

2021

Flawed by Design?: A Case Study of Federal Enforcement of Migrant Workers' Labour Rights in Canada

Sarah Marsden

Faculty of Law, Thompson Rivers University

Eric Tucker

Osgoode Hall Law School of York University, etucker@osgoode.yorku.ca

Leah F. Vosko

York University

Source Publication:

23:1 (2021) Canadian Labour and Employment Law Journal 71-102

Follow this and additional works at: https://digitalcommons.osgoode.yorku.ca/scholarly_works

 Part of the [Labor and Employment Law Commons](#)

Repository Citation

Marsden, Sarah; Tucker, Eric; and Vosko, Leah F., "Flawed by Design?: A Case Study of Federal Enforcement of Migrant Workers' Labour Rights in Canada" (2021). *Articles & Book Chapters*. 2932.
https://digitalcommons.osgoode.yorku.ca/scholarly_works/2932

This Article is brought to you for free and open access by the Faculty Scholarship at Osgoode Digital Commons. It has been accepted for inclusion in Articles & Book Chapters by an authorized administrator of Osgoode Digital Commons.

Flawed by Design?

A Case Study of Federal Enforcement of Migrant Workers' Labour Rights in Canada

Sarah Marsden, Eric Tucker** & Leah F. Vosko****

Although Canada's migrant labour programs are seen by some as models of best practices, rights shortfalls and exploitation of workers are well documented. Through migration policy, federal authorities determine who can hire migrant workers and the conditions under which they are employed, through the provision of work permits. Despite its authority over work permits, the federal government has historically had little to do with the regulation of working conditions. In 2015, the federal government introduced a new regulatory enforcement system — unique internationally for its attempt to enforce migrants' workplace rights through federal migration policy — under which employers must comply with contractual employment terms, uphold provincial workplace standards, and make efforts to maintain a workplace free of abuse. Drawing on enforcement data, and frontline law and policy documents, we critically assess the new enforcement system, concluding that, because of design flaws and implementation failures, it does not realize its potential to protect workers' rights.

1. INTRODUCTION

Canada is home to a longstanding and expansive temporary migrant worker program. Migrant workers¹ in Canada provide

* Faculty of Law, Thompson Rivers University.

** Osgoode Hall Law School, York University; Distinguished Scholar in Residence, Cleveland Marshall College of Law, Cleveland State University.

*** Political Science, York University.

Authorship is listed alphabetically to reflect equal contribution.

1 We use the term “migrant worker” to refer in general to workers in Canada without permanent residency status. In principle, this group includes undocumented workers, but because our study is focused on documented workers, the term has this more limited meaning herein. Documented migrant workers enter Canada under two programs: the Temporary Foreign Worker Program (TFWP) and the International Mobility Program (IMP). We refer to workers in the TFWP as TFWs. All TFWs fall within the inspection program. Only some workers migrating under the IMP (those requiring closed work permits) fall within the ambit of the program. Our focus is TFWs, but, where appropriate, we indicate when we are also referring to covered IMP workers.

essential labour in response to “labour shortages,” including in key occupations and sectors unattractive to native-born workers and permanent residents on the terms and conditions offered by employers. As observed by Sharma, the concept of “labour shortage” is qualitative: the demand is not for labour generally, but specifically for labour in conditions and for rates of pay that Canadian citizens and permanent residents will not accept.² Industries with a high proportion of migrant workers include agriculture, caregiving and domestic work, retail, and construction.

Canada’s federal government regulates migrant labour through immigration law and policy, under which state authorities determine who can hire migrant workers and the conditions under which they may be employed, by way of granting permission to employers to hire migrant workers and granting work permits to the workers themselves.

Elements of Canada’s migrant work programs are often touted as “best practice” examples,³ yet worker exploitation and rights shortfalls are well documented within various components of Canada’s migrant labour programs.⁴ Evidence suggests that exploitation is most acute among those engaged in low-skilled jobs, tied partly to the dirty, dangerous, and demeaning work they perform (e.g., agricultural

2 Nandita Sharma, *Home Economics: Nationalism and the Making of “Migrant Workers” in Canada* (Toronto: University of Toronto Press, 2006) at 98, 108.

3 Jenna L Hennebray & Kerry Preibisch, “A Model for Managed Migration? Re-Examining Best Practices in Canada’s Seasonal Agricultural Worker Program” (2012) 50:S1 Int’l Migration J 19 at 23.

4 See, e.g., Luin Goldring & Patricia Landolt, eds, *Producing and Negotiating Non-Citizenship: Precarious Legal Status in Canada* (Toronto: University of Toronto Press, 2013); Judy Fudge & Fiona MacPhail, “The Temporary Foreign Worker Program in Canada: Low-Skilled Workers as an Extreme Form of Flexible Labour” (2009) 31:5 Comp Lab L & Pol’y J 101; Kendra Strauss & Siobhán McGrath, “Temporary Migration, Precarious Employment and Unfree Labour Relations: Exploring the ‘Continuum of Exploitation’ in Canada’s Temporary Foreign Worker Program” (2017) 78 Geoforum 199; Kerry Preibisch & Gerardo Otero, “Does Citizenship Status Matter in Canadian Agriculture? Workplace Health and Safety for Migrant and Immigrant Laborers” (2014) 79:2 Rural Sociology 174; Leah F Vosko, Eric Tucker & Rebecca Casey, “Enforcing Employment Standards for Migrant Agricultural Workers in Ontario, Canada: Exposing Underexplored Layers of Vulnerability” (2019) 35:2 Intl J Comp Lab L & Ind Rel 227.

workers and caregivers).⁵ Some of the exploitive practices violate applicable legislated minimum standards that are primarily regulated by provincial/territorial law. These include employment standards (e.g., minimum wage, overtime, etc.), occupational health and safety regulation (e.g., the provision of proper safety equipment), and human rights (e.g., non-discrimination on the basis of gender, race/ethnicity). Other rights shortfalls arise from a failure to fulfill the terms attached to the closed work permit (e.g., the work not being performed for the employer specified, the work being of a different nature than that described in the initial job offer). These shortfalls are amplified by the limited labour mobility and deportability of temporary foreign workers (TFWs), and conditions that create structures of vulnerability and unfreedom which make it particularly risky to voice complaints.⁶ While the data used for the present study predates the COVID-19 pandemic, researchers and advocacy groups have noted how rights shortfalls, and the persistent failure of governments to provide adequate protection and enforcement measures, have contributed to the severity of outbreaks and the death rate among migrant workers, particularly in agriculture.⁷ The pandemic thereby highlights the urgent need for structural reform that prioritizes effective worker

5 See Sedef Arat-Koc, “‘Good Enough to Work but Not Good Enough to Stay’: Foreign Domestic Workers and the Law” in Elizabeth Comack, *Locating Law: Race/Class/Gender Connect* (Halifax: Fernwood Publishing, 1999) at 125; Tanya Basok, “Free to Be Unfree: Mexican Guest Workers in Canada” (1999) 32:2 Lab Cap & Soc 192 at 204; Jenna Hennebry, “Permanently Temporary? Agricultural Migrant Workers and Their Integration in Canada” (2012) 26 Institute for Research on Public Policy 1 at 22; Kerry Preibisch, “Pick-Your-Own Labor: Migrant Workers and Flexibility in Canadian Agriculture” (2010) 44:2 IMR at 415.

6 See Todd Gordon, “Capitalism, Neoliberalism, and Unfree Labour” (2019) 45:6 Critical Sociology 921 at 924; Robert Miles, *Capitalism and Unfree Labour: Anomaly or Necessity* (London: Tavistock, 1987).

7 See e.g., Migrant Workers’ Alliance for Change, “Report: Unheeded Warnings – COVID-19 & Migrant Workers in Canada” (2020) online: <<https://migrantworkersalliance.org/unheededwarnings>>; Migrant Worker Health Expert Working Group, “Recommendations for Overcoming Health Challenges Faced By Migrant Agricultural Workers during the COVID-19-Virus Pandemic” (2020), online (pdf): <<http://www.migrantworker.ca/wp-content/uploads/2020/06/June-9-2020-HC-recommendations.pdf>>.

protection, an issue to which we return with specific recommendations in the Discussion section of this paper, in Part 4 below.

Despite evidence of these challenges and the manner in which legal and policy structures serve to entrench migrant worker vulnerability, the federal government has historically had little to do with the regulation of working conditions for migrant workers. Rather, employment standards, occupational health and safety, and human rights fall largely within provincial/territorial authority. Migrant workers are covered by these laws, but their deportability, limited labour mobility, and the prevalence of complaint-based systems for redress tend to limit their enforcement. Consequently, while the federal immigration system created structures of vulnerability, historically the government has disclaimed responsibility for addressing the resulting labour rights violations and instead exercised its powers solely to protect Canadian jobs and the domestic labour market.⁸

The government's refusal to exercise its powers for the protection of migrant workers began to change in 2011 with the introduction of a very limited employer compliance review process. However, it was only in 2015 that the federal government created an enforcement regime that, for the first time, required employers to comply with basic labour standards and the terms of migrant workers' contracts as a condition of hiring migrant workers.⁹

Like Canada's labour migration program, the federal enforcement system may come to be considered externally, including by other states, as a model policy for protecting migrant workers. With this in mind, we provide the first analysis of this new system. We draw on program statistics, federal enforcement data, and operational policy

8 See Bridget Anderson, "Migration, Immigration Controls and the Fashioning of Precarious Workers" (2010) 24:2 *Work Employ & Soc* 300 at 301; Mimi Zou, "The Legal Construction of Hyper-Dependence and Hyper-Precarity in Migrant Work Relations" (2015) 31:2 *Int'l J Comp Lab L & Ind Rel* 141 at 144, 149; Chris F Wright, Dimitria Groutsis & Diane van den Broek, "Employer-Sponsored Temporary Labour Migration Schemes in Australia, Canada and Sweden: Enhancing Efficiency, Compromising Fairness?" (2017) 43:11 *J Ethnic & Migration Stud* 1854 at 1859.

9 See Sarah Marsden, Eric Tucker & Leah F Vosko, "Federal Enforcement of Migrant Workers' Labour Rights in Canada: A Research Report" (2020) SSRN Electronic J, online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=3601870> at 3.

materials we obtained through freedom of information requests, alongside legislation, regulations, and case law to provide a comprehensive view of the regulatory structure and the policy by which frontline officers interpret and apply the new system.¹⁰ We evaluate the federal enforcement system, taking into account an extensive enforcement literature on the efficacy of different styles of regulatory enforcement systems for securing meaningful employer compliance with labour standards, as well as the particular vulnerabilities that result from migrant workers' precarious immigration status. We conclude that the extreme compliance orientation and practice of federal enforcement, in conjunction with other design flaws, undermine the protective potential of the new system.

The article progresses as follows. We begin by documenting the recent growth and proliferation of temporary migration programs in Canada and explain why we focus on the federal enforcement scheme created for the Temporary Foreign Worker Program. Next, we describe the sources of labour rights for migrant workers, and explain the legal basis and role of the federal scheme. We then critically examine the design and implementation of the scheme, identifying features that, we argue, undermine its efficacy. Finally, drawing on an international enforcement literature, we explain in greater detail why those features, and especially the regime's compliance orientation, limit its potential to better protect migrant workers' labour rights.

However, before turning to these matters, it is necessary to offer a brief overview of the major enforcement regimes we discuss in greater detail in the Discussion in Part 4, where we also assess their efficacy. In early scholarly debates over models of enforcement, a central debate pivoted on whether regulators should pursue deterrence or compliance.¹¹ The deterrence model is premised on the notion that employers are rational actors whose behaviour is significantly shaped by a comparison between the costs and benefits of violating the law. The regulator, therefore, must convince employers that the risk of

10 Policy and enforcement data were not available for dates past 2018 at the time of writing, due in part to extensive delays in the processing of Access to Information requests by federal agencies. Those interested in more detailed data analysis than presented here should consult our research report: *ibid*.

11 For example, see John Braithwaite, *To Punish or Persuade: Enforcement of Coal Mine Safety* (Albany: State University of New York Press, 1985).

detection and the resulting penalties will be more costly than any benefits they would gain by violating the law. Specific deterrence of particular employers also leads to general deterrence when other employers generally become aware that their violations may be detected and punished.

The compliance model, by contrast, is premised on the idea that most violations are the result of ignorance or incompetence, so that the first response to detected violations should be to offer compliance assistance, and direction, rather than to impose a punishment.¹² It therefore involves the engagement of strategies prioritizing the provision of information, persuasion, and negotiation in order to bring employer practices into compliance with the law. Strongly aligned with the emergence of the regulatory new governance paradigm,¹³ which views the proper role of government as steering rather than rowing,¹⁴ arrangements that disperse regulatory activity among state actors, employers, and employees are integral to the compliance model.

Beyond such influences and emphases, several key features characterize this model of enforcement: first, it is based on a reactive approach to violations stemming primarily from employee-initiated complaints, which makes complainants responsible for asserting their rights; second, a compliance model seeks efficiency in the processing of complaints and takes speedy resolution as a central indicator of success; and, third, the model encourages escalating penalties only among those employers deemed to be the most inalcitrant, pursuing punitive interventions, such as heavy administrative or monetary fines, or formal prosecutions, in only the most egregious and rare cases.¹⁵

12 For example, see Keith Hawkins, *Environment and Enforcement* (Oxford: Oxford University Press, 1984).

13 For example, see Orly Lobel, "Interlocking Regulatory and Industrial Relations" (2005) 57:4 Admin L Rev 1071 at 1143.

14 For example, see Leah F Vosko, Mark P Thomas & John Grundy, "Challenging New Governance: Evaluating New Approaches to Employment Standards Enforcement in Common Law Jurisdictions" (2016) 37:2 Economic & Industrial Democracy 373 at 374.

15 Leah F Vosko, Andrea M Noack & Eric Tucker, *Employment Standards Enforcement: A Scan of Employment Standards Complaints and Workplace Inspections and their Resolution under the Employment Standards Act, 2000*, Research Projects Commissioned to Support the Changing Workplaces Review (Toronto: Ontario Ministry of Labour, 2016).

In more recent years, theorists have tried to go beyond the punish-or-persuade debate by thinking about how these strategies might be combined. Many models, taking up a range of issues and often characterized by gradations of deterrence and compliance, have been proposed.¹⁶ Here we focus on two that have achieved prominence, namely, responsive regulation and strategic enforcement. Responsive regulation is premised on the view that most violations are inadvertent and, thus, regulators should begin by offering compliance assistance. However, if firms do not respond to this assistance, regulators should escalate their responses up an enforcement pyramid until the firm comes into line.¹⁷ Strategic enforcement, by contrast, focuses on four principles that are seen as foundational to the design of an enforcement scheme: prioritization, deterrence, sustainability, and systemic effects. Prioritization entails the identification of areas where violations are likely to be widespread or severe; deterrence is seen as an essential component of enforcement; sustainability aims at achieving lasting effects; and systemic effects require an understanding of the more fundamental problems driving violations and the development of responses that are responsive to those drivers.¹⁸

2. THE SIGNIFICANCE OF TEMPORARY MIGRATION IN CANADA: PATTERNS AND TRENDS

As has been the case within the Organisation for Economic Co-operation and Development (OECD) overall, the orientation of Canada's migration policy has seen a movement away from the post-Second World War emphasis on permanent immigration, and towards

16 For a survey, see Neil Gunningham, "Enforcement and Compliance Strategies" in Robert Baldwin, Martin Cave & Martin Lodge, *The Oxford Handbook of Regulation* (Oxford University Press, 2010) 120 [Gunningham, "Enforcement"].

17 Ian Ayres & John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford: Oxford University Press, 1992) at 35-40.

18 David Weil, "A Strategic Approach to Labour Inspection" (2008) 147:4 *Int'l Lab Rev* 349 [Weil, "Strategic Approach"].

an emphasis on temporary migration for employment.¹⁹ Indeed, from 2009 to the present, total temporary migration for employment grew steadily, with the number of temporary work permits for work purposes (i.e., excluding refugees and people awaiting permanent status) exceeding admissions to permanent residency for economic reasons.²⁰ Just over 300,000 (302,821) temporary migrant workers signed permits in 2017 (up from 116,540 in 2000), but Canada granted permanent status to just 159,262 (economic class) immigrants that year (up from 136,287 in 2000); temporary migrants thus went from representing 46% to 66% of total economic migrants between 2000 and 2017.²¹

Non-residents wishing to work in Canada are required to obtain work permits that fall into two broad categories. In the first category, permits are issued under the Temporary Foreign Worker Program (TFWP). These permits cover positions for which a Labour Market Impact Assessment (LMIA) — the labour market test — is required. All of these permits limit the worker to working for a specific employer, for a specified time period, in a named role. They are often

19 See Organisation for Economic Co-operation and Development, *International Migration Outlook*, 42 (Paris: OECD Publishing, 2018) at 25-27; Salimah Valiani, “The Shifting Landscape of Contemporary Canadian Immigration Policy: The Rise of Temporary Migration and Employer-Driven Immigration” in Luin Goldring & Patricia Landolt, eds, *Producing and Negotiating Non-Citizenship: Precarious Legal Status in Canada* (Toronto: University of Toronto Press, 2013) 55 at 56.

20 On an annual basis, Canada admits tens of thousands of immigrants as permanent residents under family and humanitarian classes; however, the majority of permanent residents arriving annually enter under the “Economic Class.” These migrants receive permanent residency on such bases as their skill level, occupation, and/or financial investments. Permanent residents migrating on economic grounds are nevertheless being outpaced by those on temporary work permits. See Immigration, Refugees & Citizenship Canada, “Immigration Overview – Permanent Residents” (2016) at 4, online (pdf): <www.cic.gc.ca/opendata-donneesouvertes/data/Facts_and_Figures_2016_PR_EN.pdf>; Immigration, Refugees & Citizenship Canada, “2018 Annual Report to Parliament on Immigration” (2018) at 15, 29, online (pdf): <www.canada.ca/content/dam/ircc/migration/ircc/english/pdf/pub/annual-report-2018.pdf>.

21 See Leah F Vosko, *Disrupting Deportability: Transnational Workers Organize* (Ithaca: Cornell University Press, 2019) at 142 [Vosko, *Disrupting Deportability*].

described as “closed” or “bonded” work permits, as the worker is not authorized to work in any other positions, or for any other employers, than those listed on their permit. Such permits are potentially available to any employer and for any type of work, provided the employer can meet the labour market test. Historically, however, the largest groups of workers have been in agricultural and domestic work pursuant to specific sub-programs of the TFWP.²² In order for a worker to change employers, the prospective new employer must obtain another LMIA, which is an employer-initiated process, beyond the control of the worker.

The second broad category of temporary work permits falls within the International Mobility Program (IMP), which comprises those entering Canada pursuant to international agreements, working holidaymakers, spouses of high-skilled workers, and post-graduate work permit holders, among other groups. Unlike the TFWP, employers do not need to obtain an LMIA in order to hire a worker under the IMP. Most migrant workers entering under IMP sub-programs have open work permits and are not subject to an inspection system. However, approximately one-third of those participating in the IMP hold closed work permits, tied to a single employer, a specific occupation, and a location.²³

22 One stream within the TFWP is designed specifically for caregivers who, unlike other workers in this stream, are given a pathway to permanent residency. Recently, the government announced it planned to provide caregivers with sectoral rather than employer-specific permits. See Immigration, Refugees & Citizenship Canada, “Caregivers Will Now Have Access to New Pathways to Permanent Residence” (News Release, 23 February 2019), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/news/2019/02/caregivers-will-now-have-access-to-new-pathways-to-permanent-residence.html>>.

23 See Regulatory Impact Analysis Statement, *Regulations Amending the Immigration and Refugee Protection Regulations* (15 December 2018) C Gaz I, vol 152, no 50, online: <<http://www.gazette.gc.ca/rp-pr/p1/2018/2018-12-15/html/reg1-eng.html>>. IMP participants with closed work permits are subject to an inspection system parallel to that covering the TFWP, but enforced by IRCC rather than ESDC. See also *Immigration and Refugee Protection Regulations*, SOR/2002-227, s 209.2(1) [IRPR]. IRCC was formerly known as Citizenship and Immigration Canada (CIC).

The total number of IMP participants almost tripled between 2005 and 2017, whereas the number of TFWP participants declined precipitously from 2013 to 2017, after stabilizing at high levels between 2007 to 2013. Despite the greater growth of the IMP²⁴ and increasing concerns about the contours of certain sub-programs, in this article we focus on TFWs and the inspection system that governs their employment because of the magnitude of evidence of their vulnerability generally, and also that of a highly precarious subset — those in agriculture — whose numbers are growing despite the contraction of other sub-programs of the TFWP.²⁵ On the other hand, migrant workers participating in the IMP are a heterogeneous group, with different degrees of vulnerability that are difficult to document.²⁶

3. THE FEDERAL ENFORCEMENT SYSTEM

(a) Sources of Labour Rights for Migrant Workers: Connecting Federal Immigration Powers to Provincial/ Territorial Jurisdiction over Protective Standards

The new enforcement system takes its place in the context of multiple, sometimes overlapping, sources of workplace rights for migrant workers, shaped in part by the division of powers in Canada's federalist system. Under the Canadian constitution, the

24 Leah F Vosko "Temporary Labour Migration by Any Other Name: Differential Inclusion under Canada's 'New' International Mobility Regime" (2020) J Ethnic & Migration Stud at 5.

25 See Leah F Vosko, Eric Tucker & Rebecca Casey, "Enforcing Employment Standards for Migrant Agricultural Workers in Ontario, Canada: Exposing Underexplored Layers of Vulnerability" (2019) 35:2 Int'l J Comp Lab L & Ind Rel 227 at 228, 231, 234; Vosko, *Disrupting Deportability*, *supra* note 21 at 27; Daiva Stasiulis, "Elimi(Nation): Canada's 'Post-Settler' Embrace of Disposable Migrant Labour" (2020) 14:1 Stud Soc Justice 22 at 24 & 26.

26 See Eric M Tucker, "Migrant Workers and Fissured Workforces: CS Wind and the Dilemmas of Organizing Intra-Company Transfers in Canada" (2017) 41:2 Economic & Industrial Democracy 372 at 373.

federal government exercises paramount jurisdiction over immigration.²⁷ Labour and employment law is largely a matter of provincial or territorial jurisdiction, and applies to the overwhelming majority of migrant workers, although there are significant barriers to meaningful protection for migrant workers under these laws.²⁸ Paramount federal jurisdiction over immigration does not empower the federal government to override provincial or territorial jurisdiction over labour and employment. However, the federal government's immigration jurisdiction does allow it to set conditions for employers who hire migrant workers that must be included in an offer of employment. These terms may be more generous than minimum standards established by applicable workplace laws but may not be lower. Immigration law thus provides migrant workers with a further source of workplace

27 See *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 95. Provincial governments have recently assumed a more active role in the selection of immigrants, but not in the enforcement of immigration regulations. For a discussion, see Mireille Paquet, "The Federalization of Immigration and Integration in Canada" (2014) 47:3 CJPS 519 at 520; Sasha Baglay & Delphine Nakache, "Immigration Federalism in Canada: Provincial and Territorial Nominee Programs (PTNPs)" in Sasha Baglay & Delphine Nakache, eds, *Immigration Regulation in Federal States* (Dordrecht: Springer, 2014) 95. While limitations of space and scope inhibit us from providing an analysis of the relationship between Indigenous sovereignty and Canadian law here, it nevertheless bears mentioning that Canadian immigration law was developed as a fundamental component of territorial and cultural colonization. Like much of Canada's legal system, its development is linked to the dispossession, murder, violence against, and forced assimilation of Indigenous peoples. Indigenous legal systems exist throughout the territory claimed by Canada, and serious questions exist as to the legitimacy of the Canadian state to exert control over this territory, particularly in those parts neither ceded nor subject to treaty. See e.g. Amar Bhatia, "We Are All Here to Stay? Indigeneity, Migration, and 'Decolonizing' the Treaty Right to be Here" (2013) 31:2 Windsor Yearbook of Access to Justice 39; Soma Chatterjee, "Immigration, Anti-Racism, and Indigenous Self-Determination: Towards a Comprehensive Analysis of the Contemporary Settler Colonial" (2018) 25:5 Social Identities 644; Laura Madokoro, "On future research directions: Temporality and permanency in the study of migration and settler colonialism in Canada" (2019) 17:1 History Compass 1 at 4.

28 Federal jurisdiction over labour and employment is limited to only 6-10% of Canada's private-sector labour force, and few migrant workers are employed in the federally regulated sector.

rights, which was underutilized until the implementation of the new enforcement system.

Two federal agencies are directly involved in regulating migrant labour: Employment and Social Development Canada (ESDC) and Immigration, Refugees and Citizenship Canada (IRCC). ESDC provides permission to employers to hire migrant workers if the employer can demonstrate that hiring a migrant worker will have a neutral or positive impact on the Canadian labour market.²⁹ Once an employer obtains a positive LMIA, it may make an offer of employment to a migrant worker, who can then apply for a work permit from IRCC. The offer of employment must describe the job duties, rate of pay, and working conditions, as approved in the LMIA. An employer's failure to provide wages and working conditions that are substantially the same as — but not less favourable than — those laid out in the offer constitutes non-compliance with the employer's obligations *under immigration law*.

Until recently, the federal power to regulate the employers of migrant workers was used solely for protectionist purposes to impose conditions restricting the employment of migrant workers, and not for protective purposes to prevent or remediate abusive treatment of migrant workers. The new federal inspection system requires employers not only to meet the terms of LMIA's, but also to comply with applicable workplace laws and make reasonable efforts to provide an abuse-free workplace. The latter two obligations created new *federally* enforceable workplace rights not previously found in LMIA's.³⁰

To summarize, TFWs have several overlapping sources of labour rights:

- Labour and Employment Law
 - Provincial/territorial labour and employment laws, including both statutory and judge-made (common) law (or the federal government's laws for those employed in the federal jurisdiction).
- Immigration Law (Federal)
 - The terms of the positive LMIA and offer of employment, which may not be inferior to legislated employment standards;

29 See *IRPR*, *supra* note 23, s 203.

30 *Ibid.*, s 209.3(1)(a)(v).

- The right to have their employer make reasonable efforts to provide an abuse-free workplace (pursuant to the *Immigration and Refugee Protection Regulations (IRPR)*); and
- For the Seasonal Agricultural Worker Program (SAWP), the standard contract arising from interstate agreements, which may add to, but may not derogate from, legislated minimum standards.

This brings us to the question of rights enforcement. Under Canada's federal structure, provinces/territories have exclusive jurisdiction over the enforcement of their laws. However, because immigration regulations now require employers to comply with provincial standards, ESDC has the power to treat the violation of provincial standards as *immigration* law violations and take enforcement action. As noted above, this is a recent development. In 2011 law and policy changed to grant ESDC and IRCC the power to actively review employers of migrant workers. Initially, when this power was exercised through paper-based Employer Compliance Reviews (ECRs), few employers faced sanctions. However, in 2015, the federal government implemented a further set of regulatory changes, creating much broader enforcement and inspection powers for ESDC³¹ — the enforcement system that is the central subject of this analysis.

While our inquiry is concerned primarily with the enforcement of labour rights, or the protective role, this system also enforces the terms of LMIAs that restrict migrant workers' labour market freedom so that they can be employed only in the same occupational category, location and business for which their employer received an LMIA. The scheme is thus designed both to enforce the protectionist restrictions that construct migrant workers' juridical unfreedom, and the protective standards that aim to shield migrant workers from the labour rights violations and workplace abuse that they experience disproportionately because of their unfree status.³²

31 A parallel enforcement system by the IRCC was created to enforce the closed work permits and workplace rights of workers in the IMP with closed work permits.

32 See Gordon, *supra* note 6 at 922; Miles, *supra* note 6.

(b) The Design and Practice of Enforcement

The creation of a federal enforcement system holds the promise of significantly reducing the burden of labour rights violations suffered by TFWs. Ideally, we would like to be able to measure how the burden of violations has changed over time, but enforcement studies, including ours, suffer from an inability to know what is not detected. Therefore, we have adopted the strategy of identifying weaknesses in the design and implementation of the federal enforcement system that unduly limit the ambit of inspectors' powers and produce a compliance-based system that is less effective in achieving its protective goals than a deterrence- and strategic enforcement-based system would be.

We develop our argument in two steps. First, we analyze the design and practice of the enforcement system. We begin by examining the regulations creating it and the directives given to frontline enforcement officials. Second, we consider how frontline officers have exercised their enforcement powers. Of course, the exercise of enforcement powers is not unrelated to the directives that are given, but we also recognize that frontline officials exercise a degree of discretion in how they exercise their powers and thus outcomes are not entirely reducible to the directives issued.³³ The result, we argue, is an extreme compliance enforcement regime that limits the ability of investigators to determine whether violations have occurred. In the Discussion section below, we turn to the enforcement literature to explain why such an orientation is a matter of concern.

(i) *Design Flaws*

The enforcement system's design has both positive and negative features. A positive feature is that it builds in a role for proactive inspections, an important feature in a context in which migrant workers are likely to be particularly reluctant to complain because of the

33 See Eric Tucker et al, "Making or Administering Law and Policy? Discretion and Judgement in Employment Standards Enforcement in Ontario" (2016) 31:1 CJLS 65 at 66.

fear of retaliation and ultimately deportation.³⁴ Inspections may be triggered where an officer has “reason to suspect” that the employer has not complied with the conditions described above, where the employer has not complied with those conditions in the past, and as part of a random verification of compliance.³⁵ ESDC’s policy manual on inspections (henceforth “the Inspections manual”) elaborates on these. With regard to “reason to suspect,” the manual lists multiple sources of information, including tips from the public (ESDC operates a “tip line”), other federal sources, non-governmental organizations (including unions), provincial/territorial government agencies, and the media.³⁶ In the case of known past non-compliance, the Inspections manual indicates that an employer may be selected for inspection at the discretion of staff and based on the nature and severity of the infraction. Random selection is generated using an algorithm whose model aims to provide representative samples and sorting by region, sector, and occupational type.³⁷

Once an inspection is triggered, the new regulations empower Integrity Services Investigators (“investigators”) to exercise broad powers to gather information. However, under the new system, an inspection does not require an on-site investigation. To the contrary, the Inspections manual makes it clear that an on-site visit is optional, and it specifies when an on-site inspection is required: to ensure worker safety, to verify conditions if required, and to limit

34 See generally Sarah G Marsden, *Enforcing Exclusion: Precarious Migrants and the Law in Canada* (Vancouver: UBC Press, 2018)) at 75; Leah F Vosko, “Rights without Remedies: Enforcing Employment Standards in Ontario by Maximizing Voice among Workers in Precarious Jobs” (2013) 50:4 Osgoode Hall LJ 845 at 857 [Vosko, “Rights without Remedies”]; Catherine Barnard, Amy Ludlow & Sarah Fraser Butlin, “Beyond Employment Tribunals: Enforcement of Employment Rights by EU-8 Migrant Workers” (2018) 47:2 Ind Law J 226 at 242; David Weil & Amanda Pyles, “Why Complain? Complaints, Compliance, and the Problem of Enforcement in the US Workplace” (2006) 27:1 Comp Lab L & Pol’y J 59 at 83.

35 See *IRPR*, *supra* note 23, ss 209.3(1), 209.5.

36 Employment & Social Development Canada, *Integrity Operations Manual: Chapter 63b – Temporary Foreign Worker Program* (Ottawa, 2018) [ESDC A], provided in response to a request under the *Access to Information Act*, RSC 1985, c A-1, s 4.1 [*Access to Information Act*].

37 ESDC A, *supra* note 36, ss 9.1-3.

employer misrepresentation.³⁸ The manual indicates that the investigator will consult with the Team Leader prior to determining that one is required, implying that on-site inspections are the exception, rather than the norm.³⁹ We examine the frequency of on-site inspections below, but the implication that paper-based inspections will normally suffice itself suggests a light-touch enforcement orientation, since on-site inspections would be necessary in order to take stronger enforcement actions.

This light-touch orientation becomes more explicit in the manual's set of principles to guide the conduct of inspections. The first principle is that investigators are to "[b]e remedial, rather than adversarial: work with employers during the inspection to educate them about their responsibilities under the *IRPR* and assist them to comply with TFWP conditions."⁴⁰ Other principles involve transparency, freedom from bias and adherence to the "precautionary principle" so as to prevent avoidable harm, and use of the "newspaper test" to establish whether an enforcement action, if publicized, would be judged ethical. It is unclear, however, whether these principles tilt toward vigorous enforcement to avoid harm to migrant workers and embarrassing critiques of government inaction, or toward restrained enforcement to avoid harm to employers and embarrassing critiques of governmental overreach.

Inspection outcomes are classified as either "satisfactory," "satisfactory with justification," "satisfactory with justification and compensation," or "non-compliant."⁴¹ On finding that an employer has breached the regulatory conditions, the investigator must provide a "notice of preliminary finding" to the employer, to which the employer has 30 days to respond. As in other regimes, employers may respond by contesting the alleged facts. However, and further emphasizing the compliance orientation of the regime, the regulations also

38 *Ibid.*, s 11.8.

39 *Ibid.*, s 11.9.

40 *Ibid.*, s 5.

41 *Ibid.*, s 12; Employment & Social Development Canada, *Policy: Employer Inspection And Determination Of Consequences* (Ottawa, 2018) [ESDC B], provided in response to a request under the *Access to Information Act*, *supra* note 36.

provide that the employer may provide a justification for the breach.⁴² The regulation lists seven acceptable justifications. These include a change in federal or provincial law, an error in interpretation made in good faith (with compensation if workers were short-changed), an unintentional accounting or administrative error (again, with compensation), and *force majeure* (i.e., an unforeseeable circumstance that prevents a person from fulfilling a contract).⁴³

Despite the generality of acceptable justifications in the regulation, in *Obeid Farms v. Canada (Obeid)*,⁴⁴ the Federal Court held:

[T]he justification provisions must be strictly interpreted The intention of Parliament in enacting these provisions was to prevent abuse of highly vulnerable temporary foreign workers, given the tenuous circumstances of their employment which lack the normal safeguards preventing abuse otherwise available to most Canadian workers.⁴⁵

However, as we shall see, the practice of enforcement does not necessarily follow the Court's admonition, but arguably is more in line with the regulation's compliance orientation.

If the employer does not provide an acceptable justification, the employer is non-compliant and liable to sanctions. We will say more about sanctions in our examination of the practice of enforcement, but note that few employers are sanctioned, and when they are, the penalties tend to be on the lighter side of the range.

Investigators receive direction with respect to the enforcement of each of the three protective obligations: compliance with the offer of employment, compliance with applicable labour and employment laws, and the duty to take reasonable steps to provide an abuse-free workplace. With regard to the first obligation, on a positive note, the directions make it clear that an employer cannot substitute one condition for another. For example, the employer cannot substitute increased compensation for health insurance if the job offer/LMIA included a requirement to provide health insurance.⁴⁶

42 ESDC B, *supra* note 41, s 5; ESDC A, *supra* note 37, ss 209.993-4.

43 ESDC A, *supra* note 36, ss 209.3(3), 203(1.1).

44 *Obeid Farms v Canada*, 2017 FC 302 [*Obeid*].

45 *Ibid* at para 31.

46 See Employment & Social Development Canada, Access to Information Request, A-2018-02770 (Ottawa, 2018) [ESDC C].

On the other hand, investigators are directed to defer to housing inspectors with regard to on-site worker housing, which is a major source of complaints by migrant agricultural workers whose job offers address this issue.⁴⁷ As a result, no new inspection resources are made available to increase the detection of housing violations. At worst, an employer who is found by provincial or municipal authorities to have provided substandard housing will be subject to immigration law penalties, in addition to those prescribed by provincial or local law.

A similar problem arises in regard to enforcing the duty to comply with applicable employment laws. Federal investigators do not independently determine whether an employer has violated such laws. Rather, they only determine whether the employer *has been found* to be in violation by the federal/provincial/territorial authority primarily responsible for the law's enforcement.⁴⁸ The federal enforcement system, therefore, does not increase the likelihood that violators will be detected; rather, it creates additional potential liabilities for employers caught violating applicable statutory labour rights. As a result, the enforcement of workplace laws under the inspection system is only as good as those primary enforcement regimes.

Finally, with regard to the employer's duty to "make reasonable efforts to provide a workplace that is free of abuse,"⁴⁹ the regulations define "abuse" broadly:

For the purpose of this Part abuse consists of any of the following:

- (a) physical abuse, including assault and forcible confinement;
- (b) sexual abuse, including sexual contact without consent;
- (c) psychological abuse, including threats and intimidation; and
- (d) financial abuse, including fraud and extortion.⁵⁰

47 See generally Adam J Perry, "Living at Work and Intra-Worker Sociality Among Migrant Farm Workers in Canada" (2018) 19:4 JIMI 1021 at 1034; Adrian Smith, "The Bunk House Rules: A Materialist Approach to Legal Consciousness in the Context of Migrant Workers' Housing in Ontario" (2015) 52:3 Osgoode Hall LJ 863 at 877; Patricia Tomic, Ricardo Trumper & Luis LM Aguiar, "Housing Regulations and Living Conditions of Mexican Migrant Workers in the Okanagan Valley, BC" (2010) Canadian Issues 78 at 82.

48 See ESDC A, *supra* note 36, ss 5.4, 11.17.vi.

49 *IRPR*, *supra* note 23, s 209.3(1)(a)(v).

50 *Ibid*, s 196.2.

“Reasonable efforts” is not a defined term in the regulations, but the policy manual identifies criteria to determine whether reasonable efforts have been made, namely:

- The employer had made general efforts to prevent workplace abuse;
- The employer, or anyone in a supervisory role or acting on the employer’s behalf, has not actively participated in abuse, including failing to stop abuse of which it had knowledge; and
- Where an allegation or incident of abuse occurred, steps were taken by the employer to address abuse and prevent it from happening again.⁵¹

The manual provides examples of how an employer could prove compliance with this requirement, including disclosing its policies and procedures regarding abuse, demonstrating its efforts to inform and educate employees of the policies and procedures, and demonstrating its ongoing commitment to provide a work environment that is free from abuse and violence. The manual also states that policies may vary, and smaller employers need not have specific policies at all. Nevertheless, all employers “*must make efforts to treat employees, including TFWs, in a fair and abuse free manner and to take steps to provide a work environment that is free of abuse and violence.*”⁵²

While the focus is on “reasonable efforts” to provide an abuse-free workplace, the manual suggests investigators may also become involved where allegations of actual abuse are being made.⁵³ For example, although investigators do not have authority to inspect workers’ bodies, they are directed to look for signs of physical confinement or abuse, such as “bruises, blood, and intimidated workers.”⁵⁴ In regard to sexual abuse, they are to look for signs such as “intimate relations between workers or between workers and management, erotic literature, photographs and/or websites in the workplace, trafficking in persons.”⁵⁵ The policy also discusses when the employer

51 ESDC A, *supra* note 36, s 14.10.i.

52 *Ibid*, s 14.10.ii [emphasis in original].

53 See ESDC B, *supra* note 41, s 5.2.2.

54 *Ibid*, s 15.

55 *Ibid*.

will be considered actively responsible for the abuse, including where the employer or its agent have directly abused a worker, where “it is more likely than not” that the employer or its agent directed, encouraged, or supported abuse, where there is evidence that the employer protected the abuser, and where the employer has placed an employee who has been convicted of abuse in contact with a migrant worker.⁵⁶

Either way, the regulation ultimately is concerned with whether the employer has made “reasonable efforts,” not with whether it has *succeeded* in providing an abuse-free workplace. But how is the failure to make reasonable efforts to be demonstrated in the absence of evidence that abuse has occurred? The manual directs investigators to consider various indicators of the employer’s preventive efforts,⁵⁷ but as a result of the Federal Court judgment in *Obeid*, it is unclear what evidence would satisfy a court. In that case, the Minister found the employer to be non-compliant on multiple grounds, including failing to make reasonable efforts to provide a workplace free of abuse. On review, the Federal Court quashed the “reasonable efforts” finding.⁵⁸ On the one hand, the Court emphasized that the duty is to make reasonable efforts, not to provide an abuse-free workplace, and so rejected the employer’s argument that there must be evidence of actual abuse to support a finding that “no reasonable efforts” were made.⁵⁹ On the other, the Court also suggested that in the absence of evidence of actual abuse, it might be very difficult to prove the employer failed to make reasonable efforts. The fact that an employer had no policies in place to prevent abuse was not sufficient evidence of its failure to make reasonable efforts. The Court explained:

Reasonableness is a highly, and indeed, almost entirely contextual standard Evidence of reasonableness often is based on the norms of other persons in similar circumstances The Court’s sense is that other small farming TFW employers might have interpreted this provision in a similar fashion, not really knowing what the requirement really entailed other than assuring no abuse was occurring.⁶⁰

⁵⁶ *Ibid*, s 16.

⁵⁷ See *IRPR*, *supra* note 23, ss 209.2(4) & 209.3(4).

⁵⁸ *Obeid*, *supra* note 44 at para 54.

⁵⁹ *Ibid*.

⁶⁰ *Ibid* at para 56.

We consider the impact of these confusing directions on the practice of enforcement of the “reasonable efforts” requirement below.

(ii) *The Practice of Enforcement*

To examine the practice of enforcement, we obtained statistics from ESDC on inspection and outcomes. When the inspection program started, paper-based reviews were by far the most frequent; however, on-site inspections became more frequent in subsequent years. In the first six months of 2018-19 (the most recent year for which data are available), around 55% were on-site. A consequence of the shift from paper reviews to on-site inspections has been a reduction in the number of completed inspections annually. In 2016-17, 3,666 inspections were completed, but in 2017-18, the number dropped to 2,888, and for 2018-19, only 867 inspections were completed at the end of six months.⁶¹ If this trend continues, there will be fewer than 2,000 for 2018-19.

In terms of inspection results, Table 1 divides the outcomes of all completed inspections over the three complete years for which we have data (2015-16 to 2017-18) into four categories: satisfactory, compliant with intervention, non-compliant, and awaiting final adjudication. ESDC considers “compliant with intervention” identical to the category of “satisfactory with justification/restitution” found in the Inspections manual. Therefore, we must assume that investigators who initially determined non-compliance, to which employers responded with sufficient justification, have reported these as satisfactory or satisfactory with justification (compliant with intervention).

The most frequent outcome was satisfactory (about 40%), followed by compliant with intervention (about 36%), awaiting final adjudication (about 20%), and non-compliant (about 4%) (see Table 1). We calculate the percentage of employers who were found non-compliant in the first instance by adding together the categories “non-compliant” and “compliant with intervention” and divide that by the number of completed inspections less those awaiting final adjudication. The result is that nearly 50% of employers were found to be non-compliant in the first instance; however, about 90% of the

61 See ESDC C, *supra* note 46.

employers found to be non-compliant offered a justification (with restitution when required) that was accepted by the investigator. Only 10% of employers found non-compliant in the first instance were ultimately cited as non-compliant (361 out of 3,948) (see Table 1).

TABLE 1
Outcomes of Completed Inspections, By Inspection
Type and Totals, 2015-16 to 2017-18

	<i>On-Site: Number (%)</i>	<i>Paper: Number (%)</i>	<i>Total: Number (%)</i>
Satisfactory	438 (46%)	3,646 (40%)	4,044 (40%)
Compliant with Intervention	460 (48%)	3,127 (35%)	3,587 (36%)
Non-Compliant	9 (1%)	352 (4%)	361 (4%)
Awaiting Adjudication	43 (5%)	1,923 (21%)	1,966 (20%)
	950 (100%)	9,048 (100%)	9,998 (100%)

Source: ESDC, Access to Information Request A-2018-02770.

Unfortunately, data are not available on the reasons why employers were found non-compliant in the first instance. This is an important lacuna since it prevents us from determining the extent to which inspections are targeting the protective aspects of the regulations as opposed to the protectionist ones. We also do not have data specifying the accepted justifications in cases of initial non-compliance. These, too, are important, since their analysis would allow us to better understand how this supposedly narrow exception is being interpreted to excuse 90% of the non-compliance detected in the first instance.

Nevertheless, the high rate at which justifications for violations are accepted by investigators provides strong evidence of a compliance orientation. Investigators imbued with a compliance orientation will likely be open to accepting claims that violations were good faith errors, or unintentional accounting or administrative mistakes, notwithstanding the judicial pronouncement in *Obeid* that justifications should be strictly construed.

What do we know about the small percentage of employers found to be non-compliant? The Canadian government maintains a public list of non-compliant employers, which as of 17 April 2019 contained 149 names. The list is compiled from both ESDC (TFWs)

and IRCC (IMP) inspections and includes employers who were found non-compliant under the ECR review process. Our analysis of IRCC enforcement data from 2015-16 to 2017-18 shows that a total of 17 employers were found non-compliant. Therefore, we can assume that the great majority of employers listed as non-compliant are from ESDC inspections or ECR reviews of employers of TFWs. In 53 of the 149 cases, no reason is provided because the non-compliance occurred before the new regulations came into force in December 2015. That leaves 96 employers who were found non-compliant on inspection and for whom we have reasons.

Some of these employers were found to be non-compliant for more than one reason, and so the total number of reasons given (122) exceeds the number of non-compliant employers.⁶² Table 2 identifies the reasons given by year and by category.⁶³ Administrative reasons include such things as failing to keep or provide an investigator with requested documents or failing to attend a meeting or inspection. LMIA enforcement refers to the enforcement of provisions related to the protectionist requirements such as those related to the job description or the obligation to create new jobs or improve skills for Canadians. Unfortunately, compliance with LMIA conditions blends protection and protectionist concerns; thus, it is impossible to know whether employers were found non-compliant for a workplace rights violation or for failing to employ the migrant worker in the job described in the LMIA.

Table 2 provides several interesting insights. First, the number of employers who were found non-compliant increased dramatically in 2019; however, this data must be approached cautiously since it is based on the year of decision, not the year of violation, and a great many employers (40) were added to the non-compliance list in January of 2019. Thus, it is impossible to discern whether the increase in 2019 reflects the resolution of some kind of bureaucratic glitch in processing cases or a real increase over time in the number of employers being found non-compliant.

62 See Immigration, Refugees & Citizenship Canada, "Employers who have been non-compliant" (last visited 17 April 2019), online: <www.canada.ca/en/immigration-refugees-citizenship/services/work-canada/employers-non-compliant.html>.

63 We constructed the 6 categories from the 17 reasons reported in the data.

TABLE 2
Reasons for Finding of Non-Compliance by Year of Decision and Type of Violation

<i>Year of Decision</i>	<i>Administrative Reason</i>	<i>LMIA Enforcement</i>	<i>Applicable Workplace Law</i>	<i>Abuse-Free Workplace</i>	<i>Working Conditions or Job Description</i>	<i>Live-In Caregiver</i>	<i>Total Reasons Given</i>
2019 (to 17 April)	51	5	0	0	11	0	67
2018	12	5	1	0	12	0	30
2017	6	1	0	0	17	0	24
2016	1	0	0	0	0	0	1
Total	70	11	1	0	40	0	122

Source: Government of Canada, Immigration and Citizenship, “Employers who have been non-compliant” (accessed 17 April 2019), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/services/work-canada/employers-non-compliant.html>>.

Second, with regard to the reasons why employers are found non-compliant, Table 2 shows that nearly half of the reasons relate to administrative matters (70), the most common by far being the failure to provide the investigator with requested documents. The fact that this is the most common reason for employers being cited for non-compliance, rather than a substantive labour rights violation, further supports the conclusion that the enforcement system is heavily compliance-oriented, where non-cooperation with the investigator is taken very seriously and cannot, unlike substantive labour rights violations, be justified.

Third, only one employer has been found non-compliant because of its failure to comply with applicable protective employment laws. This is not a surprising result since, as we noted earlier, federal investigators do not make an independent determination of whether a violation has occurred; they depend on the provincial/territorial authorities with primary enforcement jurisdiction. Such an approach is problematic because studies have shown that statutory labour rights are poorly enforced generally, and that enforcement for precariously employed workers, and TFWs in particular, is especially fraught.⁶⁴ In effect, the federal enforcement system, which was called into existence in large measure because of the failure of primary enforcement to protect migrant workers against rights' violations, has been implemented to make it structurally dependent on the flawed enforcement system it is supposed to ameliorate, and almost no additional sanctions are imposed if such violations do come to the attention of the investigator.

Finally, no employer has been found non-compliant with its duty to make reasonable efforts to provide an abuse-free workplace. It is possible that investigators have found employers non-compliant in the first instance and that employers have offered acceptable justifications for their failure to do so, but that would mean that justifications were accepted in all such instances. The more likely explanation for the absence of employers that are ultimately found non-compliant is that, since the judgment in *Obeid*, investigators lack guidance as to what non-compliance means in a world in which the lack of positive efforts by the employer to prevent abuse does not provide a sufficient

64 See Vosko, "Rights without Remedies," *supra* note 34 at 851-852.

basis for finding the employer failed to make reasonable efforts. In effect, the Court has made the positive duty to take reasonable efforts unenforceable, and instead transformed the provision into a due diligence defence that an employer can raise if there is a finding that abuse occurred: “But I made reasonable efforts” The Court implicitly recognized this result and invited the Minister to consider whether it would be advisable to make it clear what proactive measures were expected of employers, but no action has been taken to date.⁶⁵

In terms of consequences, 54 employers were suspended from the program, in most cases for two years (see Table 3). Suspensions were more common in the first years of the program, when more than half of non-compliant employers were suspended. Only three suspensions were imposed in the first 3 1/2 months of 2019, suggesting that there has been a turn away from suspensions.

TABLE 3
Penalties Imposed on Non-Compliant
Employers by Year of Decision

<i>Year of Final Decision</i>	<i>Total Number of Non-Compliant Employers (Number Non- Complaint with ECR)</i>	<i>Number of Employers Fined</i>	<i>Number of Employers Suspended</i>	<i>Number of Employers Fined and Suspended</i>
2019 (to 17 April)	54 (3)	51	3	0
2018	47 (23)	22	24	1
2017	46 (26)	19	26	1
2016	2 (1)	1	1	0
Total	149 (53)	93	54	2

Source: Government of Canada, Immigration and Citizenship, “Employers who have been non-compliant” (accessed 17 April 2019), online: <<https://www.canada.ca/en/immigration-refugees-citizenship/services/work-canada/employers-non-compliant.html>>.

⁶⁵ See *Obeid*, *supra* note 44 at para 59.

One reason for not suspending employers from the program is a concern about the impact on the TFWs who would be at risk of deportation unless they can find another employer who has, or can obtain, an LMIA. To address this problem, the regulations were amended in the summer of 2019 to allow TFWs to obtain open work permits if they can demonstrate that they are “at risk of abuse.”⁶⁶ This provision may encourage workers to report abuse and reduce the reluctance to suspend employers guilty of abuse; however, to date no employer has been found non-compliant because of its failure to make reasonable efforts to prevent abuse.

When employers are fined, the level of the fine is usually low, in the \$1,000 to \$3,000 range. One company, Kameron Coal in Nova Scotia, was fined \$54,000 (and received a one-year suspension), but that was truly exceptional. The next highest fine was for \$16,000, imposed on two companies: Harbour Sushi in British Columbia and Mozza Vera Foods in Quebec. Below these, the next highest fines are \$4,000 or less.

4. DISCUSSION

The federal enforcement system imposes a condition of hiring migrant workers that employers comply with legislated labour standards and the terms of migrant workers' contracts, as well as requiring employers to make “reasonable efforts” to ensure workplaces are free of abuse. The system is promising insofar as it seeks to respond to a widely acknowledged rights shortfall, and integrates labour standards into federal regulatory control of labour migration. However, the protective potential of the inspection system is not being realized.

At the outset of this study, we identified four enforcement models: deterrence, compliance, responsive regulation, and strategic enforcement. Here we return to consider which of these models the current practice of federal enforcement most closely resembles and the problems we see associated with this approach.

66 Immigration, Refugees & Citizenship Canada, “Open Work Permits For Vulnerable Workers” (last visited 4 June 2019), online: <www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/temporary-residents/foreign-workers/vulnerable-workers.html>.

It is clear that the federal enforcement regime is not based on a deterrence model. Instead, consistent with its provincial counterparts' approach to employment standards enforcement, the federal government has adopted an extreme version of the compliance model of enforcement. Our data show that employers are rarely cited for non-compliance for violations of migrant workers' workplace rights despite the fact that nearly half of all inspected employers are found to be non-compliant in the first instance. Rather, most non-compliance is excused on the basis of employer justification and restitution to workers if they have been short-changed. While supporters of the compliance model argue that it is an effective and efficient way of protecting workers' rights,⁶⁷ studies of the enforcement of other statutory labour rights, such as the *Employment Standards Act* (ESA) of Ontario, contradict the assumptions on which the compliance model is built and thus raise serious concerns about the efficacy of compliance-based approaches.⁶⁸ Moreover, the compliance orientation of this new system is deeply rooted in the history of the enforcement of protective labour law, which has proven to result in significant enforcement gaps.⁶⁹

We have also considered the possibility that the current inspection regime embodies some of the principles of responsive regulation or strategic enforcement, outlined in the Introduction.

67 See Paul Almond & Garry C Gray, "Frontline Safety: Understanding the Workplace as a Site of Regulatory Engagement" (2017) 39:1 Law & Pol'y 5 at 7; Gunningham, "Enforcement," *supra* note 16.

68 See Eric Tucker et al, "Carrying Little Sticks: Is there a 'Deterrence Gap' in Employment Standards Enforcement in Ontario, Canada?" (2019) 35:1 Int'l J Comp Lab L & Ind Rel 1 at 15 [Tucker, "Carrying Little Sticks"]; John Grundy et al, "Enforcement of Ontario's *Employment Standards Act*: The Impact of Reforms" (2017) 43:3 Can Public Pol'y 190 at 193; Leah F Vosko et al, "The Compliance Model of Employment Standards Enforcement: An Evidence-based Assessment of its Efficacy in Instances of Wage Theft" (2017) 48:3 Indus Rel LJ 256 at 257.

69 See generally WG Carson, "The Conventionalization of Early Factory Crime" (1979) 7:1 Int'l J Soc Law 37; Richard Johnstone "Occupational Health and Safety Prosecutions in Victoria: An Historical Study" (2000) 13:2 Austl J Lab L 113; Eric Tucker, *Administering Danger in the Workplace: The Law and Politics of Regulation in Ontario, 1850-1914* (Toronto: University of Toronto Press, 1990) at 127-130.

Yet it is hard to fit the practice of federal enforcement into the responsive regulation model. First, based on our earlier studies of violations of Ontario's *ESA*, the 90% rate at which inspectors accept justifications from employers found to be non-compliant in the first instance suggests an unrealistically rosy view of employers of TFWs, even within a responsive regulation frame.⁷⁰ Second, investigators do not have a range of tools that allow for incremental escalation when violations are detected. For example, they do not have the power to issue compliance orders, a common feature of most inspection regimes. Third, it is not clear that the federal inspectorate has the resources to routinely re-inspect employers who have been found non-compliant in the first instance to determine whether they have become and remain compliant. Finally, there is little evidence that the hammer of deterrence is brought down often or hard enough to produce a pyramid of enforcement that rises much above the broad horizon of forgiven non-compliance.

It is similarly difficult to characterize federal enforcement as consistent with the strategic enforcement model, also described earlier.⁷¹ Unlike responsive regulation, the theory does not build on general assumptions about the character of employers, but rather is concerned with the context in which employers operate and the systemic pressures that tempt employers to violate protective labour laws in order to make a profit. In contrast to compliance and responsive regulation approaches, strategic enforcement supports the use of carefully crafted, highly publicized deterrence measures intended to ensure that employers unequivocally know in advance that the costs of violating employment standards are likely to be higher than its benefits. This strategic crafting is crucial in precisely those contexts where employers may be under pressure to violate the laws. To that end, Weil makes a number of concrete suggestions. For example, civil monetary penalties should be routinely assessed, especially for

70 See Leah F Vosko et al, *Closing the Enforcement Gap: Improving Employment Standards Protections for People in Precarious Jobs* (Toronto: University of Toronto Press, 2020) at 152; Tucker, "Carrying Little Sticks," *supra* note 68 at 29-30.

71 See Weil, "Strategic Approach," *supra* note 18; David Weil, *Improving Workplace Conditions Through Strategic Enforcement: A Report to the Wage and Hour Division* (May 2010) at 16 [Weil, *Improving Workplace Conditions*].

repeat offenders. Weil also recommends an increased use of liquidated damage awards, which compensate workers for the additional losses they suffer when they do not get paid what they are owed, but which are likely to be viewed by employers as deterrence measures because they pay more than the amount saved by violating the law.

While there is evidence that the federal enforcement regime prioritizes inspections through its use of an algorithm to select employers for proactive inspections, it does not appear that it embraces other elements of strategic enforcement. Certainly at the level of deterrence, investigators do not have the power routinely to impose civil penalties when they find employers have failed to pay TFWs what they are owed, and workers are not compensated for the losses they suffer as a result of not being paid on time. Moreover, there is no indication that the federal enforcement regime has the resources or the mandate to achieve systemic effects by, for example, reaching agreements with major purchasers of agricultural products not to buy from farms that fail to comply with the federal enforcement requirements.

In short, in our view, the federal enforcement program most closely resembles an extreme compliance model, notwithstanding the lack of support for such an approach in the literature.

The extreme compliance orientation of the federal government is exacerbated by its interaction with the primary enforcement of protective labour laws by provincial/territorial governments. Given the well-documented barriers migrant workers face in accessing provincial employment standards remedies, and the fact that such remedies are not always well designed to account for the particular vulnerabilities confronting migrant workers, an effective federal system would respond to these weaknesses. In this regard, however, the federal system also fails. Federal investigators are not authorized to take action unless provincial authorities have found non-compliance, and so they add no additional resources to the detection of violations. At best, the threat of federal enforcement increases the potential consequences for those caught violating statutory labour rights.

Finally, the current judicial interpretation of the requirement to make reasonable efforts to prevent workplace abuse renders this provision ineffective. In the absence of a finding of actual abuse, it appears almost impossible to hold an employer non-compliant for failing to make reasonable efforts to prevent it. In effect, the “make reasonable efforts” provision does not impose a meaningful duty on

employers to take positive proactive measures, but rather provides employers with a due diligence defence in the event abuse occurs.

5. CONCLUSION

Arguably, the most logical response to the exploitation of migrant workers is to change the structures of vulnerability that elevate their risk.⁷² Replacing employer-tied, time-limited work permits with open work permits and pathways to permanency for migrants who provide necessary labour would do much to resolve these issues. Furthermore, migration status security would likely reduce migrant workers' reluctance to use existing rights mechanisms.

Barring structural change of this order, reforms to the existing federal enforcement system should address the three major shortfalls we identified. First, the federal enforcement regime needs to move away from the extreme compliance model it currently practices and embrace a strategic enforcement model. This reform would require changes to regulatory design and enforcement practices. For example, at the design level, investigators need to be given the power to issue compliance orders and to impose monetary penalties where violations are detected, particularly where employers did not pay workers what they were owed. At the practice level, investigators should be instructed to comply with the dictum of the court in *Obeid* that justifications should be accepted only in very limited circumstances. Thought should also be given to identifying and developing working relationships with strategic partners, such as farm worker advocacy organizations, that can provide information on sites of violations that might otherwise go unnoticed, or with purchasers of farm products who might use their influence to help regulate growers.⁷³

72 See Malcolm Sargeant & Eric Tucker, "Layers of Vulnerability in Occupational Health and Safety for Migrant Workers: Case Studies from Canada and the UK" (2016) 7:2 PPHS 51 at 67.

73 See Janice Fine, "Enforcing Labor Standards in Partnership with Civil Society: Can Co-Enforcement Succeed Where the State Alone Has Failed?" (2017) 45:3 Politics & Society 359 at 361; Janice Fine & Jennifer Gordon, "Strengthening Labor Standards Enforcement through Partnerships with Workers' Organizations" (2010) 38:4 Politics & Society 552 at 575; Weil, *Improving Workplace Conditions*, *supra* note 71 at 79.

Second, in addition to addressing the deficiencies of the current compliance model, any reforms should reconsider the role of investigators in enforcing provincial/territorial minimum standards. As we saw, currently investigators cannot make an independent determination that violations have occurred, meaning that federal enforcement resources are not supplementing provincial/territorial ones. This limitation likely explains why the federal enforcement system never finds the employers whom it inspects to be non-compliant with these laws. The division of powers under federalism may play a role here. However, if the federal enforcement regime is to contribute meaningfully to the protection of the labour rights of TFWs, it will be necessary to put in place agreements requiring provincial authorities to communicate violations to federal enforcement officials. These officials should be given the power to determine whether provincial standards have been violated and to treat these as violations of the employer's immigration law obligations.

Finally, there needs to be a rethinking of how to enforce the employer's duty to take reasonable efforts to prevent workplace abuse. As we have seen, no employer has been held non-compliant for failing to make reasonable efforts. This coheres with the decision in *Obeid* that taking no proactive measures is not evidence of a failure to make reasonable efforts to prevent abuse. The regulations have to be amended to require employers to take proactive measures to prevent abuse, and to include specific direction as to the actions employers must take to achieve this result. These regulations should be evidence-based and developed in consultation with workers and advocacy organizations to produce meaningful requirements that go beyond *pro forma* compliance gestures (such as "workers' safety" posters), and should be paired with effective enforcement measures to fulfill the promise of abuse-free workplaces.