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# **MISTREATMENT OF TEMPORARY FOREIGN WORKERS IN CANADA: OVERCOMING REGULATORY BARRIERS AND REALITIES ON THE GROUND**

**Edited by  
Eugénie Depatie-Pelletier  
and  
Khan Rahi**

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## CONTRIBUTORS

*Luis Aguiar*

is an associate professor at the University of British Columbia Okanagan, in the Department of Sociology. His current research explores globalization and labour.

*Robert Annis*

is currently an adjunct professor in the department of Rural development at Brandon University and a research affiliate of the Prairie Metropolis Centre.

*Jill Bucklaschuk*

is a doctoral student at the University of Manitoba in the Department of Sociology. Her research is on temporary migration to Canada with a particular focus on using qualitative methods to examine the experiences of those migrants arriving through the Low-Skill Pilot Project.

*Eugénie Depatie-Pelletier*

is a PHD candidate in Immigration Law at Université de Montréal. She currently coordinates the REDTAC-Migration/Temporary foreign workers unit of the Center of International Studies at University of Montréal (CÉRIUM). Her main publications have focused on the production of demographic data on temporary foreign workers and on the protection of their human rights within Canadian society.

*Anne-Claire Gayet*

détient une maîtrise en Études internationales et un LLM (Droit international) de l'Université de Montréal. Elle est candidate au B.C.L/L.L.B (Droit civil et Common Law) à l'Université McGill et agente du Domaine « Justice, police et sécurité » du Centre Métropolis du Québec-Immigration et métropoles.

*Alison Moss*

received a Master of Rural development from Brandon University and currently works as a policy analyst with the Government of Manitoba in the department of Family services and Consumer affairs.

*Khan Rahi*

holds an MA in Sociology of Development and is a Toronto community-based researcher. He is currently management consultant with the Canadian Community-based Research Network (CCRN) and former Executive Director of Access Action Council in Toronto and Manager of BC & Alberta Research Alliance (BALTA).

*Patricia Tomic*

is an associate professor at the University of British Columbia Okanagan, in the Department of Sociology. Her areas of interest include: the politics of language and the Latin American

immigrant experience in Canada, feminism, hinterland studies and the effects of neoliberalism in Chile (1973 to the present).

*Ricardo Trumper*

is an associate professor at the University of British Columbia Okanagan, in the Department of Sociology. His recent research explores the questions of neoliberalism, globalization and power.

*Shaghayegh Yousefi*

completed in 2009 a Master in Public Policy at Simon Fraser University. Her master thesis focused on BC's farm owners' perspective on the application, for their temporary foreign workers from Mexico, of the provincial workplace health and safety standards.

*Sarah Zell*

is a PhD Candidate in Geography and Liu Scholar at the University of British Columbia. She studies transnational migration patterns and processes, with particular focus on North America and Latin America. Her current project explores the management of Mexican migration to Canada, examining the role recruiters and other gatekeepers play in constituting, regulating, and enabling the mobility of foreign labour and in (re)producing the borders of the Canadian state.



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# INTRODUCTION AND OVERVIEW

***Eugénie Depatie-Pelletier and Khan Rahi***

About half (54,2% in 2009<sup>1</sup>) of the temporary foreign workers (TFW) admitted every year to Canada come under one of the special programs developed and regulated by Citizenship and Immigration Canada (CIC). Under this provision, TFW are not required to provide proof of a job offer and/or of its validation by Human Resources and Skills Development Canada (HRSDC). These workers are either admitted under an “open” work permit allowing them to work for any employer in Canada, or under a “semi-open” work permit - linked to a specific employer but easily modifiable to allow work for another employer upon proof of a new job offer. The largest portion of the workers admitted under these special programs are unskilled workers under 35 years old from “friendly” source countries<sup>2</sup> (45 325 workers in Canada in 2009<sup>3</sup>).

The other half of Canadian temporary foreign workers come through admission programs under which employers must first give proof to HRSDC that they cannot find a Canadian worker to fill the job, and then obtain a positive “labour market opinion” (LMO) from the Department. The majority of these workers admitted upon request by Canadian employers (65% in 2009) come to be employed in a so-called “low-skilled” occupation (assumed to require less than a two years post-secondary diploma or less than two years of on-the-job training<sup>4</sup>), and they are admitted under a work permit tied to a specific employer, an obligation to live on the employer’s premises, and a (temporary or permanent) exclusion from procedures allowing work in Canada for the spouse and permanent settlement in Canada.

These restrictions and exclusions tied to the work permit are only the first of multilayered barriers making it difficult for these migrant workers to exercise both their fundamental rights and freedoms, and their labour rights, during their stay in Canada. Some layers of these barriers will be explored in this collective publication.

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<sup>1</sup> Citizenship and immigration Canada (2010), *Facts and Figures 2009: Immigration overview*, 126 p., accessible on line at <http://www.cic.gc.ca/english/pdf/research-stats/facts2009.pdf>

<sup>2</sup> For more information on the dozens of Canada’s temporary foreign workers programs, see in particular Depatie-Pelletier, E. (2008), Under legal practices similar to slavery according to the U.N. Convention : Canada’s “non-white” “temporary” foreign workers in “low-skilled” occupations, paper presented at the *10th National Metropolis Conference*, Halifax, April 5, 49 p. accessible on line at [http://www.cerium.ca/IMG/pdf/Article\\_Depatie-Pelletier\\_Metropolis\\_2008.pdf](http://www.cerium.ca/IMG/pdf/Article_Depatie-Pelletier_Metropolis_2008.pdf)

<sup>3</sup> *Supra* note 1

<sup>4</sup> Human Resources and Skills Development Canada (2010), *National Occupational Classification (NOC) Tutorial*, p.8, accessible on line at <http://www5.hrsdc.gc.ca/noc/english/noc/2006/Tutorial.aspx#8>

The first paper by Khan Rahi takes a broader western and historical perspective to examine Canada's stand on the employment of workers under temporary status. The main aspects of the federal reform of 2011 are then analyzed in a paper by Eugénie Depatie-Pelletier, including the new but ineffective policy of blacklisting employers guilty of infraction. The fact that the entry and stay of temporary foreign workers are usually being organized by unregulated (or under-regulated) labor brokers complicate their situation by diluting employers' accountability, as detailed in the paper by S. Zell.

Three papers look at the specific barriers faced by migrant workers employed in the agricultural industry. Anne-Claire Gayet analyzes how international human rights standards, and in particular the instruments developed by the International Labor Organization, should be applied by Canadian authorities in their administration of the *Seasonal Agricultural Worker Program*. Patricia Tomic, Ricardo Trumper and Luis Aguiar draw, on the other hand, our attention to the day to day situation of workers employed in the fields of the Okanagan Valley. Further, Shaghayegh Yousefi has brought to us the farmers' perspective, necessary to understand if sustainable public policies are to be developed and efficiently applied at all, in order to improve, not only on paper, the respect of the right to health and safety for agricultural workers under temporary work permits.

Finally, two papers in this publication focus on special policy orientations taken by provincial government with regard to the admission of temporary foreign workers on their territory. The paper by Alison Moss, Jill Bucklaschuk and Robert Annis, describes the reality made possible by the first steps taken by the Manitoba government to address the federal denial of a path to permanent residency for temporary foreign workers in "low-skilled" occupation. The last chapter, again by Eugénie Depatie-Pelletier, looks at the recent changes made by the Quebec Department of Immigration (ministère de l'Immigration et des Communautés culturelles - MICC) to the framework regulating the employment of migrant workers in the province.

# BEHIND THE REGULATORY SCREENS OF CANADIAN TEMPORARY FOREIGN WORKER PROGRAM

*Khan Rahi*

In Canada, we are currently witnessing the expansive re-emergence of temporary foreign worker programs (TFWP), which has been a landmark labour force mechanism known as “Guestworker” programs in Western Europe in the 1960s and 1970’s. Although the “Guestworker” program in the prominent user states of Germany and the Netherlands, with the extensive history of the practice in this period, show decline in popularity after 1970’s, the post-Cold War version has appeared in Western European countries and recently in Canada. The “new” practice has summarily incorporated differential treatment towards the highly skilled and low-skilled labour force admitted into this national program<sup>5</sup>.

The re-emergence of TFWP in the Western European context shows an uneven development in their efforts to incorporate this kind of employment programs, ranging from promoting its economic development benefits for the source countries through income transfers, responding to the Central and Eastern European labour force opportunities to curbing human trafficking and illegal flow of migrants. In the US as well, temporary foreign worker initiatives were promoted to address the increasing influx of undocumented migrants from Mexico<sup>6</sup>.

In the Canadian context, the TFWP represents an aggregated system of different regulated temporary migration programs under one administrative regime. The Canadian Seasonal Agricultural Workers Program (SAWP) is the flagship of temporary migration, which has regulated migrants from Mexico and the Caribbean source countries through a stream of bilateral agreements to meet the labour demands of the agriculture growers throughout Canada<sup>7</sup>. In 1973, the Non-Immigrants Employment Authorization Program was established to increase the influx of low-skilled workers from any of the non-traditional source countries and occupations other than domestic and agricultural work, which laid the foundation for the current TFW program<sup>8</sup>. This Non-Immigrant Employment Authorization Program had the legacy of mistreatment and employer-specific work permit regime, allowing no mobility and tolerated the substandard working conditions. The program systematically transformed migrant

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<sup>5</sup> Castles, S. & M. Miller, 2009, pp.186-88

<sup>6</sup> Castle, S & M. Miller, 2009, pp. 186-88

<sup>7</sup> Tanya Basok, “Canada’s Temporary Migration Program: A Model Despite Flaws”, Migration Policy Institute, November 2007

<sup>8</sup> Carly Austin and Harald Bauder, “*Jus Domicile*: A Pathway to Citizenship for Temporary Foreign Workers?” CERIS Working Paper No. 81, December 2010

workers into perpetually flexible economic units within the Canadian labour market. In 2002, a commonly shared regulatory arrangement under the control of the federal bodies of Citizenship and Immigration (CIC) and Human Resource and Skills Development Canada (HRSDC) Canada incorporated a revolving system by which foreign workers would simply come and go and be denied meaningful membership to the national community of Canada.

The institutionalization of the regulatory measures aiming at temporary migration to meet Canadian labor market demands is not a novel notion. It is, in fact, in line with the phenomena of postwar neoliberalism, which has prioritized market imperatives over social policy and equity considerations. Globalization, and the push to fulfill the neoliberal economic and political agenda, have moved Canada away from its previous commitment of nation-building<sup>9</sup> into the fixated search for more flexible and disposable low-skilled migrants to serve as economic units to fill industrial production labor shortages dictated, in part, by global trends towards lower labour costs and degradation of work conditions.

Since 2002, the TFWP low-skilled stream having been facilitated, standard procedures now expanded beyond agriculture and domestic work to meet in particular the demands of the meat transformation, construction, hospitality, food services and construction sectors. The new low-skilled program, in a nutshell, institutionalized the strategic disposability and insecurity, promoting the supply of low-skilled foreign labour from poorer regions of the world<sup>10</sup>. The data, since 1993, reflects that the admission of temporary foreign workers have outpaced the traditional entry of foreign workers, family members and refugees as permanent residents. In fact, in 2008, the number (just fewer than 400 000) of temporary foreign workers on Dec. 1<sup>st</sup> had completely outnumbered the 2008 admissions of permanent residents (250 000). The increase in the admissions of TFW continued during the recession of 2009<sup>11</sup>.

The TFWP regulatory practice in Canada has consistently remained employer driven and, as a labour force, TFW remains flexible and disposable, in majority at the lower-end of the labour market, and if employed in a low-skilled occupation, systematically denied citizenship, mobility, better pay and safe working conditions.

Under the TFWP, workers cannot freely choose their occupation or employer. The power to hire, dismiss and evaluate the worker's individual performance, as well as the obligation to ensure healthy and safe working conditions, all lay in the hands of the employer designated on

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<sup>9</sup> McBride, Stephen, *Paradigm Shift*, 2001, Fernwood Publishing, Halifax, p. 13

<sup>10</sup> Giselle Valarezo "The Institutionalized Disposability of Temporary Migrant Workers: Assessing the Canadian Low-Skilled Foreign Worker Program" Policy Papers, Queen University, Vol 2., No 1. Winter 2010, p. 15

<sup>11</sup> Giselle Valarezo "The Institutionalized Disposability of Temporary Migrant Workers: Assessing the Canadian Low-Skilled Foreign Worker Program" Policy Papers, Queen University, Vol 2., No 1. Winter 2010, p. 15; Carly Austin and Harald Bauder CERIS Working Paper No. 81, December 2010, p.7

the worker's work permit. The paternalistic and arbitrary code of behaviour remains the dominant mode of operation<sup>12</sup>. The massive regulatory, employer-driven entanglement imposes unfair labour practices, and places these workers in vulnerable, exploitative conditions, thus subject to abusive treatment by an employer.

Given the fear that their contract be terminated by the employer (and thus that they be excluded from the program and deported), TFW endure much of the exploitative and bad working conditions through a self-imposed denial of their right to complain, including illness and injuries. In addition, the lack of independent representation to protect their rights and freedoms further facilitates exploitative labour force practices.

The TFW as a cluster in the Canadian labour market thus implies duality between the family and economic class immigrants, who enjoy full access to national and provincial settlement and integration services, and TFW with no right to access the subsidized settlement services. It is the responsibility of the respective employers to meet their settlement needs, which provides support on an unregulated and unpredictable scale. In fact, the protection mechanisms, for these workers, fall under a maze of complex regional regulatory jurisdictions, without any clear line of delegated responsibilities. The entrenchment as well as the lack of appropriate services have exhausted and frustrated the community resources and showed the limits of what individual employers could do to accommodate TFW.

Furthermore, TFW in low-skilled occupations are generally employed in sectors partially excluded from provincial labour laws. For example, Quebec health and safety legislation does not protect domestic workers, and the Ontario labour relations legislation does not protect the right of agricultural workers to unionize. This right to bargain collectively for agricultural workers has been an issue brought in and out of the courts, with fluctuating and contradictory measures of success. In 2007, the BC Supreme Court gave protection to the right to collective bargaining to farm workers, which was a major step forward in achieving legal recognition. However, in the recent Charter Challenge to the Supreme Court of Canada by three Ontario factory farm workers, launched by the United Food and Commercial Workers Canada union to go beyond the right to association towards a right to unionize, the Supreme Court of Canada dashed that hope<sup>13</sup>.

Given the sub-treatment given to TFW at multiple levels, TFWP has recently received serious attention and has come under scrutiny by the public, the media and academic circles. The most significant public policy criticism of the TFW program was launched by the Auditor General,

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<sup>12</sup> Carly Austin and Harald Bauder  
CERIS Working Paper No. 81, December 2010, p.8

<sup>13</sup> "Farm workers have no right to unionize, top court rules" Kirk Makin, Justice Report, Globe and Mail, Friday, Apr. 29, 2011

Sheila Fraser, who characterized TFWP administrators as callous since there is no insurance as to whether the jobs offered to TFW were real in the first place, or if the employers promises for healthy working conditions were maintained:

"The problems we noted could leave temporary workers in a vulnerable position and pose significant risks to the integrity of the immigration program as a whole".<sup>14</sup>

The Auditor General's report pointed out what other observers and practitioners in the field had said all along: many of these workers were quite vulnerable once admitted under precarious conditions and terms of employment (and often without Canadian experience, without adequate understanding of the language and/or isolated). They are exposed to a wide range of possible abuses by recruiters and employers, since their immediate economic conditions make them hesitate before launching any complaint about illegal working conditions, for fear of losing their right to work or opportunity to apply for permanent residency status in Canada. This, the report pointed out, was particularly the case with lower-skilled workers, including caregivers and those working under isolated conditions in remote rural communities.

The Auditor General's report also criticized the lack of strategic planning, stakeholder consultation and programs evaluations by the government, and underlined the overall impact on the current immigration practices. It has characterized the TFW program as being administratively run to meet haphazardly the labour market needs of the country: "there is little evidence that this shift is part of any well-defined strategy to best meet the needs of the Canadian labour market".<sup>15</sup>

Recent research has focused on specific aspects of the Canadian TFWP, essentially critically reviewing the labour market needs, and comparing official processes and procedures to recruit, employ and protect the rights and freedoms of TFW against the reality on the ground. Issues have been identified in the specificity of their regional context and labour market sector characteristics and, yet, they can always easily be linked with national and global trends of TFW recruitment and employment practices and policies, which has resulted in the hyperflexible and disposable labour force of lower-status workers growing every day within our societies.

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<sup>14</sup> Fraser, quoted by Les Whittington, Ottawa Bureau, Toronto Star, Nov. 4, 2009

<sup>15</sup> Quoting Auditor General, Sheila Fraser, Les Whittington, Ottawa Bureau, Toronto Star, Nov. 4, 2009



# **2011 FEDERAL REFORM: MAKING THE CANADIAN MIGRANT WORKERS PAY IF EMPLOYER FOUND ABUSIVE**

***Eugénie Depatie-Pelletier***

In 2009, both the House of Commons' Standing Committee on Citizenship and Immigration (SCCI) and the Auditor General of Canada made policy recommendations to Citizenship and Immigration Canada (CIC) and Human Resources and Skill Development Canada (HRSDC), in order to see the federal administrative framework better protecting the rights of temporary foreign workers (TFW). The following year, the Government had the *Immigration and Refugee Protection Regulations*<sup>16</sup> (here after "the Regulations") modified, first for minor changes<sup>17</sup> to the Live-in Caregiver program (LCP), and later for modifications<sup>18</sup> to the general framework of the temporary foreign workers programs (TFWP) requiring HRSDC labour market opinions.

The Federal administration decided, in these 2010 reforms (which came into effect in April 2011), not to implement the main<sup>19</sup> recommendations from the SCCI and Auditor General, except for one. Instead of improved protection mechanisms, new measures were added making the TFW lose their right to work in Canada if their Canadian employer is found to be in non-compliance with the program's objectives or conditions.

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<sup>16</sup> Canada SOR/2002-227, accessible on line at <http://laws-lois.justice.gc.ca/eng/regulations/SOR-2002-227/index.html>

<sup>17</sup> The details of the last federal policy changes to LCP are accessible on line at <http://www.gazette.gc.ca/rp-pr/p2/2010/2010-04-14/html/sor-dors78-eng.html> ; the ones

<sup>18</sup> The details of the policy changes concerning the general framework of the TFWP were published in August 2010 and can be consulted at <http://www.gazette.gc.ca/rp-pr/p2/2010/2010-08-18/html/sor-dors172-eng.html>

<sup>19</sup> About the "hierarchization" of the Canadian administrative barriers to the respect of human rights of migrant workers, see among others Depatie-Pelletier 2008a.

## **I. The House of Commons' Committee (SCCI) and the Auditor General: Making temporary foreign workers (TFW) less vulnerable**

In May 2009, in order to have the federal government improve the protection TFW's rights and in particular of the TFW employed in a "low-skilled"<sup>20</sup> occupation (TFW-LS), policy recommendations<sup>21</sup> were addressed to the Government by the SCCI. Most importantly in matters of protection of the rights of migrant workers<sup>22</sup>, the House of Commons' Committee recommended that temporary work permits stop being employer-tied<sup>23</sup>, that the right to work in Canada never be associated with an obligation to live on the premises of the employer<sup>24</sup>, and that temporary foreign workers in "low-skilled" occupations be given, as those in "high-skilled" occupations, access to procedures to gain permanent residency<sup>25</sup>.

The Fall 2009 Report of the Auditor General of Canada<sup>26</sup> that followed a few months later also addressed the question of the protection of TFW's rights and of the TFW-LS in particular:

"Various studies and report over the years have recognized that low-skilled temporary foreign workers entering Canada may be vulnerable to exploitation or poor working conditions [...]. There is a risk that live-in caregivers may tolerate abuse, poor working conditions, and poor accommodations so as not to lose the opportunity to become permanent residents. The program's requirement that the caregiver reside in the employer's home can put them particularly at risk. A number of CIC internal reports, some dating back as far as 1994, raised serious concerns about abuse of the program by employers and

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<sup>20</sup> The expression "low-skilled" is commonly used in the Canadian context for referring to temporary foreign workers, and will thus be instrumental for the purpose of this analysis. It is however a controversial expression, since it might implicate that the workers employed in this kind of occupation are less skilled or are of less social value than the ones commonly referred to as "high-skilled" workers. For example, the Canadian Council for Refugee calls into "question the notion of grading skills as "higher" or "lower", and of attaching lesser value to some people's contributions to the country's economy. We believe that all types of contributions make immigrants worthy of becoming permanent residents of Canada. » (CCR 2009)

<sup>21</sup> Standing Committee on Citizenship and Immigration of the House of Commons of Canada (2009), *Temporary Foreign Workers and Non Status Workers – Report of the Standing Committee on Citizenship and Immigration*, 81 p., accessible on line at <http://www2.parl.gc.ca/content/hoc/Committee/402/CIMM/Reports/RP3866154/cimmrp07/cimmrp07-e.pdf>

<sup>22</sup> *Supra* note 4

<sup>23</sup> *Supra* note 6 at pp.24-26

<sup>24</sup> *Ibid.* at pp.9-13

<sup>25</sup> *Ibid.* at p.45

<sup>26</sup> Auditor General of Canada (2009), *Fall Report – The Temporary Foreign Worker Program*, access. on line at [http://www.oag-bvg.gc.ca/internet/English/parl\\_oag\\_200911\\_02\\_e\\_33203.html#hd4e](http://www.oag-bvg.gc.ca/internet/English/parl_oag_200911_02_e_33203.html#hd4e) , pp.28-35

immigration consultants, as well as risks to individuals. Temporary foreign workers hired through the pilot project for occupations requiring lower levels of formal training may also be at risk of similar abuse and poor working conditions.”<sup>27</sup>

The Auditor General added that the lack of verification of the authenticity of the job offers<sup>28</sup> and the lack of follow-up on working conditions<sup>29</sup> were, in particular, putting the well-being of the temporary foreign workers at risk.

Of these five major policy recommendations aiming at decreasing the vulnerability of TFW, and thus the risk of them being abused by employers or recruiters, only one, the importance of verifying the authenticity of the job offers, has been recognized by CIC and HRSDC as important enough to be applied in a systematic manner (or, in other words, to be worthy of integration into the official Regulations). As a result, the main policy elements that enable the “law of silence” of TFW-LS in case of rights violations have been maintained in the regulatory framework. The Regulations now include HRSDC’s authority to deny non-compliant employer access to TFW for two years, but since it relies on TFW themselves to monitor their employers, and it cannot be effective for workers under employer-tied work permits. Ironically, the policy framework as modified in 2010 by CIC and HRSDC will make workers suffer major losses themselves if their Canadian employer is found to be in non-compliance with the objectives and conditions of the TFWP.

## 2. Key policy elements

- **The retention of employer-tied work permits**

In its official response to the SCCI recommendations, the federal government did not acknowledge that “the work permit [... which] specifies a single employer for whom the worker may work [...] gives the employer considerable power over the employee »<sup>30</sup>, or that the employment of bonded labor is convenient or profitable for most of the Canadian employers using the TFWP. Instead, the Government argued that the very bond to a unique employer is necessary to minimize the risk of abuse they may incur at the hands of the employer. The Government alleges that giving employers a legal authority on the stay of their employee in Canada is the “only” way for the Government to keep track, efficiently

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<sup>27</sup> *Ibid.* at pp.33-34

<sup>28</sup> *Ibid.* at p.32

<sup>29</sup> *Ibid.* at pp.33-34

<sup>30</sup> *Supra* note 6 at p.24

enough to identify violations of rights, of the temporary foreign worker's employment trajectory:

"In order for monitoring initiatives recently introduced or underway to successfully improve monitoring of employers [...], the occupation, location of work and employer of the TFW [temporary foreign worker] must be known. [...] To expand open work permits (including through the issuance of occupation/sector specific or province-based work permits) [...] would undermine initiatives recently introduced or underway to better monitor employer's compliance with their commitments under the TFWP, and hence better protect TFW."<sup>31</sup>

Efficient tracking of employment trajectories of TFW does not however require employer-tied work permits, since this can be accomplished by making it mandatory for authorized employers to confirm with the employment programs authorities the beginning of an employment contract with a TFW.

Because TFW-LS are under an employer-tied work permit, if fired by their employer or if they leave the employer for lack of decent work conditions, they automatically lose their right to work in Canada, risk being repatriated or deported to their country, excluded from future work opportunity in Canada and, in the case of caregivers, losing their right to apply for permanent status.

This explains why, when faced with abusive behavior by the employer, most of the TFW employed in a "low-skilled" occupation (under the LCP, the *Seasonal Agricultural Worker Program* (SAWP) or the TFWP stream for other "low-skilled" workers) have endured, are enduring, and will endure violations of their human and labour rights, keeping silent, not complaining and even refusing to testify against the abusive Canadian employer: they cannot afford to lose the right to work in Canada.

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<sup>31</sup> Government of Canada (2009), *Government of Canada Response to the Report of the Standing Committee on Citizenship and Immigration: Temporary Foreign Workers and Non-Status Workers*, access. on line at [www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=4017803&Language=E&Mode=1&Parl=40&Ses=2](http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=4017803&Language=E&Mode=1&Parl=40&Ses=2)

In the past, the vast majority of the few TFW-LS who finally told their stories of abuses by the employer or recruitment agency did so only after being protected by a permanent status in Canada<sup>32</sup>, or after having lost not only their right to work, but also all hope to ever access a temporary work program in Canada<sup>33</sup>.

However, if these workers had the possibility to accept another job offer thanks to an “open” work permit (allowing to work for most employers in Canada), a province-specific work permit, an occupation-specific work permit or a sector-specific work permit (in other words, if they would not automatically lose their right to work in Canada if fired by their employer), they would be more likely stand up, speak out, and demand the respect of their human, labour and immigration rights in front of an (or a potentially) abusive employer (or recruitment agent), even when there is a possibility that they will be unjustly fired (or denied a promised employment opportunity) for doing so. Open, sector-specific, occupation-specific and province-specific work permits, as opposed to the current employer-tied work permit, would make the monitoring of work conditions useful by allowing (thanks to a simple right to seek and accept alternative employment) the workers to better deal with the risks (such as losing one’s employment) associated with speaking out against an abusive employer.

- **The retention of the obligation to live with the employer**

In the Government of Canada’s 2009 response to the SCCI recommendations, it is stated that the obligation to reside with the employer imposed upon foreign workers admitted under the Live-in Caregiver Program (LCP) is a “vital component of the LCP”, even when considering “the TFW’s vulnerability in live-in situations”, because of the “continuing shortage of caregivers willing to live in the home of those they are caring for. [...] Should the live-in requirement be eliminated, there would likely be no need to hire TFW”.<sup>34</sup>

The following year, the Government of Canada did indeed decide, in the reform that came into effect on April 1<sup>st</sup> 2011, to maintain the live-in obligation, in the Regulations for caregivers and, for the other “low-skilled” workers, through the systematic authorization of contracts including live-in obligation (which then becomes, as in the case of caregivers, a de

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<sup>32</sup> Many women from Philippines origin have wait until the obtaining of their permanent status to finally share with researchers their story of abuse by employer or recruitment agency. For some of these stories, see for example the report published by Oxman-Martinez and al. in 2004.

<sup>33</sup> For example, the union United Food and Commercial Workers has dealt with many Mexican workers forever excluded from the Seasonal Agricultural Worker Programs. Their last report, *The Status of Migrant Farm Workers in Canada 2010-2011*, is now access. on line at [www.tuac.ca/templates/ufcwcanada/images/awa/publications/UFCW-Status\\_of\\_MF\\_Workers\\_2010-2011\\_EN.pdf](http://www.tuac.ca/templates/ufcwcanada/images/awa/publications/UFCW-Status_of_MF_Workers_2010-2011_EN.pdf)

<sup>34</sup> *Supra* note 16

*facto* condition of the validity of their work permit and therefore of the legality of their stay in Canada).

However, alarms have been sounded for decades about the live-in obligation, including in CIC internal reports as mentioned by the Auditor General<sup>35</sup>, and more recently by the Quebec Human Rights Commission during the 2008 public consultations organized by the SCCI, which has summarized the situation in the following terms:

“The fact of living in the employer’s premises put the worker in a situation in which outside his/her working hours, the exercise of the right to privacy, protected by the art. 5 of the (Quebec Human Rights) Charter, risk of being overridden by the right of the landlord (the employer) of limiting the access to his property/land. In this context, the free movement of the worker or his/her visitors might be compromised. This limitation may constitute a barrier to the exercise of the freedom of association and freedom of opinion, protected by the art. 3 of the Quebec Charter. This freedom of association includes the adhesion to a workers union and to any association working for the defense of rights. The obligation to live in the employer’s premises does not apply to non-migrant Quebec workers. Therefore, the obligation to live-in imposed to agricultural workers might compromise their right to equality protected by art. 10 of the Quebec Charter on the ground of their ethnic or national origin. Moreover, this requirement included in the validated contract might also constitute a barrier to the exercise of the right to freedom of the worker, and also to his/her right to peaceful enjoyment and free disposition of personal property, as protected by the art. 1 and 6 [...]. In front of the erosion of the rights and freedom of live-in caregivers, the Commission could not underline enough to the Committee the necessity of the abolition of the obligation to live-in integrated within the Live-in Caregiver Program”.<sup>36</sup>

In maintaining the live-in obligation policy for TFW in “low skilled” occupations, the Government of Canada knowingly chose to make many fundamental human rights and freedoms of migrant workers in practice difficult, if not impossible, to exercise.

The Canadian Labor Congress has furthermore suggested that the removal of the live-in obligation would be a first step, but a formal obligation for the employer would also be required to minimize abuses and exploitation of caregivers:

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<sup>35</sup> *Supra* note 11

<sup>36</sup> Commission des droits de la personne et des droits de la jeunesse (2008), *Notes de présentation aux audience pancanadienne du Comité Permanent des Communes sur la Citoyenneté et l'Immigration*, p. 4 and 8 (personal translation)

« A fundamental flaw in the LIC program is the obligation for workers to reside in an employer's home, thereby, creating the conditions for exploitation and abuse. Regulatory changes are needed to end this arrangement and stipulate that employers must provide a Living Out Allowance (LOA) for Live-in Caregivers. Living Out Allowances must be adequate to cover accommodations, meals, transport to and from work, and phone calls to home at a minimum. Living Out Allowances details should be developed with the input of LIC advocacy groups. »<sup>37</sup>

- **No guarantee of status in case of complaint against employer**

As mentioned above, if a TFW employed in a “low skilled” occupation (under the LCP, SAWP or TFWP-LS) loses his/her employment, he/she will automatically lose the right to work in Canada. For that reason, most will not complain against an abusive employer because of the fear of being dismissed.

If however, for a reason or another, a worker unjustly dismissed by an abusive employer, chances are that he/she will still not complain afterwards, and instead accept to be repatriated by representatives of his/her government to the country of origin, in the hope of not being put on a “blacklist” (in the hope of being re-hired again in the future through a Canadian temporary foreign worker program).

For the rare abused (or injured) TFW-LS who would choose not to go away (even if without income, without the right to work in Canada and risking being excluded from the Canadian temporary work program<sup>38</sup>) forever and instead stay in Canada to submit a complaint (or ask for the respect of their right to treatment and/or compensation), chances are that the validity of their work permit (of their right to stay in Canada), their financial capacity to live in Canada without income and/or their emotional capacity to stay away from children and spouse, will end long before any obtainment of justice (or compensation).

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<sup>37</sup> Canadian Labour Congress (2010), *Canadian Labour Congress response to IRPA Regulatory Changes Regarding Temporary Foreign Workers*, p.6, access. on line at [www.canadianlabour.ca/news-room/publications/canadian-labour-congress-response-irpa-regulatory-changes-regarding-temporary](http://www.canadianlabour.ca/news-room/publications/canadian-labour-congress-response-irpa-regulatory-changes-regarding-temporary)

<sup>38</sup> Excluded by their Government authorities or other labor brokers who might think that such vocal workers would not be much appreciated by their “clients” (the Canadian employers) – who would then just look elsewhere (Guatemala instead of Mexico, for example) to get more “obedient” workers (workers less aware of their rights).

Indeed, by the end of the work permit validity, the countdown starts towards deportation by the Canadian Borders Service Agency (and possibly towards an interdiction to come back to Canada), even if legal procedures against an abusive employer are still in progress (unless the Minister of Citizenship and immigration makes an exceptional intervention to allow the extension of the stay in Canada).

This gap in the law (“you have rights, but you will certainly lose your status before being able to exercise them”) could have been easily filled by CIC/RHSDC during this 2010-2011 reform of the Regulations, for example by allowing these TFW-LS to apply for permanent status if so desired, even if only to be able to stay and work during the indeterminate period of a legal procedure towards reparation for a violation of human or labor rights by the employer or recruitment agency.

In response to the recommendation concerning a pathway to permanent status for all lower-skilled temporary foreign workers, in 2009 the Government of Canada justified the denial of access to permanent status for them (with the exception of caregivers) in these terms: they “generally have limited training, transferable skills and linguistic abilities, which mean adapting to changing conditions and finding their way around in the Canadian labor market could be more of a challenge. Moreover, it does not appear that a broad-based long-term need for lower-skilled workers exists across Canada”<sup>39</sup>.

This line of argument is not supported by the data currently available in Canada. First, in the past, migrants coming for permanent settlement came with lower skill levels, but showed less difficulties integrating in the Canadian labour markets than the more recent cohorts of foreigners with “higher skills”<sup>40</sup>. In addition, more temporary foreign workers in specific low-skilled occupations are admitted every year, which points to the fact that the labour market needs they are filling are not temporary, but instead long-term, permanent, if not increasing. See for example, tables 1 and 2 below, concerning the admissions of TFW to fill the so-called “temporary” labor shortages in the sectors of domestic services and agriculture.

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<sup>39</sup> *Supra* note 16

<sup>40</sup> See, among other research on this subject, Worswick 2008



**Table 1**  
Number of TFW employed in Canada  
as caregivers on December 1<sup>st</sup> (1996-2006)

Année	Total
1996	4942
1997	5272
1998	5562
1999	5724
2000	5942
2001	7694
2002	10148
2003	12370
2004	14995
2005	17697
2006	21489

Source : Depatie-Pelletier 2007

**Table 2**  
Numbers of Mexican and Caribeen TFW employed in Canada  
as agricultural workers on December 1<sup>st</sup> (1996-2006)

Année	Total
1996	10948
1997	11891
1998	12782
1999	14742
2000	16402
2001	18098
2002	18354
2003	18457
2004	18628
2005	19879
2006	20829

Source : Depatie-Pelletier 2007

The federal immigration authorities not only maintained, in this last reform, the denial of access to permanent status for TFW in “low-skilled” occupations, they also modified the Regulations so that the TFW-LS will now be forced to leave Canada after their fourth year of Canadian work experience (except if from Mexico or the Caribbean and employed within the agricultural industry)<sup>41</sup> - even though previous Canadian work experience has been shown to be a significant predictor of successful integration in the labour market and thus of successful permanent settlement process<sup>42</sup>. This measure, the “4-year time-limit”, will be further discussed in the last section of this analysis, “Making migrant workers pay for non-compliant employers”.

- **No monitoring of work conditions**

In 2009, CIC and HRSDC officials responded to the Auditor General that neither the *Immigration and Refugee Protection Act* nor its Regulations give them authority to conduct compliance reviews of employers who have not consented, but that “regulatory modifications aimed at resolving some of these issues are currently being considered”<sup>43</sup>. Indeed, there is a concrete need for monitoring the work conditions of these workers. For example, according to a study by J. Hanley, 43% of live-in caregivers interviewed were not paid for overtime, 7% were not receiving minimal wage, and 16% responded to having been harassed physically or psychologically by their employer<sup>44</sup>.

Even if the monitoring of employer’s compliance was considered necessary to the protection of the rights of the foreign workers by the Auditor General and the SCCI, the 2011 reform of the Regulations did not provide either CIC, the Canadian Border Services Agency (CBSA), or HRSDC with new authority to monitor employers’ compliance with the federal regulations.

Rather, the modifications of the Regulations confirmed instead HRSDC’s authority to only deny the future privilege of a hiring permit to non-compliant employers who wish to hire foreign workers again. Since federal authorities will not monitor work conditions, it is assumed that TFW will submit a formal complaint themselves against an abusive employer (under provincial or federal labour laws and human rights protection agencies), and then transfer that information to the federal authorities, before HRSDC even begins to ask for a “justification of non-compliance” to an employer looking for the renewal of the hiring

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<sup>41</sup> *Supra* note 3, policy change 2 (3), referring to new art. 200(3)(g)

<sup>42</sup> *Supra* note 25

<sup>43</sup> *Supra* note 11, p. 34

<sup>44</sup> Centre des travailleuses et travailleurs en maison privée et DroitsTravailleusesTravailleursMi-grants-Canada (2009b), *Lettre à l'Honorable Jason Kenney sur les modifications aux programmes de travailleurs étrangers temporaires*, p. 1 and 3 (personal translation)

permit. This measure for “monitoring” the employers of TFW-LS under an employer-tied work permit will therefore be inefficient, unless the Regulations are modified to guarantee that those who speak out against their employer are able to keep working in Canada afterwards. The Government has also maintained the provision of the Regulations which allow all employers openly in « dispute » with their TFW and wanting to replace them by other TFW to be authorized to do so:

« An officer shall not issue a work permit to a foreign national if [...] the specific work that the foreign national intends to perform is likely to adversely affect the settlement of any labour dispute in progress or the employment of any person involved in the dispute, unless all or almost all of the workers involved in the labour dispute are not Canadian citizens or permanent residents »<sup>45</sup>

In this regulatory context, it is highly unlikely that TFW would openly ask the employer for the respect of applicable labour or human rights legislation, risk an open dispute and thus replacement by another foreign worker and deportation: they will efficiently be kept silent if exploited by employers.

The Reform did however formally provide the non-compliant employers with the right to force HRSDC to allow them to keep on hiring TFW, if they are able to “justify” why their foreign worker(s) were not granted the conditions initially promised to them<sup>46</sup>. This provision essentially nullifies what little power HRSDC already has. The section makes sure that testimonies by a non-compliant employer (if submitted by someone who understand the Regulations) will by definition most certainly be covered by at least one of these broad categories (and thus constituting a “justification”): “an error in interpretation made in good faith by the employer with respect to its obligations to a foreign national”, “the implementation of measures by the employer in response to a dramatic change in economic conditions that directly affected the business of the employer”, “an unintentional accounting or administrative error made by the employer” or “similar circumstances”<sup>47</sup>.

### **3. Making workers pay for non-compliant employers**

Regulatory modifications that came into effect in April 2011 are not only inefficient to decrease the vulnerability of the TFW-LS to abuses by employers or to facilitate the monitoring of their working conditions during their stay in Canada, but they also officially make workers pay for the abusive behavior of employers.

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<sup>45</sup> *Supra* note 1, art. 200(3)(c)

<sup>46</sup> *Supra* note 3, new article 203(1)(e)(ii)

<sup>47</sup> *Ibid.*, new art. 203 (1.1.)

First, these TFW-LS are asked to “sacrifice” their right to work in Canada (their financial survival and that of their family members) in order to make sure an abusive employer is finally found to be in infraction of federal or provincial labour, recruitment or immigration laws, so that the federal authorities will be able to forbid them from hiring TFW for two years. By complaining against their employer, chances are that they will indeed be dismissed, and thus lose their right to work in Canada.

If they are working for an employer when he/she is declared by federal authorities to be non-compliant with the TFWP, these workers will not only lose their right to work in Canada, but they will also be taken to be in violation of Canadian immigration regulations<sup>48</sup> (even if they are also the victim of a violation to the regulations in question) - which would prevent them from accessing another Canadian work permit in the future. This policy change has been called into question by the Canadian Labour Congress in the following terms:

« This amendment places an unfair and impractical burden on migrant workers. It is unreasonable to presume that all migrant workers will have access to the internet, nor the linguistic or technical capacities to navigate a CIC webpage listing ‘disingenuous employers’. Furthermore, there is no evidence that disingenuous employers or unscrupulous labour brokers won’t represent themselves differently from what may appear on a CIC website ».<sup>49</sup>

Furthermore, these workers admitted under work permit will be forbidden to work in Canada for 48 months if their Canadian employer has abused the TFWP during four years<sup>50</sup> (filling long term or permanent labor shortages with TFW instead of hiring Canadian citizens or permanent residents). The Canadian Council of Refugees explained why this change in the Regulations might be inappropriate:

« This change is presented as a way to confirm the temporary nature of the Temporary Foreign Workers Program. This solution is based on an assumption that the problem lies with the individual workers, who need to be prevented from continuing to work in Canada on temporary visas. The CCR considers that the problem lies rather in the labour market, which is relying on workers on temporary visas to fill long-term needs, and in the immigration program, which denies access to permanent residence to workers in the “lower” skill category<sup>51</sup>. CCR considers that [...] any time limits should be placed on employers, no

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<sup>48</sup> *Supra* note 3, new art. 183 (1)

<sup>49</sup> *Supra* note 22 at p.4

<sup>50</sup> *Supra* note 3, new art. 200(3)(g)

<sup>51</sup> Canadian Council for Refugees 2009

workers, to prevent employers from using temporary workers with fewer rights to meet long-term labour demands ».<sup>52</sup>

#### **4. Authorizations in underprotected sectors: making Canadian workers pay**

Finally, it should be noted here that the Government has maintained in the Regulations the policy of authorizing the hiring of new TFW in provincial sectors where workers are not covered by the health and safety legislation (such as the domestic workers in Quebec) or, more importantly, where workers are forbidden to unionize (such as the agricultural workers in Ontario).

Because the majority of TFW-LS are currently employed in these kinds of underprotected provincial sectors in Canada, it is fair to say that the provision detailed above (“no work permit is to be issued if a labor dispute is in progress”)<sup>53</sup> is, in effect, mostly void, since in many instances “labor dispute” cannot be identified by HRSDC agents since unionization of the workers is not protected in the sector evaluated.

Moreover, in order for the provision asking for a reasonable effort to fill the labor shortage with citizens and permanent residents<sup>54</sup> (asked to employers before allowing them to hire a TFW) to be meaningful in all cases as well, as the spirit of the Regulations asks, the federal authorities should not authorize the hiring of a temporary foreign worker unless unionization is allowed in the sector of employment in question (unless the possibilities to attract citizens and permanent residents for the job are made concrete).

In conclusion, in considering TFW now fully “protected” in Canada, CIC and HRSDC officials have shown, with the coming into effect of these last policy changes of the *Immigration and Refugee Protection Regulations*, they largely underestimate the non-applicability of any (even if highly deficient) protection available under provincial labor laws for TFW-LS forced by federal Regulations to “keep silent” in the face of a violation of labor rights or other abuse by their employer (if they are to preserve their right to work in Canada). As the Canadian Labor Congress<sup>55</sup> puts it, the Regulations are unbalanced towards the interests of employers, imposes an unfair punitive burden on migrant workers and, furthermore, does not protect the long term interests of Canadian workers and the preservation of decent work conditions in Canada by authorizing the employment of TFW in sectors where

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<sup>52</sup> Canadian Council for Refugees 2010

<sup>53</sup> *Supra* note 30

<sup>54</sup> *Supra* note 1, art. 203(3)(e)

<sup>55</sup> *Supra* note 22

workers are not allowed to bargain collectively or are not covered by the health and safety legislation.

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# **CONTRACTING OUT ACCOUNTABILITY? THIRD-PARTY AGENTS IN TEMPORARY FOREIGN WORKER RECRUITMENT TO BRITISH COLUMBIA<sup>56</sup>**

***Sarah Zell***

There is currently a global trend toward increased temporary labour migration, with patterns of circular migration becoming more common and replacing the “old paradigm of permanent migrant settlement” (GCIM 2005; Vertovec 2007). Canada, traditionally a country of permanent immigration, has seen a rise in temporary migration in recent years. Workers arriving through Canada’s Temporary Foreign Worker Program (TFWP), for example, have swelled from 139,103 in 2006 to 192,519 by 2008 (CIC). The program provides a source of temporary, flexible labour to Canadian employers who demonstrate skills and labour shortages. Unprecedented demand for this labour across Canada has come with a number of challenges, and research has pointed to concerns related to the social exclusion, transitional needs, and rights and protections of these workers (e.g., Pratt 1997; Depatie-Pelletier 2008; Kim and Gross 2009).

There has been little research, though, examining the recruitment of TFWs and how the recruitment process itself may engender challenges. Many of the TFW case complaints emerging in Alberta and British Columbia in 2006-2007 documented by Flecker (2008), for example, could be traced back to abusive labour brokers, who have been accused of charging illegal fees and providing misleading claims about jobs and access to citizenship.<sup>57</sup> The TFWP is designed as an employer-driven program, and Canadian employers who choose to hire workers through the program, particularly for the first time, often lack the in-house capacity (resources, time, expertise) and knowledge of source-country training or program bureaucracy required to navigate the foreign recruitment process.<sup>58</sup> Thus they engage the services of a third-party recruiter or consultant to assist them.

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<sup>57</sup> There are a number of media stories documenting challenges associated with unscrupulous recruiters or immigration consultants (e.g., Lee-Young 2007, 2008; CBC 2009a, 2009b; Millar 2009).

<sup>58</sup> Interviews indicated that human resource personnel often do not have specific training in the area of immigration, and until the employer develops in-house expertise—particularly in the absence of clear program guidelines—navigating the process and completing the associated

Existing research on TFW recruitment and the role of “intermediaries” in facilitating transnational labour migration to Canada is for the most part anecdotal and relayed through the media,<sup>59</sup> and there is a demonstrated need for a greater exploration of the recruitment process and the attendant financial and social costs for workers. This paper draws on field research conducted in August-September 2009 and examines the actors involved in TFW recruitment in British Columbia (BC).<sup>60</sup> Primary data were collected through fifty-one semi-structured interviews with a variety of stakeholders, including employers and industry association representatives; immigration lawyers/consultants and recruiting agents; policy-makers; and migrant workers and representatives from immigrant-serving agencies in BC.<sup>61</sup> The paper describes how employers are using third-party agents to recruit workers to Canada through the TFWP and highlights the primary challenges faced by both workers and employers. It then discusses the changing regulatory context in Canada around the issue of foreign worker recruitment and concludes by considering some possible directions for addressing those challenges.

## **I. Expanding Temporary Labor Migration to Canada**

The TFWP is designed to respond to regional, occupational, and sectorial skills and labor demands. An employer facing shortages submits a request to hire a TFW to Human Resources and Skills Development Canada (HRSDC)/Service Canada, who reviews the employer’s application and issues an opinion on the likely impact on the Canadian labor market, or a Labor Market Opinion (LMO). Initially, the TFWP was intended to bring in short-term skilled workers, but in recent years it has been expanded. In 2002 the program was extended to all categories of employment (HRSDC 2008), with additional conditions

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paperwork can be overwhelming. Even larger companies with TFWP experience, especially in the construction sector, frequently outsource aspects of the recruitment process, in part because of a culture of subcontracting.

<sup>59</sup> This is in large part because of the extreme vulnerability felt by many TFWs related to the precariousness of their status (De Genova 2002; Goldring et al. 2007). There are a few studies that have focused on the role of recruiters, including: Harney (1977); Pratt (1997); Abella (2004); Kuptsch (2006); Guevarra (2009).

<sup>60</sup> The scope of this study was limited to the hospitality/tourism and construction sectors in the TFWP in BC. Several streams can be identified within the TFWP: The Seasonal Agricultural Worker (SAWP) and Live-In Caregiver (LCP) programs are unique and have specific regulations. Some highly skilled TFWs also come to Canada through the North American Free Trade Agreement, Canada-Chile Free Trade Agreement, and the General Agreement on Trade in Services. There is also the Project for Occupations Requiring Lower Levels of Formal Training (PORLLFT) and what is seen as the *general* TFW program, which is the focus of this paper.

<sup>61</sup> Purposive snowball sampling was used to identify interviewees. An effort was made to include a wide-ranging cross-section of each stakeholder group, for example in terms of employer size, level of government, and geographical distribution across BC. More information on methodology can be found in Zell (2009).

imposed on employers hiring “lower skilled” (i.e., NOC C and D)<sup>62</sup> workers, including payment of return airfare, provision of medical coverage for the duration of the employment contract, and reasonable assistance in locating suitable accommodations for the worker. Until recently, the Canadian government was also removing obstacles for employers to obtain LMOs by expanding its list of “Occupations Under Pressure” to include nearly all construction trades and health professionals as well as numerous lower-skilled occupations in retail and the service industry (HRSDC 2009; Gross and Schmitt 2009).

As the TFWP has been made more accessible to employers, there has been a marked increase in employer demand and consequently in the number of TFW entries. Estimates indicate a 57% increase in foreign worker requests in Alberta and British Columbia from 2006 to 2007 alone (HRSDC 2008). Confirmed LMOs rose from 90,829 in 2006 to 175,737 in 2008 across Canada, and in BC from 18,08 to 35,520, with the largest increases in NOC C and D occupations, particularly in the areas of trades/transport and sales/services (HRSDC 2010).<sup>63</sup> According to Citizenship and Immigration Canada (CIC), by 2008 the number of TFWs in BC was nearly double the number in 2003, and triple that in 1998. There has also been a notable shift in the composition of these migrants, with notable increases in workers coming to BC from the Philippines and Mexico to work in lower-skilled occupations.

In BC, government officials and employers cite a booming economy, an aging workforce, and an increasingly educated population unwilling to take low-skilled jobs as contributing to labor shortages—and they see TFWs as an important labour source going forward.<sup>64</sup> At the national level, it was projected that by 2010 the Canadian workforce will have declined in overall number for the first time in history, even as BC is poised for significant economic growth over the next decade (BC Chamber of Commerce 2008). As labor shortages continue to rise the BC government sees immigration as part of its comprehensive labor market strategy—and it is increasingly temporary workers that are filling those shortages. In fact, CIC figures show that in 2008, for the first time since the mid-1980s, the number of

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<sup>62</sup> The Canadian National Occupational Classification (NOC) has the following categories: 0 (Managerial), A (Professionals), B (Skilled/Technical); C (Intermediate/Clerical), and D (Elemental/Labourers). Categories 0, A, and B are considered “skilled” (HRSDC 2006). Scare quotes are included to indicate that these skills categories are ascribed to occupational categories rather than individuals.

<sup>63</sup> The number of confirmed LMOs has fallen slightly since 2008, to 103,720 Canada-wide and to 18,347 in BC, in large part because of the economic downturn.

<sup>64</sup> Even with the economic downturn interviewees in tourism/hospitality noted a continued demand especially for lower-skilled labour, and several employers in construction indicated that they have TFWs pre-selected and “waiting in the wings” as they anticipated new projects. Responding to a question about the economic downturn one employer rejoined, “Those auto workers from Ontario aren’t going to be moving to the BC interior to clean toilets, you know.”

temporary workers entering BC superseded that of new immigrants (permanent residents).<sup>65</sup>

## **2. Third-Party Recruiting Agents and Service Provision**

As the TFWP has expanded, there has been a corresponding “commercialization” of migration and proliferation of recruiting agents to assist employers. Canadian employers use a range of methods to locate TFW candidates, approaching them directly through public advertisements or based on the recommendations of current employees, or indirectly, using third parties. Private third-party recruiters, as opposed to in-house or state-run public agencies, are becoming increasingly common in international migration. Especially where there is a significant cultural, linguistic, or geographic distance between employers and workers, recruiters draw on their information about available positions or labour pools to act as brokers.

There are a variety of actors involved in the recruitment of TFWs, including employment agencies, immigration consultants and lawyers, and in-house human resources recruiters, as well as educational institutions, industry associations, provincial and local governments (often involved in marketing or hosting job fairs in potential source countries), and embassies or source-country public employment agencies.<sup>66</sup> Table I presents a survey of some services offered by these various agents, which range from initial screening and interviewing to the provision of settlement services. The three primary types of third parties facilitating TFW migration to BC are: 1) Employment Agencies, 2) Immigration Lawyers, and 3) Immigration Consultants. In BC, employment agencies must pass a test to be licensed under the *Employment Standards Act* (ESA). There is a list of “licensed” agencies available on the Employment Standards Branch website, but there is currently no formal quality or pro-active audit function conducted on a regular basis, and much enforcement of the Act with respect to employment agencies remains reactive in nature.

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<sup>65</sup> This is in part due to a relative drop in resources allowed by CIC for the treatment of Federal Skilled Worker applications, which still faces a large backlog.

<sup>66</sup> This would be the case, for example, in bilateral labour mobility agreements such as the Canada-Mexico Partnership on Labour Mobility, a pilot project to connect eligible employers with Mexican workers in the tourism, hospitality, and construction sectors.



Immigration lawyers and certified immigration consultants are required to meet education and competency requirements and are subject to the codes of professional conduct of their self-regulating bodies. Immigration lawyers are regulated by the relevant law society. Immigration consultants may be certified as members of a self-regulating body or may operate uncertified.

The Canadian Society of Immigration Consultants (CSIC) was established in 2004 as a consumer protection measure in an effort to regulate the immigration consulting industry and set standards for its level of education, quality of services, and professional accountability. To become certified a consultant must demonstrate English proficiency, complete a four-month course (at local colleges), and contribute to insurance and compensation funds. Nationally, CSIC currently regulates more than 1,900 Certified Canadian Immigration Consultants or CCICs (about one-third based in BC), who advise and represent foreign nationals or employers on immigration-related applications for a fee. CSIC has instituted a formal complaints process to deal with unscrupulous or fraudulent consultants and has raised the profession's standards, but there have been questions raised about its effectiveness as a self-regulating organization. According to CSIC's annual report, there were 205 complaints lodged against members in the 2008-2009 fiscal year. In October 2009 the society still had a backlog of 127 that remained open and unresolved (CSIC 2009).

Of course, CSIC can only regulate those consultants who are members, and there are thousands of unregistered or "ghost" consultants in operation, including those whose CSIC membership has been suspended or revoked (Millar 2009; Standing Committee on Citizenship and Immigration 2009). Furthermore, the fact that immigration consultants, lawyers, or employment agencies hold a certification or valid license does not guarantee that they will abide by their regulatory body's professional standards or by federal or provincial regulations. The burden falls to employers and oftentimes to migrants themselves to practice due diligence in selecting and contracting an agent to represent them.

Reports by the Standing Committee on Citizenship and Immigration in 2008 and 2009 pointed, however, to governance issues and a lack of public confidence in CSIC. In particular, in the 2008 report the parliamentary committee investigating problems in the industry noted criticisms of CSIC including high fees for membership, an unaccountable board, and a lack of transparency in decision-making problems that many claim has pushed consultants to work underground (Standing Committee on Citizenship and Immigration 2008; Friesen 2010; Keung 2010).

### 3. Challenges Related to Third-Party Foreign Worker Recruitment

“[There are] a lot of empty promises, a lot of money being, being extracted from these people. We’ve heard of foreign workers paying as much as ten thousand dollars to come over here and . . . the only promise they got was that they would get some interview.”  
– BC employer

Unscrupulous third parties pose challenges for both employers and workers involved in the TFWP, and some points of pressure are related to the mediation inherent in outsourcing recruitment. Primary challenges identified in this study concern fees for service, misrepresentation, and miscommunication.

For-profit employment agencies and immigration lawyers and consultants involved in recruiting TFWs often offer a “package” of services, from pre-screening candidates, to navigating the immigration paperwork, to assisting in the settlement of foreign workers (Table 1). Most charge employers flat fees for each worker recruited, with a typical placement fee totaling \$2,500 to \$5,000, depending on the source country and occupation.<sup>67</sup> Foreign recruiting can be a costly process for an employer, but interviews indicate that many employers, especially when new to the TFWP, do not understand the cost. Some larger employers reported paying exorbitant fees: “[At first] the costs were extravagant. Anywhere from four thousand...all the way up to twelve thousand dollars per man. ... We know we got toyed around with at the beginning, but we learned....” In some cases employers paid for services, such as return airfare or private medical insurance, which were never rendered. They learned from experience to include these items in a contract and to monitor the agencies more closely.

Some third-party agents market the TFWP to employers as an easy solution, approaching unsolicited and offering foreign workers at no cost. Instead they are often charging the workers themselves. The most common recruitment-related issue for migrants is the payment of fees for job placement or “immigration-related” costs. While illegal in Canada under the ESA, in many source countries there is a culture of paying fees to a recruiter. All TFW respondents in this study paid fees—ranging from \$4,000 to \$15,000—to recruiters for job placement in Canada, and only one individual was aware that having to pay such fees was illegal in Canada. Often there is a case of double dipping, with recruiters charging both the employer and the worker. One worker explained: “My original owner didn’t know that we paid the agency to come here because all of us Jamaicans who are here right now working, we all paid the agency each \$4,000 ... which the owner of our [company] did not

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<sup>67</sup> The actual cost of recruitment includes a variety of other costs, including source-country government documentation, transportation, return airfare, and three months of private medical coverage, depending on the NOC of the occupation.

know ... because he already like paid thousands to bring us here.” In many cases a recruiter in Canada has a transnational relationship with an affiliate or sister agency based in the source country, and it is the source country agency (in some cases unbeknownst to the Canadian agency) that is charging the worker.<sup>68</sup>

Some employers in Canada expect that workers will arrive, recruited by a third party acting on their behalf, at zero cost to them. Better educating potential employers about the financial costs associated with TFW recruitment, and holding employers liable for the actions of the third parties they choose to represent them, would help in preventing them from contracting to recruiters who illegally charge workers. It might also induce some employers to consider more seriously other local sources of labour, if disabused of the notion that TFW recruitment has little or no financial cost.

Outsourcing worker recruitment comes with other challenges; because of the very nature of contracting to third parties, employers and foreign workers frequently contend with misinformation. One of the primary obstacles for employers is locating qualified workers who match the skills demanded by a particular occupation—in particular in the construction sector with trade people, and in the tourism and hospitality sector in BC with occupations such as cooks. Employers rely on a recruiter to understand source-country standards and assess a candidate’s qualifications. While a number of employers mentioned cases of misrepresentation (with recruiters or workers overstating qualifications or providing fraudulent documentation), there is also the situation of workers having the requisite work experience but, as one employer put it, “something’s lost in translation.” Workplace processes, quality and safety standards, and tools and equipment vary across international contexts, a reality for which many employers had not been adequately prepared. An assumption by employers, tacit in the design of the TFWP itself, is that skills in one area of the globe are easily transferable to another. But, as one employer explained: “the fine finish that we do here was quite foreign to them...and so we had to have an aggressive and expensive training program...we thought, drywall was drywall.... The qualifications were all there on paper, but as I said, the reality just didn’t work.”

On the other hand, almost all of the migrant interviewees were misinformed about employment conditions or their eligibility for permanent residency in Canada. In some cases recruiters had promised, and workers anticipated, a higher wage rate (sometimes this involved employment contract substitution), and some workers were not made aware of the cost of living in the destination, that taxes would be deducted from their salaries, and that

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<sup>68</sup> Some sending countries, such as the Philippines and Korea, require that a local consultant (i.e., one registered in the country) be used in worker recruitment and the processing of source-country documentation (Agunias 2008).

they were eligible for some benefits (such as Employment Insurance). One worker from the Philippines was hired as a general labourer (NOC level C) but was in fact working as a welder (which would be NOC level B and carry a higher wage rate and potential access to permanent residency). Even worse, some migrants arrive in Canada to find they have paid a recruiter thousands of dollars when there is no legitimate job or employer.

It appears that there is a widespread misconception among migrants—in many cases propagated in the source country by recruiters—that working as a TFW is a guaranteed “foot in the door” to permanent residency. Workers often do not understand before arriving that their eligibility for permanent residency is based in part on the NOC of their job. Also, their ability to access certain settlement services and to bring their families with them may be restricted because of their temporary status. Though immigrant-serving agencies across BC have reported increases in inquiries by TFWs, provincially funded agencies are not able to serve TFWs (AMSSA 2009). Some settlement services are provided directly by employers, but in many cases, if a third-party recruiter is used, employers are contracting both information provision and settlement services to the third party (i.e., immigration lawyers or consultants picking up workers at the airport, settling them in temporary housing, and providing community orientation).

In many cases contracting out recruitment only widens the information gap between job providers and seekers—because of either miscommunication or misrepresentation. With information relayed through an extra layer of mediation, there is a greater risk of less competent or unscrupulous third parties providing an inaccurate picture of worker qualifications, employment conditions or requirements, or prospects for permanent residency. Because their status is tied to their employer, workers in the TFWP are already in a somewhat vulnerable position. Third-party recruitment introduces an extra layer of dependency and thus vulnerability, as workers are reliant not only on their employer but also on the recruiter, who is often the first and only contact and source of information throughout the immigration process.

#### **4. Regulatory Context and Provisions for Protection**

With third-party recruiters acting as the only source of information about the TFWP for workers and in many cases employers, instituting mechanisms to provide accurate and comprehensive information to these stakeholders at the outset of the process is essential.

In the spring of 2009 CIC launched a public awareness campaign to warn applicants of the risks of unscrupulous third-party or “ghost” agents who advertise nonexistent jobs or who

charge high fees for advice leading their clients to submit fraudulent applications. Information now posted on the CIC website includes tips on choosing a representative and steps that can be taken in filing a complaint. CIC has also moved to simplify online instructions and applications with the aim of precluding applicant reliance on third-party assistance. Similarly, the BC government has posted warnings as well as guidelines for selecting a representative on its websites. The BC Employment Standards Branch also offers information about the ESA, which governs the licensing and activities of employment agencies, covers foreign workers with provisions concerning wages, and makes charging fees for helping foreign workers find jobs illegal.

At the federal level, the relevant legislation is the *Immigration and Refugee Protection Act* (IRPA), which makes it an offence to use false identity documents or counsel misrepresentation. As of 2004 regulations required that any consultant charging a fee to assist someone with immigration must be an “authorized representative”—a member in good standing of either a provincial or territorial law society; the *Chambre des notaires du Québec*, or the Canadian Society of Immigration Consultants (CSIC). However, there are continuing problems with untrained and unregulated “ghost” consultants, who assist with the immigration process but whose names do not appear on the documentation their clients submit. Legitimate consultants, many of whom perform a valuable role in assisting employers and potential immigrants with applications, have expressed frustration at having to compete with ghost consultants, who are often able to offer lower prices because they have not invested in professional training and membership fees. To address this issue Bill C-35, known as the *Cracking Down on Crooked Consultants Act*, was introduced in June 2010 to amend IRPA. It allows law enforcement authorities (the RCMP and Canada Border Services Agency) to lay criminal charges against any unauthorized individuals who provide advice for a fee—or even offer to do so—at all stages of an application. Such individuals could face a \$50,000 fine and two-year jail term. This clamps down on unauthorized individuals who charge for services performed prior to application submission. The act also gives the Citizenship, Immigration and Multiculturalism Minister the authority to designate a body to govern consultants. He thus launched a public process to select a new regulator that will be subject to greater government oversight (CIC 2010b; Torobin 2010), and recently announced that the Immigration Consultants of Canada Regulatory Council (ICCRC) has been selected (CIC 2011).

Recent legislation in Manitoba instituted a licensing and monitoring regime for employment agencies and recruiters in the province. The *Worker Recruitment and Protection Act* (WRAPA) came into effect in April 2009, and it expands employments standards coverage and provides the branch with more teeth in enforcing contraventions (Allan 2009). WRAPA requires that agents recruiting TFWs are licensed with the province and provide a \$10,000 irrevocable letter of credit. Employers must also register with the province before recruiting foreign workers, with the aim of ensuring they have a good history of compliance with labour laws and are using a licensed recruiter. The act is a definite step forward in expanding worker protections in the province, but its efficacy has yet to be evaluated. It has the potential to curtail the frequency of instances in which workers bear the entire cost of recruitment while employers pay nothing or have no intention of hiring a worker. However, interviewees raised concerns that the bond would be ineffective, with unscrupulous recruiters simply recouping this cost through additional fees to the worker. Also, there is concern that the regulation might push recruiters underground (with employers continuing to work informally with a recruiter unlicensed in Manitoba) or outside the jurisdiction of the legislation (for example to another province)<sup>69</sup>.

At the national level, HRSDC has no regulatory authority to monitor employer compliance with program requirements so, according to one Service Canada representative, “We often find ourselves dealing with third parties who have repeatedly misrepresented employers because we don’t have a mechanism to refuse to deal with them.”

In October 2009, the federal government proposed regulations amending IRPA with regard to the TFWP, amendments that came into effect on April 1, 2011. The amendments aimed to “minimize the potential for TFW exploitation by employers and third-party agents,” mostly through the implementation of stricter employer monitoring mechanisms. Concerning the monitoring of third-party agents, the amendments establish a set of factors to guide the assessment of the genuineness of an employer’s offer of employment to a TFW that includes « the past compliance of the employer, or any person who recruited the foreign national for the employer, with the federal or provincial laws that regulate employment, or the recruiting of employees, in the province in which it is intended that the foreign national work.” (see CIC 2010a)

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<sup>69</sup> Indeed, preliminary findings from this study as well as CBC reports indicate these regulations are in some cases being circumvented (CBC 2009a, 2009b). In the CBC story workers a recruiter based in Ontario recruited workers to work in Saskatchewan but were subsequently moved to a Manitoba location. Then Manitoba Labour Minister Nancy Allan responded, “[Recruiters are] trying to get around the rules in Manitoba. So if you’re unscrupulous enough, you’re going to go to another jurisdiction.”

HRSDC/Service Canada signed an information-sharing agreement with BC in 2010 so that the province may communicate information with the federal government about employer compliance with labour standards. The move to confirm an employer's legitimacy and labour standards compliance at the outset of the recruitment process is a step forward. However, these regulations actually make workers responsible for checking that their potential employer is not one of those listed on the CIC website found to be in noncompliance.

Bill C-35, WRAPA, and the regulatory amendments to IRPA contribute to strengthening TFW protection—as well as protection of employer and “legitimate” consultant interests, in some cases. The changes they introduce will result in greater regulation of third parties involved in the immigration process and do provide enforcement authorities greater reach. However, more regulation does not necessarily entail a decline in the problem of unscrupulous consultant or recruitment practices. For one, regulation does little without enforcement, and many argue that the Canadian and BC governments should do more to ensure that existing regulations set forward by IRPA and the ESA are sufficiently enforced (Government of Canada 2008). Though the RCMP has the ability to pursue fraudsters, for example, it rarely does (Brethour 2010). The BC Employment Standards Branch does not have adequate resources, for example, to conduct regular proactive site visits, and according to interviews, its enforcement of the ESA remains limited and largely reactive in nature.<sup>70</sup> Though the branch provides a mechanism for filing complaints, many migrants are hesitant to lodge a complaint against their recruiter or employer, for fear of jeopardizing their current employment relations, being sent home, or negatively affecting their opportunities for residency or return to Canada, and/or out of loyalty to a recruiter (especially if a family member or co-ethnic). Having the enforcement tools in place to protect vulnerable TFWs through legislation is important. Recognizing that no amount of regulation and enforcement will entirely eliminate the problem of unscrupulous recruitment practices, though, meaningful enforcement of regulations needs to be a comprehensive, coordinated effort, involving the commitment of all relevant provincial and federal agencies and the provision of adequate resources for proactive monitoring.

Moreover, the regulatory changes do little to address the issue of unscrupulous practices carried out by third parties in source countries or in cross-border transnational space—beyond Canada's jurisdiction. Many third-party recruiters contracted by Canadian employers have affiliate agencies abroad. The current Citizenship, Immigration and Multiculturalism Minister Jason Kenney has engaged in talks with officials in India, China, and the Philippines on the issue of “ghost” consultants and fraudulent applications, but outside the context of

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<sup>70</sup> And Fairey et al. (2008) have documented a steady erosion of employment standards in BC since 2001.

bilateral agreements Canadian officials have limited authority to intervene in much recruitment-related abuse (Torobin 2010). One way the Canadian government can organize TFW recruitment to address cross-jurisdictional concerns and build more integrity into the process is through (1) coordinating transnational enforcement mechanisms through bilateral agreements, which would allow them to chase and enforce the activities of so-called “partner” agencies in source countries, or (2) engaging in bilateral agreements that allow a government-to-government coordination of the recruitment process, with the aim of cutting out the third-party middleman.<sup>71</sup> In this approach there would need to be a monitoring mechanism to prevent the outsourcing of certain services (by government bodies) that could lead to corruption and fraudulent activities.

## Conclusion

The commercialization of migration that leads to the proliferation of private recruitment agencies entails the emergence of fraudulent or abusive agents and practices (though it is often difficult to distinguish between these and more “legitimate” ones; Salt and Stein 1997; Silvey 2007). As a consequence, governments involved in labour migration—in both sending and receiving countries but particularly in heavy-traffic sending countries—are increasingly instituting measures to regulate the migration industry.<sup>72</sup> The recruitment market is unique, though, in that fees are not determined so much by the financial value of the good, but rather by the demand itself. What is being paid for is information, and experience in other contexts has shown that private third-party agents are often better at obtaining information about jobs than their public counterparts. Public authorities’ efforts to protect workers by implementing regulatory measures are in other TFW contexts widely disregarded—often with the cooperation of workers themselves (Abella 2004; Kuptsch 2006). Migrant workers I spoke with want to believe recruiters who say they will help them find a job—and a route to permanent residency—in Canada. As long as TFW status is employer-tied, workers will prefer to keep silent about third-party recruitment-related fraud to avoid the risk of losing (the possibility of) their employment, and thus their right to work and in some cases settle permanently in Canada.

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<sup>71</sup> Though by no means perfect, one example of this model is the process of recruitment by FARMS in the SAWP or in the Canada-Mexico Partnership on Labour Mobility pilot project.

<sup>72</sup> The Philippines, for example, has established a highly regulated licensing and monitoring regime for its private recruitment industry, which is often held as a model for other sending countries developing their overseas employment potential (Abella 1997). However the “governmentalization” of strict regulation regimes, though established to protect workers, may do little to alleviate worker abuse, in some cases even reinforcing it (Silvey 2007; Agunias 2008; Guevarra 2009).



Providing migrants information forewarning them of potential recruiter-related risks and simplifying the application process are important first steps in combating misrepresentation and fraud. The TFWP is designed to be an employer-driven process, though, so information on “ghost” consultants and potential recruiter fraud needs to be provided to employers as well as immigrants. But “helping prospective immigrants to protect themselves” is not enough for TFWs who are structurally reliant on both employers and recruiters. Employers using third-party recruiters to hire TFWs are contracting out some of their accountability. Better educating employers about the financial costs associated with TFW recruitment, and holding employers liable for the actions of the third parties they choose to represent them, will help in preventing them from contracting to recruiters engaging in unscrupulous practices such as illegally charging workers. It might also diminish the misconception that the program is an easy means of obtaining labour that requires little investment (financial or otherwise) on their part. The findings of this paper suggest that if the government 1) provides employers with comprehensive information about the program and their responsibilities as well as guidelines on using third-party recruiters, 2) implements effective measures to regulate the recruiter/consultant industry, 3) increases the monitoring and enforcement capacity of government agencies, and 4) explores alternative recruitment models such as those organized through bilateral agreements, then instances of fraud and abuse—at least during the recruitment process—might be moderated.

Ultimately, the surest means of increasing protections for foreign workers in Canada is through the expansion of channels for permanent (rather than temporary) immigration. Even as Canada experiences demographic decline and a structural shortage in its labour force, the government has continued to expand the TFWP and make it more accessible to Canadian employers.<sup>73</sup> Doing so without also increasing measures for worker protection has—as is echoed by the Auditor General’s 2009 fall report—placed many workers in more precarious positions. The fact that many employers contract out the selection and recruitment of these workers to third parties only adds a layer of vulnerability for workers. While this study concludes that there is an immediate need for the provision of better information at the outset of interest in the program—to both potential TFWs *and* employers—this does not preclude regulatory amendments that would significantly facilitate monitoring (enforcement) systems of labour brokers that are not complaint-driven. As more employers have turned to the TFWP to address shortages and more workers come to Canada temporarily, some of them eventually transitioning to permanent resident and becoming Canadian citizens, it is important to consider how the recruitment process itself may engender challenges for

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<sup>73</sup> The Auditor General’s fall 2009 report states that in 2008 there were 120,000 more temporary foreign workers than permanent residents admitted to Canada (Office of the Auditor General 2009).

TFWP stakeholders, including those related to worker protection and short- as well as longer-term socio-economic integration.

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**Table 1**  
Survey of Recruiter Services in TFW Recruitment and Integration

<b>Services Offered</b>	<b>1</b>	<b>2</b>	<b>3</b>	<b>4</b>	<b>5</b>	<b>6</b>
<i>Sourcing workers</i>						
Assist with job analysis		X	X		X	
Provide information on the TFWP	X	X	X	X	X	X
Arrange international job fairs					X	X
Provide/arrange advertising	X	X	X	X	X	X
Locate foreign candidates	X	X	X	X		X
Pre-screen – skills, language, drug testing	X	X	X		X	X
Reference checking	X	X	X		X	X
Interview and selection of worker	X	X		X		X
Source country training/upgrading			X			X
<i>Paperwork</i>						
LMO application	X	X				
Source country documentation	X	X	X			X
Work permit applications	X	X	X			X
Draft employment contract	X	X				
Re-applications and extensions	X	X				
Assist with PNP transition	X	X	X		X	
<i>Settlement-related</i>						
Arrange for medical coverage	X	X				
Arrange transportation	X	X		X		
Pick-up at airport	X	X				
Locate accommodations	X	X				
On-site workplace orientation		X				
In-Canada training/upgrading			X	X		

Source: Based on primary research and adapted in part from CSC (2007).

**Legend**

1. For-profit recruitment/employment agencies, immigration consultants, and immigration lawyers
2. In-house HR recruiters
3. Educational institutions (such as community colleges or language schools, or for-profit recruiters operating for non-profit colleges)
4. Industry associations
5. Government

Embassies or source-country public employment agencies





# **INTERNATIONAL HUMAN RIGHTS STANDARDS AND SEASONAL AGRICULTURAL WORKER PROGRAM: CANADA AND INTERNATIONAL LABOUR ORGANIZATION CONVENTIONS**

***Anne-Claire Gayet***

The following chapter is inspired by the preamble of the *American Convention on Human Rights*, which recognizes “that the essential rights of a man are not derived from one’s being a national of a certain State but are based upon attributed of the human personality” (Organization of American States, 1969, entry into force 1978: §2). Fundamental human rights are inherent to all individuals. They should not depend on one’s belonging to a certain State.

This aim of this study is to expose the international human rights standards and more specifically the International Labour Organization (ILO) ones related to migrant workers, in order to draw guidelines to adapt the *Seasonal Agricultural Worker Program* through a human rights approach.

The ILO is the only UN agency with a constitutional mandate to oversee international labour standards and working conditions worldwide, since 1919. The ILO sets international labour standards through tripartite consensus, meaning that governments, unions and employer organizations are all involved in their development. It aims at promoting “decent work for all”<sup>74</sup>. Canada has played an active role in the ILO since its foundation. However, Canada has ratified only 28 conventions out of a total of 188 and has not ratified any of the specific instruments related to migrant workers. This paper argues that the SAWP falls short in respecting a number of fundamental rights of migrant workers and that ILO instruments related to migrant workers should be ratified and implemented in order to enhance Canada’s human rights standing and coherence.

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74 Visit the ILO website: [www.ilo.org/global/lang--en/index.htm](http://www.ilo.org/global/lang--en/index.htm)

## I. Qualifying temporary migration

- **Definition of temporary migrants**

According to ILO Convention n° 97 and n° 143, a migrant worker is “a person who migrates or has migrated from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant worker” (ILO, 1949a, entry into force 1952: art.11; ILO, 1975a, entry into force 1978). There is no distinction in ILO instruments between “temporary” and “permanent” migrant workers.

- **Perceptions and realities of farm temporary migrants**

*“Temporary workers have a place in the economy but not in the nation”* (Macklin, 2003: 466). This assertion shows how temporary migration is conceived by our host societies: we need migrant workers to address labour-market shortages, but we do not want to see them as more than economic entities. However, temporary workers *are social entities* - they have families and they have rights.

Seasonal farm work in Canada is defined as *“labour intensive and low-paying”*. It is also characterized as a “3D” sector (dirty, dangerous, and difficult). The SAWP has been designed to address “shortages” in the Canadian market. However, several authors agree that “shortages” do not necessarily refer to a *“quantitative or actual lack of workers”*, but to the “shortage of a particular *kind* of work force”, that is, “cheap, politically repressed, and so on” (Sharma, 2006: 67). Actually, temporary workers fill *immediate though not necessarily temporary needs*, as they fill chronic gaps in “3D” occupations. We could therefore argue that temporary status leads to a *suspension of migrant workers’ rights*, making the majority of these workers “slave-like labour” (Sharma, 2001; Macklin, 2003; Stasiulis D. and A. B. Bakan, 2003).

Among the challenges that migrant workers face, the most common are discrimination, poor working conditions, low social protection and absence of union rights.

## 2. International Labour Organization instruments related to migrant workers' rights

- **The value of international law in domestic law**

International law cannot be directly enforced by Canadian Courts as Canada is a dualist country, which means that “statutory incorporation” is mandatory for an international treaty to acquire the force of law in the country. However, thanks to landmark cases defended before the Supreme Court and the Federal Court, among others *Baker v. Canada* (1999, SC) and *Malekzai* (2005, FC)<sup>75</sup>, even short of incorporation, Canada’s international obligations can have some value in Canadian Courts (Mégret, 2004). More precisely, judges are invited to interpret the law in light of international law principles.

- **The right to work in International Human Rights Law**

Canada has been party to the *International Covenant on Economic, Social and Cultural Rights* since 1976: art. 7 guarantees to “everyone” the right to the “enjoyment of just and favourable conditions of work”. In its *General Comment 18 on the Right to Work*, the Committee on Economic, Social and Cultural Rights (CESCR) recalls that this right “is essential for realizing other human rights and forms an inseparable and inherent part of *human dignity*”, and that the principle of non-discrimination (art. 2.2) “should apply in relation to employment opportunities for migrant workers and their families” (§18).

Although international human rights instruments are universal in their coverage, migrant workers cannot benefit fully from all their rights as other citizens, because they are outside their country of origin and they are more likely to be victims of discrimination than nationals. However, as workers, they should enjoy basic labour rights, which include the right to equality of opportunity and treatment, fair remuneration, determined working hours and regular periods of rest and occupational safety and health. To clarify migrant workers’ status and rights, the ILO and the United Nations have elaborated specific instruments. In this paper we will focus our analysis on the ILO instruments.

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75 Since then, the immigration official exercising discretion in deportation cases is bound to consider the principle of “the best interests of the child” stated in the 1989 *UN Convention on the Rights of the Child*.

### 3. International Labour Organization standards

ILO principles related to the protection of workers are found in two comprehensive instruments dealing with the protection of migrant workers as a “separate group”: the *Migration for Employment Convention* of 1949 (hereafter Convention n°97)<sup>76</sup> and the *Migrant Workers Convention* of 1975 (hereafter Convention n°143)<sup>77</sup>, with their respective Recommendations n°86 and n°151.

While ILO Conventions are legally binding standards and once ratified impose obligations upon States in international law, recommendations are only indicative, sort of general comments of the Conventions. Although ILO instruments do include a flexible approach by States according to their resources, the standards are of *universal application*.

Both Conventions n°97 and n°143 cover issues concerning the whole migratory process and apply to persons who migrate from one country to another with a view to being employed otherwise than on their own account. With the exception of art. 8 of Convention n°97 and to some extent Part II of Convention n°143, the instruments *do not make a distinction between permanent or non-permanent migrants*. The provisions in these instruments *do not depend on reciprocity*. They do, however, allow for some exceptions from their scope of application, which correspond to specific categories of workers who usually benefit from other agreements (seamen, frontier workers, artists and members of the liberal professions who have entered the country on a short-term basis, art.11 of both Conventions).

The **principle of non-discrimination** between migrant workers lawfully resident in the host country and nationals is found in art. 6 of Convention n°97 and art. 8 of Convention n°143: each Member State (...) “undertakes to apply, without discrimination in respect of nationality, race, religion or sex, to immigrants lawfully within its territory, treatment no less favorable than that which it applies to its own nationals” in respect of remuneration, membership of trade unions, accommodation, social security and employment taxes, “in so far as such matters are regulated by law or regulations” (art.6, Convention n°97). Cholewinski noted that this provision was weak as there was no obligation for States to practically promote equality and eliminate discrimination (Cholewinski, 1997: 104).

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76 Adopted after the Second World War, these instruments addressed the organisation of migration and equality of treatment between migrants and nationals under law and administrative practise, aiming at “facilitating the movement of surplus labours from Europe to other parts of the world” (ILO, 2004b: 75).

77 The second set of instruments was adopted after the oil crisis of 1973: the ILO Migrant Workers Convention of 1975, hereafter Convention n°143 (ILO, 1975a, entry into force 1978) and its Recommendation n°151 concerning Migrant Workers (ILO, 1975b), were more concerned by bringing migration flows under control. They addressed the suppression of clandestine migration and the illegal employment of migrants, in a broader framework that promotes equality of opportunity and treatment (ILO, 2004b: 75).

Convention n°143 is **more inclusive** than Convention n°97 as it says that State parties have “to respect the basic human rights of *all* migrant workers” (emphasis added), hereby including migrant workers in irregular situation (art. I). But the Committee of Experts on the Application of Conventions and Recommendations (hereafter CEACR<sup>78</sup>) said that this provision, under Part I entitled “Migrations in Abusive Conditions”, was restricted to the most fundamental rights such as those embodied in art. 6, 7, 9 and 14 of the *International Covenant on Civil and Political Rights* (ILO, 1980: §256).

Part II of Convention n°143, entitled “**Equality of Opportunity and Treatment**”, is strictly reserved to migrant workers and their families who are lawfully resident in the host country. Art. 10 provides that migrant workers should be entitled to equality of opportunity, e.g. equality with regard to access to employment, trades union rights, cultural rights and individual and collective freedoms and art. 12(g) guarantees “equality of treatment, with regard to working conditions, for all migrant workers who perform the same activity”.

These instruments have been reviewed in the context of the ILO’s examination of the need for revision of its standards in 1998. The conclusions of the CEACR were that the international context had changed and that there were certain lacunae in these standards. It mentioned the declining role of State leadership in the world of work, the feminization of migration for employment, the increase in temporary migration in place of migration for permanent settlement as well as the increase in illegal migration. It also reported that both Conventions did not deal with the elaboration of a national migration policy in consultation with employers’ and workers’ organizations, within the framework of overall national policy (ILO, 2004b: 76). Therefore these instruments needed to be reviewed globally in order to be adapted to the new context. However, the CEACR recalled that these Conventions enshrined important rights for migrant workers and were needed anyway. It is problematic to observe that the two Conventions have been ignored by major labour force receiving countries such as Canada<sup>79</sup>.

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<sup>78</sup> The CEACR is the legal body responsible for the examination of the compliance by ILO member States with ILO conventions and recommendations. It was established in 1926 and is composed of 20 independent experts. The examination takes place on the basis of reports sent by governments pursuant to questionnaires prepared by the ILO Governing Body. The CEACR produces two reports, the first one containing its general report and observations concerning certain countries; the second being a general survey on a particular subject, covered by one or more of the conventions or recommendations.

<sup>79</sup> As of 30<sup>th</sup> October 2010, Convention n°97 has been ratified by 49 countries – the latest being Philippines in 2009 – and Convention n°143 by 23 countries. To see the state of ratification: <http://www.ilo.org/ilolex/english/newratframeE.htm>

The 2004 report *Towards a Fair Deal for Migrant Workers in the Global Economy* stressed that ILO conventions operate within a broader policy context including recently-adopted UN treaties, such as the *Convention on the protection of the Rights of Migrant Workers and their Families*<sup>80</sup>. Indeed, the ILO and UN instruments specifically concerned with migrant workers have similar overall aims: to further the rights and protections of persons migrating for employment and to discourage and eventually eliminate irregular migration. All these instruments shall complement each other (ILO, 2004b: §255).

In line with the general review in 1998, the ILO made public the *Declaration on Fundamental Principles and Rights at Work* in which it stated that all ILO member States have an obligation, that arises from the fact that they belong to the Organization, “to respect, to promote and to realize, in good faith and in accordance with the Constitution, four categories of principles and rights at work”, even if they have not ratified the corresponding Conventions. The freedom of association, the elimination of all forms of forced labour, the effective abolition of child labour and the elimination of discrimination in employment constitute fundamental principles and rights at work and are “universal and applicable to all people in all States, regardless of the level of economic development”. Therefore, they “apply to all migrant workers without distinction, whether they are temporary or permanent migrant workers or whether they are regular migrants or migrants in an irregular situation” (ILO, 1998, emphasis added)<sup>81</sup>.

#### **4. A few recommendations in light of international ILO principles**

- **Promoting Decent Working and Living Conditions**

Strengthened supervision of living and working conditions would certainly lead to a general improvement. This is suggested by ILO *Recommendation n°86 concerning Migration for Employment*<sup>82</sup>, according to which there shall be “the supervision by the competent authority or duly authorised bodies of the territory of immigration of the living and working condi-

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80 Among the recently-adopted UN treaties that address trafficking, smuggling and exploitation, there are the UN *Convention against Transnational Organized Crime* (2000), its *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (2000) and *Protocol against the Smuggling of Migrants by Land, Sea and Air* (2000), the *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* (2000), as well as the earlier 1951 Convention and 1967 Protocol relating to the Status of Refugees.

81 To have a comprehensive description of the rights cited above and the Conventions to which they refer, read the *ILO Declaration*, 72-75.

82 While ILO Conventions are legally binding for States that have ratified it, recommendations are only indicative, but they have their importance as interpretation of law.

tions, including hygienic conditions, to which the migrants are subject”<sup>83</sup> (ILO, 1949b). This issue constitutes a constant claim of the Canadian branch of the United Food and Commercial Workers union (UFCWC). This labour union recommends that all workers’ housing be inspected prior to and following their occupancy. In addition, random inspections should be mandated during the season on a regular basis. There should be a strict implementation of the principle that when an employer is found contravening the adequate standards of living he/she should be asked to improve the conditions immediately. If poor conditions are reported again, the abusive employer shall be discarded from the SAWP. Regarding the practice of housing of workers above or adjacent to greenhouses, this should be immediately banned “in recognition of the dangers associated with living in buildings housing chemicals, fertilizers, boilers, industrial fans and/or heaters” (UFCWC, 2007: 4, Rec.6).

- **Protecting the right to appeal**

One of the main demands of UFCWC and of other advocacy groups such as Justice for Migrant Workers (J4MW) is the **right to appeal** for workers who complain that they work in virtual bondage. They denounce both the abuses against migrant workers and the lack of national remedies<sup>84</sup>. An effective judicial or other appropriate remedy at the national level is considered necessary in international law for any person or group who is a victim of a violation of the right to work. In its *General Comment on the Right to Work*, the CESCR affirms that “victims of such violations are entitled to adequate reparation, which may take the form of restitution, compensation, satisfaction or a guarantee of non-repetition” and that the right to work should also be protected by trade unions and human rights commissions (CESCR, 2006: §48).

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83 The exact wording is “1. Provision shall be made for the supervision by the competent authority or duly authorised bodies of the territory of immigration of the living and working conditions, including hygienic conditions, to which the migrants are subject.”

84 There are a large numbers of such reports, but documenting abuses against migrant workers was not the aim of this study. See notably UN Commission on Human Rights (2000). *Report of the Special Rapporteur on Migrant Workers, Ms. Gabriela Rodríguez Pizarro, in visit to Canada*; Brem, M. (2006). *Migrant workers in Canada: a review of the Canadian Seasonal Agricultural Workers Program*. L. Ross. Ottawa, Ontario, Canada, The North-South Institute; Macklin, A. (2003). “Dancing Across Borders: Exotic Dancers, Trafficking, and Canadian Immigration Policy.” *International Migration Review* 37(2): 464-500; Sharma, N. (2006). *Home Economics: Nationalism and the Making of “Migrant Workers” in Canada*. Toronto, University of Toronto Press; Global Workers Justice Alliance. (2006). “Temporary Worker Programs in Canada.” Retrieved 18th November, 2008, from [http://www.globalworkers.org/migrationdata\\_mx.html](http://www.globalworkers.org/migrationdata_mx.html).

- **Provide a path to citizenship for migrant workers**

After working a certain time in a country, coming back year after year to work for several months, migrant workers should have the right to apply for citizenship in Canada. Indeed, labor migration cannot only be understood as an economic issue that States regulate according to their market's needs. Migrant workers are a labour force, but also human beings. As such, their own motivations should be taken into account. Furthermore, considering the “blurring in boundaries” between temporary and permanent forms of labour migration, and keeping in mind “the potential and actual exploitation inherent in non-permanent status”, it is vital to provide certain legal path towards the permanent status for migrant workers (Stasiulis, 2008: 96).

- **Ratification of international instruments**

In her report prepared for the Senate Committee on Human Rights of the Parliament of Canada, Nicole La Violette noted that Canada has not ratified 29 Human Rights Treaties. While some of them may be outdated or their content may already be enshrined in other instruments and the refusal to sign them is legitimate, other such as the *Convention on Migrant Workers* and ILO instruments are still relevant. Canada should seriously consider ratifying them. This should logically result from Canada's commitments to promote human rights abroad and on its own territory, as evidenced by the *Canadian Charter of Rights and Freedoms* and provincial human rights instruments (La Violette, 2006).

We shall build on the foundations of existing instruments to reach a consensus “on the need to revitalize and extend multilateral commitments, including issues such as the basic rights and protection of migrant workers and their families” (ILO, 2004a: §441).

A strong argument in favour of the ratification of such instruments was made in 2009 by the ILO Director-General, Juan Somavía: “Gains from migration and protection of migrant rights are (...) inseparable. Migrant workers can make their best contribution to economic and social development in host and source countries when they enjoy decent working conditions, and when their fundamental human and labor rights are respected” (Somavía, 2006).

Looking specifically at Canada, the non-ratification of ILO and UN instruments related to migrant workers cannot be justified by the scarcity of resources or by the fact that this country is not concerned by migrants. It is a major migrant receiving country. The refusal to commit to such instruments is a political issue.



Today, labour migration is often referred to as the “new deal” (Gabriel and Pellerin, 2008: 4), a “fair deal” (ILO, 2004b). However, to be profitable *and* sustainable for both sending and receiving countries, migrants and host societies, this “new” conception of migration has to embrace a human rights approach that respects and promotes fundamental and other migrant rights whose protection are necessary for the respect of their dignity.

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# **'HEALTHY' FARMING AND ITS SOCIAL COSTS: THE DIFFERENTIAL RIGHTS OF MEXICAN MIGRANT WORKERS IN THE OKANAGAN VALLEY OF BRITISH COLUMBIA, CANADA<sup>85</sup>**

**Patricia Tomic  
Ricardo Trumper  
Luis Aguiar**

*“Access to foreign seasonal agricultural workers appears to be the only way we will be able to meet our current and future labour needs. ...” (British Columbia Grapegrowers’ Association Newsletter, 2008).*

Nandita Sharma (2001; 2006) has been influential in understanding the extent of the limitations of rights and freedoms embedded in migrant worker programs in Canada. She argues that restrictions integral to temporary immigration programs flow primarily from flexible notions of nation and borders which affect the political rights of people, their consciousness and conceptions of who “belongs” and who does not. Through these flexible conceptualizations it is normalized that citizenship rights may be granted to some and denied to others. In this paper we study the temporary immigration of Mexican farm workers to the Okanagan Valley in the interior of British Columbia, from 2004 to the present, through their participation in the Seasonal Agricultural Worker Program (SAWP). In this context, this research is based on interviews with government officials, community and farmer organizations, farmers and Mexican migrant farm workers in the Okanagan Valley, in British Columbia, during 2008. Focusing primarily on the question of housing, we argue that Mexican migrant farm workers, although essential for the survival of the agricultural sector in the region, are restricted in their rights and freedoms in ways Canadians are not. The character of their temporary immigration, and shared notions of borders, workers’ rights and citizenship in Canada contribute to the conceptualization that their lack of rights is acceptable and fair. The way housing is regulated by the bilateral agreement between the governments of Canada and Mexico is one of the structural elements responsible for temporary workers’ differential rights. In our case study we found that Mexican farm

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workers are de facto denied the right to choose where to live; the right to leave their employers' premises after work; and the right to move freely within those premises. While the survival of agriculture in the Okanagan today depends in important ways on foreign laborers, the desperate poverty of Mexican agricultural workers, which has forced millions to migrate north in search of work, weakens their bargaining power, forcing them to accept the conditions imposed by government to government agreements that render them, in practice, un-free rather than wage labour (Mendis, 2007; Depatie-Pelletier, 2008).

## **I. Labour recruitment and housing in the BC agricultural industry**

The SAWP in British Columbia – and in the Okanagan – has grown exponentially since its inception in 2004, when eleven BC farmers brought 47 temporary workers under BCSAWP; in 2005, the number of employers increased to 67, and the number of workers to 690. In 2006 twice as many employers and workers were participating in the program (119 employers and 1278 workers). Almost one thousand workers were participating in BCSAWP in 2007. In this short period, the BCSAWP has increased to over 3,000 workers and to over 300 employers (Brett, 2005: A1; Mendis, 2007; Steeves, 2008; Schmidt, 2009). In 2008, it was estimated that one third of the Mexican migrant workers brought to BC labored in the Okanagan.

This is not the first time that farmers in British Columbia have imagined a program like SAWP to resolve the endemic scarcity of 'Canadian' labour in a region historically identified as a seasonal work-dependent. In 1957, the B.C. Fruit Growers' Association requested from the provincial government to explore importing agricultural workers from Mexico or the Philippines: "Whereas there is a general shortage of agricultural labour throughout Canada, and Whereas in this past year of light crop the National Employment Service could not provide us with sufficient labour for orchard employment, and Whereas Boards of Trade and School Boards who have assisted at the harvest season for years past now are becoming reluctant to. Therefore be it resolved by this 1957 B.C.F.G.A. Annual Convention that the Provincial Department of Agriculture be requested to explore the possibilities of bringing into the province labour from Mexico or the Philippines for seasonal agricultural employment, to be moved to various parts of the province as required, and with the understanding that they will be returned to their country of origin at the end of the crop year." (B.C.F.G.A., 1957, p.30, cited in Lanthier and Wong, 2002, our emphasis). This resolution inscribes an understanding of differential rights for foreign migrant workers. This request never materialized in actual practice as the shortage of labour that gave life to it was resolved, at least in part, with new immigrants from Portugal (Lanthier and Wong, 2002).

Throughout the years non-white labour has been a constant feature of the agricultural landscape of British Columbia, and of the Okanagan in particular. Among the minority groups that have left an in-print in the region's food production before the current wave of Mexicans temporary migrants include First Nations, Chinese bachelor men, Japanese Canadians displaced from the coast during and after the Second World War (Lanthier and Wong, 2002), and the list goes on. Flexible notions of nation and borders and of rights and freedoms have been applied to these workers, independent from their place of origin or citizenship status in Canada.<sup>86</sup>

An important strategy in recruiting agricultural labour for the Okanagan has been to advertise in Quebec. French Canadians have been most prominent among the temporary migrants working in the Okanagan agricultural sector. They have been treated as outsiders too and have experienced differential rights. Their housing conditions during their stay in the region attest to this. For decades French Canadian youth have provided seasonal labor in the valley moving through the summer months within the Oliver-Vernon corridor following the different picking seasons for the different commodities harvested in the area. Historically, they have been subject to poor housing, at times living in substandard fruit picker cabins, or camped in farms with little or no facilities. In 1984, under the Kelowna Economic Recovery and Employment Development, a program was created to allow the building of 'picker cabins' in farms to accommodate seasonal farm workers. These cabins were to be used exclusively for this purpose. The program was eventually discontinued as many farmers transformed the picker cabins into year-round renting accommodations or even summer rentals. In fact, through the years municipalities in the region have passed legislation prohibiting building permanent dwellings on farm properties to house temporary workers, with the exception of the SAWP. Camping has become an accepted practice to house Canadian migrant pickers during the harvesting season. Although there is variation in the type of facilities offered in the Okanagan, at the beginning of the 21 century, in general, precarious temporary living conditions are the norm:

"Most farmers will allow workers to tent in their orchard while working for them. Some farmers have running water, some do not have. Very few farmers provide anything 'extra' like cabins, cookhouses or showers. Some do not even have outhouses on their property for

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<sup>86</sup> A detailed discussion of the historical development of agricultural temporary labour is beyond the scope of this paper.

workers. If you are planning to come and pick fruit, you will be roughing it. Bring a good tent” (Oliver BC Blogger, 2008).<sup>87</sup>

Camping has been normalized as an acceptable form of housing for temporary workers through a discursive narrative of migrant agricultural workers as pleasure seekers. Increasingly, taking advantage of the new image of the Okanagan as a ‘four season paradise’ where people come to play and work, an idea marketed by local municipalities and economic commissions in the current neoliberal times (Aguilar, Tomic, Trumper, 2005), farmers and farmer organizations represent Canadian and European workers as youth who choose to come to the valley mostly for holidays, work coming only secondary to it. Joe Sardinha, president of the B.C. Fruit Growers Association, says about migrants from Quebec: “... someone from Quebec ... is here partly on vacation and partly here to pick some cherries. They may bring their own tent, and they’re comfortable and happy with having access to some bathroom facilities” (Brett, 2005, A1). However, with the introduction of the SAWP, camping has been indirectly questioned as an acceptable form of housing arrangement for migrant workers.<sup>88</sup>

## **2. The SAWP and agricultural workers’ housing needs**

There is an important difference in the way the SAWP is mandated to resolve the housing needs of temporary workers. Under the SAWP employers must provide “suitable housing.” Providing housing is an important challenge for many employers. Joe Sardinha presents the problem in the following way:

“under government regulations for the Seasonal Agricultural Worker Program, proper housing must be provided for the Mexicans. That means four walls, roof, sanitary facilities, cooking and sleeping area, so if there’s one limiting factor preventing some growers from accessing workers through this program, it’s the housing” (Brett, 2005).

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<sup>87</sup> Some farms offer better facilities than the ones described here, in particular, larger operations. For example, a relatively large cherry farm operation that employs French Canadian workers, describe their facilities when advertising summer work for the 2009 season in the following words: “Depending on the crop, we employ 25-30 pickers and packing house workers who live rent-free in our campsite at one of the farms. You will need a tent, sleeping bag, cooking utensils, working clothes (warm and cold), boots, and a bathing suit (there is a pool). The camp has showers, flush toilets, stoves, fridges, microwaves, sinks, safe drinking water, couches, and sometimes TV and movies.” (Norton Okanagan Harvest, 2009)

<sup>88</sup> Given the conditions of the SAWP, it would be a huge challenge to represent the work of foreign temporary farm workers mostly as fun or holiday.

No doubt, for many employers the fixed cost of housing increases the cost of wage labor.<sup>89</sup> While in 2008 newspaper ads in British Columbia offered an hourly pay of \$9.50 for Canadian farm workers, the BCSAWP required farmers to pay minimum salaries of \$8.90 an hour<sup>90</sup>, plus “suitable housing” at a rate of 7% of the gross daily pay up to a maximum of \$550.00 during the workers’ entire stay in Canada, and the return ticket to Mexico City (Human Resources and Social Development Canada, 2008). The average cost per hour for a SAWP worker, once the housing and transportation costs are factored in, fluctuates between \$12 and \$15.<sup>91</sup> Moreover, the mandate to provide “suitable housing” may demand a significant investment for a farm operator, at least at the initial stage (Squire, 2008). Then, it is not surprising that to lower the impact of fixed costs in the total cost of the commodity employers try to increase workers’ productivity. Increasing productivity by demanding more hours of work is feasible because migrant workers constitute a captive labour force, readily available to work as long as needed, six and even sometimes seven, days a week. Housing the foreign temporary worker directly on the farm, the location of choice for the SAWP “for obvious practical reasons,” (Government of Canada, 2009, 6) is an effective way to increase the SAWP worker’s productivity to the maximum.

The SAWP is often constructed as a “win-win” program for both Canadian farmers and foreign workers. For example, at the launching of the SAWP in British Columbia in 2004, the Mexican Consul at the time, Hector Romero, stated that the SAWP “... is mutually beneficial for both countries and Mexico is pleased with the rights and protection of its workers” (Human Resources and Skills Development Canada, 2004). Experience shows that although migrant workers benefit from the program, the North has the upper hand in the bilateral agreement. Migrant workers from the South have little bargaining power in the current global labor market. The SAWP is an economic agreement at the global level signed between Canada and the sending country, with participation of farmer organizations but not of workers or workers’ organizations. The most vulnerable participants in these country-to-country agreements are the workers, for whom differential notions of citizenship and rights apply. For example, the SAWP program mandates a back-up of workers, staged in Mexico, ready to leave, in case more workers are requested by Canada on short notice. Work is not guaranteed for the workers in this situation.<sup>92</sup> Migrant workers must be married to be able

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<sup>89</sup> This is not always the case. Some employers may even profit from providing housing to workers. This may depend on the number of workers housed, the period of employment, and the type of facility in which the workers are housed.

<sup>90</sup> The BCSAWP minimum wage rate for 2009 was increased to \$9.09 per hour (vacation pay is extra); this applies to both the Mexico and the Commonwealth Caribbean BCSAWP. (Cranberry WEB, 2009: 3) The hourly rate for SAWP workers in 2010 is \$9.14, the minimum wage for this year (Human Resources and Social Development Canada, 2010, 2010)

<sup>91</sup> Calculations provided by three operators interviewed.

<sup>92</sup> “The BCSAWP Operational Guidelines require that sending countries maintain a pool of workers ready to depart for Canada when requests are received from Canadian employers. Workers are to



to participate, but their families are left behind;<sup>93</sup> in general, migrant workers are kept ignorant of their actual placement until very late in the very long bureaucratic process, even as late as after their arrival in Canada, unless the employer has ‘named’ them to return to work for the same operation (this may be communicated earlier to the worker); workers have no say as to where they will dwell in Canada (sometimes as long as 8 months); farmers are entitled to charge them rent<sup>94</sup> (“costs related to accommodation” in the letter of the agreement), in the amount set by the bi-lateral agreement, but workers do not sign a rental contract, nor do they have a say on the conditions of their housing arrangements; not only workers have no choice (or bargaining power) in deciding for whom they will work, they have no say as with whom they will share accommodation; by contract, migrant workers must be available for work six days a week during the season; and they often work shifts of 10 to 12 hours, often willingly, but out of necessity and sometimes out of boredom.

Mendis (2007), in his study on greenhouses in Delta, BC, addresses one of the most problematic constraints of foreign migrant labour, the right to bargain labour conditions. In an industry characterized by periods of varying labour needs, he says,

“migrant workers find themselves in fairly rigid circumstances with respect to mobility – in essence unfree labour .... Contracts, agreed to between an employer and a worker before the journey to Canada, stipulate that the worker is obliged to labour for only that particular employer and must return to Mexico upon completion of the contract term” (139).

These workers’ immobility is reinforced by the fact that their dwellings are constantly under the gaze of the employer. Thus, housing is central to the restrictive character of the SAWP. When applying for foreign workers, Service Canada requires employers to submit with their Labor Market Opinion (LMO) applications a Seasonal Housing Accommodation Inspection showing that the premises have been inspected and approved according to the specifications in the provincial guidelines.<sup>95</sup> Alternatively, they are required to submit a contract from a commercial accommodation supplier, such as a motel, hotel or apartment.

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be available in cases of harvest-related emergencies or when worker replacements are needed. In Mexico, the reserve is equal to 10 per cent of the total number of workers requested each year. The costs associated with meeting this requirement have to be absorbed by the Mexican authorities and by Mexican workers who have to pay for medical screenings and travel to the registration points in Mexico City” (Brem, 2006, 6). This was also confirmed in our interviews with workers and government officials.

<sup>93</sup> There is nothing in the letter of the law to prevent the families of migrant workers to apply for a tourism visa; only the structural conditions of the program make this unimaginable for most.

<sup>94</sup> Justicia for Migrant Workers has raised this point (Justicia for Migrant Workers BC, 2007).

<sup>95</sup> British Columbia developed guidelines in 2005 using Ontario as a model. In Ontario, in June 2005, new guidelines were developed on assessing the suitability of housing intended for the housing of both domestic and foreign migrant farm workers. There, housing standards for

More precisely, the employer will: “i) provide suitable accommodation to the WORKER. Such accommodation must meet with the annual approval of the appropriate government authority responsible for health and living conditions in British Columbia or with the approval of a private housing inspector licensed by the province of British Columbia.” It adds: “In the absence of such authority, accommodation must meet with the approval of the Government Agent;<sup>96</sup> or ii) ensure that reasonable and suitable accommodation is affordably available for the worker in the community” (Human Resources and Social Development Canada, 2009). The reality is that the SAWP favors the provision of accommodation within the work premises, in the farms (Government of Canada, 2009, 6). In British Columbia, not only most foreign migrant workers are housed within the limits of the employer’s property, but the annual inspections of the premises are conducted by private inspectors. Only the City of Abbotsford and the District of Pitt Meadows provided Municipal Inspection Occupancy Permits in 2009. The rest of the province is in charge of six accredited private inspection services to inspect seasonal housing. One company is located in Qualicum Beach, BC; one in Creston, BC; one in Salmon Arm, BC; one in Kelowna, BC; and finally one company appears with two locations, one in Abbotsford, BC and the other one in Surrey, BC (WALI Canada, 2009). In 2008, farmers paid \$85 dollars for the annual inspection of the housing facilities. The fee is paid directly to the inspector. There is no further government control over the private housing inspections.

The guidelines mandate that the premises be visited only once in the season, before the workers arrive. This is an important visit for the employer, because without approval, the application to bring migrant workers cannot go forward. From our interviews we learned that the inspections are often carried out very quickly; about half an hour at the most is spent in buildings going through their first inspection, less in those that have already been inspected for an earlier season. Sometimes, during the most pressing period of housing inspections, five or six farms are inspected in one single trip. In accordance to these guidelines, inspectors must pay attention to gross measurements, such as if the building complies with the minimum surface and air volume specifications, but not necessarily to other aspects. For example, we learned from one inspector that checking the size of the hot

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employers of migrant workers follow provincial Ministry of Health guidelines. Those guidelines had not been modified since from 1982. The Ministry of Municipal Affairs and Housing, Ontario Fire Marshal’s Office, Ontario Ministry of Agriculture, Human Resources and Development Canada, Foreign Agricultural Resource Management Services, numerous local health units, and the Ministry of Health and Long-Term Care were consulted in preparation of the 2005 guidelines. Niagara Region Health and Wellness pointed out that the guidelines are to be interpreted as minimum requirements with regard to Seasonal Housing for Migrant Farm Workers and “are designed to assist in meeting legislative and regulatory requirements and are not to be used as a replacement for specific legislative or regulatory requirements.” (Niagara Region Health and Wellness, 2006)

<sup>96</sup> The “Government Agent” is an agent from the Government of Mexico “stationed in Canada to assist in the administration of the program.”

water tank in relation to the number of people to be housed in a dwelling is not necessary under the guidelines. One of the farmers interviewed suggested that a recent inspection of his premises had been very rushed. The inspector had failed to observe that the house had not yet been connected to the water main. And when one of the members of our team tagged along with an inspector somewhere in the province, it was clear that the inspection was perfunctory. The dwellings inspected were little more than tool sheds with wet, moldy and dirty cement floors. The member of our team noticed that the inspector had not checked if the old stove and fridge were in working condition. Also, the accommodations being inspected had not been furnished yet, and sheets, pots and pans were not on site for the inspection. The inspector let the farmer know that he would go back to check that those essentials were there before the workers arrived. Dirty and stained mattresses were ignored as well as loose hanging wires, dirty toilets and that the inadequate showers were located in a furnace room. The inspector failed to check one of the rooms as the door was closed. The farmer was told that he needed to clean the place, get rid of the rubbish, and broken glass and that he had to fix the hanging wires found in the room. The accommodations were approved with the warning that the inspector was coming back. We do not know if the inspector returned. The guidelines do not mandate further inspections or random visits by inspectors and the government is not required to check the inspectors' work. Further, we learned from authorities that controls are "complaint driven."

### **3. SAWP housing conditions as limitations to the workers' freedom in Canada**

Foucault's (1995) analysis of the regulating gaze in medicine, penal institutions and schools is instructive to analyze the agreement between Canada and the sending countries for the temporal importation of agricultural workers. This government to government agreement not only fails to assign sufficient resources to oversee the quality of housing arrangements, but it also favours locating the dwellings within the limits of the farmers' property, close to the employer's' gaze, potentially under constant surveillance, during and after working hours, seven days a week. In fact, the conditions under which this program operates reminds us of Goffman's idea of total institutions (Goffman, 1961). When workers live on the "work premises," they are subject to rules of behavior at work and off-work. The sense of privacy most Canadians take for granted in the intimacy of their homes does not exist here. At the will of the employer to control are, for example, visitors, smoking, drinking, partying, and music. Living in isolated areas and relatively immobile, foreign migrant workers are always

on hand, ready to work at anytime.<sup>97</sup> Many lack independent transportation means, disposable income for outings, and community and family networks to visit and with whom to socialize. Most importantly, they often lack the language to function independently. Also, it is worrisome that housing guidelines which are supposed to establish “suitable” standards of comfort and hygiene are sufficiently vague to leave much of the decisions with respect to standards to the will of the farmer.<sup>98</sup> Why then are these documents only general guidelines with no regulatory power? For example, one of the officials at the Fraser Valley Regional District pointed out that the Housing Guidelines “outline general requirements that should be met as a minimum for housing standards. The guidelines are generally not enforceable [by Regional districts] as they are a performance standard not within [our] jurisdictional authority” (Fraser Valley Regional District, 2008, our emphasis). In more detail, the guidelines require compliance with some ‘objective’ measurements or standards, such as the minimum necessary airspace per worker, or the minimum distance that bunks should be from the floor. Still, there are a number of aspects that are left to the judgment of the farmer to determine suitability or adequacy. In fairness, the farmer starts from general guidelines that indicate minimal compulsory requirements to house workers. For example, employers may house workers in structures as varied as mobile homes, industrial camp trailers, bunkhouses or family houses. The guidelines are also silent about a number of aspects. Human beings who work hard for ten to twelve hours a day, often under the sun, six (and even seven) days a week, who may remain idle for long periods of time because of bad weather or lack of work, with not much else to do, dwell in physical spaces with no

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<sup>97</sup> Preibisch (nd) argues a similar point from her report to the North-South Institute “[h]ousing arrangements under the SAWP can result, potentially, to increased control over farm workers’ behaviour, including restrictions on workers’ mobility on and off the farm and the entry of visitors. ... the extent of worker mobility depended ultimately on the subjective goodwill of the individual employer. The research heard of cases of employers who prohibited workers from leaving the property as well as others that provided a vehicle for workers’ use. The control that employers exercise on their property is buttressed through their capacity to set down “farm rules.” There are no specifications on the content of farm rules. It is not surprising that the research found wide variations in farm rules among employers; while some were fairly restrictive, others were more relaxed.”

<sup>98</sup> The SAWP guidelines prescribe that buildings to be used as housing for migrant workers should be located on well drained land, waterproof, hundred feet from barns or poultry cages and detached from buildings that store inflammable material and provided with adequate lighting and ventilation; that floors are tight fitting, smooth-surfaced, readily cleanable; walls between 7 ft and 8 ft above floor level, smooth painted or of treated surface material. Bunks should be “separate and sleep one person”, 12 inches above the floor, and at least 18 inches apart from the next bunk, when not lying lengthwise along the walls. The airspace per person in sleeping areas should be of 300 cubic feet. A clean mattress and pillow, a supply of clean blankets sheets and pillowcases, and one storage unit per person complete the requirements for bunkhouses. For family houses the guidelines add specific stipulations such as a maximum occupancy rate of one person for 80 sq.ft. of usable floor area; that the sleeping areas should be partitioned from other living areas; and a list of basic furnishing compatible with maximum occupancy, such as tables, chairs and beds. One toilet and shower for ten people, one sink for seven, and constant supply of hot and cold potable water is prescribed. To these very elementary directions, safety, garbage and basic kitchen guidelines are also added (WALI Canada, 2005).

suitable areas to relax comfortably. The accommodations usually consist of a kitchen-eating area with a table and chairs, plus the bedrooms, with multiple single beds or bunks. Phones or email facilities are not considered a basic necessity for these married men (97% of those brought under the program are male, although it is open to both men and women), who are far from their families for months at a time. Free access to transportation means after work time is deemed unimportant for workers who often live in relatively isolated areas, with little access to disposable income. Many significant aspects of the everyday life of migrant workers, the “microcosm of housing” are, to a large extent, still omitted in the guidelines. In fact, the guidelines may set higher standards than the tent that for years has been normalized as suitable for Canadian transient fruit pickers in the region, but still do not recognize the right of agricultural workers to freedom of movement, privacy and comfort.

Thus, housing is primarily left to the employers’ sense of justice and their perceptions of Mexican workers’ needs, views that are often tinged by discursive constructions of race and underdevelopment. Actually, the ambiguity embedded in the regulations of the SAWP allows for a wide range of practices. To illustrate this point, in what follows we offer a few descriptions of housing arrangements we encountered during our field work:

Vineyards connected to wineries offered the most comfortable conditions. In one of the vineyards that hire Mexicans, a few workers were accommodated in a dwelling formerly used as a guest-house. The house was equipped with a living-room, a Jacuzzi and spectacular lake views. Each worker had his own bedroom. These workers were not charged for accommodation. This was one of the two locations in our sample where employers did not charge rent. And yet these workers could not shake the sense of total institution they experienced daily. The door to the property was kept locked to outside vehicles and the workers required permission of the foreman to receive visitors; the foreman had his own housing arrangement on the property. These premises are located far away from town; there is no public transportation available; walking or biking is dangerous and difficult; basically the only option for these workers to go out was the company’s vehicle. Indeed, the contractual obligation of the employer to offer transportation once a week for workers to go shopping was fulfilled, but the sense of isolation remained. These workers had access to a church organization that offered some support and helped with transportation sometimes.

A second group of Mexican also worked on a vineyard. Their home was located in a public rural road. The house was less luxurious than the one described above. It had a beautiful view, a deck, a large barbeque, a well-appointed kitchen, washer and dryer, telephone, a functional living room that included two sofas, a large TV screen and games. The house had laminate floors, clean painted walls, two washrooms, hot water. Workers paid rent. Some of the standards found in other accommodations for foreign workers also existed here: shared

bedrooms, fairly thin mattresses, and sparse furniture. However, when questioned about their perceptions, these workers unanimously agreed that they were very satisfied with their accommodation, that housing was unproblematic. Perhaps the most important aspect of this particular experience is that this residence was far from the gaze of the employer, the workers' sense of surveillance was limited. Yet, from our standpoint, they still remained unfree bachelor men, with little room for privacy living in an isolated setting chosen by the employer.

In one case, a group of around forty workers labored for a cherry farmer. In this cherry orchard the workers' experience was radically different. Their accommodation was reminiscent of army barracks. The premises consisted of two bunkhouses; sleeping twenty workers each. A large room of concrete floors was furnished with a continuous single line of bunk beds stretching lengthwise along three walls, simulating a Lego construction. Bunk beds were complete with thin foam mattresses. The rest of the furniture consisted of two arm chairs, one TV set, a line of small lockers in the middle of the room, and a few large plastic boxes. No sense of privacy existed here. Four washrooms that included sinks, toilets and showers were located in an attached building. The workers ate institutionally like, in a separate mess hall, furnished with a few large picnic tables, similar to those found in city parks. The employer provided the meals. In the morning a box of cereal and coffee; there was never enough coffee for everyone; a vegetable soup at lunch time; and in the evening solid food with tortillas. In the interviews workers complained of hunger and food of poor quality.<sup>99</sup> They mentioned that they had requested to cook for themselves, but that the request had been denied under the argument that there were no facilities. Within the stipulations of the agreement, this employer charged the maximum allowable for food, \$6.50 per worker per day. In total, around \$260 a day was collected for meals; Workers also paid rent, amounting to 7% of their daily gross salaries. We calculated that this farmer might get around 20,000 dollars per season in rent if workers stay long enough (in 2008 and 2009 the maximum amount employers were allowed to charge each Mexican worker for accommodation for the season was \$550). It is problematic to think that this farmer complies with all the minimum requirements mandated by the BC-SAWP guidelines. He does nothing illegal, however, he has created a total institutional arrangement for his temporary workers. We were told that workers at this particular farm had complained to the consulate and that the consulate had visited the farm.

Between these extremes we found employers who try their best to balance low costs and relatively acceptable housing conditions for the foreign migrant workers. A minority does

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<sup>99</sup> There are vendors who drive their vans to farms who hire Mexican temporary workers to sell Mexican food. This particular employer did not allow the van to enter the farm.

not even take advantage of the provision to charge for accommodation and even invite their workers to parties and family celebrations. With some variations, workers in this category were able to resolve their basic daily necessities with relative ease, for example having more or less easy access to phones and transportation. Some were driven to resolve personal problems when needed, others had access to public transportation or were given access to a vehicle and gas very much on demand. In other cases, workers had access to bicycles and were able to use them to resolve their transportation needs independently.

## **Conclusion**

Regardless of the quality of housing arrangements found by foreign workers in the Okanagan, the SAWP has the power to curtail the freedom and citizenship rights of migrant workers. It is inscribed in the program as the norm that adult men share bedrooms for months, sometimes two or three to a bedroom, sometimes ten or twenty to one (at least each person is given the right to a bed of his/her own). Bunks, unfinished interiors, cement floors, overcrowding are also the norm rather than the exception. And more problematic yet, is the fact that the program privileges housing workers within the work premises, under the employer's gaze. It is irrelevant if workers' movements are actually controlled or not, the possibility is always there.

This research shows that in the Okanagan Valley, in British Columbia, where today around one third of the SAWP workers brought to British Columbia work for periods that go from a few weeks to a maximum of eight months, the housing arrangements under SAWP reinforces immobility and surveillance. Housing regulations allow for multiple possibilities for employers. They may improve the lot of the workers or make their lives miserable, all within the legal provisions of a program in which housing symbolizes a disciplinarian total institution. It is notable that some companies and individual farmers do their best to house workers according to higher moral standards. True, many of these conditions are marked by narratives of underdevelopment, and by a history of racialization (Miles, 1989) and class exploitation, but these employers act according to their moral conscience to be fair within the limits of their business needs. Others take advantage of vulnerable people, within the rules set by the program. Also concerning are the government dispositions in relation to housing inspections, including the resources assigned for this service, the character of the inspection process, the frequency with which they are performed, and the control and supervision mechanisms for inspection services. In sum, we argue that housing provisions under the SAWP, although in some ways a step higher than the non-system under which temporary migrant workers have been housed in the region in the past, still reflects a system with little regulation for employers and significant constraints for workers.

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# **IMPROVING HEALTH, SAFETY AND HOUSING CONDITIONS OF MEXICAN FARMS WORKERS IN BRITISH COLUMBIA: A FARMER'S PERSPECTIVE**

***Shaghayegh Yousefi***

The Seasonal Agricultural Workers Program (SAW) is the federal government's initiative to solve the growing labor shortages in the Canadian agricultural sector (HRSDC, 2008c). For decades, this sector has been unable to attract domestic workers due to its physically demanding nature and comparably low wages. For a wage equal to the minimum provincial wage rate, workers can often find alternative job solutions in industries with more desirable working conditions. Consequently, labor shortages are addressed through hiring of foreign workers on temporary contracts. In Canada, these temporary agricultural workers are coming from Mexico or the Caribbean countries on contract terms often shorter than 8 months. Foreign workers benefit from temporary employment opportunities through remittances send to their local communities. Incomes earned through such temporary foreign workers' programs can often contribute to increased living standards for families of foreign workers (Basok, 2002).

As the number of seasonal agricultural workers has increased, concerns have been raised over their rights, their health conditions and their living arrangements. The temporary status of these migrant workers along with their often poor language skills and literacy level make them particularly vulnerable to violations of their rights. In recent years, advocates of seasonal agricultural workers have particularly raised concerns over workers' occupational health and safety and their living conditions. Evidence suggests that Occupational Health and Safety (OHS) regulations have been violated on occasions and facilities provided to seasonal agricultural workers are often overcrowded and do not meet the housing requirements of seasonal agricultural workers' accommodation.<sup>100</sup> The objective of this study is to find out why farmers who are hiring seasonal agricultural workers fail to fully implement occupational health and safety regulations and housing guidelines.

The scope of this study is restricted to the province of British Columbia. I conduct a survey among a group of BC farmers and use existing literature to identify some of the barriers that farmers as owners of small-scale enterprises face with occupational health and safety regulations and housing guidelines. After identifying the major barriers, I use best practices in

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<sup>100</sup> See Yousefi (2009), chapter 3 for details

other jurisdictions (U.S.A.) to design policy alternatives that best fit the needs of BC farmers and can ensure effective fulfillment of regulations and guidelines.

In the next section, I survey existing literature to identify barriers to fulfillment of occupational health and safety regulations and housing requirements. The policy problem that this paper is addressing is also clearly defined.

## **I. Barriers to fulfilling Occupational Health and Safety regulations and housing guidelines**

Five main barriers to implementation of Occupational Health and Safety (OHS) regulations and housing guidelines are identified and discussed in this section.

The first major challenge is related to the time sensitive nature of agricultural production specifically during the harvesting season. Basok (2002) studies the nature of Green House industry in Leamington Ontario. Through interviews with farmers, she finds that the nature of greenhouse production and sensitivity of agricultural sector make it very difficult to comply fully with regulations. For example in an interview with a greenhouse farmer, she finds that after pesticides have been applied to the fields, it can be days before workers can safely re-enter the fields. In the case of tomato production for example, if the harvesting period is postponed for too long, tomatoes can ripen too much and crack before they are picked. For farmers, this could result in large losses (Basok, 2002, p. 67).

The second barrier to training foreign workers as identified by researchers is the workers' poor language skills and often-poor literacy levels. This topic has been studied on a population of Mexican farm workers in the United States, who share similar characteristics with the Mexican farm workers in Canada. It is found that only 5% of Mexican farm workers are capable of speaking English. Among those with adequate English skills, 95% had lived in the United States for 5 years or more. Workers often reported that because of their poor English skills, they were often unable to understand safety trainings, to read warnings signs and understand educational materials (Das et al., 2001). Therefore, considering the time constraints during harvest season, and workers' poor communication skills, training can be a major challenge for farmers with the limited resources.

The short term of employment contracts of temporary foreign workers also creates a third barrier to OHS training. Workers often are unable to improve their language skills during the very short term of the contract (maximum 8 months). In addition, short employment contracts distort training incentives for farmers. Guadalupe (2002) in her comparative study of accident rates among fixed term workers versus permanent workers suggests that higher

accident rates are observed among temporary workers. She argues that employers' investment in safety training is a form of human capital investment, which depends on its rate of return. In the case of short-term employment, the employer is reluctant to invest in training since the employee does not stay long enough to contribute high returns. Furthermore, she suggests that if there are potentials of future rehiring by the same employer, the employee would want to impress that particular employer by for example working faster or more intensely. This by itself can increase the rate of accidents.

Fourth, studies indicate that poor health and safety performance is a common characteristic of small and middle-sized enterprises. Walters (1998) links the high rates of injuries in industries such as construction and agriculture to the nature of small-sized enterprises. He identifies a number of economic and non-economic factors that contribute to the poor health and safety performance of small enterprises. They include factors such as "limited resources, limited knowledge of regulatory requirements, poor awareness of the economic advantages of health and safety, poor knowledge and understanding of safe working practices, short term economic pressure and competition, and inadequate enforcement and absence of preventive services"(Walters, 1998, p.182).

Finally, the general problem of housing affordability and low vacancy rate in the province of British Columbia may have an impact on farmers' ability to provide low cost housing to farm workers. In 2006, 43.7% of renters and 22.8% of owners spent over 30% of their household income on shelter. According to BC Housing, an affordable rent is defined as costing no more than 30% of a household's total gross monthly income. In addition to the affordability problem, the low vacancy rate also is a major barrier to providing suitable housing to farm workers. In 2008, the vacancy rate in British Columbia was 1.1%, the second lowest in Canada (Snow, 2008). As mentioned in section, 3.2, one of the major concerns over housing of foreign workers is overcrowding. In a housing market where accommodations are costly and in short supply, farmers with their limited resources may face difficulties in providing suitable housing while charging workers a very small fee.

To summarize, farmers' ability to effectively implement OHS regulations and housing requirements are affected by a number of economic factors. The nature of agricultural production and time sensitivity of harvesting season adds additional obstacles to training farm workers. In addition, the problem of poor communication skills lowers the effectiveness of training. Finally, expensive housing and tight supply limits the availability of suitable housing. Strategies should be considered to remove such barriers and to help farmers better implement regulations and guidelines. The next sub-section states the policy problem and the key stakeholders affected by this policy problem.

## 2. Policy problem and key stakeholders

Why do BC farmers fail to fully implement Occupational Health and Safety regulations and housing requirements?

In light of evidence provided, temporary Mexican workers employed in BC's agriculture sector lack sufficient OHS training, are often exposed to health hazards, and live in overcrowded, substandard housing accommodations. The evidence also suggests that farmers have access to limited resources and face economic pressures. In an industry with large production costs and international competition, farmers as owners of small-scaled operations face a number of challenges when trying to maximize their profits. Some of these challenges may contribute to insufficient training of foreign workers in OHS regulations and violations of housing requirements. Labor cost is one of the few expenses that farmers have direct control over. Therefore, when facing rising costs of equipment, machinery, energy prices, and raw production inputs, farmers have a tendency to minimize labor costs in any way possible.

The main stakeholders involved in these issues are primarily BC farmers and Agricultural Workers Program (SAW). Farmers' involvement in these issues relates to the farmers' role in fulfillment of OHS regulations and housing guidelines. Farmers are responsible for providing training in OHS regulations and for suitable accommodations for SAWs. However, their ability to fulfill regulations and guidelines has been affected by a number of obstacles. SAWs are also directly affected when they do not receive sufficient training in OHS regulations and live in substandard, overcrowded facilities. Other agencies concerned by these issues are Work Safe BC and Farm and Ranch Safety and Health Association (FARSHA). Work Safe BC is the regulatory power that enforces OHS regulation and guidelines in BC's agricultural sector. FARSHA provides variety of services including training programs, booklets and brochures and site visit evaluations to ensure the health and safety of farm workers. Both agencies are actively involved in ensuring health and safety of foreign workers and play vital roles in promoting policies that guarantee better fulfillment of regulations and guidelines. Therefore, they are likely to have an interest in the policy recommendations provided by this study.

In the next section, I provide analysis of survey findings to identify barriers to fulfillment of OHS regulations and housing guidelines by BC farmers. Next section also includes the analysis of best practices in the U.S, which will guide the design of policy options<sup>101</sup>.

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<sup>101</sup> See Yousefi (2009), Chapter 5 for more details on the methodologies used in this study

### 3. Analysis of survey findings

Out of 358 surveys that were mailed to the members of the BC Raspberry Industry Council, 21 responded on the first week. The small response rate is due to the association's decision to discontinue its support for farmers' participation in this study. However, despite these special circumstances, I find the findings useful and supportive of the evidence provided in Section 4. Among 21 respondents, 7 farmers meet their labor needs only locally, and they are eliminated from the sample; 8 farmers have experience in hiring foreign workers, and they are identified as Group 1 Farmers. Finally, 6 farmers have never hired foreign workers despite their labor needs not being met locally, and they are identified as Group 2 Farmers. The results are discussed separately for the two groups.

#### GROUP 1 FARMERS

The sizes of the production area of the farms for Group 1 vary by significant amounts. The majority of the farms in my sample of 8 surveys are among the small and medium-sized farms, with 25% of farmers indicating that the size of their production area is between 0-10 hectares and 37.5% indicating that it is between 11-50 hectares. There are also disparities among the average number of workers hired during the peak season. Among 8 Group 1 farmers, 50% hired only 0-10 workers (both domestic and SAWs) during the harvesting season; and the maximum number of SAWs hired by 84% of Group 1 farmers was 0-10 SAWs. 50% of Group 1 farmers reported that the average term of contract for their SAWs is 8 months; and 50% indicated that they rehire less than 25% of their SAWs after the completion of their first work contract.

#### *OHS regulations and training*

The top three challenges faced by Group 1 farmers when fulfilling OHS regulations are lack of information about support services for OHS training, difficulty in monitoring workers while they are on the fields, and language barriers. 80% of the farmers indicated that Work Safe BC provides them with the handbook of OHS regulations. However, none of these farmers was informed of the support service that is available to them through FARSHA. No farmer knew about the availability of the training contractor provided through FARSHA and the kind of services he provides.<sup>102</sup> In addition, 37.5% of the farmers said that language barrier is a challenge when training foreign workers, and 37.5% said language barriers is

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<sup>102</sup> During May 1<sup>st</sup> to October 1<sup>st</sup> of 2008, FARSHA hired a training contractor to provide OHS training to seasonal agricultural workers in Spanish. The services of the training contractor is available based on the farmers' demand (FARSHA, 2008).

somewhat challenging. Finally, 80% of the farmers suggested that monitoring workers to ensure effective fulfillment of OHS regulations is difficult during the busy harvesting season with their limited resources.

### *Housing requirements*

When farmers were asked about the barriers to providing suitable housing for their SAWs, the majority agreed that affordability (80%) and availability (90%) are barriers to providing suitable housing to SAWs.

Finally, I asked farmers to provide suggestions on what they think should be done to improve the implementation of OHS regulations and housing guidelines. To make implementation of OHS regulations easier and more affordable to farmer, some of the suggestions included: making regulations more relaxed, providing educational seminars, and providing training in Spanish to the group of SAWs upon their arrival and before they head off to their individual farms. To provide suitable and more affordable housing for temporary foreign workers, farmers' recommendations included: increasing the amount that employers can charge for providing accommodations to SAWs, providing certified contractors to build suitable housing at a discount rate, allowing small farms to install temporary accommodations on farmlands, and reducing the red tapes associated with getting building permits.

In summary, lack of information about the training support services, language barriers, and the time constraint during the harvesting season, which makes monitoring workers difficult to organize, are some of the challenges that farmers identified. In addition, higher costs and low availability of housing create barriers to providing housing for temporary foreign workers. These results support some of the factors I identified in section 2 as the major challenges to fulfilling OHS regulations and housing guidelines.

### **GROUP 2 FARMERS**

The sizes of the 6 Group 2 farms are equally divided in to the three size categories: 33.3% in 0-10 hectares range, 33.3% in 11-50 hectares range and 33.3% in 50+ hectares range. 50% of Group 2 farmers hire 0-10 workers during the harvesting season, and the remaining 50% hire 11-50 workers during the harvesting season.



### *OHS regulations and training*

80% of the Group 2 farmers identified compliance with OHS regulations as a barrier to hiring SAWs. The concerns over fulfillment of OHS regulations included cost associated with training (66%), time associated with training (50%) and language barriers (33%).

### *Housing requirements*

90% of Group 6 farmers identified housing requirements as a barrier to hiring SAWs. Concerns over housing requirements included both affordability of accommodations (80%), and availability of accommodations (100%).

Finally, I asked farmers what they think should be done to help them with improved implementation of OHS regulations and housing guidelines. To make implementation of OHS regulations easier and more affordable to farmer, suggestions included making regulations more relaxed and easier to understand, training workers in OHS in their own countries and prior to arriving in Canada, providing one day seminars. To provide suitable and more affordable housing for temporary foreign workers, some of the recommendations included: provision of government subsidies to help with financing of SAWs accommodations, facilitating the application process for installing mobile homes on the farms, allowing small farms to build temporary accommodations on their farmlands, and requiring workers to maintain their own facilities.

To summarize, using the findings of the sample of 14 farmers and evidence provided in section 2, I conclude that the major barriers to effective fulfillment of OHS regulations and housing guidelines are the following:

- Time constraint during the harvesting season and lack of information about support services
- Language barriers between farmers and seasonal agricultural workers
- Lack of affordable housing
- Lack of available housing

Having identified barriers to effective fulfillment of OHS regulations and housing guidelines, I will identify in the next section how other jurisdictions have addressed the identified barriers. The current policies in place and effective programs designed to address similar

challenges will guide the design of policy alternatives that can help growers in British Columbia better implement existing regulations and guidelines.

#### **4. Review of the studies of best practices in the U.S.**

Studies of best practices in the United States are analyzed in this section to determine the relevant policy options that address each of identified barriers to effective fulfillment of regulations. The analysis of cases studies identifies a number of occupational health and safety training programs for workers, farmers and supervisors and a number loan, grant and tax credit programs for migrant workers housing.

##### **Addressing the problem of Occupational Health and Safety of migrant workers**

This section discusses some of the initiatives taken in the U.S. to address occupation health and safety of migrant farm workers. United States Department of Agriculture (USDA) has a number of partnership agreements in the area of risk management, which provides funding and assistance for research and development, education and outreach programs (USDA, 2005). A few focus on educating and training farmers and farm workers on OHS regulations and hazards. The two successful programs are the Farm worker-Farmer Partnerships to Reduce Risk and Increasing Health and Safety in Agricultural Workplace and the Agricultural Safety Seminars.<sup>103</sup>

The Farm worker-Farmer Partnerships to Reduce Risk and Increasing Health and Safety in Agricultural Workplace is administered by the Rural Coalition, a Washington based organization, which implements policies promoting a more sustainable agriculture sector. The project is a partnership between the growers, farm workers, an insurance company, a risk management firm and an actuarial firm, who have developed two risk management tools. Both are designed to meet the labor needs of farmers and reduce the risk of occupational hazards to farmers and farm workers. One tool is designed specifically for owner of small farms, and since the design and structures of the tools are similar (Rural Coalition, 2007a), I only describe the one focusing on the small farms.

The Small Farmer-FarmWorker Risk Reduction Partnership Tool has four components:

1. An agreement between the farmers and farm workers;
2. Pesticide training and certification;

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<sup>103</sup> This section is based on Rural Coalition (2007b), unless otherwise stated.

3. On-site mapping to identify potential sources of injuries; and a meeting with the farmers to correct any identified areas for potential injuries.
4. An evaluation of workers

The agreement identifies the rights and responsibilities of farmers and workers. Provisions include requirements on housing, health and safety training, tools and equipment, hours of work, wage and benefits and other standard terms of contract. This component of the project applies to the workers that are not H-2A workers since the H-2A requirements mandates an employment contract prior to the worker's start of employment term. The second component is the pesticide health and safety training for all the workers. The training is provided by a certified instructor and is approved by the Environmental Protection Agency (EPA). The trainer first identifies the level of pesticide knowledge among farm workers through pesticide knowledge pre-test. The training is then provided in the language of farm workers and in groups of no more than 18 workers to ensure active interaction. Instructions cover all aspects of pesticide use (i.e. mixing, loading and application of pesticides), use of tools and protective clothing, and regulations and personal hygiene. Once training is completed, workers are provided a training license also known as Worker Verification Card, which is produced by the EPA and is valid for 5 years. The third component of the project includes an on-site mapping exercise to identify possible physical or chemical hazard. Through this interactive exercise, instructors identify possible hazards in front of workers. They then communicate the identified sources of hazards to the farmers and advise for the necessary changes to be made. Finally, the last component is an evaluation by instructors of the level of knowledge of the farm workers about pesticide safety. Instructors also check back with the farmers to make sure the required changes if any at all is being made.

The second program is the Agricultural Safety Seminars. Seminars are run by a non-profit workers' compensation insurance company based in Oregon. They are free and designed to educate farmers on risk management, fatal hazards, pesticides and farm safety. They are also open to other farm staff including the supervisors or those involved in handling pesticides and chemicals. For the past two years, from October to March, 24 seminars are held throughout 16 cities across Oregon, some of which are presented in Spanish to target the non-English speaking population of farmers. Growers, by attending these seminars, can meet one of the requirements of the Occupational Health and Safety regulations, which exempt them from random inspections (SAIF, 2008).

To summarize, the two programs are designed to help farmers and farm workers get occupational health and safety training despite their limited resources. Next, I introduce

some of the housing programs implemented in the U.S. to address the housing needs of migrant workers.

### **Addressing the housing needs of migrant farm workers**

This section discusses some of the initiatives taken by the federal and the States governments to address the housing needs of migrant workers. On the federal level, the United States Department of Agriculture (USDA) has three programs which provide low-interest rate loans, grants and rental assistance for migrant workers' housing; they are referred to as USDA sections 514, 516 and 521 respectively (USDA, 2007). The funds from the loan or the grant can be used to build new housing or rehabilitate existing housing. Any farmer, associate of farmers, public agency or non-profit agency would be eligible for the USDA 514 loan program; however, only non-profit organizations, associations of farmers, public agencies and Indian tribes could receive grants under section 516, the grant program. The federal funds are available for the use in migrant workers' housing only and not for the H-2A workers' housing (HAC, 2008). However, in addition to the federal funding programs, many states have initiated new approaches to address the housing needs of their farm workers including the H-2A workers.

In California, the Joe Serna, Jr. Farm Worker Housing Grant Program: is available to government agencies, non-profit organizations, cooperative housing corporations, and recognized Indian tribes. It provides loans or grant to support new construction and rehabilitation of existing farm workers housing. Applicants are required to provide a matching share to the amount of the loan or the grant that they are requesting. There is a limit for funds available for each project. In 2008, California's Department of Housing and Community Development assigned approximately \$27 million dollars as the available funds for the program (HCD, 2008). The Rural Pre-development Loan Fund provides funding for expenses that are associated with long term financing of the migrant workers' housing. It is a low-interest loan that covers expenses such as legal and engineering fees. This loan is available to any individual or organization inquiring a loan for farm workers' accommodation (HAC, 1998).

In Oregon, the Farm Worker Housing Tax Credit Program provides funding incentives for growers and non-profit organizations to invest in farm workers housing. The tax credits are transferable, allowing non-profit organizations that do not pay income taxes to transfer their credits to other investors and encourage development of farm workers' housing. Any expense, incurred in building new accommodation, rehabilitating existing ones or installing temporary farm workers' housing can be counted towards state tax credits (CASA, 2009).

The Farm Worker Tax Credit for Lenders is administered by the Oregon's Department of Revenue (ODR) as a state tax credit program. It provides tax credits to lenders that provide loans for construction of new farm worker accommodations, rehabilitation of existing ones or installation of temporary accommodations (CASA, 2009). The Rural Rehabilitation Loan Fund provides funds to non-profit, for-profit or government organizations that develop farm worker housings. Eligible projects include new constructions or rehabilitation of existing units. The maximum amount of loan is \$100,000 over a maximum of 10 years. The interest rate on the loans is a fixed rate 1% for non-profit and 3% for for-profit organizations (OHCS, 2008).

In Ohio, the Agricultural Labor Camp Improvement Program provides grants for up to \$50,000 to owners and operators of migrant worker camps who wish to make improvements on the existing housing facilities. Eligible applicants must be licensed by Ohio Department of Health (ODH) which means they should meet the housing and sanitation requirements as provided by ODH (Sachs et al, 2001).

Using comparative analysis of OHS programs, I find that the main features of both programs include 1) training with specific objectives, 2) training tailored to the needs of employees, and 3) training that targets supervisors.<sup>104</sup> The comparative analysis of housing programs also reveals that the main features of the U.S. housing policies are:

- 1) Restrictions on the amount of loans available/ tax credits rewarded with 9 out of 9 programs having this feature
- 2) Availability of funds for new constructions, rehabilitation of existing farms and for installing of temporary accommodations with 8 out of 8 programs having this feature
- 3) Availability of funds to all farmers regardless of the size of farm operation<sup>105</sup>

The main features of OHS and housing policies in the U.S. will guide the design of policy options in the next section.

## **5. Policy alternatives**

This section presents policy alternatives that the province of British Columbia in coordination with the federal government can implement to help for an effective implementation of OHS regulations and housing requirements. For each category of occupational health and

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<sup>104</sup> See Yousefi (2009), Chapter 6.2.3. for details

<sup>105</sup> See Yousefi (2009), Chapter 6.2.5 for details.

safety and housing of seasonal agricultural workers, I provide three policy alternatives. I start with policies addressing OHS concerns and then suggest policies for housing.

- **Occupational Health and Safety policies**

The current approach, although effective in principle to provide training to SAWs, is not fully utilized and needs to be more proactive. From May 1<sup>st</sup> to October 1<sup>st</sup>, 2008, Farm and Ranch Safety and Health Association (FARSHA) hired a Spanish speaking training contractor to provide services such as on-site orientation of new workers, occupational health and safety training and to assist with Spanish learning resources. Farmers need to contact FARSHA to arrange for the services. FARSHA also provides training materials and brochures to assist training of farm workers (FARSHA, 2008). As indicated in section 3, farmers were not aware of these services. Therefore, I provide policies to better utilize the current resources available to the farmers.

*Policy Alternative 1: The Full-Time Hiring of the Training Contractor*

As discussed in earlier sections, the training of the farm workers is an effective and vital step to alleviate farm accidents. In addition, farmers should have a better knowledge about the resources that are available to them. Finally, training should be provided and communicated in a language that workers understand. The temporary hiring of the bi-lingual trainer, although a positive step needs to be adopted on a more permanent basis. Better outreach strategies should take place to educate farmers about the availability of such services. For example, an information book, which summarizes all the necessary requirements for farmers hiring SAWs, should be prepared to inform farmers of their responsibilities and the resources available to them. In addition, co-ordination between FARSHA and agencies managing SAWP perhaps can provide the link between farmers hiring SAWs and FARSHA and provide farmers with a better access to such training resources.

*Policy Alternative 2: Free Educational Seminars for All Farmers and Supervisors*

Educational seminars are an effective strategy that is used to provide information and training to farmers and farm supervisors. In addition, some participants of my survey suggested that the availability of educational seminars would help them in better implementation of OHS regulations. These seminars can cover variety of topics including risk management principals, general occupational health and safety education and pesticide knowledge and training. Either Work Safe BC or FARSHA can organize agricultural training seminars in BC's farm communities. The seminars should be presented in both English and Punjabi for

both English speaking and Punjabi speaking farmers and supervisors. Agricultural seminars can help farmers of all size operations and improve their knowledge of OHS regulations and requirements. Supervisors and farm managers should also be required to attend the training seminars since they directly monitor workers. Schedules of training seminars should be flexible and not during the busy harvesting season to ensure full participation by farmers and supervisors.

#### *Policy Alternative 3: Policy Alternative 1 plus Assign Supervisors to Monitor Workers on the Fields*

The role of monitoring workers to ensure safe and sanitary practices is crucial in avoiding field hazards and pesticide related illness. Arcury et al (2001) provides three main strategies to prevent pesticide-related illness. The first strategy is to provide workers with safety equipment and sanitation facilities on the fields. The second strategy is to educate workers about the risks associated with exposure to pesticides and chemicals and learn how to alleviate the risk using safety equipment and sanitation facilities. Finally, a work environment where employers continuously remind and encourage workers to practice safe handling of pesticides is required. Hence, in conjunction with the direct training of the workers, the presence of a supervisor who monitors field practices is an important part of an effective occupational health and safety strategy. Therefore, policy alternative 3 includes policy alternative 1 combined with the assignment of a supervisor. Supervisors should be required to complete FARSHA's training courses. FARSHA provides a number of training courses for agricultural workers and agricultural employers. These courses range from a few hours a day to full-day courses and are for the most part free of charge. FARSHA also provides a pesticide applicator training course which is presented in English and Punjabi. There is a modest fee for FARSHA's pesticide applicator training course (FARSHA, 2009). The supervisor will be hired on a permanent basis to provide monitoring of new and returning workers.

In the next section, I present evaluation of each policy alternative using 4 measures: 1) Effectiveness, 2) Cost, 3) Acceptability among stakeholders, and 4) Administrative feasibility and using an established ranking system.<sup>106</sup> Each policy is given an overall performance score and recommendations are made based on the overall score given to each policy.

### **Evaluation summary and policy recommendation**

Based on the results in Table 1, I make recommendations using the scores calculated for each policy alternative.

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<sup>106</sup> See Yousefi (2009), Chapter 7 and 8 for details

**Table 1**  
Evaluation of Policy Alternatives for Occupational Health and Safety

	Alternative 1	Alternative 2	Alternative 3
Criteria	Full-Time Hiring of the Training contractor	Free Educational Seminars for Farmers and Supervisors	Alternative 1 + Assigning Supervisors to Monitor Workers on the Fields
<b>Effectiveness</b>			
Reduction in $IR_{Ag} - IR$	High (3)	Medium (2)	High (3)
<b>Cost</b>			
Annual expenditure per worker	Low (1)	Low (1)	Low (1)
<b>Acceptability among Stakeholders</b>			
Acceptability among farmers	High (3)	High (3)	Low (1)
Acceptability among government agencies financing the program	Low (1)	Low (1)	Low (1)
<b>Administrative feasibility</b>			
Ease of Administration	High (3)	Medium (2)	Medium (2)
Total Score	11/15	9/15	8/15



Given the ranking of the three policy alternatives, the full time hiring of FARSHA's training contractor is the best alternative to improve occupational health and safety of SAWs. This is the policy that I recommend to be implemented immediately. The most promising feature of this policy is the direct training of the workers, which effectively lowers the injury rate among SAWs. The availability of training resources has very little impact if farmers are unaware of the services, as is the case under status quo based on results of my survey. In addition, some participants of my survey suggested that it is best if workers are trained in their own countries or upon their arrival in Canada. This policy provides training services for farmers that are time constraint during the harvesting season. This policy also offers a more proactive role for the training contractor through information handbooks, outreach and coordination between farmers and FARSHA. Administration of this policy alternative is relatively simple considering the training contractor is already hired by FARSHA. The services will be provided to farmers free of charge as is the case under the status quo; therefore, there will be no additional financial burden on the farmers. Although, government's spending slightly increases under the policy alternative I, it can save in the form of health care cost while protecting the health and well-being of foreign workers in Canada.

The other two policy alternatives, although still effective in reducing injury rates among SAWs, are also costly to either the government or the farmer and are more complex to administer. Agricultural seminars rank second in the evaluation of policy alternatives and should be considered by FASHA and Work Safe BC as a more long term strategy that targets all farmers including those that their labour needs are met locally. The third policy alternative which ranks last may not be the most promising alternative since it puts additional financial pressure on the farmers who may not be willing to incur additional costs.

The next section provides housing policies followed recommendations on the best policy alternative to improve the housing needs of SAWs.

- **Housing policies**

The current policy addressing the housing needs of seasonal agricultural workers in BC focuses on the provision of temporary accommodations on agricultural farmland. However, there is no fund directly allocated to the housing needs of seasonal agricultural workers. Under the employment contract, farmers are permitted to charge workers a marginal amount for providing accommodations (HRSDC, 2008a). However, farmers find the amount insufficient to cover the cost of providing suitable housing to SAWs. As a result, two of my alternatives relate to financial support for farmers.

### *Policy Alternative 1: Low Interest-Rate Loans*

The low interest rate loans will have the same structure as student loans and will be administered by banks. The loans should be made available for the use in new constructions, rehabilitation or installing of temporary accommodations. Funds should also be available for the use in renovating existing dwellings used for farm workers housing and to cover pre-development cost associated with long term financing (i.e. legal fees, appraisal fees, and the cost of obtaining building permits). All farmers, regardless of the size of their farms should be eligible. The availability of low interest loans should be tied to certain requirements such as increasing the per person livable area to 10m<sup>2</sup> or more, and to rehabilitating and better maintenance of existing accommodations. Regular inspections should be arranged to ensure appropriate use of funds.

### *Policy Alternative 2: Farm Workers Housing Grant*

I also recommend a grant program to fund improvements on the migrant workers' housing. The grant recipients should be required to use the funds towards meeting the housing requirements, and inspections should be arranged to follow up on improvements on accommodations and the use of funds. The grants provided in the U.S. are often on a much larger scale since the population of migrant workers in the U.S. is considerably large compared to the BC's seasonal agricultural workers' population. Therefore, I recommend a total of \$300,000 worth of grant to be assigned to migrant workers housing needs. Farmers who receive the grants should be required to provide more livable area per worker, and invest the funds in rehabilitating the accommodations.

### *Policy Alternative 3: Assign Managers to Farm Workers Camps*

Farmers should assign supervisors to oversee housekeeping and maintenance of workers accommodations. A study of farm workers in Colorado, through visits to 5 worker camps, finds that although some of the camps that were visited did not meet safety standards, for the most part, these camps met the requirements of migrant workers housing. Therefore, evidence suggests that although farmers satisfied most of the requirements, there was evidence of poor housekeeping by the workers. The same study finds that camps that had a manager living near the camp were better maintained and better housekeeping was observed (Vela-Acosta, 2002). Therefore, to improve sanitation and general condition of the camps, farmers can hire a supervisor, who oversees maintenance and housekeeping. The supervisor

earns an hourly wage of \$12 and visits the camps 5 times per week and spends an hour during each visit monitoring and managing the facilities. In the next subsection, I describe the criteria used for the analysis of these policies. Recommendations are made based on overall performance level of each policy.<sup>107</sup>

## **Evaluation Summary and Policy Recommendation**

Table 2 below summarizes the results of this policy analysis for the three proposed policy alternatives discussed above.

Based on the scoring in the policy evaluation, the policy providing farm worker housing grants is the best alternative to improve the housing needs of SAWs. Grant requirements improve overcrowding of the facilities and provide financial resources to the farmers to provide suitable accommodations. This policy requires funding from the government and eases the financial burden to the farmers hiring SAWs. Funding resources also accommodate renovations and better maintenance of workers' facilities. Although, currently there is no administrative unit in place that manages farm workers' housing grants; this policy can be implemented by the existing units either dealing with low income housing (BC Housing) or the existing units dealing with health and safety of SAWs (FARSHA). The provision of farm workers' housing grants is a popular strategy that has effectively been used in the U.S. by both federal and state governments. Therefore, my recommendation is that considering the rapidly increasing population of SAWs in BC, it is vital for the government to step in to provide funding resources to the farmers and help them in providing suitable accommodations to workers.

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<sup>107</sup> Ibid

**Table 2**  
Evaluation of Policy Alternatives for Housing

	Alternative 1	Alternative 2	Alternative 3
Criteria	Low Interest-Rate Loans	Farm-Workers Housing Grant	Assigning Supervisors for Farm-Workers' Accommodations
<b>Effectiveness</b>			
Reduction in overcrowding	High (3)	High (3)	Low (1)
Improvements in maintenance	Medium (2)	Medium (2)	High (3)
<b>Cost</b>			
Annual expenditure per worker	Low (1)	Low (1)	Low (1)
<b>Acceptability among Stakeholders</b>			
Acceptability among farmers	Low (1)	High (3)	Low (1)
Acceptability among government agencies financing the program	Low (1)	Low (1)	High (3)
<b>Administrative feasibility</b>			
Ease of Administration	High (3)	Medium (2)	Medium (2)
<b>Total Score</b>	<b>11/18</b>	<b>12/18</b>	<b>11/18</b>

Alternative 1, which is the second highest ranking policy is also a viable alternative. Low interest rate loans create access to funding resources for the farmers for a variety of expenses incurred towards farm workers' housing. Since housing grants only provide limited funds to the farmers, this policy should also be implemented to provide alternative funding resources to the farmers. Therefore, although this policy may not rank as a more immediate strategy to improve the status of SAWs' housing, it should be considered by the government. It should be phased in as a complement to policy alternative 2 in the near future.

Policy 3, although ranks equally as the alternative 1, may not be a desirable option compared to alternatives 1 and 2 since it puts additional financial burden on the farmers. Farmers that are already financially challenged may not fulfill the requirement of hiring a full time supervisor to monitor despite having a policy in place. Therefore, I do not recommend this policy.

## **Conclusion**

Through analysis of survey findings, case studies of best practices and a survey of relevant literature, this study recommends policy options that can improve fulfillment of OHS regulations and housing requirements by farmers hiring seasonal agricultural workers. Surveys conducted among BC farmers finds that the three major barriers to fulfillment of OHS regulations are: 1) Lack of knowledge about the training resources available to farmers, 2) Time constraints, which result in farmers' inability to monitor workers on the fields, and 3) Workers' poor language skills, which makes training ineffective. Survey analysis also suggests that both affordability and availability of housing in BC are major obstacles when providing accommodations to SAWs. Analysis of case studies demonstrates how the U.S. with the largest population of Mexican migrant workers in the agricultural industry addresses OHS and housing needs of its migrant workers. Programs that have been implemented in the U.S. to address OHS of migrant workers include variety of training programs for farm workers, farmers and farm supervisors. Policies addressing the housing needs of migrant farm workers include migrant workers' housing loans, grants and tax credit programs. These programs are administered both at the federal level and the state level.

Using complementary analytical methods, this study provided three alternatives to address OHS needs of SAWs and 3 policies to address the housing needs of SAWs. Policies that were based on achieving the long term goal of effective implementation of OHS regulations were: 1) full time hiring of the training contractor, 2) free educational seminars for farmers and supervisors, and 3) policy alternative 1 plus the requirement to hire a supervisor to monitor workers on the fields. Policies that were based on addressing the housing needs of

SAWs were: 1) low interest rate loans, 2) farm workers' housing grants, and 3) assigning a supervisor to oversee maintenance and housekeeping of the facilities.

The evaluation of policies revealed that the full time hiring of FARSHA's training contractor and the provision of farm workers' housing grants were the most desirable policies that would help reduce injury rate among SAWs, reduce overcrowding of accommodations and improve housekeeping and maintenance of farm workers housing in less crowded facilities. The full time services of the training contractor, combined with more outreach and information sharing with the farmers can be greatly effective in reducing injuries among SAWs. The training is provided to workers in Spanish, making it more effective. The housing grants provide funding resources to the farmers to meet and exceed the requirements of farm workers' housing. The grants that have higher space per person requirement ensure less crowded facilities that are better maintained by fewer worker occupants. The proposed highest ranking policies are administered by existing institutions, therefore, they can be more quickly implemented and more rapidly address the concerns over OHS and housing needs of SAWs.

As British Columbia takes steps towards integrating a larger population of SAWs into its agricultural sector, it is important to track and overcome the current issues before they become more complex and costly to resolve. This study is based on a small sample of BC growers and over a limited time horizon; consequently only a few challenges have been revealed by participants of this study. One possible area of future research is a province wide survey of growers in British Columbia to analyze and compare barriers in different sectors of agriculture and to find how they may be contributing to violations of regulations by farmers. Although such amendment is important, it remains outside the scope of my analysis.

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# **PERMANENT POPULATIONS OR TEMPORARY RESIDENTS? THE STORY OF MIGRATION IN BRANDON, MANITOBA**

*Alison Moss  
Jill Bucklaschuk  
Robert Annis*

The impact of transnational migration has begun to revolutionize rural Manitoba; communities have been transformed into multicultural hosts for newcomers. Brandon, which is the focus of this chapter, is in the midst of rapid and unprecedented change owed to temporary migration driven by an industrial strategy to meet immediate labor needs. Brandon's story, as it unfolds, is unique because of geography; the community is situated in a province that aggressively promotes immigration through a successful Provincial Nominee Program that, under the Employer Direct Stream, allows industry to nominate temporary migrants for permanent resident status. Despite the fact that the majority of Brandon's newcomers are temporary foreign workers, 'temporary' is not necessarily impermanent, and in many cases actually equates to permanent immigration. Though Brandon has already experienced a large influx of temporary foreign workers, further changes will become increasingly evident over time as migrants gain permanent immigrant status and families continue to reunite.

This chapter explores the local experience, as well as anticipated challenges and opportunities that accompany continued growth. As the number of newcomers continues to increase and diversify, service provision challenges are likely to intensify. Most notably, there will be additional pressure on the school division, health services, and housing market, both private and rental. The need for large family-appropriate dwellings will continue to increase, amplifying housing shortages and further challenging the community.

## **1. The demography of Brandon, Manitoba**

According to Census data, the city's population increased from 39,716 to 41,511 since 2001. Brandon's population is, on the whole, ethnically homogenous with the vast majority of residents claiming to be of British Isles (48%) or European (36%) origins. Most of Brandon's residents are not recent immigrants; the 2006 Census showed that 2,695 residents claimed first generation status while 25,355 indicated third generation or more. Few residents claim visible minority status, however, there has been a relative increase since the last Census – 2% of Brandon's population claimed visible minority status in 2001 compared to 4% in 2006

(Statistics Canada 2007). In addition to population growth, Brandon is also becoming ethnically diverse.

An important concern noted locally is the need for increased language supports since newcomers often come with limited levels of English proficiency. Currently, a number of local businesses and service providers wish to hire individuals fluent in languages other than English, particularly Spanish and Mandarin, which is unprecedented in the city. Local stakeholders have come together to work across sectors to establish a local interpretation cooperative, built on local talent, providing an essential service to the community and invaluable Canadian work experience.

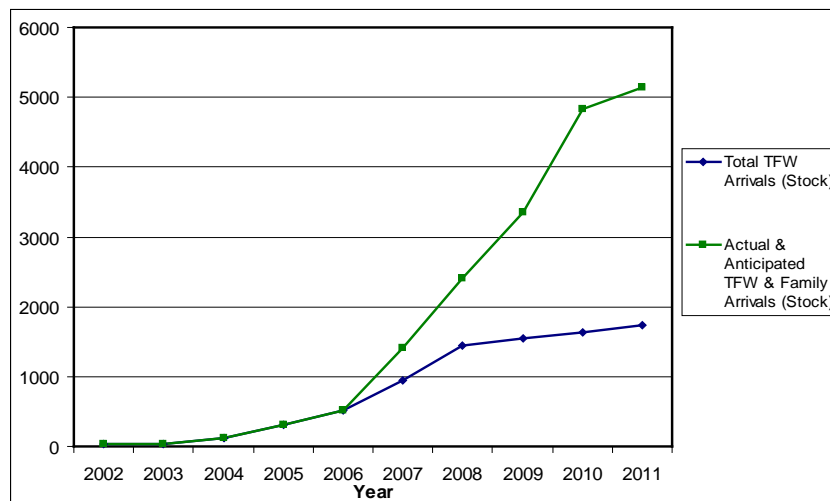
Manitoba has set and attained high per capita immigration targets. In 2007, Manitoba welcomed nearly 11,000 immigrants, of which approximately 70% were Provincial Nominees. The *Canada-Manitoba Immigration Agreement (CIMA)* came into existence in 1996 and serves as the province's main immigration policy framework. CIMA represents one of the first agreements in the country outlining an innovative and cooperative arrangement between the federal government and a province, granting increased autonomy and responsibility for immigration to the province (Amoyaw 2008). In 2007, immigration to Manitoba represented 4.6% of total immigration to Canada, and the province's 2.6% population growth is largely accredited to immigration (Government of Manitoba 2007). Most newcomers settling in Manitoba make their homes in Winnipeg, but many also choose to settle in rural centres such as Steinbach, Brandon and Winkler.

## **2. Increasing recruitment of temporary foreign workers**

Over the past four years, the number of temporary foreign workers migrating to Manitoba to fill labor shortages has doubled. In 2003 there were 1,426 temporary foreign worker arrivals and 2,878 in 2007. Interestingly, 45% of temporary foreign workers arriving in Manitoba went to communities other than Winnipeg (Manitoba Labour and Immigration 2008). Many of the temporary foreign workers arriving to Manitoba enter Canada with the knowledge that they may apply for permanent residency after six months of working in the province through the Provincial Nominee Program. In Manitoba, temporary foreign workers are considered a source of permanent immigration, thus contributing to the province's annual immigration targets. With this option of permanence there is a fundamental need to reconsider how migrant workers are perceived and treated upon their arrival through the federal Temporary Foreign Worker Program.

Brandon has become the third most common immigrant destination community in Manitoba, following Winnipeg and Winkler (Manitoba Labour and Immigration 2008). It is estimated that if all temporary foreign workers and their families stay in Brandon, by 2011 there will be an addition of about 5,100 residents; this addition represents approximately 12% of Brandon's 2006 population (Bucklaschuk, Moss, and Gibson 2008). Initial estimates from Maple Leaf Foods indicate that over 90% of temporary foreign workers apply for Provincial Nominee status. Family reunification visibly began during the fall of 2007 and will continue as a large percentage of temporary foreign workers receive Provincial Nominee status. Figure 1 illustrates anticipated arrivals of temporary foreign workers and their families over the next two years.

**Figure 1**  
Temporary Foreign Worker Arrivals and Estimated Family Arrivals  
2002 - 2011



The Maple Leaf hog processing plant in Brandon opened in 1999, and implemented a full second shift in June 2008. The recent second shift expansion has made the Brandon mega-plant the largest Maple Leaf facility in Canada (Maple Leaf Foods March 2008). Maple Leaf Foods staffing in Brandon occurs in three streams: domestic, international, and salaried. Efforts are made to recruit and hire employees domestically, but national recruitment strategies have been unable to fully meet the company's staff needs. International recruitment of foreign workers began in 2002 with the first group arriving from Mexico, since which time workers have been recruited from China, Colombia, El Salvador, Mauritius, Honduras, and Ukraine (Rural Development Institute 2008b). Temporary foreign worker recruitment efforts have resulted in the arrival of approximately 1,000 newcomers. Of the

1,700 employees at the Brandon plant, 60% are international recruits (Boeve and Annis 2008). Maple Leaf Foods has become the largest driver of migration and immigration to Brandon.

### **3. The challenges of integrating temporary foreign workers**

Rural regions and communities confront unique challenges in attracting, supporting and retaining newcomers. Related growing pains are amplified in small centres since amenities and services associated with large-scale immigration to urban centres often do not exist. Furthermore, communities that are not traditional immigrant-receiving destinations lack the capacity to serve rapidly arising diverse needs (Foster and McPherson 2007). Trusting relationships have provided the foundation necessary to connect individuals and organizations within Brandon, fostering multi-sector communication. It is important that the drivers of migration, local planners, decision-makers, government, and service providers communicate to share information and concerns, generate awareness of future plans, and establish a spirit of shared responsibility and cooperation.

The nature of migration to Brandon is unique and attention must be focused on how to immediately meet the needs of individuals as they arrive, transition, adapt and subsequently reunite with family. Provincial policy changes have allowed local immigration service providers to better support temporary foreign workers, a class of migrant not previously entitled to full settlement services. The decision to permanently remain in Brandon will be influenced by initial experiences. Retention issues create challenges not only for Maple Leaf, but also for local service providers and the community as a whole. Planning for a constant turnover of new arrivals creates different planning needs; families require very different services and supports than young unattached individuals. Retention has been linked to welcoming communities that have the capacity and willingness to absorb newcomers and assist their integration. The interim period between when temporary foreign workers arrive and become permanent residents is a time in which community can impact newcomers' decisions to stay in the area. Community preparedness and welcome initiatives are imperative (Rural Development Institute 2008a).

Transnational families, though not a recent phenomenon (Ho 2008), are increasing as industrial and developmental strategies foster reliance on international labour pools (Landolt & Da 2005; McGuire and Martin 2007; Pottinger 2005; Suarez-Orozco, Todorvova, and Louie 2002). Globalization, increased immigration, temporary migration, and mobility have left few states static. Migrants to Brandon are often single young men or men with dependants that are left in their country of origin. The subsequent reunification of spouses and

children can be considered a second wave of migration/immigration to the community. Industrial developments in the United States during the 1990s prompted similar patterns of migration to non-traditional immigrant receiving locales. These destination communities often experience a series of stages influenced and shaped by gender (Hernandez-Leon and Zuniga 2000).

Concern regarding family separation and the presence of relatively high numbers of 'single' males has the potential to produce long-term impacts on migrant families and the community. A Manitoba study indicated that factors such as loneliness, differing cultural norms, boredom, anonymity, and an increased sense of freedom can sometimes place newcomers at risk. The same study also found that "bars" become a main source of recreation and social interaction for newcomers (Foster and McPherson 2007). There is local concern that migrants and their families may face domestic strain and possible family breakdown owed to long periods of separation. Family reunification is a goal of many temporary foreign workers as they arrive in Brandon; however, two years is a long time to be separated from one's family, and this may negatively impact family members as they relocate to Canada. In some instances, when families are reunited they no longer function as a single-family unit. In cases of family breakdown, local service providers offer assistance to spouses to ensure they are able to obtain food and shelter, apply for social assistance and child support, and seek legal aid. These issues require further attention as women and children are put at risk of poverty, social isolation, domestic violence, and possible homelessness. An increased understanding of family reunification, associated needs, and challenges is timely and necessary (Rural Development Institute 2008c).

In addition to ensuring that basic needs are met, the community is faced with positive challenges related to an increased demand for services. Historically, the Brandon School Division has experienced an annual decline in enrolment, and 2007 was the first year without a decline. There are about 7,000 students in the Brandon School Division. Approximately 5 new students register per week, compared to the previous average of 2 per week. The school division has noted that the increase has been gradual thus far, allowing for better settlement and planning. Between May 2008 and June 2009, the Brandon School Division expects approximately 167 new English as an Additional Language (EAL) students, in addition to the 276 currently enrolled. Without immigration, enrolment from kindergarten to grade 8 would be in decline. With increasing enrolment, adequate physical space is not a concern; however, sufficient programming, resources, and personnel are of great concern (Rural Development Institute 2008c).

Immigration is increasing more rapidly than government resources. The Brandon School Division, like many local stakeholders and service providers, recognize the need to collabo-

rate and share information to plan holistically for local growth and change. The school division works with Maple Leaf Foods to pre-register potential students enabling planning to occur based on accurate numbers from actual anticipated arrivals. Understanding differences amongst EAL learners and newcomers is needed to ensure enhanced education and a positive, effective experience. EAL students have traditionally arrived with higher levels of English language proficiency; in many instances children's parents had high levels of formal education. It is critical to understand how needs have evolved, which is, in part, due to different categories of immigrants and skill levels. Since 2005, the Brandon School Division has been in a period of adjustment and transition as more EAL students arrive with lower levels of English language proficiency. Support for EAL in secondary schools is in the greatest need, as those students have the least amount of time to complete their education in an additional language. It is vital to provide mechanisms to support EAL development in addition to integrating newcomers into the student body.

## **Conclusion**

The Brandon story is unique and must be recognized as so to ensure that policy and programming effectively meet local needs and enhances the experience of newcomers and the community. The nature of the community and the ability to welcome and absorb newcomers will impact retention rates. Attraction of migrants and newcomers is well underway; however, without community planning and preparedness, Brandon could become merely a transitional destination. Family reunification is an important contributing factor to retention and integration into the region. Multi-level partnerships and communication is vital to ensure the municipality receives needed provincial support.

Successful settlement is as much about integration as it is about ensuring a welcoming community that positively reacts to newcomers and includes them in community life. A welcoming community respects diversity and exudes positive attitudes towards the arrival of newcomers who come with different languages and cultures. Anti-racism initiatives and cultural diversity celebrations are critical components of a welcoming community as well as successful settlement and integration. Families must feel included in their new community and efforts must be taken to ensure a hospitable environment. A community that welcomes newcomers and works to ensure their full participation in society will experience the benefits of population and economic growth and increased diversity.

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# L'EMBAUCHE DE TRAVAILLEURS ÉTRANGERS TEMPORAIRES AU QUÉBEC : PROBLÈMES JURIDIQUES SOULEVÉS PAR LA RÉFORME DE 2011<sup>108</sup>

*Eugénie Depatie-Pelletier*

Le Québec est passé d'environ 20 000 travailleurs étrangers temporaires admis au cours de 2006 à plus de 30 000 durant l'année 2010<sup>109</sup>. Parmi les postes occupés par ces derniers au sein de l'économie, « travailleur agricole » et « aide familiale » étaient encore au 1<sup>er</sup> et au 2<sup>e</sup> rangs en 2008<sup>110</sup>, des emplois officiellement qualifiés de « peu spécialisés » par le ministère fédéral Ressources Humaines et Développement des Compétences Canada (RHDSC), selon les termes de sa *Classification nationale des professions*.

Ces travailleurs étrangers temporaires « peu spécialisés » (ci-après « travailleurs ET-PS ») sont principalement admis au Québec dans le cadre de programmes cogérés, en collaboration avec Citoyenneté et immigration Canada (CIC) et RHDCC, par le ministère de l'Immigration et des Communautés culturelles (MICC) : *Programme des travailleurs agricoles saisonniers du Mexique et des Caraïbes (PATs)*, *Programme des travailleurs étrangers temporaires peu spécialisés (PTET-PS)* et *Programme des aides familiales résidentes (PAFR)*<sup>111</sup>. Ils sont communément nommés « travailleurs migrants » - par opposition aux travailleurs immigrants (munis d'un statut légal permanent), même s'ils sont encouragés à travailler au Québec durant toute leur vie active, au moins dans le secteur des services domestiques et du travail agricole.

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<sup>108</sup> Basé sur l'article « Normes du MICC pour l'embauche de travailleurs étrangers temporaires (ou comment éviter l'application des lois du travail au Québec en 2011) » présenté dans le cadre du 66<sup>e</sup> Congrès des relations industrielles de l'Université Laval *Immigration et travail – s'intégrer au Québec pluriel*, Québec, 2 mai 2011

<sup>109</sup> Citoyenneté et immigration Canada, *Faits et chiffres 2010*, en ligne à <http://www.cic.gc.ca/francais/ressources/statistiques/faits2010-preliminaire/03.asp>

<sup>110</sup> Citoyenneté et immigration Canada, statistiques sur les entrées en 2008 de travailleurs étrangers au Québec par catégorie d'occupations

<sup>111</sup> Pour plus d'information sur la nature de ces programmes et des autres programmes de travailleurs étrangers temporaires au Québec et dans les autres provinces canadiennes, voir en particulier Depatie-Pelletier, E. (2008), *Synthèse du cadre normatif réglementant l'admission et l'intégration au Canada des travailleurs étrangers temporaires*, rapport de recherche du Centre de Recherche Interuniversitaire sur la Mondialisation et le travail, 77 p., disponible en ligne à <http://www.cerium.ca/Synthese-du-cadre-normatif>

Contrairement aux travailleurs ayant le statut de citoyen, de résident permanent, de travailleurs étrangers temporaires spécialisés, d'étudiants étrangers ou de demandeurs d'asile au Québec, ces travailleurs ET-PS se voient restreindre depuis plusieurs décennies, tant par le gouvernement fédéral que par le gouvernement québécois, l'exercice d'une série de droits et libertés : droit à la liberté, droit à la dignité, liberté d'association, liberté d'opinion, droit à la vie privée, inviolabilité de la demeure, droit à la non-discrimination sur la base de l'origine nationale, droit à la non-discrimination sur la base du sexe, droit à la non-discrimination sur la base de la condition sociale<sup>112</sup>.

## **I. Permis lié à l'employeur et loi du silence**

La principale caractéristique de ces travailleurs ET-PS résidant au Québec, c'est de ne pas avoir le droit de changer d'employeur. Ils résident et travaillent légalement au Québec sous permis de travail fédéral et certificat d'acceptation du Québec (CAQ) liés à un employeur spécifique<sup>113</sup>. Pour ces travailleurs ET-PS, être renvoyé par son employeur québécois, ou quitter l'emploi en question de son propre chef, implique automatiquement la perte du droit de travailler au Canada, un risque de rapatriement ou déportation dans le pays d'origine, un risque de ne jamais regagner le droit d'entrer ou de travailler au Canada et, dans le cas des travailleuses employées comme aides familiales, le risque de se voir refuser dans le futur la résidence permanente au Québec.

Étant donné que ces travailleurs ET-PS n'ont pas, en général, la marge de manœuvre financière nécessaire pour vivre au Canada sans travail ou pour obtenir un emploi décent dans leur pays d'origine (autrement dit, pour être en mesure d'assumer les pertes et risques associés à la perte de leur emploi au Québec), on ne s'étonne pas du fait que, depuis le début de ce type de programmes d'admission sous statut légal lié à un employeur unique en

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<sup>112</sup> Pour plus d'information à ce sujet, voir notamment Depatie-Pelletier, E. (2009), *Travailleurs (im)migrants admis au Québec sous statut temporaire pour emploi « peu spécialisé » : restrictions de droits et libertés, abus et alternatives politiques à considérer*, dans *Pour une véritable intégration - Droit au travail sans discrimination*, Commission des droits de la personne et des droits de la jeunesse, Fides : Montréal, disponible en ligne à <http://www.cerium.ca/Travailleurs-im-migrants-admis-au>

<sup>113</sup> Tel qu'expliqué ci-après (section #1 concernant le permis de travail lié à l'employeur), le nouveau CAQ pour plusieurs employeurs exceptionnels pour les travailleurs agricoles n'aura pas d'effet sur la situation de ces derniers : à cause du contrat de travail liant le droit de travailler au Canada à la volonté d'un employeur spécifique, le travailleur agricole comme les autres temporaires en emploi peu spécialisé ne peut pas choisir de son propre chef de quitter son employeur pour accepter un autre emploi dans le même secteur économique – le CAQ et le permis de travail valide pour plusieurs employeurs ne servira qu'à simplifier les procédures pour les employeurs cherchant à « prêter » leurs travailleurs agricoles à d'autres employeurs. Ces travailleurs ont ainsi besoin de l'accord de leur employeur pour pouvoir travailler pour quelqu'un d'autre au Canada.

1955<sup>114</sup>, rares sont ceux et celles qui ont exigé, en cas d'abus par l'employeur québécois, auprès de ce dernier ou d'une autorité québécoise compétente, réparation et/ou respect de leurs droits - droits pourtant garantis à l'heure actuelle, entre autres, par la *Charte des droits et libertés de la personne* (ci-après Charte québécoise) et par les lois du travail.

Les initiatives institutionnelles pour informer ces travailleurs de leurs droits au Québec sont de plus en plus nombreuses quoique sporadiques<sup>115</sup>, développées notamment par la Commission des droits de la personne et des droits de la jeunesse (CDPDJ), par la Commission sur les normes du travail (CNT) et par la Commission de la santé et de la sécurité au travail (CSST). Seulement une minorité de travailleurs étrangers temporaires toutefois sont actuellement rejoints par les outils d'éducation aux droits développés jusqu'à présent. De plus, ces systèmes de protection des droits, basés sur la déposition officielle d'une plainte, demeurent encore généralement perçus comme trop risqués par les travailleurs ET-PS pour être utilisés au besoin. En effet, aucune de ces agences n'est en mesure de garantir à un travailleur qui porterait plainte que le MICC l'autorisera à demeurer (et à continuer à travailler) au Québec après s'être mis à dos l'employeur québécois associé au permis de travail. Par ailleurs, tel que revendiqué entre autres par le Congrès du travail du Canada (CTC) et par le Conseil canadien pour les réfugiés (CCR), un régime de contrôle aléatoire et obligatoire des conditions de travail serait nécessaire pour vérifier s'il y a infraction ou pas aux législations du travail - les systèmes de protection de droits basé sur les plaintes n'étant pas utilisables en pratique par des travailleurs sous statut légal lié à l'employeur.

Malgré cette loi du silence qui règne ainsi généralement, au Québec comme dans le reste des provinces canadiennes, une poignée de groupes communautaires, organisations non gouvernementales, syndicats de travailleurs, journalistes, chercheurs et fonctionnaires ont néanmoins réussi, durant les dernières décennies, à recueillir, et parfois même à documenter, différents témoignages sur les situations abusives vécues par ces travailleurs résidant au Québec<sup>116</sup>. Cependant, la grande majorité de ces témoignages n'ont jamais abouti à une dénonciation officielle (en vertu de la législation du travail ou de la Charte québécoise).

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<sup>114</sup> Année de la mise en place d'un programme d'admission de femmes d'origine jamaïcaine pour travail domestique au Canada - qui semble avoir servi de modèle pour plusieurs des programmes canadiens actuels d'embauche temporaire de travailleurs étrangers pour emploi peu spécialisé

<sup>115</sup> Voir notamment le dépliant en espagnol téléchargeable à partir du site web de la CDPDJ à [http://www2.cdpdj.qc.ca/publications/Documents/depliant\\_travailleurs\\_agricoles\\_esp.pdf](http://www2.cdpdj.qc.ca/publications/Documents/depliant_travailleurs_agricoles_esp.pdf)

<sup>116</sup> Voir notamment le dernier rapport public des Travailleurs Unis de l'Alimentation et du Commerce (TUAC) et de l'Alliance des travailleurs agricoles (ATA) sur la question, La situation des travailleurs agricoles migrants au Canada, 2010-2011, disponible en ligne à [http://www.tuac.ca/templates/ufcwcanada/images/awa/publications/UFCW-Status\\_of\\_MF\\_Workers\\_2010-2011\\_FR.pdf](http://www.tuac.ca/templates/ufcwcanada/images/awa/publications/UFCW-Status_of_MF_Workers_2010-2011_FR.pdf)

Si exceptionnellement la peur d'être renvoyé par l'employeur (et des pertes et risques associés) n'a pas empêché certains travailleurs ET-PS de dénoncer les abus dont ils étaient victimes, ces derniers ont généralement été rapatriés dans leur pays d'origine avant d'avoir eu le temps de faire valoir leurs droits au Québec – le plus souvent à cause de pressions (menaces d'exclusion définitive du programme d'emploi canadien) à leur égard par un représentant consulaire de leur gouvernement ou par un agent de l'Organisation internationale des migrations (responsable notamment de placer en emploi au Canada des travailleurs du Guatemala, de la Colombie, du Honduras et de El Salvador)<sup>117</sup>. De surcroît, comme nous le verrons plus loin, ceux et celles qui ont finalement résisté aux pressions et choisi demeurer au Québec (sans revenu et sans droit de travailler), afin de poursuivre des procédures contre leur ancien employeur, ont vu leur droit de résider au Canada arriver à échéance avant d'avoir pu obtenir justice ou réparation - à moins d'une intervention ministérielle exceptionnelle.

## **2. Nouvelles normes en vigueur au Québec depuis le 1<sup>er</sup> avril 2011**

Depuis 1991, le Québec a officiellement un droit de regard sur la nature de la majorité des programmes d'emploi de travailleurs étrangers temporaires peu spécialisés sur son territoire<sup>118</sup>. En 2009, le gouvernement du Québec a par ailleurs constitué un comité interministériel ayant le mandat de se pencher sur la protection des travailleurs étrangers<sup>119</sup>. Finalement, le ministère de l'Immigration et des Communautés culturelles (MICC) a modifié, le 30 mars 2011, la section du *Règlement sur la sélection des ressortissants étrangers* (ci-après le *Règlement*) qui porte sur l'embauche de travailleurs étrangers temporaires au Québec<sup>120</sup>.

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<sup>117</sup> Les représentants de gouvernements étrangers, responsables de faciliter l'emploi au Canada d'un maximum de leurs travailleurs, sont placés en directe compétition les uns contre les autres, afin de conserver ou gagner les bonnes grâces des employeurs québécois et canadiens à la recherche de main-d'œuvre étrangère. Par exemple, le consulat du Mexique au Québec doit s'assurer que les employeurs agricoles québécois ne trouvent rien à redire contre leur main-d'œuvre mexicaine, afin que cette dernière ne soit pas simplement remplacée par des travailleurs guatémaltèques l'année suivante.

<sup>118</sup> Accord Canada-Québec relatif à l'immigration et à l'admission temporaires des aubins (Accord Gagnon-Tremblay-McDougall), 1991, art. 22 b), accessible en ligne à <http://www.micc.gouv.qc.ca/publications/fr/divers/Accord-canada-quebec-immigration-francais.pdf>

<sup>119</sup> Commission des droits de la personne et de la jeunesse, Rapport d'activités et de gestion 2009-2010, accessible en ligne à [http://www2.cdpdj.qc.ca/publications/Documents/Rapport\\_activites\\_gestion\\_2009-2010.pdf](http://www2.cdpdj.qc.ca/publications/Documents/Rapport_activites_gestion_2009-2010.pdf)

<sup>120</sup> Gazette officielle du Québec, 30 mars 2011, 143<sup>e</sup> année, no 13, partie 2, p. 1213 –1215, disponible en ligne (avec frais) <http://www.publicationsduquebec.gouv.qc.ca/fre/products/2011-13-55304-P2F>

Ces changements réglementaires alignent le droit québécois sur les normes fédérales et visent en particulier la « simplification, pour les entreprises, du recrutement » de travailleurs étrangers temporaires<sup>121</sup> (et non à établir un meilleur arrimage entre les entreprises en pénurie de travailleurs et la grille de sélection d'immigrants permanents), sans modifier par ailleurs les principaux éléments de politiques qui maintiennent les travailleurs ET-PS dans une situation de vulnérabilité extrême face aux abus de droit.

Plus précisément, le MICC confirme ou intègre au Règlement les six mesures suivantes: (1) l'interdiction de changer d'employeur, (2) l'obligation de résidence chez l'employeur, (3) l'absence de garantie d'extension du statut légal en cas de dépôt d'une plainte contre l'employeur ou une agence de placement, (4) la fin de l'encadrement du « roulement » de main-d'œuvre étrangère dans les secteurs non syndiqués, (5) le maintien de la non-obligation de traduire le contrat de travail dans la langue du travailleur et d'y inclure le détail des normes du travail québécoises applicables, (6) le maintien de l'exclusion des travailleurs étrangers temporaires (sauf si employés comme aide familiale) des programmes communautaires d'accueil, de support et d'intégration financés par le MICC. De plus, le MICC maintient la non-obligation de consultation systématique des syndicats de travailleurs lors de l'évaluation des pénuries de travailleurs à l'origine des autorisations à l'embauche de main-d'œuvre sous statut légal temporaire.

### *Certificat d'acceptation du Québec (CAQ) pour permis lié à l'employeur*

L'interdiction de changer d'employeur place les travailleurs ET-PS dans une position de vulnérabilité extrême face aux violations de droits du travail. Tel que souligné précédemment, exiger de son employeur qu'il applique les lois du travail peut en théorie engendrer un licenciement (non justifié légalement). C'est pourquoi, la vaste majorité des travailleurs étrangers temporaires n'essaient pas de faire valoir leurs droits du travail durant la période de leur emploi au Québec. Pour mettre fin à cette situation, le règlement québécois devrait réserver l'émission de certificats d'acceptation du Québec (CAQ) aux travailleurs étrangers temporaires auxquels les autorités fédérales auront consenti à accorder un permis de travail « sectoriel » (permettant de changer d'employeur au sein d'un même secteur d'emploi), « provincial » (permettant de travailler pour n'importe quel employeur québécois) ou « ouvert » (permettant de travailler pour n'importe quel employeur canadien).

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<sup>121</sup> Selon les termes utilisés par le Sous-ministre adjoint à l'Immigration, Mr. Robert Baril (accusé de réception de commentaires sur le projet de modifications au Règlement, daté du 8 février 2011).

Le MICC a cependant maintenu la pratique actuelle d'émission de CAQs, validant des dossiers d'embauche associés à des permis de travail qui placent le travailleur sous l'autorité légale d'un employeur spécifique. Or, l'octroi de ces permis liés à un employeur spécifique place ces travailleurs en situation de vulnérabilité extrême face à leur employeur et constitue de surcroît une discrimination systémique basée sur l'origine nationale : seuls les travailleurs ET-PS provenant de certains pays spécifiques n'ont pas accès aux programmes de permis de travail ouverts gérés par l'administration fédérale<sup>122</sup>.

Le MICC a, de surcroît, décidé d'intégrer au Règlement<sup>123</sup> la pratique d'asservissement courante dans l'industrie agricole, selon laquelle le travailleur étranger temporaire est autorisé à accepter un autre emploi si, et seulement si, son employeur actuel lui ordonne de le faire (et que les administrateurs du programme au sein du consulat du travailleur, de Service Canada et du Centre d'emploi agricole local n'y voient pas d'objection)<sup>124</sup>.

### *Confirmation de l'obligation de résidence chez l'employeur*

La CDPDJ a été amenée, durant les dernières années, à émettre son opinion en ce qui a trait aux entraves à l'exercice des droits et libertés associées à l'obligation de résidence chez l'employeur imposée aux travailleurs ET-PS, en particulier dans le secteur agricole et celui des services domestiques :

« Le fait de vivre sur la propriété de l'employeur place le travailleur dans une situation où en dehors des heures de travail, l'exercice de son droit à la vie privée, prévu à l'article 5 de la Charte québécoise, risque d'être subordonné aux droits du propriétaire (l'employeur) de limiter l'accès à sa propriété privées, à ses terres. Dans de telles circonstances, la libre circulation du travailleur ou de ses visiteurs pourrait être compromise. Cette limitation pourrait constituer une entrave à l'exercice de la liberté d'association et de la liberté d'opinion, protégées à l'article 3 de la Charte québécoise. Cette liberté d'association inclut l'adhésion à une organisation syndicale et à toute association militante pour tous. L'obligation de résidence ne s'applique pas aux travailleurs québécois non migrants. En ce sens,

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<sup>122</sup> Pour plus d'information à ce sujet, voir notamment Depatie-Pelletier, E. (2008), *Sous pratiques légales analogues à l'esclavage selon les termes de la convention de l'ONU : les travailleurs étrangers « temporaires » « non blancs » au Canada dans les professions « peu spécialisées »*, article présenté lors de la 10<sup>e</sup> Conférence nationale Metropolis, Halifax, 5 avril, version française disponible en ligne à

[http://www.cerium.ca/IMG/pdf/Pratiques\\_canadiennes\\_analogues\\_esclavage\\_version\\_francaise.pdf](http://www.cerium.ca/IMG/pdf/Pratiques_canadiennes_analogues_esclavage_version_francaise.pdf)

<sup>123</sup> Supra note 12, p. 1213, art. 50 b) et c)

<sup>124</sup> Voir également à cet égard le 4<sup>e</sup> paragraphe de la partie IX du contrat-type de 2011 pour les travailleurs agricoles mexicains (contrat validé par Ressources Humaines Canada et appliqué au niveau local par Service Canada) :

[http://www.hrsdc.gc.ca/fra/competence/travailleurs\\_etrangers/contracts-formulaires/ptasmc2011.shtml](http://www.hrsdc.gc.ca/fra/competence/travailleurs_etrangers/contracts-formulaires/ptasmc2011.shtml)

l'obligation de résidence imposée aux travailleurs agricole saisonniers peut porter atteinte à l'exercice de leur droit à l'égalité protégé par l'article 10 de la Charte québécoise en raison de leur origine ethnique ou nationale. De plus, cette exigence stipulée au contrat peut également constituer une entrave à l'exercice de la liberté fondamentale du travailleur, mais aussi à la libre disposition de ses biens tels que prévu aux articles 1, et 6 [...]. Devant la fragilisation des droits et libertés des aides familiales résidentes, la Commission ne saurait trop insister auprès du Comité pour qu'il abolisse cette obligation de résidence prévue au PAFR [Programme des aides familiales résidentes]. »<sup>125</sup>

Toutefois, l'obligation de résidence chez l'employeur, au lieu d'être éliminée pour tous les travailleurs ET-PS pour raison d'incompatibilité avec la Charte québécoise, notamment à travers une précision dans l'article du Règlement qui porte sur la nature des offres d'emploi acceptable<sup>126</sup>, continuera à s'appliquer Québec. L'embauche de travailleurs agricoles et d'aides familiales par des employeurs québécois est encadrée par des contrats de travail qui intègrent systématiquement ce type de clause. Ce type de contrats de travail, avec obligation de résidence, est encore autorisé au Québec par le MICC, dans le cadre du PATS et du PAFR.

#### *Maintien de l'absence de garantie de statut si plainte pour violation de droits*

Tel que mentionné en introduction, un travailleur ayant été victime d'abus (ou d'accident, ou de maladie) et injustement renvoyé par la suite par son employeur québécois, qui décidait de s'adresser à une autorité québécoise compétente, pourrait difficilement réussir à obtenir le respect de ses droits. En effet, le fait d'avoir été renvoyé par l'employeur enclenche un compte à rebours vers la fin du statut légal (date d'expiration du permis de travail), et ainsi vers les possibilités de déportation par l'Agence des services frontaliers du Canada et d'interdiction de retour au Canada – et ce, même si des procédures sont en cours afin d'obtenir justice et/ou réparation.

Malgré cette contradiction au niveau de la loi (vous avez des droits, mais vous perdrez le statut qui vous permet de les faire valoir si vous avez un jour besoin de les faire valoir), aucun des aspects de la récente réforme ne comble cette faille en matière d'application au Québec des lois du travail et de la Charte québécoise. Cette situation pourrait pourtant facilement être corrigée par le MICC, par exemple en intégrant dans le Règlement la possibilité, pour les travailleurs en situation de détresse particulière, de se voir accorder de

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<sup>125</sup> Commission des droits de la personne et des droits de la jeunesse (2008), *Notes de présentation aux audiences pancanadiennes du Comité permanent des Communes sur la citoyenneté et l'immigration*, p. 4 et 8

<sup>126</sup> Supra note 12, pp.1214-1215, art. 50.1 et 50.2

façon prioritaire un certificat de sélection du Québec leur permettant de résider et de travailler légalement, et ainsi être en mesure de survivre financièrement durant toute la durée de procédures légales visant à obtenir justice ou réparation.

Tel que proposé notamment par la CDPDJ<sup>127</sup> en 2008 et ensuite par les parlementaires fédéraux<sup>128</sup> en 2009 dans les recommandations en matière de protection des travailleurs étrangers temporaires, la façon la plus directe pour contrer la vulnérabilisation de ces derniers face aux abus, est de leur permettre de demander le statut de résident permanent<sup>129</sup>. L'évolution de l'embauche de travailleurs étrangers temporaires durant cette dernière décennie confirme le fait que les travailleurs TE-PS viennent généralement combler des pénuries permanentes, récurrentes ou croissantes<sup>130</sup> de travailleurs au Québec – et non des pénuries temporaires de travailleurs.

Le MICC n'a cependant pas jugé pertinent de modifier l'article 38.I b) du Règlement de façon à ce que ces derniers soient en mesure de demander le statut de résident permanent au Québec – ces travailleurs étrangers sont ainsi discriminés sur la base de leur condition sociale ou type d'emploi, par rapport aux étudiants étrangers et aux travailleurs étrangers temporaires en emploi « spécialisé » (autorisés, eux, à demander la résidence permanente).

#### *Fin de l'encadrement du « roulement » de main-d'œuvre étrangère non syndiquée*

Jusqu'au 30 mars 2011, le Règlement contenait une mention précise sur l'obligation pour le MICC de considérer, avant d'autoriser un employeur à embaucher ou à rebaucher des travailleurs étrangers temporaires, « l'évolution et le roulement de la main-d'œuvre chez l'employeur éventuel, y compris la main-d'œuvre formée de ressortissants étrangers »<sup>131</sup>.

<sup>127</sup> Supra note 17, p. 6 et 7

<sup>128</sup> Comité permanent sur l'immigration et l'immigration de la Chambre de Communes du Canada (2009), *Les travailleurs étrangers temporaires et les travailleurs sans statut légal*, pp. 9-11, accessible en ligne à <http://www2.parl.gc.ca/content/hoc/Committee/402/CIMM/Reports/RP3866154/cimmrp07/cimmrp07-f.pdf>

<sup>129</sup> Par ailleurs, afin de minimiser la détresse psychologique amplifiant la situation de vulnérabilité dans laquelle sont placés les travailleurs ET-PS (et affectant leurs époux/ses et enfants laissés à l'étranger), tant la CDPDJ que les parlementaires fédéraux ont également recommandé que les conjoint(e)s de ces derniers se voient accorder, au même titre que ceux et celles des étudiants étrangers et des travailleurs étrangers temporaires en emploi spécialisé, un permis de travail « ouvert » - afin de pouvoir si désiré les accompagner (avec enfants s'il y a lieu) et soutenir durant la durée de leur emploi au Québec.

<sup>130</sup> Voir notamment à ce sujet Depatie-Pelletier, E. (2007), Programmes canadiens de travailleurs étrangers : autorisations en 2006 et sélection de portraits statistiques historiques, article présenté lors de la conférence *Immigration, minorités et multiculturalisme au sein des démocraties*, Montréal, 25 octobre, p.15-16, accessible en ligne à [www.cerium.ca](http://www.cerium.ca)

<sup>131</sup> Règlement sur la sélection des ressortissants étrangers (à jour au 1<sup>er</sup> mars 2011), R.R.Q. c. I-0.2, r.4, art. 51.3 e), version au 31 mars 2011 accessible en ligne à <http://www.canlii.org/fr/qc/legis/regl/rrq-c-i-0.2-r-4/derniere/rrq-c-i-0.2-r-4.html>



Ceci permettait, au moins en théorie, un minimum d'encadrement des employeurs qui remplacent systématiquement, sur-le-champ ou l'année suivante, ceux qui parmi leurs employés auraient demandé, sur la base du respect de leurs droits et libertés fondamentales et/ou de leurs droits du travail, de meilleures conditions de travail, de logement ou de transport.

Cette référence à la pertinence d'analyser le roulement de main-d'œuvre passé chez l'employeur cherchant à embaucher des travailleurs étrangers temporaires vient d'être retirée du Règlement – mettant ainsi fin à la possibilité pour les fonctionnaires de refuser à un employeur québécois, par exemple, le remplacement année après année de tous ses travailleurs, ou le remplacement de ses travailleurs mexicains (souvent avec plus d'années d'expérience au Québec et ainsi une meilleure connaissance de leurs droits) par des travailleurs guatémaltèques (obligés par ailleurs à payer un loyer à l'employeur contrairement aux Mexicains).

Il est vrai que les dernières modifications du *Règlement sur l'immigration et la protection des réfugiés*<sup>132</sup> permettent désormais aux autorités fédérales, d'une part, de nier pour deux années à un employeur le droit de rebaucher des travailleurs étrangers temporaires s'il n'est pas en mesure de justifier la différence entre les conditions d'embauche autorisées par le passé et les conditions de travail finalement données au(x) travailleur(s) étranger(s) à son emploi<sup>133</sup>. D'autre part, elles permettront de nier l'autorisation à l'embauche de travailleurs étrangers dans le cas d'un employeur qui ne s'est pas « conformé aux lois et aux règlements fédéraux et provinciaux régissant le travail ou le recrutement de main-d'œuvre dans la province où il est prévu que l'étranger travaillera »<sup>134</sup>.

Toutefois, dans les faits, au Québec, Service Canada - l'autorité fédérale théoriquement responsable d'évaluer les dossiers d'employeurs - respecte la compétence du MICC<sup>135</sup> en la matière. Dans ce contexte, le Règlement québécois n'est pas, comme dans les autres provinces, un simple complément aux normes fédérales : il constitue le cadre principal de l'évaluation des dossiers au Québec (évaluation qui devra néanmoins être validée, dossier par dossier, par Service Canada-Bureau du Québec). Ceci explique pourquoi le MICC a jugé

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<sup>132</sup> Gazette du Canada, 18 août 2010, vol.44, no 17, Règlement modifiant le Règlement sur l'immigration et la protection des réfugiés (travailleurs étrangers temporaires), disponible en ligne à <http://www.gazette.gc.ca/rp-pr/p2/2010/2010-08-18/html/sor-dors172-fra.html>

<sup>133</sup> Ibid., éléments de modification 2(2), 2(3) et 4(1)

<sup>134</sup> Ibid., élément de modification 2(4)

<sup>135</sup> Le MICC délègue toutefois cette responsabilité, dans le cas du secteur agricole, aux Centres d'emplois agricoles liés aux fédérations régionales de l'Union des producteurs agricoles du Québec. Pour mieux comprendre le lien entre les Centres d'emplois agricoles et l'Union des producteurs agricoles, voir notamment l'information fournie en ligne à [http://www.emploiagricole.com/fr\\_savo\\_avan.html](http://www.emploiagricole.com/fr_savo_avan.html)

nécessaire de reprendre, au sein de la réglementation québécoise, cette interdiction de deux ans à appliquer aux employeurs qui n'ont pas respecté les conditions du programme par le passé (et qui n'ont pas été en mesure de justifier ce non-respect auprès des autorités fédérales)<sup>136</sup>.

Afin de préciser pour le Québec le contenu à donner à la norme fédérale voulant que, pour être autorisé à la base à embaucher un travailleur étranger, l'employeur devra s'être « conformé aux lois et aux règlements fédéraux et provinciaux régissant le travail ou le recrutement de main-d'œuvre », le MICC a intégré une liste précise des infractions à la législation du travail et à la Charte québécoise qui ne seront pas tolérées<sup>137</sup>, y compris à la législation en matière de relations de travail<sup>138</sup>. Toutefois, tel que mentionné précédemment, un régime de contrôle aléatoire et obligatoire des conditions de travail serait nécessaire pour vérifier s'il y a infraction ou pas aux législations du travail - les systèmes de protection de droits basés sur les plaintes n'étant pas utilisables en pratique par des travailleurs sous statut légal lié à l'employeur.

Cette nouvelle formulation proposée par le MICC, et plus spécifiquement l'obligation de prendre en considération les infractions en matière de relations de travail, semble néanmoins à première vue un pas significatif dans la bonne direction, en ce qui a trait à l'amélioration sur le terrain de la protection des droits des travailleurs ET-PS. Qu'en est-il des occupations de travailleur agricole et d'aide familiale, qui constituent au Québec les deux premiers postes d'emploi occupés par les travailleurs étrangers sous permis temporaire de travail?

Le gouvernement du Québec refuse catégoriquement de reconnaître aux travailleurs agricoles (migrants, mais aussi québécois) le droit à la négociation collective. En effet, sauf pour certains d'entre eux employés dans les serres syndiquées du Québec, les travailleurs étrangers temporaires en emploi agricole travaillent dans les fermes industrielles, qui sont majoritairement visées par une exception au droit à la négociation collective propre au Code du travail du Québec (art.21 al.5) – exception récemment jugée anticonstitutionnelle par la Commission des Relations de Travail (CRT) grâce à la persévérance du syndicat des

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<sup>136</sup> Supra note 12, p.1214, art. 50.1 d)

<sup>137</sup> Ibid., p.1214, art.50.1e)

<sup>138</sup> Ibid., p.1214, art.50.1a) et 50.1e)iii, iv et vii

Travailleurs Unis de l'Alimentation et du Commerce (TUAC)<sup>139</sup>, mais pour le moment encore défendue en Cour supérieure par le Gouvernement québécois<sup>140</sup>.

Quant aux employeurs des aides familiales, soit les couples des classes moyenne et élevée du Québec, ils pourraient difficilement être affectés par la question de l'application de la législation en matière de relations de travail, même avec un comportement hautement abusif, compte tenu du vide juridique propre au travail domestique au Québec, y compris en matière de relation employeur-employé.

Ainsi, la portée réelle de cette nouvelle obligation de prendre en considération les infractions à la législation en matière de relations de travail demeurera relativement limitée. Le retrait par le MICC de la référence à la pertinence d'encadrer le « roulement » de main-d'œuvre étrangère aura en pratique des répercussions majeures sur les milliers de travailleurs migrants employés dans des secteurs où la législation sur les relations du travail est encore non applicable ou peu appliquée. Plus le « roulement » de main-d'œuvre étrangère par les employeurs québécois sera toléré dans les secteurs non syndiqués par les agents du MICC, plus les travailleurs ET-PS qui réclament le respect des lois du travail courront le risque de se faire rapatrier (ou exclure l'année suivante) et d'être remplacés facilement. Par conséquent, la majorité des autres seront poussés à garder le silence face à une violation de la législation du travail par leur employeur.

### *Maintien de la non-obligation d'un contrat de travail détaillé et compréhensible*

Les employeurs embauchant des travailleurs étrangers temporaires pour un emploi peu spécialisé devront désormais signer un contrat de travail en mentionnant l'applicabilité de la *Loi sur les normes du travail*<sup>141</sup> (à moins d'embaucher le travailleur étranger temporaire pour moins de 30 jours)<sup>142</sup>. Toutefois, pour le travailleur étranger temporaire qui arrive au

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<sup>139</sup> Coutu, M. (2010), Commission des relations du travail - Une victoire pour les travailleurs agricoles migrants, *Le Devoir*, Montréal, 21 avril, Idées, accessible en ligne à <http://www.ledevoir.com/societe/actualites-en-societe/287340/commission-des-relations-du-travail-une-victoire-pour-les-travailleurs-agricoles-migrants>

<sup>140</sup> Desjardins, F. (2010) Syndicalisation: le droit accordé à des travailleurs saisonniers sera porté en appel, *Le Devoir*, Montréal, 22 avril, Actualités économiques, accessible en ligne à <http://www.ledevoir.com/economie/actualites-economiques/287438/syndicalisation-le-droit-accorde-a-des-travailleurs-saisonniers-sera-porte-en-appel>

<sup>141</sup> Supra note 12, p.1214, art. 50.2b)

<sup>142</sup> Ibid, p.1214, art. 50.2. L'exception pour les séjours de moins de 30 jours semble difficile à justifier, si l'on considère le point de vue du travailleur : peu importe la durée de l'emploi, la vulnérabilité du travailleur étranger temporaire peu spécialisé sera extrême s'il ne connaît pas avec précision ce à quoi il s'engage auprès de son employeur québécois et ce qu'il peut compter espérer de la part de ce dernier en termes de salaire et conditions de travail.

Québec pour la première fois, souvent sans connaissance du français et de l'anglais<sup>143</sup>, généralement sans accès facile au téléphone ou à l'internet, on ne peut présumer que celui-ci connaîtra le contenu des aspects de la *Loi sur les normes du travail* qui sont applicables à sa situation.

Pour les travailleurs ET-PS qui détiennent un permis de travail lié à un employeur spécifique, la possibilité d'exercer leurs droits du travail ne pourrait être considérée équivalente à celle des travailleurs citoyens ou résidents permanents québécois, à moins que leur soient fournies systématiquement les normes du travail applicables à leur situation, par écrit et dans leur langue maternelle, avant ou lors de leur arrivée au Québec. Il aurait fallu intégrer dans le Règlement l'obligation à l'employeur d'inclure dans le contrat, d'une part, le détail des normes du travail applicables (par exemple en matière de « modalités de versement du salaire » ou de « calcul des heures supplémentaires ») et d'autre part, une traduction complète dans la langue maternelle du travailleur.

#### *Maintien de l'exclusion des programmes d'intégration (sauf exception)*

Malgré une reconnaissance officielle de la vulnérabilité des travailleurs ET-PS face aux abus, le MICC a maintenu l'exclusion de ces derniers (sauf en partie pour les aides familiales) des programmes communautaires d'accueil, de support et d'intégration que le ministère finance à l'intention des nouveaux arrivants (immigrants, demandeurs d'asile et réfugiés). Une obligation pour l'employeur de faciliter l'accès à des cours de français vient d'être intégrée au Règlement, mais elle s'appliquera seulement aux employeurs d'aides familiales<sup>144</sup>. Pourtant, sans exception, tous les travailleurs ET-PS (et par le fait même leurs collègues québécois et le reste de la société) bénéficieraient grandement qu'une telle opportunité leur soit offerte, en particulier en ce qui concerne l'apprentissage des termes techniques associés à l'application en milieu de travail des normes de santé et de sécurité.

Outre les six mesures mentionnées précédemment, qui permettent de préserver l'exception « travailleurs migrants » au sein de l'application de la législation du travail au Québec, la nouvelle formulation du Règlement précise désormais qu'il incombe au « ministre » (de l'Immigration et des Communautés culturelles) d'évaluer l'existence d'une pénurie de travailleurs à la base d'une autorisation à l'embauche de travailleurs étrangers sous permis temporaire de travail<sup>145</sup>.

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<sup>143</sup> Contrairement aux immigrants sélectionnés pour la résidence permanente, les travailleurs étrangers temporaires admis au Québec n'ont pas à connaître le français ou l'anglais, à l'exception des travailleurs embauchés à titre d'aide familiale.

<sup>144</sup> Supra note 12, p.1214, art. 50.2 a)

<sup>145</sup> Supra note 12, p.1214, art. 50.1 f)

## Conclusion : Le Québec peut faire mieux?

Les programmes d'admission de travailleurs étrangers temporaires répondent, pour le moment, exclusivement à la demande des employeurs. Face à l'embauche croissante de travailleurs étrangers temporaires, une consultation systématique par secteur économique avec les syndicats de travailleurs serait souhaitable, afin d'éviter le maintien, sinon la détérioration, de conditions de travail problématiques dans certains secteurs (et ainsi l'exclusion systématique consécutive de travailleurs québécois et de nouveaux immigrants au sein de ces emplois au Québec).

Plus précisément, afin d'appliquer une politique d'évaluation impartiale des pénuries temporaires de travailleurs qualifiés, il conviendrait pour le MICC de déléguer à des structures parapubliques ayant déjà l'expertise d'évaluer ces pénuries, tels les Comités sectoriels de main-d'œuvre et la Commission des partenaires du marché du travail<sup>146</sup>.

La récente réforme du *Règlement sur la sélection des ressortissants étrangers* par le MICC visait, outre la simplification du recrutement de travailleurs étrangers pour les entreprises, à améliorer la protection des droits des travailleurs étrangers temporaires. Les nouvelles mesures permettront certainement un maintien de la croissance annuelle fulgurante de l'embauche de travailleurs étrangers temporaires par les employeurs québécois. Cependant, d'autres modifications réglementaires seront nécessaires pour minimiser la vulnérabilité des travailleurs étrangers temporaires peu spécialisés, ces travailleurs qui constituent désormais une partie vitale de la société québécoise, même s'ils sont généralement invisibles, en quasi-permanence à l'intérieur d'une maison, loin dans un champ ou au fond d'une usine.

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<sup>146</sup> Pour plus d'information au sujet de ces structures parapubliques et de leur potentiel en matière d'évaluation de pénurie de main-d'œuvre, voir notamment l'information disponible en ligne à <http://www.cpmt.gouv.qc.ca/reseau-des-partenaires/comites-sectoriels.asp>

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Centre Métropolis du Québec – Immigration et métropoles  
INRS – Centre Urbanisation Culture Société  
385, rue Sherbrooke Est, Montréal (Québec) H2X 1E3  
Téléphone 514.499.4084 • télécopieur 514.499.4065  
[im-metropolis@umontreal.ca](mailto:im-metropolis@umontreal.ca)  
[www.im.metropolis.net](http://www.im.metropolis.net)

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