafficking under the *IRPA* only applies to the criminalization of cross-border trafficking into Canada. Because of the purpose and area of law that the *IRPA* is concerned with (immigration and border security), it is not concerned with establishing exploitation once in Canada, only with the movement of persons into Canada through the use of abduction, fraud, deception, threats or use of force, or coercion. There have been no successful convictions under *IRPA* to date.[27]

The *Criminal Code* offence of trafficking was enacted in 2005, and further amended since that time. The main offence is set out at s.279.01 and s.279.04:

> 279.01 (1) Every person who recruits, transports, transfers, receives, holds, conceals or harbours a person, or exercises control, direction or influence over the movements of a person, for the purpose of exploiting them or facilitating their exploitation is guilty of an indictable offence and liable
>
> (a) to imprisonment for life and to a minimum punishment of imprisonment for a term of five years if they kidnap, commit an aggravated assault or aggravated sexual assault against, or cause death to, the victim during the commission of the offence; or
>
> (b) to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of four years in any other case.
>
> **Consent**
>
> (2) No consent to the activity that forms the subject-matter of a charge under subsection (1) is valid.
>
> **Exploitation**
>
> 279.04 (1) For the purposes of sections 279.01 to 279.03, a person exploits another person if they cause them to provide, or offer to provide, labour or a service by engaging in conduct that, in all the circumstances, could reasonably be expected to cause the other person to believe that their safety or the safety of a person known to them would be threatened if they failed to provide, or offer to provide, the labour or service.
>
> **Factors**
>
> (2) In determining whether an accused exploits another person under subsection (1), the Court may consider, among other factors, whether the accused
>
> (a) used or threatened to use force or another form of coercion;
>
> (b) used deception; or
>
> (c) abused a position of trust, power or authority.

Despite the potentially broad application of the trafficking in persons offence under the Criminal Code, it has been critiqued due to the potential limitations associated with the definition of exploitation, and also on account of the fact that most identifiable cases where specific charges have been laid have related to sexual exploitation.[28] Of the publicly available written judicial decisions

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27 3 cases have been tried, all in BC: R v Ng, 2007 BCPC 204, R v Orr, 2013 BCSC 1883, rev'd on appeal: 2015 BCCA 88, and R v Ladha, 2013 BCSC 2437. R v Orr did result in a conviction at trial, but was reversed on appeal and a new trial ordered. The result of that subsequent trial led to conviction on the charge of

employing a foreign national without authorization, but he was found not guilty of the charge under s.118. See, "B.C. man found guilty of employing a foreign national without authorization" CBC News (9 Sept 2016) online: http://www.cbc.ca/news/canada/british-columbia/b-c-man-found-guilty-of-employing-a-foreign-national-without-authorization-1.3755485.

28 See, i.e., Julie Kaye and Bethany Hastie, "The Canadian Criminal Code Offence of Trafficking in Persons: Challenges From the Field and Within the Law" (2015) 3:1 Social Inclusion 88; Julie Kaye, John

that could be located, there are 18 identified cases involving specific charges of human trafficking under the Criminal Code.[29] Of those identifiable cases, all but one involved domestic sex trafficking,[30] meaning trafficking of Canadian women or girls for the purposes of sexual exploitation. The RCMP Human Trafficking National Coordination Centre states that, as of January 2015, there have been "85 completed HT [human trafficking] specific cases where convictions were secured."[31] However, that statistic makes it unclear whether "specific cases" mean those where charges under s.279.01-s.279.04 were laid, or where other charges were laid but the case was characterized as one of human trafficking. This further contributes to both the confusion and critiques surrounding the use of 'human trafficking', and its possible strong association to sexual exploitation.[32]

Beyond the definitional issues and ambiguities identified above, a criminal law-based approach to addressing human trafficking presents further limitations when examining a situation of exploitation from the perspective of the victim or complainant. Criminal justice frameworks may do little to provide an exploited person with the remedy they desire, such as compensation. Criminal law is centrally concerned with the accused and the state, and with the objective of punishment; a victim of crime has only been recently contemplated as an important figure in this context, and their participation remains comparatively limited. Further, the high standards of proof and procedural requirements associated with a criminal trial, coupled with the persistent uncertainty about Canada's human trafficking offences, mean that only a very limited number of cases would be likely to proceed through this system. Credibility remains a persistent issue in human trafficking cases, given the likelihood of a lack of concrete evidence and reliance on testimony, coupled with the often less-than-ideal characteristics of complainants in these cases.

In addition to the above problems, practical difficulties and disincentives exist for migrant workers reporting exploitation to authorities. Similar to the above, migrant workers may not perceive the criminal justice process as one which is desirable, given the length of time and the fact that such a process would do little to create or preserve employment and financial security, or offer compensation for their exploitation, such as for lost wages. Precarious status may constitute an additional barrier for migrant workers to come forward to law enforcement, particularly in cases

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Winterdyk, and Laura Quarterman, "Beyond criminal justice: A case study of responding to human trafficking in Canada" (2014) 56:1 Canadian Journal of Criminology and Criminal Justice 23; Katrina Roots, "Trafficking or pimping? An analysis of Canada's human trafficking legislation and its implication" (2013) 28:1 CJLS 21.

29 Including those where an accused was acquitted on the specific charges: R v AA, [2012] OJ No 6256, upheld on appeal: 2013 ONCA 466; R v AA, 2015 ONCA 558; R v Byron, 2013 ONCS 6427 (trial), 2014 ONSC 990 (sentencing); R v Dagg, 2015 ONCS 2463; R v Domotor, [2012] OJ No 3630; R v Estrella, [2011] OJ No 6616; R v Hosseini, 2014 QCCA 1187; R v Johnson, 2011 ONCS 195; R v McFarlane, [2012] OJ No 6566; R v Moazami, 2014 BCSC 1727; R v Nakpangi, [2008] OJ No 6022; R v Salmon, 2014 ONCJ 542; R v St Vil, [2008] OJ No 6023; R v Urizar, 13 August 2010, File No 505-01-084654-090, Longueuil QC, upheld on appeal: 2013 QCCA 46; R v Williams, 2014 ONCJ 425. In addition to these available decisions, three additional cases are also identified from the Royal Canadian Mounted Police, Human Trafficking in Canada: a threat assessment (Ottawa: RCMP, 2010) report: Emerson (at 25); Vilutis (at 25); Lennox (at 26). See also Kaye and Hastie, supra note 5 at 89, n4.

30 R v Domotor, ibid.

31 RCMP Human trafficking National Coordination Centre, online: http://www.rcmp-grc.gc.ca/ht-tp/index-eng.htm.

32 See Kaye and Hastie, supra note 27 for a more detailed discussion of this issue.

where workers have been compelled to engage in unauthorized work or whose status in Canada has otherwise been compromised by illegal activities.

A Temporary Resident Permit (TRP) for Victims of Trafficking in Persons (VTIP) does exist by which a person who meets the requirements below may receive temporary immigration relief, and so may operate to alleviate some of the above-noted concerns. The authority for the issuance of TRPs generally is found at s. 24 of the *Immigration and Refugee Protection Act*:

> **Temporary resident permit**
>
> 24 (1) A foreign national who, in the opinion of an officer, is inadmissible or does not meet the requirements of this Act becomes a temporary resident if an officer is of the opinion that it is justified in the circumstances and issues a temporary resident permit, which may be cancelled at any time.
>
> **Exception**
>
> (2) A foreign national referred to in subsection (1) to whom an officer issues a temporary resident permit outside Canada does not become a temporary resident until they have been examined upon arrival in Canada.
>
> **Instructions of Minister**
>
> (3) In applying subsection (1), the officer shall act in accordance with any instructions that the Minister may make.[33]

Ministerial Instructions provide instructions to immigration officers when assessing applications for VTIP TRPs for which the objective is to "provide protection to vulnerable foreign nationals who are victims of trafficking in persons, by regularizing their status in Canada, when appropriate." VTIP TRPs allow trafficked individuals a reflection period in Canada of 180 days, access to health care and counseling, and the right to apply for an open work permit.

VTIP TRPs may be issued following a preliminary assessment that considers the following indicators of trafficking:

(a) "The recruitment of the individual was fraudulent or coerced, and for the purposes (actual or intended) of exploitation;

(b) The individual was coerced into employment or other activity;

(c) The conditions of employment or any other activity were exploitive; or

(d) The individual's freedom was restricted."[34]

However, the issuance of VTIP TRPs has been critiqued for its highly discretionary nature and for uneven application of the Ministerial Instructions and IRCC guidelines. For example, the IRCC guidelines indicate that trafficked individuals are "not required to collaborate with enforcement agencies or testify against their traffickers in order to receive the permit."[35] Despite this, VTIP TRPs are not "generally not issued unless there is an investigation or criminal prosecution under

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33 Supra note 25.

34 See Immigration, Refugees, and Citizenship Canada, Temporary Resident Permits (TRPs): Considerations specific to victims of human trafficking, Ministerial Instructions, online: http://www.cic.gc.ca/english/resources/tools/temp/permits/victim.asp

35 Ibid.

way."[36] Without some assurance that trafficked individuals will not be deported, it is unlikely that migrant workers will come forward to law enforcement and/or apply for a VTIP TRP. In addition, known difficulties and extraneous issues attending decisions about criminal investigations and prosecutions mean that this implicit requirement may create broader inaccessibility to a VTIP TRP, even where a migrant worker is willing to report their exploitation. In short, the linkages that appear to exist on the ground between a criminal investigation or prosecution, and the issuance of a VTIP TRP, are troubling on several fronts, given the earlier noted issues in relation to the human trafficking offences and the criminal justice system.

Together, these factors present a compelling case for thinking about the value of human rights processes in addressing exploitation, and labour exploitation, in particular. Human rights processes have comparatively more relaxed standards to a criminal trial. These processes are better placed to identify and centralize the complainant's experience and needs. These processes are also more familiar with engaging in a contextual and subtle analysis of the complainant's experience in relation to discrimination.

The following sections will establish the comparative strength of human rights processes in addressing labour exploitation, as compared to criminal law, by examining in-depth the *PN* case, drawing also on similarities from the *OPT* case in Ontario. First, the factual background and BCHRT decision regarding *PN* will be set out and discussed, followed by a comparison with *OPT*. Finally, a discussion of the advantages established through these cases, concerning the contextual analysis of discrimination, the centralization and acknowledgement of the complainant's experiences, and the remedies available, will be presented, drawing out key facts and conclusions from each case to support the overall advantages of human rights processes as vehicles for addressing labour exploitation. This last part will also highlight important features of each case that may be significant in order for other, or similar, cases to achieve similar outcomes in the future.

IV. PN v FR: The Life of the Case

A. Background Facts

PN was a single mother in the Philippines who secured employment as a domestic worker with a family in Hong Kong in order to support her family. She incurred significant debt to the recruitment agency who assisted her with this process. Not long after she commenced her employment, her male employer began sexually assaulting her. This continued approximately three times per week. PN was also subject to verbal and physical abuse at the hands of her female employer. Not long after her employment began, the employers asked PN to come to Canada with them. Still owing significant money to recruiters and needing to provide for her family, PN agreed. The employers took care of all of the paperwork with regards to her immigration to Canada, and she eventually entered on a six-month business visitor's visa.

Upon arrival in Canada, PN stayed on the couch of her employers' hotel room in Richmond. The sexual, verbal and physical abuse continued, and in fact the maltreatment intensified in the close quarters. PN's employers controlled her food intake, and berated her for ever sitting down. She was not allowed to speak to any of the hotel staff. They also took PN's passport from her, and held it in their hotel safe.

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36 Canadian Council for Refugees, Temporary Resident Permits: Limits to protection for trafficked persons (2013) 2.

After a particularly bad altercation with the female employer, PN worked up the courage to leave. She eventually made contact with the RCMP, who assisted her in recovering her passport from her employers, and referred her to Salvation Armey's Deborah's Gate, a rehabilitative shelter for female survivors of human trafficking.

The RCMP began investigating the employers, and PN actively assisted with this process. However, given the lack of independent witnesses or extrinsic evidence, credibility issues arose (i.e., that it would be PN's "word" against the employers'), and the RCMP discontinued their investigation. As a result, no charges were filed against PN's employers.

B. Procedural History

PN filed a human rights complaint against her employers alleging discrimination on the basis of her sex, family status, age, race, ancestry, colour and place of origin.

The employers, who had by that time relocated back to Hong Kong, brought an application to the Human Rights Tribunal to have the complaint dismissed on a preliminary basis. They relied in part on the RCMP's decision not to press charges to argue that PN was bringing the human rights complaint in bad faith, in an attempt to leverage it for a favourable immigration status. The Tribunal rejected this argument, holding that the decisions of a prosecutor not to prosecute violations of the *IRPA* or *Criminal Code*, or of the RCMP to press charges, were not determinative of PN's motives or the outcome of a complaint under the *Human Rights Code*. The Tribunal denied the application to dismiss.[37]

At the same time as the employers applied to have her case dismissed, PN made an application to expedite the hearing, given the uncertainty of her immigration status and housing. This application was granted, and all timelines in relation to her case were abbreviated. The Tribunal also made an order anonymizing all proceedings.

In response to the human rights complaint, her employers filed a private suit in slander and breach of contract against her in Hong Kong, and served it on her in Canada, as well as sending a copy to the RCMP, CIC and CBSA. The Tribunal ultimately found that this act amounted to retaliation prohibited under s. 43 of the *Human Rights Code*.

The hearing was held over four days in Vancouver. The male employer represented himself via Skype from Hong Kong. Two interpreters were present – one to translate in Tagalog for PN, and the other to translate in Mandarin for the employer. At the outset of the proceeding, PN made an application to exclude the public from the proceeding, which was denied. There was a steady stream of people watching the hearing over the course of the four days, including media, law students and interested members of the public.

C. Summary of Tribunal Decision

Notwithstanding the challenges that the hearing presented, PN was ultimately successful in her case. The Tribunal found that she had been discriminated against by her employer and treated as "a virtual slave". It awarded her significant damages in compensation for injury to dignity, and retaliation by her employers.

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37 PN v. FR and another, 2015 BCHRT 4

In order to make a successful complaint to a human rights tribunal, an individual must generally show that: (1) she has a characteristic protected from discrimination; (2) that she experienced an adverse impact; and, (3) that the protected characteristic was a factor in the adverse impact (*Moore v British Columbia*, 2012 SCC 61, cited also in *PN v FR*, 2015 BCHRT 60).

Protected characteristics in human rights legislation include: race, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental ability, sex, sexual orientation, gender identity, and age. In *PN*, the protected characteristics at issue were both her sex, age, family status, race, colour and place of origin.

An adverse impact can include sexual harassment or sexual assault, and in the case of *PN*, was found also to include exploitative working conditions such as the lack of privacy associated with her living/working space, issues regarding proper pay, and the control over her movements.

In summarizing the facts upon which the adverse impact of exploitation was made out, the Tribunal Member noted:

> PN was a virtual slave. She could not go anywhere or do anything without permission. She could not go out on her own or speak to people in her own language, even though there were people around the hotel with whom she could have struck up such a friendship. While she was allowed to sleep, it was in between the respondents' bedrooms so she was virtually on call 24/7. She was frequently humiliated and demeaned by MR who threatened her, called her names and threatened to deduct wages were she to sit down while at work.[38]

If a complainant establishes that she has a protected characteristic, and has experienced an adverse impact, she must further establish a nexus or connection between that protected characteristic and the adverse impact.

In establishing the connection to a protected characteristic for the adverse impact of exploitative working conditions in *PN*, the Tribunal Member accepted expert evidence used to support that the treatment PN experienced was related to her race, colour and place of origin, her age and her family status. The Member notes, for example, that the "threats that worked to keep her quiet were due to her family status,"[39] and that "the way that MR treated her and the expectations of PN working all the time at the beck and call of the respondents have their roots in her hiring from the Philippines and the factors emphasized of youth, hard work and unlikeliness to complain, which are characteristics attributed to Filipino workers by stereotype and prejudice."[40]

The Tribunal Member found that PN was sexually harassed, humiliated and degraded, "isolated, underfed and treated like she was sub-human,"[41] and that she suffered symptoms of post-traumatic stress disorder including nightmares and flashbacks.[42] The Member noted that after she fled the respondent, PN could not work in Canada nor access government benefits, and the respondent continued to attempt to control her.[43]

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38 Supra note 1 at para 101.

39 Supra note 1 at para 102.

40 Supra note 1 at para 104.

41 Supra note 1 at para 133.

42 Supra note 1 at para 134.

43 Supra note 1 at paras 134-135.

The Tribunal Member held that PN was discriminated against on the intersecting grounds of race, colour and place of origin, her age, sex and her family status, and was retaliated against by the respondent after she filed her complaint. PN was awarded lost wages in the amount of $5,866.89 and compensatory damages for injury to dignity, feelings and self-respect in the amount of $50,000.[44] In discussing the compensatory damages for injury to dignity, feelings and self-respect, the Tribunal Member noted that the case "presents the factors that should result in an award at a high level," including physical harassment and PN's acutely vulnerable situation.[45]

D. Contextualizing PN's Case: Success Factors and Challenges

There are several elements that supported PN's success in relation to her human rights complaint and the Tribunal's decision. She had a significant amount of support, including representatives from West Coast Domestic Workers' Association, who translated every meeting with counsel and helped her with her ongoing immigration challenges. She had support from Deborah's Gate, who connected her with social services, health care and housing, and whose manager testified in support of her case at the Tribunal. She had a counsellor, who also testified at the Tribunal. She had free legal counsel from the Community Legal Assistance Society. Each member of the team was able to focus on supporting PN in the way that they knew best.

Ultimately, the most important factor was PN herself. She showed remarkable resilience and determination in continuing to fight and pursue her human rights complaint to its conclusion. She gave graphic and intimate testimony in front of an audience of strangers, and withstood cross examination from her abuser. Her testimony was ultimately found credible, and her account proved the allegations of sexual and other abuse. Without such fulsome support and fierce determination, it would be incredibly difficult for other exploited individuals to achieve the same result as PN did.

Unfortunately, enforcement of the Tribunal's order proved more challenging. Before PN was able to file a lien against her employer's Canadian property, they sold the property. She was able to get a garnishing order against their Canadian bank account, and a small percentage of the amount she was owed was paid into the BC Supreme Court. Her employers then filed for judicial review of the Human Rights Tribunal's decision. As a result, all collection efforts against the judgment were frozen pending the outcome of the judicial review of the human rights tribunal's decision. Ultimately, the employer did not pursue the judicial review, and the funds were released to PN, in only partial fulfillment of the Tribunal's order.

While the support PN received, and her own resilience, contributed greatly to her success at the BCHRT, her case also illustrates the significant difficulties of remedying immigration status for migrant workers pursuing legal claims against their employers on the basis of exploitation or 'human trafficking'.

After PN left her employers, she made an application to IRCC for a temporary resident permit as a victim of trafficking in persons (VTIP TRP), or in the alternative, a regular TRP. The application was based on PN's desire to pursue her human rights complaint against her employers, her need to continue trauma therapy (after being diagnosed with PTSD), and her desire to pursue employment and regain financial stability so as not to be re-exploited. That application was denied, with the IRCC officer's decision focusing on the fact that the RCMP had discontinued their investigation

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44 Supra note 1 at para 139.

45 Supra note 1 at para 137.

rather than on her need for protection as a vulnerable foreign national according to the VTIP TRP guidelines.

During the time in which PN's case was proceeding to hearing at the BCHRT, she filed requests for judicial review, and a new TRP application, both unsuccessfully. It was determined by both IRCC officers and the Federal Court that PN could continue to pursue her complaint from outside of Canada, making a TRP unnecessary in the circumstances.

Following an unsuccessful review at Federal Court after her human rights case concluded, PN submitted a new application for a VTIP TRP. A copy of the BC Human Rights Tribunal decision was included as evidence of the exploitation she experienced. Ultimately, she was successful in her VTIP TRP application, and on a subsequent application for permanent residence for herself and her daughter on humanitarian and compassionate grounds.

V. OPT v Presteve Foods Ltd: Comparing Human Rights Tribunals Successes

OPT is another human rights case decided in 2015, involving migrant workers, where the Ontario HRT found that the workers experienced discrimination and awarded substantial damages.

This complaint was brought by two migrant workers from Mexico, alleging discrimination in employment due to sex, sexual harassment, sexual solicitations or advances, and reprisal.[46]

Like in *PN*, this case relied, in part, on expert evidence, which assisted in contextualizing the experience of exploitation and motivations of migrant workers faced with exploitative demands or working conditions. This evidence was provided by Dr. Kerry Preibisch, whom the Member characterized as an expert witness on the characteristics of temporary foreign worker programs in Canada, and the vulnerability of migrant workers, particularly women.[47]

For example, in providing testimony that the complainant submitted to the respondent's demands because he "threatened to send her back to Mexico if she did not do what he wanted" (at para 24), the Member noted that this evidence aligned with Dr. Preibisch's evidence regarding the weight that such a threat can have, in light of the regulatory structure of the foreign worker programs, and that many workers comply with demands when faced with such a threat because "they believe they have no choice or because not doing so means that they would have to continue to live in Canada with no employment and no accommodation."[48]

Related to the facts giving rise to this complaint, the respondent had also been, at the time of the hearing, charged with sexual assault in relation to a number of female temporary foreign workers at Presteve, including the complainant. The respondent had pled guilty to simple assault, and as a part of the facts agreed to in that plea, the respondent had admitted to touching OPT's legs over clothing in his car[49] – one of many situations she recounted in testimony at the human rights tribunal

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46 Supra note 2 at para 1.

47 For more about the use of expert evidence to establish the necessary nexus between adverse treatment and protected characteristics in human rights law, including in PN, see Devyn Cousineau, "Adjusting the Frame: Expert Evidence of Social Context at the BC Human Rights Tribunal" (Continuing Legal Education, Human Rights Conference 2015).

48 Supra note 2 at para 25.

49 Supra note 2 at para 45.

hearing. Similarly, in relation to MPT, a second complainant in this case, the respondent had also pled guilty to simple assault, for which the facts agreed to for the plea included touching MPT in the chest and on the leg.[50] In relation to both complainants, defence counsel maintained that the facts agreed to in the guilty plea were non-sexual in nature.

In this case, unlike in *PN*, the personal respondent did not testify. Defence counsel challenged the credibility of the complainants, but the Member found each of their testimony to be credible, and sets out a lengthy discussion of the reasons on credibility in the judgment.[51]

Having accepted the testimony and evidence provided by OPT and MPT, the Member found that the respondent had engaged in sexual solicitations and advances, and sexual harassment, contrary to the *Code*, which together also created a sexually poisoned work environment in violation of the *Code*. The Member awarded OPT $150,000 and MPT $100,000 for injury to dignity, feelings and self-respect,[52] as well as a declaration of the violation of their rights, and a public interest order requiring Presteve to provide all employees under the TFWP with human rights information and training in their native language.[53]

Particularly, in discussing the compensatory awards for injury to dignity, feelings and self-respect, the Member states that the objective seriousness of the respondent's conduct was unprecedented in terms of the Tribunal's previous decisions, and that a substantial award was also justified on the basis of the complainants' particular vulnerabilities as migrant workers.[54]

A. Advantages of the Human Rights Process

The success of the complainants in *PN* and *OPT* offer some reason to be optimistic about the prospects of migrant workers using human rights law and processes to seek redress against employers who have exploited and abused them.

First, in contrast to the high burden of proof in criminal proceedings, human rights cases are determined on a balance of probabilities. Cases whose facts rely entirely on a worker's testimony, without corroborating evidence, may have a greater prospect of meeting this lower hurdle.

Second, human rights analysis by its very nature focuses on the complainant's experience of discrimination. Its driving purpose is to eradicate and prevent discrimination, without regard to an employer's intent or motive. So long as a migrant worker has suffered poor treatment and can link that treatment to their protected characteristics, their treatment will be held discriminatory without need of proving that the employer's motives and means meet the threshold for the human trafficking offenses under the *Criminal Code* and *IRPA*.

Third, in BC, proceedings at the Human Rights Tribunal are less formal than a worker would face in a criminal or civil court. The physical setting is less intimidating, and the Tribunal's Rules of Practice and Procedure will be applied flexibly to ensure an efficient and fair outcome. In *PN's* case, the ability to expedite and anonymize proceedings, the provision of interpreters, and the Tribunal's willingness to conduct proceedings with one party participating on Skype, allowed PN to complete

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50 Supra note 2 at para 65.

51 Supra note 2 at paras 103-144 re. OPT and 145-166 re. MPT.

52 Supra note 2 at para 195.

53 Ibid

54 Supra note 2 at paras 215-216.

her case over an abbreviated period, while retaining much of her privacy. Counsel pursuing these types of cases at the Tribunal are able to propose creative ways to push the process forward and adapt it to the specific challenges faced by migrant workers.

Finally, the broad remedial powers afforded to human rights bodies offer the possibility for systemic remedies to prevent future elements of similar discrimination. This may be particularly important for larger employers, who employ many migrant workers. An example of this type of systemic remedy is found in *OPT*, and discussed above. Compensatory damages are available to put a complainant in the position they would have been in but for the discrimination. This may include lost wages or other expenses. It will also include damages for injury to dignity, feelings and self-respect, and it is under this head that human rights bodies may be more prepared to order large awards that reflect their shock and disapproval of the extent of discriminatory exploitation happening to vulnerable workers in Canada. [55]

Workers pursuing human rights remedies still face challenges, however. In BC, proceedings can be protracted and delayed, particularly if respondents pursue complicated applications to dismiss complaints at a preliminary stage, and/or judicial reviews at interim stages of the proceedings.[56] For workers without permanent status in Canada, any delays threaten their ability to complete complaint proceedings. Further, in cases other than those with elements of sexual abuse or exploitation (present in both *PN* and *OPT*), workers will need to proffer evidence to prove a link between their protected characteristics (likely those related to ethnicity and place of origin) and their exploitation. In both *PN* and *OPT*, this was done through expert evidence, which may be difficult for all complainants to obtain, particularly if they do not have access to free legal counsel.

Finally, the value of an award of compensation to a migrant worker is only as great as their ability to enforce it. In *PN*, the employers relocated back to Hong Kong and sold their Canadian assets before she was able to collect the full amount of damages owing. This is a real risk where an employer is based overseas or otherwise able to manipulate their assets to make enforcement so onerous as to be unlikely or impossible. In BC, workers do not have ready access to pro bono legal counsel able to rigorously pursue enforcement proceedings.

While human rights proceedings do offer a less onerous and more complainant-centred forum for examining labour exploitation, they are not perfect. Workers still face real risks and barriers to pursuing legal redress. The true test of whether human rights proceedings offer a meaningful and accessible space for migrant workers who have been victimized will be in whether we see more workers follow in the path laid down by PN, OPT and MPT.

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55 As PN and OPT demonstrate, damage awards for injury to dignity are higher in Ontario than they are in BC. However, in University of British Columbia v. Kelly, 2016 BCCA 271, the Court of Appeal affirmed the Tribunal's discretion to order large awards under this head. It upheld an award of $75,000. This decision affirms the ability of the Tribunal to award larger damage awards than previously contemplated.

56 For example, in Chein and others v. Tim Hortons and others (No. 2), 2015 BCHRT 169, four temporary foreign workers filed human rights complaints in September 2012. Tim Hortons sought judicial review of a Tribunal order that it disclose certain documents, and brought an application to dismiss the complaint. Proceedings stalled in these interim matters, until November 2015, by which time the complainants had long since left the country. In November 2015, the Tribunal issued a decision that the complaint could proceed.

VI. Conclusion

This paper has sought to demonstrate the value and comparative benefits that human rights processes may offer for individuals who experience exploitation at work. Exploitation does not fit neatly into existing legal claims under employment standards legislation, and involves more significant harms than employment law provides remedy for. Yet, as this paper has also shown, criminal laws attending 'human trafficking', if understood as a severe form of exploitation, also fail to offer a meaningful process and remedy for exploited workers, and may be particularly ill-equipped to address exploitation of migrant workers. However, as the discussions concerning *PN* and *OPT* have shown, human rights tribunals are well-equipped for this task, given the nature and function of human rights complaints as requiring a contextual understanding and analysis of discrimination and adverse treatment, a sensitivity to issues of credibility and testimony, and broad remedial powers. Through an examination of these cases, this paper has sought to provide a foundation for practitioners and advocates to consider how to better use human rights processes in similar cases, and to highlight some critical factors that will impact on a case's success.