CITATION: Palmer v. Attorney General of Canada, 2026 ONSC 927
COURT FILE NO.: CV-23-00710918-00CP
DATE: 20260223

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
KEVIN PALMER and ANDREL PETERS Plaintiffs	*Jody Brown, Tina Yang, Louis Century, Shane Martínez, James Sayce, and Caitlin Leach*, for the Plaintiffs
– and –	*Jean-Philippe Groleau*, counsel for the plaintiff in *Association for the Rights of Household and Farm Workers v. Attorney General of Canada* (Quebec Sup. Ct.)
ATTORNEY GENERAL OF CANADA Defendant	*Ayesha Laldin, Sheila Hepworth, and Ramesha Javed*, for the Defendant
	Émilie Tremblay, counsel for the defendant in *Association for the Rights of Household and Farm Workers v. Attorney General of Canada* (Quebec Sup. Ct.)
	HEARD: January 20-22, 2026

E.M. MORGAN, J.

I. The certification motion

[1] The Plaintiffs move for certification of this proposed class action pursuant to section 5(1) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("*CPA*").

[2] The Statement of Claim dated December 6, 2023 challenges the Seasonal Agricultural Worker Program ("SAWP"), a federal program that is a part of the Temporary Foreign Worker Program ("TFWP") which operates under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("*IRPA*"). The pleading states that the SAWP is a government program that infringes the putative class members' rights under sections 7 and 15(1) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). The Plaintiffs seek declarations of these *Charter* infringements as well as *Charter* damages and damages for unjust enrichment on behalf of themselves and all participants in SAWP since January 1, 2008.

[3] At the risk of oversimplifying, one can summarize the claim as relating to two somewhat distinct aspects of the SAWP: a) the 'tied employment' provisions of the SAWP workers' permit that allows them to work only for a named employer for a limited period of time, and b) the compelled payment by the SAWP workers of Employment Insurance ("E.I.") premiums in respect of their employment in Canada despite their disqualification from receiving E.I. payments.

[4] The Crown submits that the SAWP is an advantageous program for seasonal agricultural workers who freely choose to participate in it, and the impugned policies are just the ordinary operation of policies which are properly authorized and legislated and which apply to all similarly situated persons. The Plaintiffs, on the other hand, claim that the SAWP is oppressive and exploitative of their labour and treats them in a way that infringes their *Charter* rights.

[5] A complicating factor in this certification motion is that a similar claim encompassing all participants in the TFWP since 1982, which includes the SAWP participants as a subset of the class bringing the claim, has been authorized – the equivalent of certified – by the Quebec Superior Court as a national class action: *Association for the Rights of Household and Farm Workers v. Attorney General of Canada*, 2024 QCCS 3350 (the "*Quebec Action*"). Plaintiffs' counsel have formed a consortium agreement with class counsel in the *Quebec Action* in order to coordinate their respective efforts.

[6] The consortium of counsel on the Plaintiffs' side has proposed a partial stay of proceedings in the *Quebec Action* as a solution for any overlapping aspects of the two actions, although it is at this point not known whether the Quebec court will issue the proposed stay. In addition, it is a matter of debate between the parties whether a partial stay is an appropriate or effective way to approach the two cases.

II. The SAWP

[7] The SAWP is a seasonal visa program in which foreign nationals from any of 12 participating states with Memoranda of Understanding ("MOUs") with Canada can work in Canada for a temporary period if the work is engaged with a listed agricultural commodity. Although ultimately authorized under the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*") and the *Immigration and Refugee Protection Regulations*, SOR/2002-227 ("*IRPR*"), it is anchored in the MOUs with the specific countries. The participating states are 11 English-speaking Caribbean nations along with Mexico.

[8] To make a somewhat more complicated story short for present purposes, Canada issues visas and work permits and specifies the number of temporary foreign workers any given employer participant is permitted to hire. The participating foreign states are each responsible for recruiting and selecting the workers and for maintaining an ongoing pool of agricultural workers to fill the Canadian positions each year.

[9] A three-way SAWP Contract is signed by each selected foreign worker, Canadian employer, and a representative of the government of Canada that specifies certain obligations on the workers and employers that are not otherwise contained in provincial employment laws. The standard SAWP Contract has been amended and evolved over the years to more closely parallel

the worker protections enjoyed by Canadian citizens and permanent residents in the employment context.

[10] Under SAWP, work permits are issued for temporary periods of 8 months, valid between January 1 and December 15 each calendar year. This arrangement is, generally speaking, in keeping with the seasonality of the agricultural employment provided for in the MOUs. The work permits authorize workers to work only with a SAWP-approved employer. In recent years, the permits have eliminated the need for a worker to apply for a new work permit in order to change employer in the middle of the visa period, so long as the change is from one SAWP-approved employer to another SAWP-approved employer.

[11] In other words, the current arrangement ties a SAWP worker to a list of SAWP employers, allowing the workers to transfer between them if the employer will hire them, but compelling the workers to adhere to the visa rules restricting them to a maximum 8 months of working in a 12-month period. Without a new work permit or visa under a different employment stream, the workers cannot extend their stay in Canada beyond December 15th of the given year.

[12] Unlike other foreign nationals on temporary visas and work permits, who are permitted under s. 199(a) of the *IRPR* to apply to renew their work permit from within Canada in any category if they lose or come to the end of their employment, a SAWP worker can neither extend a SAWP work permit nor apply for another SAWP work permit from within Canada. Accordingly, if the workers do not manage to insert themselves into a different immigration program, they must depart Canada for their home country at the end of the authorized period.

[13] Residential accommodations for the SAWP workers are provided by the SAWP-authorized employers. The SAWP Contract imposes an obligation to this effect on both the employers, who are compelled to provide housing to their temporary foreign workers, and on the workers, who were under older versions of the SAWP Contract compelled by contract, and more recently compelled by rural geography and their circumstance of being only temporarily employed in Canada, to reside in the employer's housing.

[14] Counsel for the Crown contends that the employer-provided housing feature of the SAWP arrangement often serves as a much-needed practical and financial benefit to the workers. Counsel for the Plaintiff, on the other hand, contends that the need to reside in employer-provided housing often represents an unnecessary and oppressive restriction imposed by the SAWP arrangement.

III. The discriminatory origins of SAWP

[15] The Plaintiffs have included in the record a significant amount of evidence about the precursor policies and origin of the SAWP. This evidence is included in an effort to demonstrate that it was a combination of economic imperatives and racial prejudice that was at the heart of the precursor programs and that was among the motivating factors giving rise to SAWP in the 1960s.

[16] In particular, the record contains a lengthy affidavit from Victor Satzewich, a Professor of Sociology at McMaster University who has focused much of his scholarly research and writing on

the sociology of migration and Canada's history relating to immigration policy, multiculturalism, and race relations. Professor Satzewich demonstrates in his evidence that SAWP originated in an effort by Canadian government officials to assist farmers in filling their chronic labour shortages while, at the same time, keeping racialized workers from becoming a permanent part of the Canadian population.

[17] By way of illustration, Professor Satzewich produces a 1955 memo from the Director of the Immigration Branch to the Deputy Minister of Citizenship and Immigration stating explicitly that "[i]t has long been the policy of this Department to restrict the admission to Canada of coloured or partly coloured persons." This basic attitude was, according to government officials, an outgrowth of attitudes prevalent in Canada at the time, as demonstrated by Professor Satzewich in another 1950s-era memo prepared for the Departmental Advisory Committee on Immigration entitled "Admission of Coloured or Partly Coloured Persons." The memo, evoking the racially charged language of the day, explained that:

> This [exclusionary] policy is based on unfavourable experience with respect to negro settlements such as we have in Halifax, the generally depressed circumstances of the negro in Canada, and an understanding that the Canadian public is not willing to accept any such significant group of negro immigrants.

[18] The racial restrictions in immigration policy at large were, for the most part, aimed specifically at the Commonwealth countries of the Caribbean. The justification for such racial restrictions was most frequently premised on Canada's climactic conditions in comparison with people used to a more tropical climate, as illustrated by Professor Satzewich through yet another 1950s internal Department of Immigration and Citizenship memo:

> It is not by accident that coloured British subjects other than negligible numbers from the United Kingdom are excluded from Canada .... They do not assimilate readily and pretty much vegetate to a low standard of living. Despite what has been said to the contrary, many cannot adapt themselves to our climatic conditions.

[19] Professor Satzewich then demonstrates how the racially exclusionary policies carried over to the specific issue of migrant agricultural workers entering Canada. Early, pre-SAWP lobbying by farmers for more agricultural labourers to be admitted to Canada was met with refusals, as illustrated in a series of internal government memos and other communications found in the national archives:

> The admission to Canada of natives from the West Indies has always been a problem with this Service and we are continually being asked to make provision for the admission of these people. They are, of course, not assimilable and generally speaking, the climatic conditions of Canada are not favourable to them.
>
> [Letter from the Director, Immigration Branch to Deputy Minister of Labour, 29 March 1947]
>
> . . .

> Regarding the employment of Jamaican labour in Canada, the matter has been discussed with the Department of Labour and it is considered that there will not be any need to draw upon this source of labour. There are other factors in the matter which in our view would make it inadvisable to admit Jamaican labourers to Canada. These people are not assimilable and the climatic conditions of this country, speaking generally, are not favourable for them.
>
> [Letter from the Deputy Minister of Labour to the Director of the Immigration Branch, April 3, 1947]

[20] In the 1960s, as part of the debate as to whether to admit agricultural workers on a temporary, seasonal basis, the government of Canada ultimately conceded that workers of colour would have to be made admissible. But the condition imposed on this admission was that the presence of the agricultural workers in the country would be restricted in terms of time and place. Thus, Professor Satzewich shows that the tied employment and strict seasonality features of the SAWP have their origins in racially-oriented policy. The Deputy Minister of Citizenship and Immigration stated in an internal memo dated October 5, 1960 that his Department…

> …[found] it difficult to justify […] a policy by which we admit to seasonal work in Canada 2,000 to 3,000 US seasonal workers from the Carolinas (including, I would think, a fair proportion of US Negroes), while refusing to allow any Commonwealth fellow citizens from the West Indies to be included in that movement, - and this in spite of the fact that the U.S. people are apparently willing to have them included and to take them back again.

[21] Accordingly, the SAWP was designed to admit workers of colour, but to keep them strictly tied to a limited type of employment. Professor Satzewich points out that at the dawn of the SAWP, racist attitudes prevailed in ensuring that the workers be kept away from factories and other employment in urban settings where their social contacts could not be readily controlled through visa and employment restrictions.

[22] The policy, with its inherent racial stereotyping, was expressly articulated in a memo from a regional employment officer to the Director General of Manpower Services in the Department of Manpower and Immigration dated May 6, 1966, dismissing a suggestion that migrant labour be used for factory work in addition to agricultural work:

> These operations require a high content of female labour and to introduce Jamaican males into the plants and provide accommodation adjacent to that used by domestic female labour could create social difficulties. Moreover, the Jamaican male is adapted to field rather than factory work and while the processors felt that they could train them to the latter, it does not seem they could hope to staff plants entirely with this labour. These factors are not present in field employment. The Jamaicans are adapted to the work, the work units are smaller, and there need not be a male-female or even a Jamaican-domestic mix of male labour on any one operation.

[23] As Professor Satzewich again points out, these racist and sexist considerations led to the recommendation that any "experiment" with Jamaican workers be confined to the agricultural sector. He notes that in a follow-up piece of internal correspondence dated May 16, 1966, the Deputy Minister of Manpower and Immigration agreed with this recommendation. That agreement, voiced by officials of the responsible federal department, embodies the combined objectives opined upon by Professor Satzewich: that SAWP fulfilled its economic objective of providing Canadian farmers with the labour the needed, while keeping within explicitly racist and sexist social objectives:

> There are some obvious and very difficult problems involved in this proposition [that workers from the Caribbean be free to take employment in non-remote, urban settings]. Perhaps the most serious are the social difficulties that might develop when groups of Negroes are working among, and far outnumbered by, Canadian female workers.

[24] The SAWP came into existence in 1966 and initially operated only between Canada and the Commonwealth Caribbean countries. By the 1970s, this labour did not suffice Canadian farmers' needs and, in addition, had become relatively expensive as wages rose for the seasonal workers. A movement developed to expand the SAWP to include workers from Mexico, incorporating many of the policy objectives and attitudes that had accompanied to original Commonwealth Caribbean-oriented program.

[25] In particular, the poverty-level subsistence of Mexican agricultural workers was seen as a benefit to the program that could not be provided by worker immigrants from European countries. A 1973 task force report by the Department of Manpower and Immigration entitled "Report on the Seasonal Farm Labour Situation in Southern Ontario" found:

> The Department can control to some extent the living and working conditions of people whom we bring in under the…Caribbean Program. It can also, by bringing the Mexican seasonal farm labour movement…under control by applying conditions similar to those in the Caribbean Program…
>
> . . .
>
> One of the Canadian farmers who is most vocal about the Department's services is a prosperous tomato and cucumber grower employing Mexicans. What he told us, when speaking of accommodation provided for Mexicans on his farm, was to the effect that 'they live like pigs (his word) in Mexico, and if we gave them anything better here, they would feel uncomfortable'.

[26] In Professor Satzewich's view, the 1974 inclusion of Mexico in the SAWP was done for the purpose of "ensuring that farmers continued to have access to suitable supplies of offshore labour, and to undermine the bargaining power of Caribbean governments by introducing more competition between countries that supplied seasonal agricultural workers for Canada." He marshals significant primary sources to support his analysis that entering a new MOU with Mexico

and including workers from that country in the SAWP was in great part premised on the reality of Mexican workers' poverty and the stereotype of Mexican labour being unschooled.

[27] The evidence in the record shows that the addition of Mexico to the SAWP secured for the agricultural sector a potentially supply large numbers of workers. It further demonstrates that the increase in numbers was hoped by Canadian officials to reduce pressure coming from Caribbean countries to achieve improved terms of contract from Canadian employers.

[28] In a brief sent by the Director of the Manpower and Employer Services Branch to the Director of the Programs and Procedures Branch dated September 17, 1974, the newly added Mexican workers were discussed not as immigrants with aspirations of their own, but as commodities to be used and discarded by Canadian employers:

> The signing of the Mexican arrangement not only gives us an alternative source of supply of agricultural workers but it also acts as a balancing force to the Caribbean supply… But taken together the present Caribbean and Mexican arrangements assure us of a virtually unlimited supply of workers

[29] Before leaving the topic of the original policy underlying the SAWP, I will observe that, in addition to the departmental memos and other written archival sources quoted above, Professor Satzewich's affidavit and the Plaintiff's Statement of Claim both quote from a number of statements by members of Parliament made during parliamentary debate attesting to the racially discriminatory origins of the program. Counsel for the Crown seeks to strike these statements on the grounds of parliamentary privilege.

[30] It is the Crown's position that any Parliamentary reports or words spoken or statements made in Parliament are subject to privilege and cannot be made part of the present court record. Crown counsel references recent case law from the Federal Court to the effect that, "Parliamentary privilege is a well-established privilege with a long history. It is a fundamental aspect of Canadian constitutional democracy": *Thompson v. Canada*, 2024 FC 1752, at para. 19.

[31] As an example of the words and documents in issue, the Statement of Claim and Professor Satzewich both cite a November 1966 statement made in Parliament by the Minister of Immigration at the time, Jean Marchand. With respect to European immigrant workers, the Minister said:

> …I am not prepared to enslave immigrant workers who have come to Canada. Even if you hire unskilled labour abroad for the mining industry, where there is a shortage right now, there is nothing that can assure us they are going to stay there, because they will not. If the working conditions are poor, or the wages too low, they will move to Toronto or Montreal and then we will have the problem. We cannot enslave them. I am opposed to this form of contract saying to an immigrant: 'You are going to work in that mine and you will have to work there for three years.' I do not think we should do that.

[32] The pleading goes on to state that "Minister Marchand made these comments rejecting tied employment…in the very same year that he promulgated the SAWP that subjected a group of Jamaican farmworkers to precisely this 'form of contract'." Professor Satzewich's affidavit contains a similar narrative.

[33] Although the Crown claims privilege over these statements, I would say with great respect that it is obvious that Minister Marchand's statements are not produced by the Plaintiffs for the truth of their contents. It is equally obvious that the "opinion" that follows the quote is not a subjective opinion. These statements appear in the pleading and in the evidence for nothing more than to demonstrate that the words were said at a certain time and place, and in relation to the implementation of a public policy. The point is that the historical record contains this statement, and not that the statement can be relied on as true, false, or anything in between.

[34] Counsel for the Plaintiffs submit that there is nothing in the modern law of evidence that prohibits this kind of evidence drawn from parliamentary records. While it is true that the doctrine of parliamentary privilege is a long established one, it is equally true that, "Some parliamentary documents, like parliamentary debates, are admissible for proof of uncontroversial facts and for statutory interpretation": *Thompson*, *supra*, at para. 21, citing *Alberta v Canadian Copyright Licensing Agency (Access Copyright)*, 2024 FC 292, at para 131.

[35] The content of what Minister Marchand is quoted as saying is indeed controversial; in fact, today one could consider the racist connotations of his speech to be outrageous. But the fact that he said it, and that he said it nearly simultaneously with his endorsement of the SAWP, is not controversial. It is historical fact.

[36] The law of evidence overall is fashioned to guard against courts relying on unproven or unreliable sources, and parliamentary privilege fosters free debate among parliamentarians without them having to restrict themselves to what can be strictly proven. But neither the law of evidence in general, nor the doctrine of privilege in particular, is fashioned to help parties obscure facts. As Lord Keith of Kinkle put it in *Prebble v. Television New Zealand Ltd*., [1994] 3 All ER 407, 418 (PC), "…there ca no longer be any objection to the production of Hansard…to prove what was done and said in Parliament as a matter of history."

[37] In short, Minister Marchand said what he said when he said it. The purpose of the rule of Parliamentary privilege, according to the Supreme Court of Canada, is to ensure that "[t]he courts…are careful not to interfere with the workings of Parliament": *Canada (House of Commons) v. Vaid*, [2005] 1 S.C.R. 667, at para. 20. Its purpose is not, however, to sanitize the historical record or to hide from the public the workings of Parliament.

[38] Having said all of that, everything that the Crown challenges in the pleading and in Professor Satzewich's affidavit is, thematically speaking, icing on the cake. Canada's archives contain Immigration and Employment department memoranda, communications among civil servants, public policy briefings by sub-ministerial departmental staff, and public announcements and press releases by government ministers that are not part of any Parliamentary record, but that demonstrate the very same type of statements as the politicians of the day were making in

Parliament. The Ministerial and other statements from the Parliamentary record add to this evidence, but are not strictly necessary to make Professor Satzewich's overall point.

[39] The totality of evidence compiled in Professor Satzewich's report supports his conclusion that the SAWP was built in the 1960s and 1970s around the stereotyping and prejudice held against racialized workers from the Caribbean, and the stereotyping and exploitation imposed on workers from Mexico. It also provides a foundation, or some basis in fact, for the Plaintiffs' contention that these discriminatory attitudes persist until today in the practices imposed by the SAWP.

IV. Employment Insurance

[40] The Crown's deponent, Mathew Lafrance, an economist and manager at Employment and Social Development Canada, has deposed that the purpose of the federal Employment Insurance program ("EI"), as created and authorized by the *Employment Insurance Act*, SC 1996, c. 23 ("*EI Act*"), is to provide temporary income support and employment assistance for a discrete period to eligible persons who lose or who voluntarily take time away from their employment due to life events. EI is intended to financially assist people who are out of work as well as to assist workers in their return to the labour force.

[41] Mr. Lafrance further deposes that the EI program is designed in keeping with the principle of universal coverage. Pursuant to sections 67-68 or the *EI Act*, every worker in insurable employment is required to pay EI premiums, and each worker pays commensurately with their salary level. As Mr. Lafrance explains it, workers and employers are required to pay premiums regardless of the expected hours of work, and premiums are payable regardless of whether the worker eventually makes a claim or expects to be making a claim.

[42] The EI program's finances are administered through the "EI Operating Account", which counsel for the Crown describes as a specified purpose account in the Public Accounts of Canada. It is not, however, a segregated account or a segregated pool of funds. Mr. Lafrance explains that the EI Operating Account is a notional account that operates on a system of credits and debits. EI premium payments are all deposited into the Consolidated Revenue Fund of Canada, although on paper they are credited to the EI Operating Account. Likewise, all expenses paid in the administration of the EI program are paid from the Consolidated Revenue Fund, but on paper are charged and debited to the EI Operating Account.

[43] The program is generally self-sufficient in that the premium contributions cover the payment of benefits; in fact, a new EI premium rate is set annually such that the projected premium contributions collected by the end of each designated economic period (generally seven years) equals the projected total spent in administering the EI program for that particular period. But all of that is a matter of bookkeeping only. The funds contributed by workers to the EI program are intermingled with the rest of the government's revenues, and are available for all other government purposes; likewise, general tax revenue and all other money held in the Consolidated Revenue Fund are available to meet EI payment obligations. EI funds are neither held in trust for the program nor segregated and handled separately from any other public funds.

[44] Counsel for the Crown has gone out of its way to emphasize that the fact that a premium payer works in insurable employment does not automatically entitle that person to receive EI benefits when they become unemployed. Unemployed workers may receive EI benefits only if they apply for those benefits and meet the entitlement conditions as set out in sections 7, 8, 9, 10, 48, and 49 of the *EI Act*. Being a premium payer does not, in itself, make anyone eligible for EI benefits. Sections 18(1), 50(1) and 50(8) of the *EI Act*, and sections 0.001 and 9.002(1) of the Employment Insurance Regulations, SOR/96-332, make it clear that no one becomes eligible for any type of EI payment just because they have contributed EI premiums.

[45] Another of the Crown's deponents, Deanne Field, the executive director of the Workers and Employers Directorate within Service Canada, has deposed that to receive regular EI benefits, temporary foreign workers must first demonstrate their availability for work with a valid work permit. According to Ms. Field, an EI officer considers all other relevant factors with respect to a SAWP applicant for EI, just as the officer would assess availability for work with any other claimant. Ms. Field also emphasizes that nothing in the SAWP terms, including the temporary resident visa, the MOUs, and the SAWP Contracts, precludes a SAWP worker from receiving EI benefits.

[46] Having said that, it is equally clear that SAWP work permits cannot be renewed in Canada. Accordingly, any SAWP worker who is out of work and in need of EI payments will be on their way home if a new SAWP employer cannot be found to obviate the need for EI payments. Plaintiffs' counsel submit that under these circumstances, the SAWP worker's supposed eligibility for EI on the same terms as all other EI premium payers is a theoretical eligibility only. From the Plaintiffs' perspective, since the benefit of EI cannot be realized, the payment of EI premiums is unjust.

V. Certification

[47] Section 5(1)(a) of the *CPA* sets out the well-known five-step process for analyzing a motion to certify a proposed class action. The onus is on the Plaintiffs to establish "a minimum evidential basis for a certification order": *Hollick v Toronto (City),* [2001] 3 SCR 158, at para. 24. The Plaintiffs must therefore "show some basis in fact for each of the certification requirements," other than for section 5(1)(a) which is "governed by the rule that a pleading should not be struck for failure to disclose a cause of action unless it is 'plain and obvious' that no claim exists": *Ibid*., at para. 25.

[48] The following analysis will follow the sequence of steps for certification set out in section 5(1)(a).

a) Section 5(1)(a) – cause of action

[49] The Statement of Claim pleads three causes of action: breach of section 7 of the *Charter*, breach of section 15(1) of the *Charter*, and unjust enrichment.

[50] As indicated, the causes of action as pleaded must be shown to pass the low bar of a 'plain and obvious' test under section 5(1)(a).

i) Breach of section 7

[51] The Plaintiffs have pleaded that the government's conduct "interferes with, or deprives them of, their life, liberty or security of the person" and that "the deprivation in question is not in accordance with the principles of fundamental justice."

[52] More specifically, the Plaintiffs plead that by curtailing workers' freedom to move freely between employers and choose where they reside, the SAWP terms impinge on their liberty interests. They also plead that the terms of their participation in SAWP infringe their security of the person in that they limit their ability to change employers, require them to reside with their employers or in employer-designated housing, make them especially vulnerable to termination, and create undue reliance on their employer "naming" to return.

[53] The Plaintiffs further plead that these restrictions on liberty and security were adopted in the SAWP for racist and discriminatory reasons – an objective that is not in accordance with fundamental justice. Moreover, the Statement of Claim alleges that even if the objective is found to be the legitimate one of filling seasonal agricultural labour shortages, the deprivations of liberty and security are arbitrary and disproportionate to that objective and impose harmful impacts that are overbroad.

[54] The Supreme Court of Canada has found in a number of different contexts that state action that prevents vulnerable individuals from protecting themselves from further risk or harm engages individuals' security rights: see *Canada (Attorney General) v. Bedford*, 2013 SCC 72, at paras. 59-60, 64, 67, 71; *Chaoulli v. Quebec*, 2005 SCC 35, at paras. 116-119. The Supreme Court has also recognized the particular vulnerability of agricultural workers due to their isolation and exclusion from statutory protections available to other workers in Canada: *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, at paras. 41-43.

[55] The Plaintiffs plead that this exposure is increased by the inherent power that employers have under the SAWP toward migrant farmworkers. Plaintiffs' counsel note that the Human Rights Tribunal of Ontario has commented on this power imbalance, opining, in *obiter*, that "the structure of the SAWP is such as to create one of the primary conditions of vulnerability" for the workers: *Peart v. Ontario*, 2014 HRTO 611, at para. 273.

[56] It is the Crown's view that participation in SAWP is not compelled, but rather is a choice that workers make. The Crown also contends that the SAWP contract and regulatory measures cannot be said to be the sole cause of the workplace harms pled by the Plaintiffs. The Plaintiffs respond that while these points may or may not be factually correct, they are not legally relevant.

[57] The Supreme Court stated in *Bedford*, at para. 76, that the applicable causal standard "does not require that the impugned government action or law be the only or the dominant cause of the prejudice suffered by the claimant, and is satisfied by a reasonable inference, drawn on a balance of probabilities." The Court emphasized, at para. 87, that "[t]he causal question is whether the impugned laws make this…activity more dangerous." Like the applicants in Bedford, the Plaintiffs are not seeking affirmative measures to make their employment safe; rather, their pleading is

structured to seek the striking down of legislative provisions, including a legislatively mandated contract, that increases their risk of serious harm. This pleading is squarely within the protection of personal dignity afforded by section 7 of the *Charter*: *Godbout .v Longueuil (City)*, [1997] 3 SCR 844, at para. 66.

[58] The Plaintiffs also plead that their section 7 interests are impinged by the SAWP Contract's denial to them of the right to choose where to live. This pleading likewise builds on existing Supreme Court case law. For example, in *Godbout*, at para. 66, the Court held that a municipal employee's liberty interest was engaged by a term of employment that required residency within the municipality.

[59] More recently, in *Drover v. Canada (Attorney General)*, 2025 ONCA 468, the Court of Appeal addressed the requirement under the *Elections Act* that returning officers reside in the riding where they are appointed. The Court found, at para. 131, that "an individual's right to decide where to live is essential to maintain personal autonomy and dignity, and it therefore falls within the core sphere of deeply personal decisions protected by s. 7."

[60] The allegations made in the Statement of Claim are supported by numerous illustrations and particulars, all of which track the section 7 case law. The pleading asserts that the impugned state action reflects the kind of arbitrariness, disproportionality, overbreadth, and discriminatory intent and impact that is prohibited under section 7 of the *Charter*. In light of this pleading, one cannot say that it is "plain and obvious" that the section 7 claim will not succeed.

[61] The test for a sustainable cause of action for certification is met by the Plaintiffs' pleading under section 7.

ii) Breach of section 15(1)

[62] In *R. v. Sharma*, [2022] 3 SCR 147, at para. 28, the Supreme Court summarized and restated the approach to a section 15(1) claim, as follows:

>]28] The two-step test for assessing a s. 15(1) claim…requires the claimant to demonstrate that the impugned law or state action:
>
> > (a) creates a distinction based on enumerated or analogous grounds, on its face or in its impact; and
> >
> > (b) imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage (*R. v. C.P.*, 2021 SCC 19, [2021] 1 S.C.R. 679, at paras. 56 and 141; *Fraser v. Canada (Attorney General)*, 2020 SCC 28, [2020] 3 S.C.R. 113, at para. 27; *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548, at paras. 19-20).

[63] The goal of any section 15(1) analysis is "to examine the impact of the harm caused to the affected group": *Fraser v. Canada (Attorney General)*, [2020] 3 SCR 113, at para. 76. The crucial point here is that it is the impact of the state action, regardless of the intention, that is the focus of the inquiry: *Quebec (Attorney General) v. A*, [2013] 1 S.C.R. 61, at para. 329. Accordingly, "[t]he perpetuation of disadvantage…does not become less serious under s. 15(1) simply because it was relevant to a legitimate state objective": *Fraser*, at para. 79.

[64] The Plaintiffs plead that the burdens on workers imposed under the SAWP discriminate based on the enumerated grounds of race, nationality, and ethnicity. They also plead that the SAWP discriminates on the analogous ground of citizenship: *Lavoie v. Canada*, [2002] 1 SCR 769, at para. 39; *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143, at 183. Conditions specific to the SAWP, including enforced seasonality, are imposed only on predominantly racialized workers from the Caribbean and Mexico.

[65] Although a s. 15(1) claim does not require discriminatory intent, the Plaintiffs have also pleaded, and have referenced ample particulars, that these burdens were specifically imposed in furtherance of racist and discriminatory objectives. It is well established that when analyzing the constitutionality of a legislative policy, it is the original intent of the legislation that is of prime importance; "[p]urpose [of the legislative program] is a function of the intent of those who drafted and enacted the legislation at the time, and not of any shifting variable": *R. v. Big M Drug Mart Ltd*., [1985] 1 SCR 295, at para. 91. The racially discriminatory origins of the SAWP cannot be discounted in analyzing the section 15(1) issue today.

[66] The Statement of Claim also sets out in considerable detail what the Plaintiffs characterize as the ongoing discriminatory impact of the SAWP. Those elements of the pleading have been summarized by Plaintiffs' counsel in their factum:

> [The Statement of Claim] pleads that that SAWP workers:
>
> a. are restricted in their ability to move freely between employers, exacerbating their risk of harm and abuse;
>
> b. are contractually obligated to reside at their employer's premises, reinforcing segregation and social isolation based on race and nationality; and
>
> c. despite paying into the EI regime, are structurally excluded from EI benefits, due to being required to leave Canada for the months that they are unemployed. This pattern of exclusion is repeated annually, with some Class Members spending their entire careers on Canadian farms, paying EI premiums every year, yet barred from receiving EI benefits during their seasonal unemployment. Notably, Canada permits workers to collect EI benefits while residing in the United States, but not in Mexico or the Caribbean.

[67] The pleading tracks the section 15(1) case law in that the distinctions created by the SAWP are alleged to perpetuate and reinforce historical disadvantage and prejudice faced by SAWP workers. The policies embedded in SAWP are pleaded as systematically denying the rights of

vulnerable workers who have historically been subject to racist stereotypes and prejudicial treatment.

[68] The pleading also alleges that the continued imposition of discriminatory terms in the SAWP perpetuates the racist policy objectives that motivated the creation of the SAWP in the first place – i.e. to prevent integration of racialized farmworkers from the Caribbean, and later Mexico, into Canadian society. The conditions imposed in the SAWP perpetuate prejudice this racialized population, and further exacerbate the disadvantages they have historically faced.

[69] Accordingly, a tenable s. 15(1) claim is pleaded that crosses the section 5(1)(a) threshold.

iii) Unjust enrichment

[70] In *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, [2013] 3 SCR 477, at para. 85, the Supreme Court stated: "The well-known elements required to establish an unjust enrichment are (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason (such as a contract) for the enrichment" [citations omitted].

[71] The Plaintiffs plead that by requiring workers to return home immediately at the end of the eight-month work period, Canada systematically excludes SAWP workers from accessing EI benefits despite requiring them to pay EI premiums. The part of the Statement of Claim dealing with EI adequately pleads the factual basis for an unjust enrichment claim: an enrichment and corresponding deprivation.

[72] The Plaintiffs also plead that there was no juristic reason for this deprivation. They contend that while provisions of the *EI Act* may appear to supporting this deprivation, the provisions of the *EI Act* are discriminatory and contrary to s. 15 of the *Charter* when applied to SAWP workers.

[73] In this respect, the pleading follows the logic of *Alberta v. Elder Advocates of Alberta Society*, [2011] 2 S.C.R. 261. There, the Supreme Court found that an unjust enrichment claim that pleaded the lack of a juristic reason based, in part, on an underlying s. 15 *Charter* violation, was viable: *Ibid*., at para. 81.

[74] To reiterate the essential point of the section 5(1)(a) analysis, the Plaintiffs need not prove themselves right at this stage, and the presence or absence of evidence supporting their claim does not get taken into account here. It is only the pleading of material facts that matters at this stage.

[75] The Plaintiffs plead that the restrictions imposed by the SAWP Contract and the *EI Act* infringed s. 15 of the *Charter* when applied to SAWP workers, and wrongfully deprive them of economic benefits. In the alternative, the Plaintiffs plead that the relevant provisions of the *EI Act* infringe s. 15 of the *Charter*, when applied to SAWP workers, based on their discriminatory effects: See *Fraser*, *supra*.

[76] Each element of unjust enrichment has therefore been validly pleaded, and there is no basis on which to conclude that this it is plain and obvious that this cause of action cannot succeed.

[77] The cause of action in unjust enrichment is tenable and passes the threshold test for certification as set out in section 5(1)(a) of the *CPA*.

b) Identifiable class – section 5(1)(b)

[78] The Plaintiff requests certification of a class defined as follows:

> Current and former agricultural workers who are or were employed in Canada on a contract basis under the Seasonal Agricultural Workers Program (SAWP) on or after January 1, 2008.

[79] The requirements for a proposed class are well established. The Supreme Court of Canada stated in *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 SCR 534, at para. 38, that "[t]he definition should state objective criteria by which members of the class can be identified... [and] should bear a rational relationship to the common issues asserted by all class members." Additionally, the class definition must be in terms that are "not unnecessarily broad – that is, that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue": *Hollick*, supra, at para. 21.

[80] Both Plaintiffs are members of the proposed class. The definition set out above is objective, and makes no reference to the merits of the claim. The definition also facilitates identification by the parties as well as self-identification by class members. In fact, the federal government has already identified precisely 74,785 individuals who are members of the class, and has produced a class list with each member's personal information.

[81] In addition, the proposed class definition is also rationally connected to the proposed common issues and is not overbroad. The contours of the class readily match the scope of the proposed common issues since the proposed common issues relate to the constitutionality of common terms and conditions imposed on each and every class member.

[82] The class definition as proposed by the Plaintiffs satisfies the requirements of a certifiable class under section 5(1)(b) of the *CPA*.

c) Common issues – section 5(1)(c)

[83] The test for certifying common issues represents a relatively low bar: *Carom v. Bre-X Minerals Ltd*., (2000), 51 OR (3d) 236, at para. 49 (CA). For example, "[a]n issue can constitute a substantial ingredient of the claims and satisfy s. 5(1)(c) even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution": *Cloud v. Canada (Attorney General)* (2004), 73 OR (3d) 401 , at para. 53 (CA). As the Supreme Court has explained it, "[t]he underlying question is whether allowing the suit to proceed as a [class proceeding] will avoid duplication of fact-finding or legal analysis: *Dutton*, *supra*, at para. 39.

[84] Furthermore, the answer to any of the common questions does not need to be identical for all class members of the class or benefit each class member to the same extent – "the answer to

the question could be nuanced to reflect individual claims": *Vivendi Canada Inc. v. Dell'Aniello*, [2014] 1 SCR 3, at para. 44. As the Court of Appeal has explained it, "common issues need not establish liability or eliminate individual trials; they need only advance claims in some meaningful way": *Carcillo v. Ontario Major Junior Hockey League*, 2025 ONCA 652, at para 45.

[85] The following is the Plaintiffs' list of proposed common issues:

> ***Charter* claims**
>
> (1) Did the conditions imposed by the defendant on the Class Members in the Seasonal Agricultural Workers Program ("SAWP") and/or the Temporary Foreign Workers Program – Agricultural Stream ("TFWP-Agricultural Stream") breach the Class Members' rights:
>
> a) under s. 7 of the *Charter*?
>
> b) under s. 15 of the *Charter*?
>
> (2) If the answer to common issue (1a) and/or (1b) is "yes", can the breach(es) be saved by s. 1 of the *Charter*?
>
> (3) If the answer to common issue (2) is "no", are damages pursuant to s. 24(1) of the *Charter* a just and appropriate remedy for the Class?
>
> (4) If the answer to common issue (3) is "yes", can the court make an aggregate assessment of *Charter* damages owed to all Class Members as part of the common issues trial? If so, in what quantum?
>
> **Unjust enrichment**
>
> (5) Was Canada unjustly enriched by its receipt of Employment Insurance premiums in respect of the Class Members' employment through the SAWP and/or the TFWP-Agricultural Stream?
>
> (6) If the answer to common issue (5) is "yes", is restitution and/or disgorgement of Employment Insurance premiums to Class Members an appropriate remedy?
>
> (7) If the answer to common issue (6) is "yes", can the court make an aggregate assessment of the Employment Insurance premiums to be disgorged to Class Members and/or the quantum of restitution as part of the common issues trial? If so, in what quantum?
>
> **Punitive damages**
>
> (8) Does the defendant's conduct justify an award of punitive damages to the Class? If so, in what quantum?

[86] The first group of four proposed common issues ask whether the SAWP breaches the *Charter* and whether damages under s. 24(1) can be awarded. Given that the Plaintiff has pleaded valid causes of action under sections 7 and 15(1) of the *Charter*, the questions about liability and damages for breach of those sections logically flow from the pleadings. In addition, the evidentiary record establishes some basis in fact for these liability and damages questions to be raised: *Pro-Sys*, *supra*, at para. 118.

[87] The collective or common nature of the section 15(1) questions is self-evident. The essence of the challenge to the SAWP is that the program's terms – both the contract terms and the legislative/regulatory terms – are not only oppressive, but are specifically imposed on racialized workers from Caribbean countries and Mexico. The impugned contract and legislative terms apply equally and identically to every SAWP participant, with no individual differentiation in experiences. They also are uniformly more oppressive than the legislative and other terms imposed on other work permit holders.

[88] The section 7 challenge addresses features of the government-mandated SAWP Contract that are also uniformly shared by each class member. One cannot participate in the SAWP or come to Canada as part of SAWP without signing a SAWP Contract, and the SAWP Contract is identical for every participant.

[89] The deprivations claimed as breaches of section 7 of the *Charter* (curtailing freedom to change employers, requiring workers to reside with their employers, imposing the risk of repatriation with termination of employment, and requiring workers to work on a seasonal basis and to leave Canada after the contract term ends) originate in contractual terms imposed by government, from the top down, in common on all class members: see *Brazeau v. Attorney General (Canada)*, 2019 ONSC 1888, at paras 336-352; *Francis v. Ontario*, 2020 ONSC 1644; *Reddock v. Canada (Attorney General),* 2019 ONSC 5053, at para 281.

[90] In terms of damages, *Charter* damages generally embody the objectives of vindication and deterrence. Accordingly, the focus of the analysis is on the alleged wrongdoer's conduct. This points to the damages issues being uniformly applicable to all class members. It also could allow damages under s. 24(1) of the *Charter* to be to be awarded on an aggregate basis without individualized inquiries. As the Court of Appeal observed in *Good v. Toronto (Police Services Board)* (2016), 130 OR (3d) 241, at para. 75, "it would be open to a common issues judge to determine that there was a base amount of damages that any member of the class (or subclass) was entitled to as compensation for breach of his or her rights."

[91] These section 15(1) and section 7 issues, together with the damages issues flowing therefrom, all represent a substantial element in each class member's claim. Their resolution at a common issues trial will determine liability as well as entitlement to and, potentially, quantum of aggregate damages. They certainly pass the threshold test of commonality and basis in fact, and will help advance the proceeding in a significant way.

[92] Proposed common issues 5 through 7 ask the Court to determine entitlement to declaratory relief as well as monetary relief on an aggregate basis for unjust enrichment. They reflect the

Plaintiffs' allegation that the government of Canada wrongly collected EI premiums in respect of SAWP workers, while it at the same time structured the SAWP so that workers in it cannot receive EI benefits.

[93] As already discussed, counsel for the Crown disagree with this view and submit that it is a product of a misunderstanding of the way EI works for everyone, including and beyond the SAWP workers. At this stage it need not be determined which side is right and which side is wrong in this argument. The point is that the EI policy requires workers whose job has terminated to be available for new work, while the SAWP policy requires workers whose job has terminated to leave Canada at the end of their visa term. There is certainly at least "some basis in fact" to support the unjust enrichment common issues questions.

[94] Resolving these issues on a common basis will advance the action for all parties. For this reason, the Court of Appeal has stated that "there is ample authority establishing that unjust enrichment can constitute a common issue": *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443, at para. 106, citing *Smith v. National Money Mart Co*., [2007] O.J. No. 46, 37 C.P.C. (6th) 171 (S.C.J.), leave to appeal refused [2007] O.J. No. 2160, 30 E.T.R. (3d) 163 (Div. Ct.); *McCutcheon v. The Cash Store Inc*. (2006), 2006 CanLII 15754 (ON SC), 80 O.R. (3d) 644, [2006] O.J. No. 1860 (S.C.J.).

[95] Turning to the final proposed common issues question, there is little doubt that the issue of punitive damages applies equally to all class members. As the British Columbia court pointed out in *Endean v. Canadian Red Cross Society*, 1997 CanLII 2079, at para. 48 (BC SC), and has often been repeated in Ontario and elsewhere, "An award of punitive damages is founded on the conduct of the defendant, unrelated to its effect on the plaintiff."

[96] The SAWP Contract terms and legislative requirements do not deviate from one class member to another. Since the common issues trial judge will be in a position to determine at least part of the compensatory damages owed to the class without individual examinations, the judge will also be in a position to consider the appropriateness, one way or the other, of an award for punitive damages: see *Good*, *supra*, at para. 81.

[97] All of the proposed common issues focus on a common set of conditions imposed on all class members in the SAWP. They predominate over any individual issues in the action.

[98] The breaches alleged are systemic and apply across the class. The *Charter* claims focus on state action in imposing oppressive and liberty-restricting terms in the SAWP Contracts and legislation/regulation. Likewise, the unjust enrichment claim arises from a set of facts imposed by legislation and held in common by all class members – i.e. the payment of EI premiums, accompanied by restrictions imposed in the EI scheme and the SAWP that prevented access to EI benefits.

[99] Accordingly, the common issues as proposed by the Plaintiffs meet the applicable test under section 5(1)(c) of the *CPA*.

d) Preferable procedure – section 5(1)(d)

[100] As a general matter, an analysis of preferability under section 5(1)(d) of the *CPA* is conducted with a view to accomplishing any of the three goals of class action litigation: judicial economy, behaviour modification, and access to justice: *Hollick*, at para. 27. This often entails a comparative analysis of the proposed class proceeding with other available types of proceedings.

[101] As indicated in the introduction to these reasons, there is a parallel case commenced in Quebec which is already somewhat more procedurally advanced than the present action. The Crown takes the view that the *Quebec Action*, *supra*, is the preferable procedure as it is already well underway and more than covers the issues raised by the present claim.

[102] While the preferability analysis does not turn on which action was started first, the stage and likelihood of progress does factor into question: *Kirsh v. Bristol-Myers Squibb*, 2020 ONSC 1499, at para. 101. The question for now is not whether an alternative procedure exists, but whether the present action is the preferable one.

[103] On September 13, 2024, the Quebec Superior Court determined that the *Quebec Action* meets the criteria set out in art. 575 of the *Code of Civil Procedure*, CQLR c C-25.01, and authorized it to proceed as a class proceeding. The court in the *Quebec Action*, at para. 1, has defined the class as national in scope:

> Any person who (a) on or after April 17th, 1982, worked in Canada as a foreign national (i.e. without being a Canadian citizen or a permanent resident of Canada at the time, and including a stateless person) and (b)(i) was issued a work permit conditional on engaging in work for a specific employer or group of employers or at a specific employer workplace location or group of locations; or (ii) was allowed to work without a work permit as a result of being employed by a foreign entity on a short-term basis or as a result of being employed in a personal capacity by a temporary resident, including a foreign representative.

[104] The Court summarized the relief sought and the substance of the claim in the *Quebec Action*, at para. 3:

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

[105] The Quebec plaintiff's claim takes aim at any and all "employer-tying measures" affecting any temporary foreign workers in Canada, regardless of the program through which they are admitted, and seeks to have those measures declared unconstitutional. Thus, the certified class in the *Quebec Action* includes, but goes significantly beyond, SAWP workers.

[106] The *Quebec Action*'s focus is the imposition of tied employment through the *IRPR*, which potentially impacts on visa holders employed in many different industries and economic sectors. It encompasses not only seasonal workers, but all visiting workers on virtually any employment visa.

[107] The class period that it defines stretches back to the dawn of the *Charter* era in 1982. Counsel for the Plaintiffs and for the Crown both concede that the class is a massive one – potentially numbering in the hundreds of thousands or even millions – and that compiling the evidence for the claim, covering a large variety of visa and employment contexts, will be a monumental task. I understand that although the authorization ruling is now a year and a half old, the *Quebec Action* is nowhere close to going to trial.

[108] Compared to the *Quebec Action*, the present claim is narrowly circumscribed. The class is limited to only one type of work permit/employment visa holder – seasonal agricultural workers – whose identities are not difficult to track and whose total number is known to all parties: 74,785 members, stretching back to the beginning of the class period in 2008. The narrow class definition means that much of the expert evidence has already been compiled for the certification process.

[109] That said, the two actions clearly overlap. Although the SAWP is but one of many foreign worker programs ensnared by the claim in the *Quebec Action*, the reasons for decision in the authorization motion make a number of references to it. In the section of those reasons describing the impugned legislation and its history, the Quebec court makes the following observations, at paras. 23-25, 27 [citations omitted]:

> **LEGISLATIVE FRAMEWORK**
>
> . . .
>
> 23. The TFWP [Temporary Foreign Worker Program] and the IMP [International Mobility Program] are subdivided in several streams with diverse requirements and operating procedures which includes, the Seasonal Agricultural Worker Program (SAWP) where the employers can hire temporary foreign workers from participating countries for a maximum period of 8 months for activities related to on-farm primary agriculture.
>
> 24. Under the SAWP, the Government of Canada imposes a standard, non-modifiable contract of employment to the temporary foreign worker.

HISTORY OF PROVISIONS

> 25. Employer-tying measures were first built into the initial iteration of the SAWP in 1966, which provided for the hiring of temporary agricultural workers from Jamaica.
>
> . . .
>
> 26. The basic features of the SAWP and NIEAP [Non-Immigrant Employment Authorization Program] still exist in the modern-day TFWP: among other things, workers are bonded to a specific employer and hiring is limited by various requirements for employers, including a requirement to demonstrate labour market needs.

[110] It is the Crown's submission that the SAWP aspect of the claim is an integral part of the *Quebec Action*, and that that action is the most advantageous place for the claim to be litigated. The Crown points out that the British Columbia courts have specifically rejected the argument that where "a second action was filed on a much narrower set of facts than the first", a new and non-duplicative claim was thereby created: *Reid v. Google LLC*, 2022 BCSC 158, at para. 149, aff'd 2023 BCCA 350. In the context of a carriage motion – an analogous context, but where competing cases are both in the same jurisdiction – two factually similar claims, although not identical in the way that they overlap, can be considered to be the same case, especially where the second one "sought to subtract rather than add facts": *Las Vegas Strip Ltd. v. Toronto (City)* (1996), 30 OR (3d) 286, at 297 (Gen. Div.), aff'd (1997), 1997 CanLII 3841 (CA).

[111] The Plaintiffs, of course, advocate litigating the SAWP claim in Ontario rather than have it packaged together with other types of claims in the *Quebec Action*. As indicated at the beginning of these reasons, Plaintiffs' counsel, in coordination with Quebec class counsel, have proposed a partial stay of proceedings such that the SAWP part of the *Quebec Action* will not be pursued pending the outcome of the present action.

[112] Counsel for the plaintiffs in the *Quebec Action* has appeared at this motion to explain that if and when this case is certified, his client will move for a stay in Quebec Superior Court; and that stay will not be lifted until the Ontario action is resolved. Since the difference between the two actions is more one of scope than substance, the rest of the *Quebec Action* would carry on without being prejudiced while avoiding any duplication with the present action.

[113] Counsel for the Attorney General in the *Quebec Action* submits that it is not at all clear whether the Quebec court would grant such a stay. She indicates that the grounds for a stay of proceedings under the *Civil Code* may not be met under the present circumstances. By contrast, counsel for the plaintiff in the Quebec Action is more confident that a stay will be granted.

[114] I do not profess to have any special insight into the civil law of our neighbouring province beyond what both sides' counsel in the *Quebec Action* helpfully explained to me at the hearing. However, I do note that in *Micron Technology Inc. v. Hazan*, 2020 QCCA 1104, the Quebec Court

of Appeal rejected a similar application for a stay of a Quebec class action in favour of a class action in Federal Court. The Court explained that before staying a *Quebec Action* on the grounds that there is a similar action in a different jurisdiction, it would look very closely at all of the factors, including, at para. 52, "[a] *difference in the scope* of the proposed class action in the two cases" [emphasis added].

[115] For SAWP workers, unlike temporary foreign workers more generally, the inability to change employers arises from the combined effect of work permits that limit workers to approved SAWP employers, and provisions of the SAWP Contract. As discussed earlier in these reasons, the present claim challenges an array of conditions imposed by the SAWP Contract, including residence requirements, termination provisions, enforced seasonality, and the denial of Employment Insurance benefits. Those SAWP conditions are only imposed on the class members in the present action, who represent a rather small percentage of class members in the *Quebec Action*.

[116] In addition, the present action entails a claim for unjust enrichment and seeks disgorgement of EI premiums collected from SAWP workers. That claim and remedy is entirely missing from the *Quebec Action*. In fact, it would apply to no other temporary foreign worker other than those in the SAWP.

[117] Furthermore, the Plaintiffs' SAWP-based claim is centred around the alleged unconstitutionality of the restrictive and discriminatory conditions imposed upon SAWP workers, in light of the specific racial identity and societal position of those workers. The Plaintiffs' claim under s. 15 of the *Charter* is distinctly rooted in the race and nationalities of SAWP workers. By contrast, the *Quebec Action* includes a much larger group of claimants comprised of all temporary foreign workers across all industries, nationalities, and racial groups; as such, it does not directly challenge either the SAWP Contract or the EI scheme.

[118] For these reasons, the Plaintiffs' claim and the *Quebec Action* can each proceed on parallel tracks, each one advancing its own purposes. Certification of the present claim does not demand a stay of the SAWP portion of the *Quebec Action*, if one were at all likely to be granted.

[119] As in other cases with overlapping classes in different jurisdictions, there will obviously come a time when class members will have to opt for one claim or another. In the event that they achieve compensation in one jurisdiction, they will not be permitted to replicate that recovery with a second recovery in the other jurisdiction. Recovery in one jurisdiction's action may necessitate opting out of the other jurisdiction's action; but that is a considerable way down the road.

[120] It will be for the Court "in the event of a future settlement or judgment to keep in mind that no class member should get 'two bites at the apple' against any defendant": *Badesha v. Cronos Group, Inc*., 2023 ONSC 5678, at para. 85, citing *Silver v. Imax Corporation* (2013), 117 OR (3d) 616, at para 31 (SCJ). For now, however, neither action is preferable to the other, and both can proceed in parallel.

[121] The present class action is the preferable procedure for the Plaintiffs' claim, in satisfaction of the requirement for certification in section 5(1)(d) of the *CPA*.

e) Representative Plaintiff – section 5(1)(e)

[122] The plaintiff Kevin Palmer worked in Canada through the SAWP for six years, until a sudden termination of his employment left him without income or recourse, despite having paid into EI. He has deposed that he was ineligible to access regular EI benefits or secure alternative employment due to the SAWP's restrictions, and he and his family suffered as a result.

[123] The plaintiff Andrel Peters gave similar evidence of his experiences working under the SAWP, including termination without cause, all while being compelled to continue paying into EI without any ability to collect regular benefits.

[124] Both Plaintiffs have given evidence that they would fairly and adequately represent the interests of the class and that they understand the duties of a representative Plaintiff. I have no reason to doubt the veracity of those statements. Neither Plaintiff has a conflict with the class, and they have both apparently participated actively in instructing counsel and in bringing the present motion.

[125] Counsel for the Crown faults the Plaintiffs for not having actually applied for EI benefits when terminated from their employment. She submits that on that basis neither Mr. Palmer nor Mr. Peters is qualified to be representative Plaintiff.

[126] With respect, there is no requirement that a representative Plaintiff go through the futile motions of applying for a benefit to which he is not entitled under the governing statute before bringing an action challenging the constitutionality of that statute. The Plaintiffs have standing to bring a *Charter* challenge to the EI regime as it applies to SAWP participants, and have pleaded a valid cause of action in unjust enrichment as well since they have both paid into the system that will not pay them any benefit.

[127] The Crown's position on the representative Plaintiffs places a misconceived notion of form over substance. The Plaintiffs are qualified to be representative Plaintiffs in this case, they have produced a detailed and workable litigation plan, and overall satisfy the requirements of their position under section 5(1)(e) of the *CPA*.

VII. Disposition

[128] The action is certified as a class proceeding under s. 5(1) of the *CPA*.

[129] The Plaintiffs are approved as representative Plaintiffs. Plaintiffs' counsel are appointed as class counsel.

[130] The class is defined as set out in paragraph 78 above.

[131] The common issues are approved as set out in paragraph 85 above.

VIII. Costs

[132] The parties may make written submissions on costs.

[133] I would ask Plaintiffs' counsel to email my assistant with brief submissions within three weeks of today, and for counsel for the Crown to email my assistant with equally brief submissions within three weeks thereafter.

Morgan J.

Released: February 23, 2026

CITATION: Palmer v. Attorney General of Canada, 2026 ONSC 927
COURT FILE NO.: CV-23-00710918-00CP
DATE: 20260223

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

KEVIN PALMER and ANDREL PETERS

Plaintiffs

– and –

ATTORNEY GENERAL OF CANADA

Defendant

REASONS FOR JUDGMENT

E.M. Morgan J.

Released: February 23, 2026