The Inequality of Low-Wage Migrant Labour: Reflections on *PN v FR* and *OPT v Presteve Foods*

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Abstract

This article explores the inequality inhering to low-wage migrant labour and critically evaluates the current capacity of human rights law to account for and address this inequality. This article uses two recent human rights tribunal decisions as case studies through which to conduct this examination: *PN v FR, 2015 BCHRT 60*, and *OPT v Presteve Foods Ltd, 2015 HRTO 675*. While these cases establish the positive role of human rights law in accounting for the wider context in which inequality impacts on migrant labour, this role is also inherently limited by the purpose, scope, and function of the Tribunals. This article will identify and discuss issues illustrated in the cases that are reflective of deeper systemic and structural inequalities attending low-wage migrant labour, including: the underlying reasons motivating low-wage labour migration; the legal regulations governing migrant workers' status and employment conditions; and, the racialization of migrant workers.

Keywords: migrant labour, inequality, transnational labour law, human rights, discrimination

Résumé

Cet article explore les inégalités inhérentes aux travailleurs migrants à faible revenu et évalue d'une manière critique la capacité actuelle des droits de la personne à prendre en compte ces inégalités et à y remédier. Pour mener cet examen, dans le présent article, nous analysons deux décisions récentes du Tribunal des droits de la personne comme études de cas: *PN v FR, 2015 BCHRT 60* et *OPT v Presteve Foods Ltd, 2015 HRTO 675*. Bien que ces affaires illustrent le rôle positif des droits de la personne dans la prise en considération du contexte plus large dans lequel les inégalités ont des incidences sur le travail des migrants, ce rôle s'avère également intrinsèquement limité par le but, le champ d'action et la fonction des Tribunaux. Cet article identifiera et discutera les enjeux qui sont relatifs aux cas et qui reflètent les inégalités systémiques et structurelles les plus marquées en ce qui a trait au travail des migrants à faible revenu, tels que les raisons sous-jacentes qui motivent la migration de travailleurs à faible revenu, les règlementations régissant le statut et les conditions d'emploi des travailleurs migrants ainsi que la racialisation des travailleurs migrants.

Mots clés : travailleurs migrants, inégalités, droit transnational du travail, droits de la personne, discrimination

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Introduction

Transnational labour law [TLL] is emerging as a critical site for resistance or counter-narrative to the pervasiveness of neo-liberalized accounts of globalization. Contrary to the emphasis placed on privatization, free trade, and minimal government intervention characteristic of neo-liberal narratives, TLL centralizes the oft-neglected issues of social justice, poverty, and discrimination that persist within or may even be exacerbated by globalization. This necessitates calling attention to the fact that "[g]lobalization appears to have in fact further entrenched socio-economic inequities and restructured inequality in the workplace."[1] As one manifestation of this global inequality, this article critically examines the issue of low-wage labour migration.

Low-wage labour migration has rapidly expanded as a feature of the globalized economy. It is predicated on a "triple win" development promise: destination countries have ready access to a pool of labour to fill domestic labour shortages; origin countries benefit from the remittances sent home by workers, improving the domestic economy; and workers benefit from the income-generating opportunities they may not otherwise have in their origin country. In this way, labour migration has been represented as a "better form of foreign aid" which provides assistance and opportunity to the Global South,[2] while enabling industry in the Global North to remain globally competitive. Contrary to this promise, low-wage labour migration has been identified as creating dependence and reproducing structural inequality between nation-states, rather than fostering independence through development, and as contributing to the entrenchment of socio-economic inequality for migrant workers.[3]

Low-wage labour migrants are most often employed in industries characterized by inferior wages, poor working conditions, and minimal job security, such as

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1 Colleen Sheppard, "Mapping anti-discrimination law onto equality at work: Expanding the meaning of equality in international labour law," *International Labour Review* 15 (2012): 14. For general discussions on globalization and labour, see also: Adelle Blackett and Anne Trebilcock, introduction to *Research Handbook on Transnational Labour Law*, ed. Adelle Blackett and Anne Trebilcock (Northampton, MA: Edward Elgar Publishing, 2015), 3–36; Harry Arthurs, "Who's Afraid of Globalization? The Transformation of Canadian Labour Law," in *Globalization and the Future of Labour Law*, ed. John Craig and Michael Lynk (Cambridge, UK: Cambridge University Press, 2006), 51–74; Joanna Howe and Rosemary Owens, "Temporary Labour Migration in the Global Era: the Regulatory Challenges," in *Temporary Labour Migration in the Global Area*, ed. Joanne Howe and Rosemary Owens (Oxford: Hart Publishing, 2016), 3–40. For an account that advocates for the positive role of temporary labour migration in liberalising international migration in the global era, see: Martin Ruhs, *The Price of Rights: Regulating International Labor Migration* (Princeton, NJ: Princeton University Press, 2013).

2 See Harald Bauder, "Foreign farm workers in Ontario (Canada): Exclusionary discourse in the newsprint media," *The Journal of Peasant Studies* 35 (2008): 112–114; Karl Flecker, *Canada's Temporary Foreign Worker Program (TFWP): Model Program – or Mistake?* (Ottawa: Canadian Labour Congress, 2011), 16–18; Jenna L. Hennebry and Kerry Preibisch, "A Model for Managed Migration? Re-Examining Best Practices in Canada's Seasonal Agricultural Worker Program," *International Migration* 50 (2010): 33.

3 See Flecker, "Model Program," 18; Bridget Anderson, "Migration, immigration controls and the fashioning of precarious workers," *Work Employment Society* 24 (2010): 311; Harsha Walia, "Transient servitude: migrant labour in Canada and the apartheid of citizenship," *Race Class* 52 (2010): 71; Howe and Owens, "Temporary Labour Migration"; Adrian Smith, "Racism and the regulation of migrant labour," in *Research Handbook on Transnational Labour Law*, ed. Adelle Blackett and Anne Trebilcock (Northampton, MA: Edward Elgar Publishing, 2015), 138–149.

agriculture, domestic work, construction, food services, and hospitality. In many countries, including Canada, low-wage labour migrants are authorized to work only for one employer and for a specific duration, as set out in their work permit.[4] Immigration status, though not formally linked to the work permit under Canada's Temporary Foreign Worker Program (TFWP), is similarly designated for a specific duration, and often perceived to be tied to employment. These regulatory rules create a significant power imbalance in the employment relationship and produce precariousness for workers. This precariousness, coupled often with racialized perceptions of migrant workers, has facilitated the production of a "second-class" workforce and a landscape in which discrimination against these workers is normalized.[5] This occurs in a setting where individuals often migrate for work due to existing inequalities and a lack of viable job opportunities in their home countries, resulting from the structural inequality between nation-states. Thus, rather than advancing equality for migrants as part of a global workforce, low-wage labour migration operates to accentuate inequality.

This article explores the inequality inhering to low-wage migrant labour, through a limited case study concerning domestic human rights law and migrant workers in Canada. Specifically, through this case study, I critically evaluate the current capacity of human rights law to account for and address this inequality. Transnationally, the intertwining of human rights and labour equality has become an important vehicle for both advancing workers' interests as rights, and for "re-embedding […] the social in the economic."[6] Domestically, human rights law is a primary vehicle for remedying discrimination

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4 See Fay Faraday, *Made in Canada: How the Law Constructs Migrant Worker Insecurity* (Toronto, ON: Metcalfe Foundation, 2012).

5 For critical commentary in the Canadian context, see, e.g.: Patti Tamara Lenard and Christine Straehle, ed., *Legislated Inequality: Temporary Labour Migration in Canada* (Montreal: McGill-Queen's University Press, 2012); Tanya Basok, "Post-national Citizenship, Social Exclusion and Migrants Rights: Mexican Seasonal Workers in Canada," *Citizenship Studies* 8, no. 1 (2004): 47–64; Leigh Binford, "From Fields of Power to Fields of Sweat: the Dual Process of Constructing Temporary Migrant Labour in Mexico and Canada," *Third World Quarterly* 30, no. 3 (2009): 503–517; Judy Fudge and Fiona MacPhail, "The Temporary Foreign Worker Program in Canada: Low-Skilled Workers as an Extreme Form of Flexible Labour," *Comparative Labour Law and Policy Journal* 31 (2009): 101–141; Nandita Sharma, "The 'Difference' that Borders Make: 'Temporary Foreign Workers' and the Social Organization of Unfreedom in Canada," in *Legislated Inequality: Temporary Labour Migration in Canada*, ed. Patti Tamara Lenard and Christine Straehle (Montreal: McGill-Queen's University Press, 2012), 26–47.

6 Blackett and Trebilcock, 16. It is beyond the scope of this article to address rights and developments at the international level, however it should be noted that migrant workers possess an array of rights under international law, including under the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, 18 December 1990, GA Res 45/158. In addition, concerns regarding low-wage labour migration programs are noted and currently being discussed and acted upon at the international level, such as through the Global Compact for Migration. Finally, sending countries have taken some action to protect workers abroad. For example, in November 2017, ASEAN leaders signed a new agreement, the "Consensus on the Protection and Promotion of the Rights of Migrant Workers." For further reading on the rights of migrant workers under international law, see, e.g.: Judy Fudge, "The Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers" (2011) (Metropolis British Columbia Working Paper Series No. 11–15); Elspeth Guild, Stefanie Grant, and C. A. Groenendijk, ed., *Human Rights of Migrants in the 21st Century* (New York: Routledge, 2018); Cathryn Costello and Mark Freedland, ed., *Migrants at Work: Immigration and Vulnerability in Labour Law* (Oxford: Oxford University Press, 2014).

in the workplace.[7] In addition, human rights commissions in Canada can engage in broader educational, policy, and research activities to promote anti-discrimination and equality, including in workplaces and in respect of migrant workers.[8] As such, while human rights law is not the only vehicle for resistance that migrant workers use to advance equality and justice claims,[9] it is an important site to examine, given its purpose and function in the legal system and in relation to workplace rights.

In order to ground this inquiry, this article uses two recent human rights tribunal decisions as case studies: *PN v FR*, 2015 BCHRT 60, and *OPT v Presteve Foods Ltd*, 2015 HRTO 675. Of the small body of existing human rights case law concerning discrimination against migrant workers in Canada,[10] these two cases present distinctive features that lend well to this inquiry. First, unlike the few other identified successful complaints, in both *PN* and *Presteve*, the Tribunal was presented with complex and nuanced discrimination claims concerning the treatment of the complainants and intersecting grounds of discrimination.[11]

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7 See, e.g., Sheppard, "Mapping," for a general discussion on the intersections between anti-discrimination law and equality. This is also explained further in Section 1 of this article.

8 For example, in Quebec, the Human Rights Commission tabled a report on systemic discrimination of migrant workers in 2011: Quebec Human Rights Commission, "Systemic Discrimination Towards Migrant Workers," summary of *La discrimination systémique à l'égard des travailleuses et travailleurs migrants*, adopted at the 574th meeting of the Commission, held on December 9, 2011, by Resolution COM-574-5.1.1.

9 Legal claims related to migrant workers' experiences and conditions in Canada can, and have been, pursued also through employment and labour law, constitutional law, and immigration law, to name a few. See, e.g., *Re Certain Employees of Sidhu & Sons Nursery Ltd and United Food and Commercial Workers International Union, Local 1518* (2014), 241 CLRBR (2d) 1 (BCLRB); *Espinoza v Canada (Attorney General)*, 2013 ONSC 1506; *Re 639299 Alberta Ltd and Meganathan*, [2014] AWLD 1468, (AB ESU); *Martinez v Muir*, 2016 NSLB 26; Devyn Cousineau, "At Risk: The Unique Challenges Faced by Migrant Workers in Canada," Human Rights 2014 Conference Proceedings (Vancouver: Continuing Legal Education Society of British Columbia, 2014). In addition, legislation has surfaced in response to noted problems in a few provinces: *Worker Recruitment and Protection Act*, SM 2008, c 23; *Foreign Worker Recruitment and Immigration Services Act*, SS 2013, c F-18.1. Resistance and strategies to advance equality further exist outside of the formal legal process and include broad-based advocacy, policy reform, and other work, by both migrant workers and community and other organizations working at a concerted and collective level. For further reading on broader collective actions and resistance in these contexts, see: Aziz Choudry, Jill Hanley, Steve Jordan, Eric Shragge and Martha Stiegman, *Fight Back: Workplace Justice for Immigrants* (Blackpoint, NS: Fernwood Press, 2009); Jill Hanley, Eric Shragge, André Rivard and Jah-Hon Koo, ""Good enough to work? Good enough to stay!" Organizing Temporary Foreign Workers," in *Legislated Inequality: Temporary Labour Migration in Canada*, ed. Patti Tamara Lenard and Christine Straehle (Montreal: McGill-Queen's University Press, 2012) 245–271; Jill Hanley and Eric Shragge, "Organizing Temporary Foreign Workers: Rights and Resistance as Canada Shifts Towards the Use of Guestworkers," *Social Policy* 40, no. 3 (2010); Aziz Choudry and Adrian Smith, ed., *Unfree Labour?: Struggles of Migrant and Immigration Workers in Canada* (Oakland, CA: PM Press, 2016).

10 A total of eleven reported human rights complaints in Canada concerning discrimination against migrant workers were identified. Four claims proceeded to a full hearing and were determined in favour of the complainant (*Guzman v T*, (1997) 97 CLLC 230-029, [1997] BCHRTD No 1; *Monrose v Double Diamond Acres Limited*, 2013 HRTO 1273; *CSWU Local 1611 v SELI Canada Inc*, 2008 BCHRT 436; *Ben Saad v. 1544982 Ontario Inc*, 2017 HRTO 1). Six claims were unsuccessful, settled, or abandoned (*Peart v Ontario (Community Safety and Correctional Services)*, 2014 HRTO 611; *Raper v Foreign Agricultural Resource Management Services*, 2015 HRTO 269; *Casimir v Twin Peaks Hydroponics*, 2013 HRTO 141; *Jamjai v Greenwood Mushroom Farms Inc*, 2013 HRTO 96; *Milay v Athwal*, 2004 BCHRT 132; *Hazel v 624091 Alberta Ltd*, 2013 HRTO 435). One claim is currently proceeding through the BCHRT: *Chein v Tim Hortons*, 2015 BCHRT 169.

11 Unlike *CSWU*, which involved wage discrimination, *Monrose*, which involved blatant derogatory comments, *Saad*, which was determined on the basis of disability, not ethnic origin, or *Guzman*, where the primary question related to parental liability. The details of *PN* and *Presteve* are set out in Section 2 of this article.

In addition, the Tribunals' written decisions necessitated situating the discrimination claims within a broader understanding of the systemic and structural inequality issues that affected the individual workers' experiences, and drew on expert evidence tendered in the course of the hearing that explained pervasive problems arising under the regulatory structure of TFWP (in *Presteve*) and broader considerations surrounding low-wage labour migration (in *PN*). *PN* and *Presteve* thus provide a window through which to view the potential ability and limitations of domestic human rights law to address broader dimensions of inequality that arise in an inevitably transnational labour landscape.

While these cases illustrate the potential of human rights law to account for the wider context in which inequality impacts on migrant labour, they also demonstrate its limitations. These cases highlight factors that are reflective of systemic and structural inequalities attending low-wage migrant labour broadly, including: the underlying reasons motivating low-wage labour migration, the legal regulations governing migrant workers' status and employment conditions, and the racialization of migrant workers. These factors, and their treatment in the cases, reveal the inherent limitations of human rights law, of domestic law, and of individualized complaints-based processes for addressing inequality in a transnational labour context. Given these limitations, this article and the inquiry it undertakes provides only a glimpse into a much larger and more complex landscape in which low-wage labour migration unfolds. While domestic human rights law may play an important role, it is only one component of a broader response required to redress and resist the entrenchment of inequality for low-wage labour migrants in its transnational context. This broader response, one which captures a range of actors, institutions, legal rights and values at multiple levels of governance, is reflective of the emerging tradition of transnational labour law.[12]

This article begins in section 1 by outlining three dimensions of inequality (individual, systemic, and structural) that are relevant to a deeper understanding of *PN* and *Presteve* and to issues attending low-wage migrant labour more generally, briefly discussing their relationship with labour and human rights law. This sets a foundation from which to examine *PN* and *Presteve* in section 2, focusing on the analysis undertaken by the Tribunals in each case, on the one hand, and identifying the broader problematic trends attending low-wage migrant labour illustrated in the cases, on the other. Finally, section 3 will discuss these broader trends in their wider context, establishing the inherent links between systemic and structural dimensions of inequality and the identified issues attending low-wage migrant labour.

1. Dimensions of Inequality

This article focuses on three dimensions of inequality that are relevant to the analysis of *PN* and *Presteve* and to issues attending low-wage migrant labour more generally: individual inequality, systemic inequality, and structural inequality. These three dimensions move from a specific, localized, and individualized understanding of inequality (individual inequality), to a group-based understanding of

[12] See Blackett and Trebilcock, 3–5.

inequality that begins to account for institutionalized and societal factors of discrimination (systemic inequality), to a broad understanding of the role that labour markets, globalization, and disparity between nation-states play in creating inequality (structural inequality). Importantly, these dimensions are interrelated and co-existent,[13] and together, illustrate the landscape that TLL attempts to counter and resist.

Individual inequality reflects the traditional focus of anti-discrimination and human rights law on individual complainants.[14] This dimension of inequality, while connected to group characteristics,[15] focuses on how individual complainants experience discrimination in particular events and settings and arising from treatment by other individual persons. As such, it has traditionally understood discrimination as an "aberrant or exceptional phenomenon"[16] and a product of individual bad actors rather than as a product of institutional and social belief systems. Formalistic understandings of individual inequality have been critiqued due to the lack of attention to and understanding of broader systemic and structural factors that produce inequality beyond individual experiences of discrimination.[17]

Systemic inequality brings attention to the ways in which institutional, social, and other forces can affect inequality and discrimination through, particularly, the concept of indirect discrimination. Indirect discrimination recognizes that certain practices, policies, or criteria that are neutral on the surface may operate, in practice, to create an unjustifiable or significant adverse impact on particular groups or communities.[18] This adverse impact is often reflective of "larger patterns of exclusion and inclusion" existing in society; in this way, such discrimination is "pervasive and systemic," not individual or exceptional.[19]

Legal concepts of inequality and discrimination have been expanding beyond a strict focus on the individual, to consider systemic and indirect discrimination, including in employment contexts.[20] Law and policies governing the workplace

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13 See, e.g., Adelle Blackett, "Situated Reflections on International Labour Law, Capabilities, and Decent Work: The Case of *Centre Maraîcher Eugène Guinois*," *Liber Amicorum in honour of Katia Boustany, Revue québécoise de droit international*, (2007): 223; Bob Hepple, "Equality and empowerment for decent work," *International Labour Review*, 140 (2001): 5; Sheppard, "Mapping," for discussions related to concepts of inequality in labour and human rights contexts. See also Colleen Sheppard, *Inclusive Equality: the Relational Dimensions of Systemic Discrimination in Canada* (Montreal: McGill-Queen's University Press, 2010) for an in-depth examination of the evolution of legal understandings of inequality in Canada.

14 See Sheppard, "Mapping"; Hepple, "Equality."

15 Enabling discrimination claims to proceed on the basis of an identifiable characteristic, such as sex, age, race, national origin, religious belief, and others. See, e.g., *Human Rights Code*, RSBC 1996, c210; *Human Rights Code*, RSO 1990, c H19.

16 Sheppard, "Mapping," 8–9.

17 See, e.g., Blackett, "Situated Reflections"; Sheppard, "Mapping"; Adelle Blackett and Colleen Sheppard, "Collective bargaining and equality: Making connections," *International Labour Review*, 142 (2003): 434; Martha Minnow, *Making all the difference: Inclusion, exclusion and American law* (Ithaca, NY: Cornell University Press, 1990).

18 Sheppard, "Mapping," 8. See also Sheppard, *Inclusive Equality*, 13; Hepple, "Equality," 7; Blackett and Sheppard, "Collective Bargaining," 426, discussing the challenge of addressing systemic discrimination in unionized environments and access to collective bargaining.

19 Sheppard, "Mapping," 8. See also Hepple, "Equality," 7.

20 See Sheppard, *Inclusive Equality*, 17–18, discussing five primary shifts in understandings of inequality and discrimination. See also, Sheppard, "Mapping," 12; Hepple, "Equality."

have made attempts to proactively address issues of inequality and discrimination in line with these broader understandings.[21] However, issues of systemic inequality remain a challenge for labour law to effectively address.[22] Similarly, human rights tribunals continue to struggle to fully account for systemic inequality and broader factors affecting discrimination in individual claims.[23] While human rights tribunals are well equipped to undertake contextual analyses, and are often attuned to issues of systemic and indirect discrimination, their primary focus remains on individual complainants, limiting the extent to which tribunals can influence broader changes to ameliorate the existence and effects of discrimination in society.

Structural inequality calls attention to how institutions, labour markets, globalization, and the disparity between nation-states act in a broader and, in some contexts, transnational fashion to create and entrench inequality for individuals and groups. Structural inequality enables us to connect specific types and sites of discrimination to broader patterns arising in social, political, labour, and other contexts. Particularly when we examine transnational labour, we can see how inequalities that persist in the global economy are reflected in the inequalities experienced in local labour markets.[24] Structural inequality thus brings to light how the global directly impacts the local—how the wider contexts in which, for example, migrant labour operates directly affect the individual experiences of discrimination migrant workers may face.

Combined, the dimensions of inequality described above bring clarity to understanding the myriad and complex factors that affect individual experiences of discrimination. It is not only an individual bad actor responsible for discrimination; rather, instances of discrimination arise in a context where systemic inequality and racialization are hidden beneath the surface, and against a backdrop of much larger issues of structural inequality between nation-states. The next section illustrates how these dimensions of inequality manifest in *PN v FR* and *OPT v Presteve Foods*.

2. *PN v FR* and *OPT v Presteve Foods*

PN and *Presteve* were decided in the same year (2015) by the BC Human Rights Tribunal, and Ontario Human Rights Tribunal, respectively. As mentioned in the Introduction, these cases present an opportunity to assess how human rights tribunals account for the wider context, and systemic and structural inequalities, that affect migrant labour and experiences of discrimination. Each case demonstrates positive attempts by the Tribunal to account for systemic and structural inequalities

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21 See, e.g., Hepple, "Equality," 8, discussing affirmative action and employment equity programs; Blackett and Sheppard, "Collective Bargaining," 446; Sheppard, *Inclusive Equality*; Sheppard, "Mapping," 8–9. For a critique of the limitations of traditional policies, such as duties to accommodate, see Gwen Brodsky and Shelagh Day, "The Duty to Accommodate: Who Will Benefit?," *Canadian Bar Review* 75 (1996), cited in Sheppard, "Inclusive Equality."

22 E.g., for a discussion of the challenge for collective bargaining and labour law to address systemic inequality, see: Blackett and Sheppard, "Collective Bargaining."

23 See, e.g., Blackett, "Situated Reflections," for a critique of *Commission des droits de la personne et droits de la jeunesse (Cupidon Lumène)* c. *Centre Maraîcher Eugène Guinois Jr inc.*

24 Sheppard, "Mapping," 14, citing Blackett, "Situated Reflections."

affecting the complainants' experiences, while navigating the constraints of the individualized complaints framework. Because human rights tribunals are specifically tasked with adjudicating individual complaints of employment discrimination, they play an important role in an effective response to labour inequality. These cases illustrate the positive role of human rights tribunals, given their ability to contextualize experiences of discrimination and account for the nuanced and subtle ways in which systemic and structural factors can bear upon such experiences. Yet these cases also demonstrate the inherent limitations of human rights tribunals to effectively respond to and ameliorate such conditions. Human rights tribunals, as a domestic adjudicative body, are individually complaints-based and retroactive in nature. The wider inequalities revealed through *PN* and *Presteve*, which will be discussed in greater depth in section 3, require a response that moves well beyond these parameters.

2.1 PN v FR

In *PN*, the complainant brought a human rights complaint against her former employers, FR and MR, claiming that they discriminated against her on the basis of her sex, family status, age, race, ancestry, colour, and place of origin, contrary to section 13 of the *BC Human Rights Code*.[25] In its written decision, the Tribunal stated that PN was a "virtual slave"[26] and awarded her $50,000 for injury to dignity, as well as compensation for lost wages.[27] This decision attracted attention primarily due to the magnitude of the award. However, less attention has been paid to the significance of the Tribunal's substantive analysis.

In this case, PN was hired through a labour agency to work for FR and his family as a caregiver in Hong Kong, later moving with the family to British Columbia.[28] Like many migrant workers, PN borrowed money to pay for her travel from her home in the Philippines to Hong Kong to take up her initial employment with FR.[29] In addition, like many female migrant workers, PN left young children behind in the Philippines, and migrated for work in order to provide for them.[30] During her employment, PN experienced an on-going pattern of harassment, exploitation, and sexual assault.[31]

In order to successfully establish a *prima facie* case of discrimination, a complainant must demonstrate three elements: first, that she has a characteristic protected from discrimination;[32] second, that she experienced an adverse impact;

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25 *PN v FR*, 2015 BCHRT 60, para 1.
26 *PN v FR*, para 101.
27 See *PN v FR*, paras 118–137, regarding the Tribunal's reasons and determinations on the remedies.
28 *PN v FR*, para 2.
29 *PN v FR*, para 17.
30 *PN v FR*, para 15.
31 *PN v FR*, paras 93–101.
32 In the context of employment, protected characteristics include: "race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person." *Human Rights Code*, RSBC 1996, c210, s13(1).

and, third, that there is a nexus between her protected characteristic and the adverse impact, or in other words, that the protected characteristic was a *factor* in the adverse impact.[33] PN's human rights complaint was based on the intersecting protected characteristics of sex, race, colour, place of origin, age, and family status.[34]

In applying this test, and particularly in finding a nexus between PN's protected characteristics, and the adverse impacts she experienced, the Tribunal demonstrated a clear and nuanced understanding of the systemic and structural inequalities that underpinned the claim. In particular, the Tribunal relied extensively on an expert report prepared by Dr. Anna Guevarra.[35] This report discussed stereotypes and prejudices related to Filipino workers and the impact these have on power structures in the employment relationship, as well as the underlying motivations concerning low-wage labour migration for Filipino women that may have an impact on their decision-making processes when faced with unreasonable and inappropriate demands from their employer.

First, as concerns the dominant stereotypes of Filipino workers, the report discussed how Filipino domestic workers are "marketed as obedient, hardworking, Godfearing, loyal, honest, cooperative, and compliant."[36] The Tribunal demonstrated an understanding of how these stereotypes are both inherently connected to protected characteristics, like sex and race, and how they influence expectations and demands associated with work. As summarized from the expert evidence, the Tribunal noted, "[a]s Filipino women, they are perceived to be "naturally inclined" to perform this kind of domestic care work […] These views of Hong Kong employers, makes Filipino domestic workers "ideal," highly sought-after[.]"[37] Relatedly, the decision discussed how the racialization of Filipino women affected their perceived desirability by employers: "the preference for Filipinos as care workers/domestic workers is often guided by the perception that workers from the Philippines possess a work ethic and values related to family, loyalty, and authority that translate to their docility in the workplace. These characteristics are pitched as cultural (if not biological), and therefore, unique to the racial make-up of Filipinos."[38]

The racialization and stereotypes of Filipino workers were further understood by the Tribunal in this case to affect the power dynamics of the employment relationship.[39] The perception of docility and family loyalty translates to a belief and expectation by employers that Filipino domestic workers will not complain about their job, instead demonstrating "gratitude for their employment."[40] In addition, employers will often isolate workers and exert detailed control over their daily movements and lives to maintain a position of power and authority and to

33 *PN v FR*, para 89, citing to *Moore v British Columbia*, 2012 SCC 61.
34 *PN v FR*, para 1.
35 *PN v FR*, paras 71–86.
36 *PN v FR*, para 72.
37 *PN v FR*, paras 74–75.
38 *PN v FR*, para 76.
39 *PN v FR*, para 80.
40 Ibid.

demonstrate to workers' the expectation, and extent, of their subordination.[41] In other words, stereotypes and prejudices held about Filipino domestic workers are used by employers to rationalize discriminatory treatment.

Finally, in responding to the question of why Filipino workers would endure such conditions, the expert report cited issues such as: the existence of recruitment debt,[42] like PN took on to finance her travel for employment; financial insecurity at home, often coupled with the need to financially provide for family members, including children;[43] and, a lack of employment opportunities in the origin country.[44] These factors affected the Tribunal's assessment of both the adverse impacts that PN experienced and their nexus with her protected characteristics.[45]

The Tribunal's assessment of the adverse impact element was especially positive given that PN's claim was based on nuanced manifestations of discrimination. A key aspect of the adverse impact advanced by PN's counsel was based on unreasonable demands and exploitative conditions of her employment. As summarized by the Tribunal, "[s]he could not go anywhere or do anything without permission. […] While she was allowed to sleep, it was in between the respondents' bedrooms so she was virtually on call 24/7. She was frequently humiliated and demeaned by MR who threatened her, called her names and threatened to deduct wages were she to sit down while at work."[46] The Tribunal showed a clear appreciation for the underlying racialized context and heightened power imbalance in the employment relationship in determining that these conditions constituted discrimination.

In reaching its decision on PN's claim, the Tribunal's analysis demonstrated specific attention to, and an appreciation of, the systemic and structural factors that influenced her particular position *vis-à-vis* FR and MR, and the discrimination she experienced. In linking the stereotypes of Filipino workers to PN's experience and the nexus element of the test, the Tribunal concluded: "PN is a young mother from the Philippines without supports in Canada. This gave rise to a situation where it was possible to take unfair advantage of her. The way that MR treated her and the expectations of PN working all the time at the beck and call of the respondents have their roots in her hiring from the Philippines and the factors emphasized of youth, hard work and unlikeliness to complain, which are characteristics attributed to Filipino workers by stereotype and prejudice."[47]

Overall, the Tribunal's decision demonstrates a clear and nuanced understanding of the wider systemic and structural inequalities that contribute to discrimination against Filipino domestic workers. The Tribunal's willingness to draw from more general expert evidence greatly assisted its ability to engage in this contextual analysis.

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41 *PN v FR*, paras 80–81.
42 *PN v FR*, para 82.
43 *PN v FR*, paras 83–85.
44 *PN v FR*, para 86.
45 *PN v FR*, paras 93–106.
46 *PN v FR*, para 101.
47 *PN v FR*, para 104.

2.2 OPT v Presteve Foods

OPT v Presteve Foods involved a human rights complaint brought by two individuals, OPT and MPT, who were temporary foreign workers from Mexico employed by Presteve Foods in Ontario. While the case had a complicated and lengthy history,[48] the 2015 decision focused on a discrimination complaint relating to several incidents of sexual harassment and assault committed by the then owner and principal of Presteve Foods.[49] Like *PN*, this case was noted for the magnitude of the award for injury to dignity, assessed at $150,000,[50] but has received little substantive attention in terms of the Tribunal's analysis of the complaint.

The applicants came to Canada from Mexico as temporary foreign workers to work at the respondent's fish processing plant.[51] Shortly after the start of their employment, the applicants experienced sexual solicitations, unwanted touching, and sexual assaults from the personal respondent. When the applicants attempted to refuse the advances of the respondent, he threatened to send them back to Mexico.[52] MPT was, in fact, sent back to Mexico after refusing the respondent's demands.[53]

Like in *PN*, expert evidence was submitted to provide "opinion evidence on the characteristics of temporary foreign worker programs in Canada and the vulnerability of migrant workers, particularly women."[54] This evidence thus aimed to place the complainants' experiences within a wider context, attentive to the systemic and structural inequalities associated with the complainants' status as temporary foreign workers. In discussing the expert evidence, provided by Dr. Kerry Preibisch, the Tribunal noted that "her evidence was relevant to the social context in which these events occurred and was also relevant to certain factors to be assessed in the context of my remedial order, including the particular vulnerability of the applicants as female temporary foreign workers."[55]

The Tribunal in *Presteve* appeared cautious in drawing on the generalized context that the expert evidence offered to assess the *prima facie* claim, given that Dr. Preibisch did not have direct involvement with the complainants.[56] For example, in discussing her evidence regarding threats of repatriation against migrant workers generally, the Tribunal stated that it was not of assistance in "determining whether such threats were made by the personal respondent to the applicants in this particular case."[57] These statements could suggest that the Tribunal approached its analysis in a more formalistic manner, emphasizing the particular individual experience of discrimination without due reference to its wider context. However, a deeper reading of the decision's substantive reasons shows otherwise.

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48 *OPT v Presteve Foods*, 2015 OHRT 675, paras 1–9.
49 *OPT*, para 2.
50 *OPT*, par 230.
51 *OPT*, para 19.
52 *OPT*, paras 3–4 (re OPT), para 6 (re MPT).
53 *OPT*, para 6.
54 *OPT*, para 13.
55 *OPT*, para 14.
56 *OPT*, para 13.
57 *OPT*, para 25.

In discussing the nature and impact of threats of repatriation for migrant workers, the Tribunal reviewed Dr. Preibisch's evidence regarding, first, the commonality and ease with which such threats can be made and carried out, and second, the consequence of such threats. The nature of the foreign worker programs in Canada "gives employers the power to "repatriate" workers for any or no reason and for which there is no opportunity for any appeal or review."[58] In addition, "many migrant workers comply with such repatriation because they believe they have no choice or because not doing so means that they would have to continue to live in Canada with no employment and no accommodation."[59] As a result, "the very threat of repatriation has the effect of causing migrant workers to do as they are told by their employers and not complain[.]"[60]

Despite the Tribunal's apparent hesitation to rely on Dr. Preibisch's testimony,[61] her evidence regarding the impact of threats of repatriation reverberated in the Tribunal's discussion of OPT's experience. In discussing the credibility of OPT and why she would continue to work for the respondent in light of the allegations she made, the Tribunal found that the threats were significant given her financial motivations and family needs: "OPT's choice was to do what she was told, or risk being sent back to Mexico and lose her ability to work and earn money in Canada that she could use to send back to help support her children."[62] In addition, the Tribunal found that the personal respondent "expressly wielded this authority by threatening to send OPT back to Mexico if she refused his sexual solicitations and advances."[63] Regardless of the extent to which the Tribunal explicitly referred to the expert evidence in making these findings, the similarities between the Tribunal's analysis of the individualized claim and the generalized evidence offered by the expert testimony suggest that the evidence was supportive to some degree, and may have highlighted contextual factors that had an impact on the Tribunal's assessment of the specific claim and circumstances.

The Tribunal also drew on Dr. Preibisch's evidence concerning the underlying motivating factors of labour migration in its analysis of the claim. The respondent challenged the credibility of the applicants, in part, on the basis that OPT had renewed her work contract.[64] However, like in PN, the Tribunal acknowledged the economic vulnerability and obligations migrant workers often face, and which may influence such a decision. It noted: "this submission [the respondent's challenge] does not sufficiently appreciate the economically vulnerable position that migrant workers find themselves in. OPT was sending money back to Mexico from her earnings at Presteve to help support her two children."[65] Drawing in part on the expert evidence, the Tribunal determined that "this provides a very strong incentive

58 *OPT*, para 25.
59 Ibid.
60 Ibid.
61 Ibid.
62 *OPT*, para 133.
63 *OPT*, para 168, the authority referring to his position as owner and principal, and ability to confer, grant, or deny a benefit or advancement to OPT as an employee.
64 *OPT*, para 132.
65 Ibid.

for OPT to renew her contract and remain at Presteve, despite the abuse she was experiencing […] the reality is that renewing her contract with Presteve was the only real choice that OPT had if she wanted to remain in Canada and continue working legally to help support her children."[66]

This analysis reflects a deeper understanding by the Tribunal of the myriad contextual factors that bear upon migrant workers' experiences and which may influence their vulnerability to discrimination. The Tribunal's analysis of the impact that threats of repatriation had on the applicants, considered in light of their underlying motivations to migrate for work, acknowledges the influence that underlying structural and systemic inequalities had on their experiences. Despite the Tribunal's hesitation to go too far beyond the individualized claim, it nonetheless was able to situate it within a wider context.

Like in *PN*, the Tribunal in *Presteve* was attentive to a broader context, able to account for the impact of underlying factors such as family obligation and financial need in understanding the position and power (or perceived lack thereof) of the workers. Further, it was able to connect these underlying factors to the specific discriminatory treatment the employer engaged in. While the Tribunal in *Presteve* appeared more cautious about looking to broader systemic and structural inequalities in its analysis than the Tribunal in *PN* did, it is clear from the overall reasoning and outcome of *Presteve* that the Tribunal was attentive to the broader dimensions of inequality that touched on the applicants' specific experiences and discrimination in this case.

3. Implications for Transnational Labour and the Law: Addressing Systemic and Structural Inequalities in Migrant Work

PN and *Presteve* illustrate the positive role that human rights law can have in addressing individual discrimination of migrant workers through contextual analyses that account for the ways in which systemic and structural inequality affect individual treatment and experiences. While not all migrant workers will be subject to discrimination or abuse, these cases reveal that, where migrant workers do experience discrimination, it is not solely an exceptional or aberrant phenomenon, nor the product of a single bad actor, but intrinsically connected to the wider systemic and structural inequalities attending low-wage labour migration. Both *PN* and *Presteve* discuss key factors related to systemic and structural inequalities that attend low-wage migrant labour and affect the experience of migrant workers, including: the underlying structural inequality between nation-states that gives rise to the need to migrate for labour, the regulatory structure governing migrant labour, and the racialization of migrant workers. These factors often work in concert to produce a landscape in which discrimination and abuse of migrant workers may become normalized.

In both *PN* and *Presteve*, the financial need of the complainants, as well as their family obligations, were highlighted in the Tribunals' overall analyses. These factors illustrate some of the ways in which socio-economic inequalities in origin

[66] Ibid.

countries may give rise to the need to migrate for labour, and the impact this has on workers' experiences and choices regarding their employment abroad. Low-wage migrant workers generally migrate from countries and regions characterized by economic instability and high unemployment, and where certain characteristics may affect their economic power, such as gender, education, and class.[67] These conditions reflect a larger pattern of structural inequality between nation-states.

High unemployment and economic instability in developing nations persists in the era of globalization, and labour migration plays a role in contributing to this. For example, in the Philippines, where PN was originally from, ongoing economic crisis has led "one out of every ten Filipinos to find work overseas."[68] Developing states are dependent on labour migration to fill the gap in the domestic economy. Over time, these states may become dependent on the remittances sent home by migrant workers, sustaining the need for on-going labour migration as a component of the domestic economy. In this way, low-wage labour migration is both sustained by, and depends upon, "the existence of structural inequalities […] and income inequalities" between nation-states.[69] For individual workers, this often translates to an on-going need to migrate for work in order to fulfill financial obligations or needs for family members at home.

Flowing from the structural inequality between nation-states, which creates dependence on migrant labour, the legal regulations governing low-wage labour migration often operate to create further inequality for workers during their employment.[70] Critiques of low-wage labour migration programs, like Canada's TFWP, under which OPT was employed, often highlight the precariousness created through regulations that tie a migrant worker to her employer, facilitate repatriation with few opportunities for appeal, and place finite time constraints on participation with no or limited opportunities for permanent immigration.[71] These mechanisms operate to give an employer significant power over individual workers, and create inequality through the development of a "second-class"

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67 Faraday, *Made in Canada*. See also Flecker, "Model Program," 13; Binford, "Fields of Power," 504; Judy Fudge and Daniel Parrott, "Private Foreign Worker Recruitment for the Live-In Caregiver Program in British Columbia" (paper presented at Regulating for a Fair Recovery conference, Geneva, Switzerland, July 6–8, 2011).

68 Fudge and Parrott, "Private Foreign Worker Recruitment." Relatedly, see Jarrah Hodge, "Unskilled Labour: Canada's Live-in Caregiver Program," *Undercurrent* 3 (2006): 60–66; Geraldine Pratt, "Collaborating Across our Differences," *Gender, Place and Culture* 9 (2002): 195–200.

69 See Faraday, *Made in Canada*, 60.

70 As discussed in the Introduction, these include a closed work permit and temporary immigration status.

71 Faraday, *Made in Canada*; Sarah Marsden, "Assessing the Regulation of Temporary Foreign Workers in Canada," *Osgoode Hall Law Journal* 49 (2011): 46; Lenard and Straehle, "Legislated Inequality," 5–6, 12; Sarah Marsden, "The New Precariousness: Temporary Migrants and the Law in Canada," *Canadian Journal of Law and Society* 27 (2012): 212; Nandita Sharma, *Home Economics: Nationalism and the Making of 'Migrant Workers' in Canada* (Toronto: University of Toronto Press, 2006); Sharma, "Difference"; Janet McLaughlin, "Classifying the "ideal migrant worker": Mexican and Jamaican transnational farmworkers in Canada," *Focaal – Journal of Global and Historical Anthropology* 57 (2010): 80; Fudge, "Precarious Migrant Status," 30; Judy Fudge, "Migrant Domestic Workers in British Columbia, Canada: Unfreedom, Trafficking and Domestic Servitude," in *Temporary Labour Migration in the Global Area*, ed. Joanne Howe and Rosemary Owens (Oxford: Hart Publishing, 2016), 151–172.

workforce subject to differential rights and treatment in practice.[72] As was discussed in *Presteve*, the perceived power of an employer to both terminate employment and effectively deport a worker facilitates a situation in which an employer may discriminate against, abuse, or exploit a worker with relative impunity, especially when considered in light of the underlying motivations for migration and existing inequalities a worker may experience in their origin country. This demonstrates how the legal regulations operate in practice to contribute to systemic discrimination against migrant workers and "how group-based patterns of inequality in local labour markets are linked to structural inequalities in the global economy."[73]

Contrary to formal regulation, a lack of regulation in certain contexts, such as domestic work, may similarly act to produce or facilitate inequality and discrimination against migrant workers. Although caregiving work in Canada is formally regulated, in PN's case, her work may be characterized as "informal" since she did not have proper authorization to work in Canada. In addition, in many countries, domestic and caregiving work remains unregulated in law, and is often taken up by migrants.[74] For PN, like many domestic workers, the informality of her status and private nature of the workplace enhanced her vulnerability. Due to a lack of legal standing or rights to assert, migrant domestic workers may be discriminated against with relative impunity. Thus, informal or unregulated labour, particularly in industries characterized by migrant work, can similarly act to facilitate discriminatory treatment.[75]

Set against a backdrop of structural inequality between nation-states and regulatory schemes that often produce minimal rights and legal protection for migrant workers, the racialization and stereotypes of migrant workers further aggravate their inequality and discrimination.[76] As noted in *PN*, stereotypes create the

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72 McLaughlin, "Classifying," 80. For similar critiques concerning the inherently racialized and discriminatory nature of low-wage migrant labour programs, see: Bauder, "Foreign Farm Workers," 103; Lenard and Straehle, introduction, 5–6, 12; Marsden, "New Precariousness," 212; Sharma, *Home Economics*; Sharma, "Difference"; Vic Satzewich, *Racism and the Incorporation of Foreign Labour: Farm Labour Migration to Canada since 1945* (London: Routledge, 1991); Fudge, "Precarious Migrant Status," 6; Adrian Smith, "Racialized in justice: the legal and extra-legal struggles of migrant agricultural workers in Canada," *Windsor Yearbook of Access to Justice* 31 (2013): 15–38.

73 Sheppard, "Mapping," 14, citing also Blackett, "Situated Reflections." See also, Lenard and Straehle, introduction, 12; Fudge, "Precarious Migrant Status," 30; Sharma, "Difference," 35–40; Faraday, *Made in Canada*.

74 See, e.g., Judy Fudge, "Global Care Chains: Transnational Migrant Care Workers," *International Journal of Comparative Labour Law and Industrial Relations* 28 (2012): 63–69; Leah Briones, *Empowering Migrant Women: Why Agency and Rights are Not Enough* (Burlington: Ashgate, 2009); Virginia Mantouvalou, "Servitude and Forced. Labour in the 21st Century: The Human Rights of Domestic Workers," *Industrial Law Journal* 35 (2006): 395–414; Clíodhna Murphy, "The Enduring Vulnerability of Migrant Domestic Workers in Europe," *International and Comparative Law Quarterly* 62 (2013) 599–627; Rhacel Parreñas, *Servants of Globalization: Women, Migration, and Domestic Work* (Stanford: Stanford University Press, 2001); Fudge, "Migrant Domestic Workers"; Virginia Mantouvalou, "Temporary Labour Migration and Modern Slavery," in *Temporary Labour Migration in the Global Era*, ed. Joanna Howe and Rosemary Owens (Oxford: Hart Publishing, 2016), 223–240.

75 See ibid.

76 See, e.g., Satzewich, *Racism and the Incorporation of Foreign Labour*; Marsden, "The New Precariousness"; Bauder, "Foreign Farm Workers"; McLaughlin, "Classifying"; Sharma, *Home Economics*; Smith, "Racism"; Smith, "Racialized in justice." The racialization and stereotyping of workers is not limited to migrant workers, though migration status may intersect in unique ways with race, gender and other characteristics: see, e.g., Blackett, "Situated Reflections."

perception of low-wage labour as "naturally suited" to particular ethnicities, and these stereotypes often operate to normalize or rationalize discriminatory treatment. Migrant workers, as opposed to residents or citizens, are perceived as more "hardworking, grateful and enthusiastic," and more flexible and cooperative with respect to working and employment conditions.[77] This perception facilitates the creation of a "second-class" workforce entitled to fewer rights and protections and perceived as willing to accept poorer working conditions and discriminatory treatment.

The legal regulations governing low-wage migrant work, coupled with racialized perceptions about migrant workers and global economic inequalities that give rise to an on-going need to migrate for work, combine to create and reinforce a situation where migrant workers may be individually subjected to discriminatory, abusive, or exploitative treatment. Yet these factors, and their interrelationships, also demonstrate how and why individual complaints-based, reactive systems like human rights tribunals can only play a small role in solving what is a much larger problem.[78] As this section has discussed, the factors producing and influencing individual experiences of discrimination go well beyond the specific site and localized context of the employment relationship.

Conclusion

This article has examined the inequality attending low-wage migrant labour through two recent human rights tribunal decisions, *PN* and *Presteve*. These decisions highlight the potential role of domestic human rights law to address individual experiences of discrimination attending migrant work. However, these decisions also reveal the limitations of human rights tribunals: as focused on individual complaints; as retroactive in nature; and, as a domestic adjudicative body. Substantive equality, within and across borders, at and beyond the workplace, requires not just having access to a legal remedy after the fact, but also having access to the "effective realization of equality rights, preferably through prevention of discrimination and social exclusion."[79]

For low-wage labour migrants, this requires a more explicit engagement with the co-existent individual, systemic, and structural inequalities attending their experience and place within the global labour market. Critically, a shift towards contextualizing (migrant) labour in its social and community spaces,[80] and not only as a factor of economic production and global economic development, must

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77 See Anderson, "Migration," 310; Sharma, "Difference," 38; Kerry Priebisch, "Pick-Your-Own Labour: Migrant Workers and Flexibility in Canadian Agriculture," *International Migration Review* 44 (2010): 413; Faraday, *Made in Canada*, 76; Anette Sikka, *Labour Trafficking in Canada: Indicators, Stakeholders, and Investigative Methods*, Report No. 42 (Ottawa: Public Safety Canada, 2013), 10, 16; House of Commons, Standing Committee on Citizenship and Immigration, "Temporary Foreign Workers and Non-Status Workers" (May 2009) (Chair: David Tilson, MP), 37.

78 See, e.g., Sheppard, "Mapping," 9, commenting that systemic discrimination cannot be solved through a retroactive and individualized legal complaints system, but requires "new regulatory strategies." See also, Hepple, "Equality," 12.

79 Sheppard, *Inclusive Equality*, 4.

80 See Sheppard, "Mapping," 14.

accompany such responses. Transnational labour law, with its emphasis on social justice, multiple actors, collective action, and counter-hegemonic narratives, presents a critical space in which to undertake this deeper engagement.

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