

# Profiting from the Precarious

APRIL 2014

How recruitment practices exploit migrant workers

by Fay Faraday



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## Part I: Introduction

Over the past decade, Canadian employers have increasingly demanded access to a “flexible” workforce of transnational migrant workers. In response, Canadian laws and policies have been created or expanded to bring workers to Canada with precarious temporary immigration status.<sup>1</sup> As temporary labour migration has exploded, an industry of third-party, for-profit labour recruiters<sup>2</sup> has emerged to match migrant workers with employers in Canada and facilitate workers’ movement across national borders.

It is true that “reputable recruiters [can] provide a valuable service helping to place foreign workers with companies, legitimately earning their fee from the employers.”<sup>3</sup> However, widespread abuse of migrant workers by disreputable recruiters who charge workers oppressive “recruitment fees” for jobs — including fees for non-existent jobs and jobs significantly different than promised — has been documented by academic and community-based researchers for years. These abuses continue to be documented on an ongoing basis.<sup>4</sup> Government reports have similarly raised the alarm about exploitation by

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<sup>1</sup> Over this period, sector-specific existing programs like the Live-in Caregiver Program and Seasonal Agricultural Worker Program have expanded. In addition, the broader Temporary Foreign Worker Program was expanded to permit temporary labour migration in any legal occupation, including the creation in 2002 of a program stream specifically aiming to facilitate temporary migration for workers filling positions in lower-skilled occupations. Two-step immigration streams were also introduced — the Canadian Experience Class and the range of Provincial/Territorial Nominee Programs — to permit some workers to apply for permanent residence after a designated period of migrant labour with temporary status. For a detailed analysis of the legal systems that regulate migrant labour in Canada, see Fay Faraday, *Made in Canada: How the Law Constructs Migrant Workers’ Insecurity* (Toronto: Metcalf Foundation, 2012), available online at [www.metcalffoundation.com](http://www.metcalffoundation.com).

<sup>2</sup> In this report, the term “recruiter” is used broadly to refer to individuals and entities that are engaged in finding migrant workers for employers or finding employment for migrant workers. While a variety of terms are often used to describe these services — for example, “labour broker” or “labour contractor” — the general term “recruiter” is used here for consistency’s sake.

<sup>3</sup> Standing Committee on Citizenship and Immigration, *Temporary Foreign Workers and Non-Status Workers* (Ottawa: House of Commons, 2009) at p. 30.

<sup>4</sup> For a sample of these studies, see: Alberta Federation of Labour, *Temporary Foreign Workers: Alberta’s Disposable Workforce* (Edmonton: Alberta Federation of Labour, November 2007); Alberta Federation of Labour, *Entrenching Exploitation: The Second Report of the Alberta Federation of Labour Temporary Foreign Worker Advocate* (Edmonton: Alberta Federation of Labour, April 2009); UFCW Canada, *Report on the Status of Migrant Workers in Canada 2011*, <http://ufcw.ca/templates/ufcwcanada/images/Report-on-The-Status-of-Migrant-Workers-in-Canada-2011.pdf>; UFCW Canada, *The Status of Migrant Farm Workers in Canada 2010–2011*, [http://www.ufcw.ca/templates/ufcwcanada/images/awa/publications/UFCW-Status\\_of\\_MF\\_Workers\\_2010-2011\\_EN.pdf](http://www.ufcw.ca/templates/ufcwcanada/images/awa/publications/UFCW-Status_of_MF_Workers_2010-2011_EN.pdf); Canadian Labour Congress, *Canada’s Temporary Foreign Worker Program (TFWP): Model Program — or Mistake?* (Ottawa: Canadian Labour Congress, 2011); West Coast Domestic Workers’ Association, *Access to Justice for Migrant Workers in British Columbia* (Vancouver: West Coast Domestic Workers Association, 2013); Ontario Federation of Labour, *Labour Without Borders: Towards a Migrant Worker Bill of Rights* (Toronto: Ontario Federation of Labour, August 2013); *Legislated Inequality: Temporary Labour Migration in Canada*, Patti Tamara Lenard,

recruiters.<sup>5</sup> Yet, Canadian governments have only recently begun to develop laws to target this problem. As abusive practices persist in the face of the law, it is important to ask why the legal response is falling short and what can be done to build meaningful protection for migrant workers.

This report examines how Ontario regulates transnational recruitment and analyzes whether the existing legal model can adequately protect low-wage migrant workers against exploitation. **Part II** reviews the growth of migrant labour in Canada and outlines how federal and provincial laws shape the field in which migrant worker recruitment operates. **Part III** draws on in-depth interviews with low-wage migrant workers in the Greater Toronto Area and southern Ontario, community organizers in Canada, and organizers working in migrant workers' countries of origin overseas to map low-wage migrant workers' experiences of recruitment. **Part IV** outlines the rights-based framework of principles and standards by which we can assess whether Ontario's laws support migrant worker security and rights to decent work. **Part V** provides a detailed analysis of Ontario's existing law in light of these guiding norms and compares it with models of proactive licensing and registration that have been adopted elsewhere in Canada. **Part VI** provides concluding analysis and outlines options for systemic reform.

There is real urgency in examining how the law regulates recruiters of transnational migrant workers because these “merchants of labour”<sup>6</sup> hold an imbalance of information and power that leaves migrant workers exposed to predatory practices. Recruiters control access to jobs and help navigate the complex procedures of moving across borders for authorized work. As a result, they are uniquely placed to exert disproportionate influence over migrant workers' experience of life and work in Canada.

What information are workers given? What terms of work and expectations of citizenship are they promised? What must workers do — and pay — to secure

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and Christine Straehle eds. (Montreal and Kingston: McGill-Queens University Press, 2012); Jenna Henneby, *Permanently Temporary? Agricultural Workers and Their Integration in Canada* (February 2012), IRPP Study, No. 26; Jenna Henneby, Kerry Preibisch and Janet McLaughlin, *Health across Borders — Health Status, Risks and Care among Transnational Migrant Farm Workers in Ontario* (Toronto: CERIS Ontario Metropolis Centre, 2010); Judy Fudge, “Global care chains, employment agencies, and the conundrum of jurisdiction: Decent work for domestic workers in Canada,” *Canadian Journal of Women and the Law* (2011) 23:1, pp. 235–264; Judy Fudge and Fiona MacPhail, “The Temporary Foreign Worker Program in Canada: Low-skilled workers as an extreme form of flexible labour” *Comparative Labor Law and Policy Journal* (2009) 31:5, pp. 5–45; Delphine Nakache and Paula J. Kinoshita, *The Canadian Temporary Foreign Worker Program: Do Short-Term Economic Needs Prevail over Human Rights Concerns?* (May 2010), IRPP Study, No. 5.

<sup>5</sup> Standing Committee on Citizenship and Immigration, *Temporary Foreign Workers and Non-Status Workers*, above note 3 at pp. 30–36; Auditor General of Canada, *2009 Report of the Auditor General of Canada, Chapter 2: Selecting Foreign Workers Under the Immigration Program* (Ottawa: Office of the Auditor General of Canada, 2009) at pp. 32–34 re. concerns about “the genuineness of both employers and jobs offered to temporary foreign workers.”

<sup>6</sup> Gerry Rodgers, “Foreword,” *Merchants of Labour*, Christiane Kuptsch, ed. (Geneva: International Labour Office, 2006) at p. xi.

work in Canada? What happens after workers arrive? How recruiters handle these initial stages of the labour migration cycle can determine whether workers are brought into Ontario on terms that offend fundamental human rights and labour standards, or on terms that allow them to experience and enforce their legal rights to decent work.

The legal response to these practices is critical. A government's choice of whether to enact a law and its choice in how a law is designed determine which relationships and interactions are encouraged and facilitated between members in a society and which relationships and interactions are discouraged. How a law operates on its own terms and how it operates as part of a system of other laws will determine whether it responds appropriately to a social problem or, alternatively, whether it creates conditions that allow known patterns of exploitation to flourish. Experience has confirmed that a failure to regulate, actively monitor, and enforce clear standards in transnational recruitment leaves workers exposed to deep exploitation.

In 2009, a high-profile *Toronto Star* investigative series reported widespread exploitation of live-in caregivers by recruiters in the province.<sup>7</sup> In response, the Ontario government enacted the *Employment Protection for Foreign Nationals Act*<sup>8</sup> (EPFNA or Bill 210). The law applies only to live-in caregivers. It prohibits recruiters from charging fees to workers, prohibits employers from recouping recruitment costs from workers, and prohibits recruiters or employers from holding workers' passports or other personal documents.

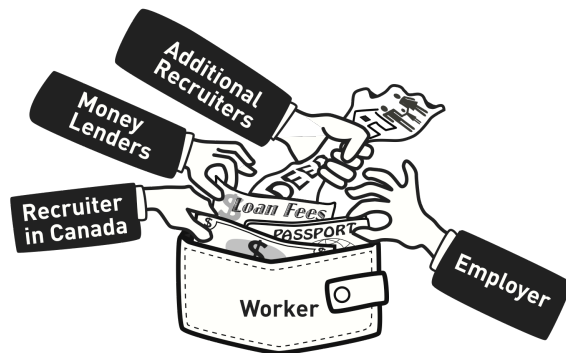
Yet, these same practices continue unabated in Ontario today among the live-in caregivers to whom the *Act* applies and among other low-wage migrant workers who fall outside the law's protection. Migrant workers continue on a routine and systemic basis to be charged thousands of dollars in "recruitment fees" — fees that can equal as much as two years' wages in their home currency. In order to pay their recruitment fees, migrant workers continue to borrow money from recruiters and informal money lenders, they continue to sign over the deeds to their homes to secure these loans, and they continue to be charged oppressive interest rates on these loans. These actions effectively place them in

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<sup>7</sup> In particular, see the series of articles by Dale Brazao and Robert Cribb and editorials between 14 March 2009 and 3 April 2009 which are all accessible on the *Toronto Star* website: Dale Brazao and Robert Cribb, "Nannies Trapped in Bogus Jobs," *Toronto Star* (14 March 2009); Robert Cribb, "Federal Agencies Fail to Protect Migrant Nannies," *Toronto Star* (15 March 2009); Dale Brazao and Robert Cribb, "Critics Want Crackdown as Nannies Exploited," *Toronto Star* (17 March 2009); Editorial, "Stop the Nanny Abuses," *Toronto Star* (18 March 2009); Dale Brazao and Robert Cribb, "Nanny Blacklist Proposed," *Toronto Star* (22 March 2009); Robert Cribb, "Nanny Flak for Labour Minister," *Toronto Star* (24 March 2009); Robert Cribb, "Province Buckles on Nannies," *Toronto Star* (25 March 2009); Dale Brazao and Robert Cribb, "Nanny Bill Takes Aim at Rogue Recruiters," *Toronto Star* (26 March 2009); Editorial, "Ontario's Nanny Shame," *Toronto Star* (28 March 2009); Raveena Aulakh, "Nannies Back Bill to Halt Abuses," *Toronto Star* (30 March 2009); Dale Brazao and Robert Cribb, "Star Nannies Series Inspired MPP to Demand Action," *Toronto Star* (3 April 2009).

<sup>8</sup> *Employment Protection for Foreign Nationals Act (Live-in Caregivers and Others)*, 2009, S.O. 2009, c. 32. The legislation came into effect on 22 March 2010.

debt bondage to their recruiters and employers. Migrant workers continue to be recruited to Ontario only to discover that the jobs they were promised do not exist and to be forced to work without status to pay off the debts they incurred to arrive here. And migrant workers continue to have their passports and travel documents seized, trapping them in abusive employment relationships.



In December 2013, the Ontario government introduced Bill 146 — the *Stronger Workplaces for a Stronger Economy Act* — for First Reading.<sup>9</sup> If passed, Bill 146 will extend EPFNA beyond live-in caregivers to cover “every foreign national who, pursuant to an immigration or foreign temporary employee program, is employed in Ontario or is attempting to find employment in Ontario.”<sup>10</sup> This initiative recognizes that predatory recruitment practices are not confined to live-in caregivers and affect migrant workers broadly. If passed, the Bill will respond in a preliminary way to concerns that migrant workers and migrant worker advocates have raised since 2009 regarding EPFNA’s limited coverage.<sup>11</sup> But it is only a preliminary response.

Over the last decade, both internationally and within Canada, best-practices models for regulating migrant worker recruitment have been moving away from individual complaint-driven models like EPFNA. Instead, they are moving toward increasingly comprehensive proactive regulatory regimes that include licensing of recruiters; mandatory registration of employers who hire migrant workers; financial security deposits to ensure funds are available to compensate workers who have been charged illegal fees; and proactive investigation, audits,

<sup>9</sup> Bill 146, *An Act to amend various statute with respect to employment and labour*, First Reading (4 December 2013).

<sup>10</sup> Bill 146, Schedule I, s. 3.

<sup>11</sup> See, for example, Workers' Action Centre, Caregivers' Action Centre and Parkdale Community Legal Services, *Submissions to the Ministry of Labour Consultation on Foreign and Resident Employment Recruitment in Ontario* (15 July 2009), online at [www.workersactioncentre.org/issues/migrant-workers/](http://www.workersactioncentre.org/issues/migrant-workers/); Migrant Workers Alliance for Change, “Our Demands” and “Make It Right” Campaign, <http://www.migrantworkersalliance.org/makeitright/>; Canadian Council for Refugees, *Migrant Workers Provincial and Federal Report Cards* (2013), online at <http://ccrweb.ca/en/system/files/migrant-worker-report-cards.pdf>; OFL, *Labour Without Borders*, above note 4; Law Commission of Ontario, *Vulnerable Workers and Precarious Work: Final Report* (Toronto: December, 2012) at pp. 83–86; and Faraday, *Made in Canada*, above note 1 at pp. 61–76 and 106–107.



and enforcement by provincial ministries of labour (and, in one case, jointly with the provincial ministry for immigration).

These proactive systems have also included mandatory record-keeping for employers and recruiters and mandatory reporting to the ministries of labour on migrant workers' contact information, the nature of work being performed, and details of employment and recruitment contracts. Proactive monitoring addresses both abuse in the recruitment process and compliance with employment standards and contract obligations. These models also impose independent legal obligations on employers to ensure that they use only licensed recruiters and hold employers liable where fees are charged by unlicensed recruiters. Finally, the more recent evolutions on this model impose mandatory requirements on recruiters to disclose all partners, affiliates, businesses, and individuals who participate in the recruiter's supply chain in Canada or abroad. Publicly disclosing the full length of the recruiter's supply chain and imposing joint and several liability on the recruiter and employer aim to hold the licensed recruiter or registered employer accountable at all stages of the recruitment process.

In Canada, this proactive approach — focused on building security for migrant workers — was pioneered in Manitoba in 2008. It has since been adopted in Nova Scotia and Saskatchewan. This model of robust domestic legislation has also, in some cases, been bolstered by government-to-government agreements with workers' origin countries to coordinate oversight at both ends of the transnational recruitment relationship.

In this context of best practices, even with the proposed extension of EPFNA, a deeper question warrants examination: does Ontario's current legal model provide effective, meaningful, and accessible protection for low-wage migrant workers?

In documents obtained in October 2013 in response to a request under the *Freedom of Information and Protection of Privacy Act*,<sup>12</sup> the Ontario Ministry of Labour reported that since EPFNA took effect in March 2010, only \$12,100 in illegal fees has been recovered from recruiters<sup>13</sup> and there are only eight investigations ongoing.<sup>14</sup> Yet, as documented in Part III, the Caregivers' Action Centre reports that *since* the law was enacted,<sup>15</sup> two-thirds of its members have been charged illegal recruitment fees. We also know that recruitment fees extracted from migrant workers continue to rise.<sup>16</sup>

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<sup>12</sup> R.S.O. 1990, c. F-31.

<sup>13</sup> Ontario Ministry of Labour, Response to access request made under the *Freedom of Information and Protection of Privacy Act* (13 October 2013), on file with the author.

<sup>14</sup> Ministry of Labour, Response to FOI request, above note 13.

<sup>15</sup> Author interviews with the Caregivers' Action Centre.

<sup>16</sup> Migrant worker interviews, August 2013 to November 2013.

The gap between the Ontario law's promise of protection and the reality of ongoing abuse is vast. To move forward, it is necessary to acknowledge the depth and pervasiveness of what the International Labor Recruitment Working Group has called the "disturbingly common patterns of recruitment abuse."<sup>17</sup> It is necessary to design an appropriately rigorous legal response that can provide meaningful, accessible, and effective protection for the human rights of those who migrate for work.

Some of the patterns that emerge in this report may well be consistent with findings of forced labour and human trafficking. Canada has ratified both of the key international conventions condemning human trafficking: the *United Nations Convention against Transnational Organized Crime* and the Palermo Protocol.<sup>18</sup> Human trafficking is also prohibited under both the *Immigration and Refugee Protection Act*<sup>19</sup> (IRPA) and the *Criminal Code of Canada*.<sup>20</sup> Moreover, there are recent cases in which recruiters and employers in Canada have been convicted of human trafficking.<sup>21</sup>

This report, however, examines the legal response to transnational recruitment through the regulatory models enacted in immigration and employment laws rather than under the criminal law. This approach is

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<sup>17</sup> The International Labor Recruitment Working Group, *The American Dream Up for Sale: A Blueprint for Ending International Labor Recruitment Abuse* (February 2013) at p. 5.

<sup>18</sup> *United Nations Convention against Transnational Organized Crime*, UN General Assembly Resolution 55/252000, ratified by Canada May 2002; Annex II, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (Palermo Protocol), ratified by Canada May 2002. While this *Convention* and the Palermo Protocol are most frequently used to combat human trafficking for purposes of prostitution, they could be employed in relation to human trafficking of migrant workers generally. The Palermo Protocol defines "trafficking humans" broadly as follows: "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs."

<sup>19</sup> *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, sections 118 to 120.

<sup>20</sup> *Criminal Code*, R.S.C. 1985, c. C-46, sections 279.01 to 279.04.

<sup>21</sup> See, for example, *R. v. Orr*, 2013 BCSC 1883. As reported by the CBC, "In Canada, human trafficking is connected with a number of industries, including construction, farm labour, the sex trade, the service sector and child care, according to law enforcement agencies"; see Ian Johnson, "Human smuggling and trafficking big business in Canada," CBC News (posted 29 March 2012), online at <http://www.cbc.ca/news/canada/story/2012/03/28/f-human-smuggling-overview.html?cmp=rss> (accessed 29 March 2012). See also, Adrian Morrow, "Judge hands down Canada's toughest penalty for human trafficking," *The Globe and Mail* (29 March 2012), re. conviction for human trafficking of Hungarian men to work in construction in GTA, online at <http://www.theglobeandmail.com/news/national/judge-hands-down-canadas-toughest-penalty-for-human-trafficking/article2386576/> (accessed 30 March 2012); Adrian Morrow, "Human-traffickers treated men on Ontario construction sites 'like slaves,'" *The Globe and Mail* (1 March 2012), online at <http://www.theglobeandmail.com/news/national/human-traffickers-treated-men-on-ontario-construction-site-like-slaves/article2356170/> (accessed 30 March 2012); Adrian Morrow, "Human trafficking kingpin lived life of successful immigrant," *The Globe and Mail* (3 April 2012) online at <http://www.theglobeandmail.com/news/national/human-trafficking-kingpin-lived-life-of-successful-immigrant/article2390980/> (accessed 3 April 2012).

deliberate. It in no way intends to downplay the gravity of the abuse. Instead, this approach aims to highlight how the law has allowed such abusive practices to be normalized and made invisible. **It is important to stress that the patterns of exploitation that are revealed as being systemic and routine are occurring not within the illegal channels of human smuggling and trafficking, but within the regular, entirely legal channels that the Canadian government has created for temporary labour migration.**

The criminal law may provide tools to combat particularly abusive practices in some cases.<sup>22</sup> However, **using human trafficking as the analytical frame — and thinking about this as an exclusively criminal-law problem — obscures the extent to which these practices are not aberrant but are in fact core to the business model that some recruiters adopt while operating within legal migration streams.**

For the present purposes, this report does not apply the legal analysis of human trafficking. It fully acknowledges, however, that many migrant workers and migrant worker organizations themselves analyze and critique labour recruitment through the lens of trafficking. They also characterize their own governments, that have adopted aggressive labour export policies, as trafficking in their own citizens.<sup>23</sup>

This tension about how to frame the analysis — legally and politically — is an important reminder that any examination of recruitment laws must also be firmly anchored in a critical examination of the larger legal and economic policy framework that constructs conditions of insecurity for migrant workers in Canada.

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<sup>22</sup> However, the criminal law imposes a much higher evidentiary burden (proof beyond a reasonable doubt) compared to civil and administrative proceedings (balance of probabilities), and so criminal convictions are more difficult to secure. Moreover, migrant workers face particular risks in trying to engage the criminal law. Some migrants workers who have attempted to use the criminal law to combat exploitative recruitment practices that left them without status in Canada have been deported upon coming forward to provide evidence to authorities while their exploiters continued to operate unpunished: Interview with Cathy Kolar, Immigration Specialist, Legal Assistance of Windsor (November 2013).

<sup>23</sup> See, for example, Migrant International, "On Int'l Day against Trafficking: Labor export policy is state-sponsored human trafficking" (12 December 2013), online at <http://migranteinternational.org/?p=3400> (accessed 4 January 2014). While it does not use the language of trafficking, the critique offered by the International Assembly of Migrants and Refugees 4 also focuses on the role of labour export policies in impoverishing and commodifying workers and depriving them of their right to live and work in a system of sustainable development within their home countries: see Asia Pacific Mission for Migrants, *Declaration of the Fourth International Assembly of Migrants and Refugees* (New York: 4 October 2013) ("IAMR4 Declaration 2013"), online at <http://ima2008.wordpress.com/2013/11/04/declaration-of-the-4th-international-assembly-of-migrants-and-refugees-iamr4/>. See also the analysis in Robyn M. Rodriguez, "Migrant heroes: Nationalism, citizenship and the politics of Filipino migrant labor," *Citizenship Studies* (2002) 6:3 pp. 341–356; Robyn Magalit Rodriguez, *Migrants for Export: How the Philippine State Brokers Labor to the World* (Minneapolis: University of Minnesota Press, 2010).

The rapid growth of Canada's temporary labour migration programs has been employer-driven. Until recently, the programs have expanded largely out of the public eye with relatively little public debate. Growing media coverage and public reports and campaigns over the course of 2012 and 2013<sup>24</sup> have drawn attention to the fact that migrant workers with temporary status are performing core jobs under conditions of extreme precariousness. Yet, migrant workers' vulnerability and precariousness are not conditions that are inherent or inevitable. Their disempowerment and marginalization are the products of active choices governments have made in building the laws and policies that govern transnational labour migration.

The Metcalf Foundation's 2012 report *Made in Canada* identified a six-stage labour migration cycle that migrant workers experience.<sup>25</sup> It analyzed how legal and policy choices by federal and provincial governments interact to create insecurity for workers at each stage of the labour migration cycle. In making recommendations for reform, *Made in Canada* emphasized the need to connect specific short-, medium-, and long-term reforms to a broader vision of building sustainable and secure communities. The report urged that

a much broader, critical and urgent public discussion must be engaged about the role of temporary labour migration if the goal is to build a sustainable economy and sustainable community. This debate must fully integrate both the labour and immigration dimension of the issue and ensure that workers' perspective is central. This debate must critically address why particular work and particular workers are, through law, constructed as "temporary." [...] It must also critically address the fundamental question of why broad classes of workers — workers who have historically played a

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<sup>24</sup> Key incidents that brought the issue to public attention included extensive media coverage and subsequent litigation beginning in the fall of 2012 regarding use of migrant workers at a mine in northern British Columbia and extensive media coverage regarding outsourcing of employees by RBC in the spring of 2013. See *Construction and Specialized Workers' Union, Local 1611 v The Minister of Citizenship and Immigration*, 2013 FCA 512, regarding the litigation involving HD Mining. For new campaigns initiated in 2013, see the campaigns by the Migrant Workers Alliance for Change (Make It Right), above note 11; Canadian Council for Refugees, *Migrant Workers Provincial and Federal Report Cards*, above note 11; OFL, *Labour Without Borders*, above note 4; Law Commission of Ontario, *Vulnerable Workers and Precarious Work*, above note 11. See also the Canadian Labour Congress, online at <http://www.canadianlabour.ca/issues/labour-and-migration>; United Food and Commercial Workers Union, online at [http://ufcw.ca/index.php?option=com\\_content&view=article&id=2009&Itemid=198&lang=en](http://ufcw.ca/index.php?option=com_content&view=article&id=2009&Itemid=198&lang=en); the Alberta Federation of Labour, online at [http://www.afl.org/index.php/component/option,com\\_campaign/Itemid,132/campaign\\_id,31/view,campaign/](http://www.afl.org/index.php/component/option,com_campaign/Itemid,132/campaign_id,31/view,campaign/); United Steelworkers (Give Everyone a Chance for Canada's Future), online at <http://www.everyoneschance.ca/>; WCDWA, *Access to Justice for Migrant Workers in British Columbia*, above note 4.

<sup>25</sup> Faraday, *Made in Canada*, above note 1. The six stages of the labour migration cycle are (1) recruitment, (2) obtaining a work permit, (3) information on arrival in Ontario, (4) living and working in Ontario, (5) expiry/renewal of a work permit, and (6) repatriation/permanent residence.

significant role in building Canada — are now, in law, generally ineligible for pathways to permanent residence and citizenship.<sup>26</sup>

This report builds on the framework and analysis of *Made in Canada*. As a next step in the research, it focuses on recruitment because that is the stage where the power imbalance between workers and recruiters/employers is greatest, and yet it is the stage with the least effective legal oversight. This research aims to move beyond the now well-worn phrases of “unscrupulous recruiters” and “exorbitant fees” to build a more nuanced understanding of how low-wage migrant workers experience transnational recruitment. It examines the choices workers make (and are forced to make) in seeking work abroad; how recruiters exercise leverage over migrant workers, their families, and communities; why recruitment fees are oppressive; and how a recruitment relationship can undermine workers’ security and their legal rights long after they arrive in Canada.

It is necessary to understand fully the nature of the social problem presented by recruitment in order to design a law that responds appropriately to the social harm. If the depth and nature of the problem is not fully known, the law cannot fully respond. The fact that recruitment is *transnational* — that part of the recruitment transaction occurs outside of Canada — is often raised as an impediment to regulation. This report challenges that stance of impotence. It examines tools that are available to build security from within Canada and back along the transnational recruitment pipeline.

Ultimately, this report stresses the importance of connecting the regulation of recruitment to the larger legal and policy debate. It does not suggest that reducing exploitative recruitment practices is an endpoint in the debate. The objective is not simply to polish up the recruitment supply chain. Instead, understanding recruitment can bring to light the depth and complexity of structural power imbalances that produce and sustain transnational migration. It can inform reflection on how Canadian temporary labour migration policies profit from that imbalance. It can promote discussion on the values and priorities that should shape Canadian legal responses.

While supporting the fundamental recommendation from *Made in Canada* — that workers of all skill levels must have access to immigrate to Canada with permanent status — this report recognizes that as long as Canada and Ontario rely on temporary labour migration they have an obligation to ensure that the laws and policies that facilitate migration provide real security for migrant workers. By examining the experience of labour recruitment from the perspective of low-wage migrant workers, it is hoped that this report will contribute to the larger debate about Canada’s temporary labour migration

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<sup>26</sup> Faraday, *Made in Canada* (Full Report), above note 1 at pp. 15–16.

programs, while also demonstrating that urgent and systemic action is needed to protect migrant workers who work in Ontario and whose numbers continue to grow.

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## ***Worker Profiles***

Although this report draws on survey data and interviews relating to nearly 200 migrant workers, no individual migrant worker profiles are included. This is deliberate. It has been done to protect the workers' security.

None of the workers interviewed was willing to be publicly identified or profiled. All workers who were interviewed spoke only on the condition of anonymity.

Composite profiles have also not been developed. The exploitation by recruiters that was reported tracked very similar patterns even when workers had come from different continents and worked in completely different industries and communities in Ontario. As a result, even with composite profiles, individual workers would be able to recognize their own stories and would fear that their anonymity had been compromised.

All workers expressed extreme fear that speaking publicly about recruiters' practices would result in them losing their jobs, being denied work permit renewals, being denied permanent residence, or being deported.

Workers also expressed real fear that speaking publicly about abuses by recruiters would subject their families at home to reprisals, including violence. They expressed fear that speaking publicly about recruiters would drive recruitment practices further underground, creating even greater risk for workers.

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## PART II: Overview of Canada's Temporary Labour Migration Programs

Canada's Temporary Foreign Worker Program (TFWP) is employer-driven. Unlike Canada's programs for permanent immigration, there are no caps on the number of migrant workers who can be hired in any year. As shown in Tables 1, 2 and 3, and detailed in Appendix A, the number of temporary migrant workers in Canada has more than tripled since the year 2000.<sup>27</sup> In fact, the number has more than doubled since 2006. Despite the recession that began in 2008, the number of migrant workers present in Canada has increased every year throughout this period, significantly outstripping the number of permanent economic immigrants admitted to Canada.

In 2012, there were 338,213 temporary migrant workers present in Canada, more than double the 160,819 economic immigrants who were granted permanent status that same year. Despite increased public criticism of temporary labour migration through 2012, temporary migrant worker entries continued to rise in 2013, with a year-over-year increase of nearly 5% during the first two quarters of 2013.<sup>28</sup> These growth patterns are also replicated at the provincial level in Ontario and at the municipal level in Toronto, where the majority of migrant workers in Ontario are employed. The number of migrant workers present in Toronto increased by 237% between 2006 and 2012.

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<sup>27</sup> Citizenship and Immigration Canada, *Facts and Figures 2012: Immigration Overview Permanent and Temporary Residents* (Ottawa: CIC, 2012) at pp. 4–5 (Canada — Permanent residents by gender and category, 1988–2012), pp. 52–53 (Canada — Temporary residents by yearly status, 1988–2012), and pp. 58–59 (Canada — Temporary residents present on December 1st by gender and yearly status, 1988–2012).

<sup>28</sup> Citizenship and Immigration Canada, *Canada — Total entries of foreign workers by gender and occupational skill level*, Research DataMart, 2nd Quarter 2013. By the end of June 2013, the latest period for which figures are available at time of publication, there were 125,017 temporary foreign worker entries to Canada, compared to 119,135 for the same period in 2012. This represents a year-over-year increase of 4.9%.

Table 1. Permanent Residents, Temporary Foreign Worker Entries, and Temporary Foreign Workers Present, 2000–2012

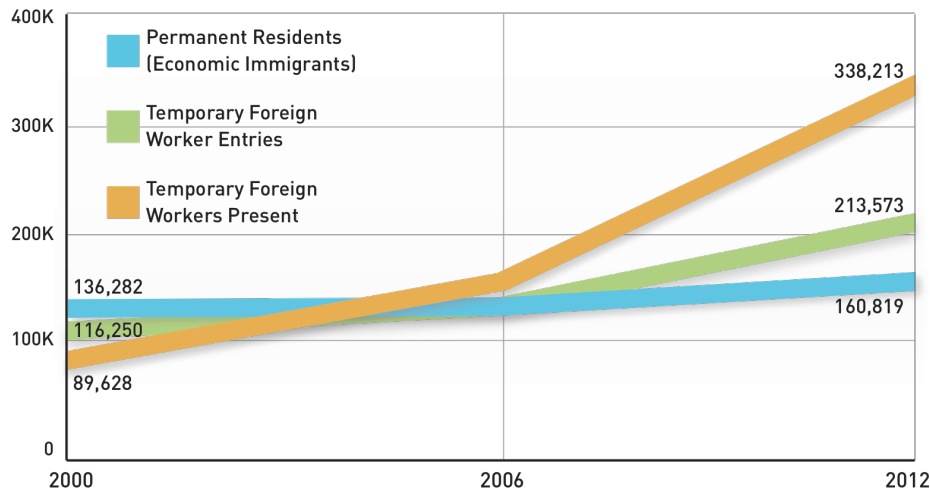
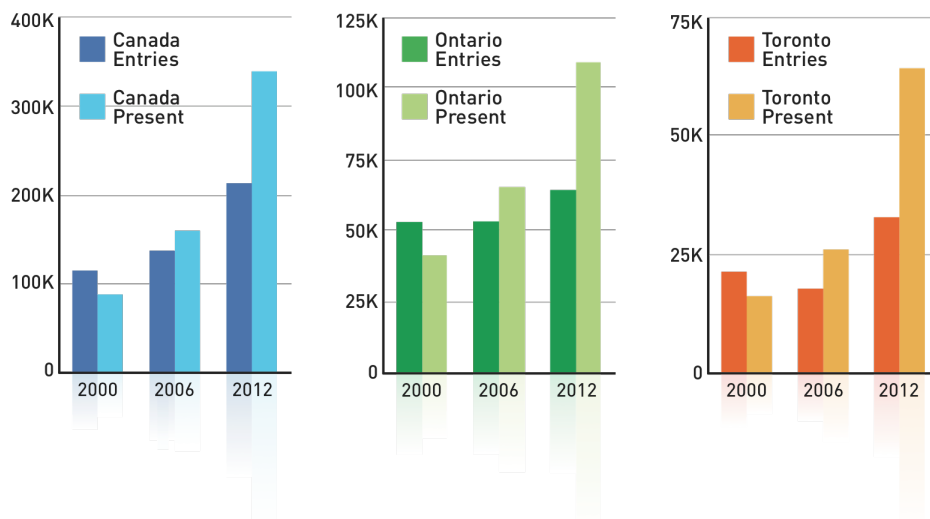


Table 2. Temporary Foreign Worker Entries and Present in Canada, Ontario and Toronto, 2000–2012



In Canada, both federal and provincial laws are engaged in regulating labour migration. Migrant workers' authorizations to enter, work, and remain in Canada are governed by federal immigration law and policy, yet their employment and social rights while in Canada are governed primarily by provincial law and policy. Regulation of migrant worker recruitment falls within provincial jurisdiction. However, the effectiveness and impact of those



provincial laws are deeply influenced by how they interact with the terms and conditions imposed by the federal immigration laws and policies. That is why we outline, over the next few pages, the federal framework governing temporary labour migration.<sup>29</sup> Ontario's laws regulating recruiters will be addressed in detail in Part IV.

Under TFWP, employers can apply to hire transnational migrant workers into any lawful occupation in Canada.<sup>30</sup> Transnational temporary migrant workers can be hired into occupations of all "skill levels." The National Occupational Classification (NOC) matrix assigns codes to jobs based on whether they

- are managerial (level O),
- are professional (level A),
- are skilled trades (level B),
- require up to two years of training or apprenticeship (level C), or
- can be performed with on-the-job training (level D).<sup>31</sup>

Citizenship and Immigration Canada (CIC) operates separate permanent and temporary migration streams that set different eligibility requirements and confer different entitlements for NOC levels O, A, and B positions, which are labelled as "high-skilled" (managerial, professional, skilled trades) and NOC levels C and D positions, which are labelled as "lower-skilled."

This report focuses on how recruitment practices affect migrant workers with temporary status who are working in low-wage jobs classified at NOC levels C and D. These workers make up nearly one quarter of all migrant workers in Canada. Every year since 2006, between 60% and 67% of all Labour Market Opinions authorizing Ontario employers to hire migrant workers have been for workers in these low-wage jobs.<sup>32</sup>

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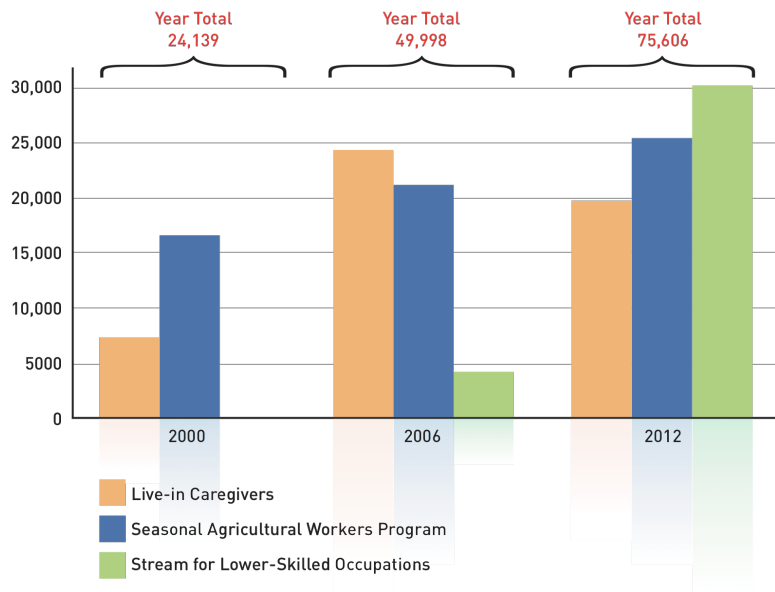
<sup>29</sup> For a detailed analysis and history of the federal framework, see *Made in Canada*, above note 1 at pp. 19–45.

<sup>30</sup> One exception is that under the IRPA regulations, Employment and Social Development Canada cannot authorize employers to hire transnational migrant workers in the areas of striptease, erotic dance, escort services, or erotic massage. This prohibition was instituted to protect workers from the risk of abuse and exploitation: see Employment and Social Development Canada, "Regulatory amendments and ministerial instructions coming into force" (28 December 2013), online at [http://www.hrsdc.gc.ca/eng/jobs/foreign\\_workers/notices/reg\\_change.shtml](http://www.hrsdc.gc.ca/eng/jobs/foreign_workers/notices/reg_change.shtml) (accessed 4 January 2014).

<sup>31</sup> For more information about the National Occupational Classification matrix, see Employment and Social Development Canada, "National Occupational Classification" webpage at <http://www.hrsdc.gc.ca/eng/jobs/lmi/noc/index.shtml>.

<sup>32</sup> *Facts and Figures 2012*, above note 27 at p. 64; *Facts and Figures 2009: Immigration Overview Permanent and Temporary Residents* (Ottawa: CIC, 2009) at p. 64 (Canada – Temporary residents present on December 1st by yearly sub-status); Employment and Social Development Canada, Labour Market Opinions – Annual Statistics, online at [http://www.esdc.gc.ca/eng/jobs/foreign\\_workers/lmo\\_statistics/annual-skill-level.shtml](http://www.esdc.gc.ca/eng/jobs/foreign_workers/lmo_statistics/annual-skill-level.shtml) (accessed 5 February 2014).

Table 3. Migrant Workers Present in Lower-Skilled Jobs in Canada, 2000–2012



Canada operates four programs through which migrant workers with temporary immigration status are delivered to fill jobs in NOC levels C and D occupations:

1. Live-in Caregiver Program
2. Stream for Lower-skilled Occupations<sup>33</sup>
3. Agricultural Stream
4. Seasonal Agricultural Worker Program

In general, before a migrant worker can be hired to work in Canada, three separate authorizations must be granted.<sup>34</sup>

First, an employer must apply for and receive a **Labour Market Opinion (LMO)** from Employment and Social Development Canada (ESDC, formerly known as Human Resources and Skills Development Canada or HRSDC). In applying for an LMO, the employer must demonstrate that they have made reasonable efforts but have been unable to either hire or train Canadian citizens or permanent residents. The employer must also demonstrate that hiring a

<sup>33</sup> This program began in 2002 as the “Pilot Project for Occupations Requiring Lower Levels of Formal Training (NOC C and D)” and has also been referred to as the “Low-skills Pilot Project.” In 2012 it ceased to be called a “pilot project” and has since been referred to as the “Stream for Lower-skilled Occupations.”

<sup>34</sup> Under the *Immigration and Refugee Protection Act*, not all temporary labour migration follows this framework. Some workers require additional authorizations such as a temporary resident visa. Other workers may need fewer authorizations. For example, a Labour Market Opinion is not needed for various categories of temporary labour migration involving higher skilled jobs, such as employment under international trade agreements, intra-company transfers, exchange programs, academic placements, religious/charitable work, or provincial nominee programs.

migrant worker will have either a positive or neutral impact on the Canadian labour market.<sup>35</sup>

Second, after a positive or neutral LMO is granted, the migrant worker must apply to CIC for a **work permit**. The fee for a work permit is \$150. In addition, applicants from designated countries must also supply biometric data (fingerprints and a photo) and are subject to an additional \$85 biometric data processing fee.<sup>36</sup> Migrant workers entering lower-skill occupations are employed on **tiered work permits**. This means that the work permit contains explicit terms and conditions that restrict the employee to performing a specific kind of work, for a specific employer, in a specific location, and for a specific time period – all of which are stated on the permit. Failure to comply with any of these terms and conditions places an employee out of authorized status.

Third, the Canada Border Services Agency (CBSA) screens the worker for compliance with general criteria for admissibility to Canada, including security requirements. While CIC approves the work permit, the worker receives the permit from CBSA at the port of entry.

When an employer applies for an LMO and when an employee applies for a work permit, they must submit a **signed employment contract** with their respective applications. Migrant workers under the Seasonal Agricultural Worker Program must sign a standard contract that is negotiated between the Canadian government and the government of the worker's origin country. For the other streams of low-wage migrant labour, ESDC provides program-specific template employment contracts. Each template contract sets out fill-in-the-blank provisions covering the basic terms and conditions of employment, including wages, benefits, contract duration, hours of work, deductions from wages, health care insurance, and commitment to register under the provincial workplace safety insurance plan. Each of the sample contracts contains two provisions that relate specifically to recruitment:

1. First, each template contract provides that the employer shall not recoup any costs incurred in recruiting the worker. The employer cannot recover these costs through payroll deductions or through any other means. The template contract for workers arriving under the Live-in Caregiver Program contains an additional statement:

*Should the EMPLOYER'S third party recruiter or recruitment agency, or their authorized representative(s) charge the EMPLOYEE for any*

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<sup>35</sup> Employment and Social Development Canada revised its Labour Market Opinion application forms effective 31 December 2013. At the time of drafting, the forms were not available electronically.

<sup>36</sup> The Citizenship and Immigration Canada website identifies which countries' citizens are required to provide biometrics: <http://www.cic.gc.ca/english/visit/biometrics.asp> (accessed 4 December 2013). See also *Immigration and Refugee Protection Regulations*, SOR/2002-227, s. 12.1 and s. 315.1(1).

*recruitment fees, the EMPLOYER must reimburse the EMPLOYEE in full for any such costs disclosed with proof by the EMPLOYEE.*<sup>37</sup>

2. Second, each template contract provides that the employer shall pay for the employee's transportation to their destination in Canada. If the worker is not currently in Canada, the contract provides that the employer must cover round-trip travel from the worker's country of permanent residence. If the worker is already in Canada, the employer must pay for transportation from the employee's current location in Canada and one-way travel to their country of permanent residence.

Each of the four programs imposes additional requirements that are unique to the specific program stream.

### Live-in Caregiver Program

Under the Live-in Caregiver Program (LCP), migrant workers provide live-in care for children, persons with disabilities, and the elderly in private homes. This is the only program for lower-skilled occupations that allows migrant workers in Ontario to apply for permanent residence.<sup>38</sup> A work permit under the LCP can be granted for up to four years and three months. In order to apply for permanent residence, a migrant worker must, within four years, complete two years of full-time work or 3,900 hours of caregiving work while living in the employer's home. Accordingly, a mandatory requirement of the LCP is that the worker must live in the employer's private home. The employer can deduct a maximum of \$85.25 per week for room and board.

### Stream for Lower-skilled Occupations

In Ontario, workers under this stream do not have access to apply for permanent residence. They can be granted a work permit for up to 24 months, which can be renewed for an additional 24 months. After holding a work permit with temporary status for four years, the migrant worker must leave Canada and must remain out of the country for a further four years<sup>39</sup> (the "four-year in/four-year out rule"). This program stream does not require that workers live on the property of the employer, but it does require that the employer demonstrate that reasonable and proper accommodation is available in the area where the worker

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<sup>37</sup> ESDC, "Live-in Caregiver Program — Contract Template," online at <http://www.servicecanada.gc.ca/cgi-bin/search/eforms/index.cgi?app=prft&frm=emp5498&ln=eng> (accessed 4 December 2013).

<sup>38</sup> Pilot projects or provisions under Provincial Nominee Programs in other provinces have at different times allowed a limited number of migrant workers in specific NOC levels C and D occupations to apply for permanent residence.

<sup>39</sup> *IRP Regulations*, s. 200(3)(g).

will be employed. In practice, many of these workers do live in employer-provided housing. Many live in bunk houses built on the employer's property or in accommodations owned and/or arranged by the employer, for which they pay rent.

### Agricultural Stream

Workers in the Agricultural Stream are also hired on permits of up to 24 months, renewable for an additional 24 months. They are also subject to the four-year in/four-year out rule. They do not have access to apply for permanent residence. Employers under the Agricultural Stream are required to provide housing for workers and can deduct up to \$30 per week, which is recouped through payroll deductions. The fee for housing can be increased by 1% effective 1 January of each year.

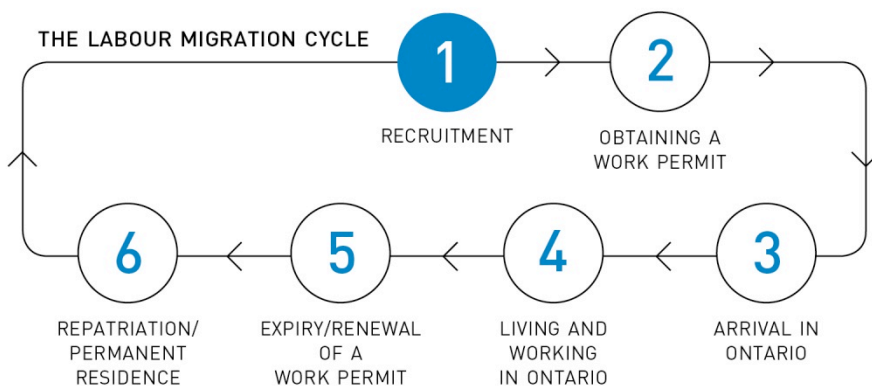
### Seasonal Agricultural Worker Program

The Seasonal Agricultural Worker Program (SAWP) is unique among the four temporary migration streams for lower-skill occupations. Unlike the other programs, which are created through regulations and policy, the SAWP is created through bilateral Memoranda of Understanding between Canada and each of the countries participating in the program.<sup>40</sup> While workers in the other three streams arrive in Canada through private recruitment, recruitment under the SAWP is conducted by the governments of the workers' origin countries. The Mexican and Caribbean governments recruit, select, and document the workers and maintain a pool of workers who are available to depart to Canada when requests are made by Canadian employers. In Ontario, a private-sector run not-for-profit organization — the Foreign Agricultural Resource Management Services — governed and funded by the agricultural commodity groups that participate in the SAWP, coordinates processing of employers' applications to hire workers.

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<sup>40</sup> The countries that have signed agreements with Canada are Jamaica, Barbados, Trinidad and Tobago, Mexico, and the Organization of Eastern Caribbean States (Antigua and Barbuda, Dominica, Grenada, Montserrat, Saint Christopher-Nevis, Saint Lucia, and Saint Vincent and the Grenadines).

Workers under the SAWP are entitled to work in Canada for a maximum of eight months in any calendar year. There is no limit on how many years a SAWP worker can return to Canada. Under the SAWP, migrant farm workers, on average, return to Canada for 7 to 9 years. One quarter of SAWP workers return to Canada for more than 10 years, many of these returning for 25 years or more.<sup>41</sup> Regardless of how many years or decades a SAWP worker returns to Canada, they do not acquire any right to apply for permanent residence.



### Migrant workers' shared labour migration cycle

Although they enter Canada under four different migration streams, all low-wage migrant workers share a common labour migration cycle. The federal immigration streams create common conditions that produce real insecurity for all these migrant workers. It is necessary to examine how the legal regulation of temporary labour migration operates as an integrated *system* whose parts interact and reinforce conditions of insecurity. As detailed in *Made in Canada*, legal regulation at each of the six stages of a migrant worker's labour migration cycle operates in a systemic and cumulative way. That regulation can be designed and coordinated to build security throughout the labour migration cycle or it can be designed in a way that exacerbates precariousness.

While this report examines migrant workers' experience of the law through the lens of recruitment, the regulation of recruitment cannot be examined in isolation. Workers' experience of recruitment is intertwined with their temporary status, tied work permits, whether they live in housing provided by the employer, and their usually very limited window of time to work in Canada. Each of these conditions created by the federal temporary labour migration programs produce significant points of insecurity that recruiters can effectively leverage for profit.

<sup>41</sup> Hennebry, *Permanently Temporary*, above note 4 at p. 13.

## Part III: Mapping Migrant Workers' Experiences of Recruitment

Part III of the report examines migrant workers' experiences of the recruitment phase of their labour migration cycle. It addresses

- the transnational context from which labour migration originates,
- how recruitment relationships are structured,
- recruitment fees,
- conduct that exacerbates precariousness after a worker arrives in Canada, and
- interprovincial recruiting.

The experiences and patterns that are recorded in this report are based on consultations with groups of migrant workers, in-depth interviews with individual migrant workers, interviews with community-based organizations supporting migrant workers in Toronto and southern Ontario,<sup>42</sup> and interviews with and data provided by community-based organizers from workers' origin countries. Unless otherwise indicated, the consultations and interviews were conducted between March 2013 and November 2013. All migrant workers who participated in this research did so voluntarily. All are in Canada with precarious temporary status. All participated in the research on the condition of anonymity and on the condition that, where they provided documents to substantiate their experiences, these would not be disclosed.

Recruitment abuse can affect workers at all skill levels. Recent undercover investigative reporting by both *The Tyee* and CBC disclosed recruiters in China demanding fees as high as \$12,500 to \$16,000 to recruit workers into skilled jobs in the Canadian mining sector where they would be paid significantly below prevailing industry wages.<sup>43</sup> These concerns are obviously significant. Yet, the

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<sup>42</sup> Community-based organizations that have been interviewed in connection with this research include the Caregivers' Action Centre, Migrant Workers Alliance for Change, Workers' Action Centre, Justicia for Migrant Workers, Migrante Ontario, Parkdale Community Legal Services, and Legal Assistance of Windsor.

<sup>43</sup> See, for example, Jeremy Nuttall, "Recruiters charging BC-bound Chinese temp miners \$12,500," *The Tyee* (18 October 2012), online at <http://thetyee.ca/News/2012/10/18/Chinese-Temp-Miners/> (accessed 4 January 2014); Adrienne Arsenault, "Canadian jobs and Chinese recruiters," CBC, *The National* (1 December 2012), online at <http://www.cbc.ca/player/News/TV+Shows/The+National/ID/2314469514/> (accessed 5 January 2014). CBC reported that, of the \$16,000 recruitment fee, an initial \$4,800 fee was to be paid directly to the employer. The remaining \$11,200 would be deducted from the worker's paycheque in Canada over the first year of their employment, and the employer would submit the fee to the recruiter. The most significant human-trafficking prosecution in the United States also involved skilled workers, in

exploitation is more intense and more frequent in lower-skill, lower-wage jobs. It is well-documented internationally that lower-skill, low-wage migrants pay a greater share of recruitment costs and are subject to greater exploitation than higher-skill workers.<sup>44</sup> Nilim Baruah, Head of Labour Migration Service for the International Organization for Migration (IOM) has observed that “due to structural reasons (including poverty, unemployment and large wage differentials between countries of origin and destination) the supply of workers in lower skill sectors far outstrips the demand and there are far more workers wishing to work abroad ... than there are jobs.”<sup>45</sup> This heightens the risk of abuse for this segment of the migrant worker population.

Accordingly, this report focuses on the experiences of migrant workers who have come to Canada to work in low-wage jobs under the LCP, the Stream for Lower-skilled Occupations, and the Agricultural Stream. Recruitment under the SAWP is conducted by the government in the workers’ origin country, eliminating the opportunity for abuse by private recruiters. Nevertheless, distinct recruitment problems arise under the SAWP, which are addressed separately at the end of this section.

## A. Migrant workers’ experience of private recruitment

### 1. Transnational context: Where the migration cycle starts

To understand migrant workers’ vulnerability to exploitation by recruiters, it is crucial to understand the economic and social context in which they make the decision to migrate for work.

In 2013, the United Nations reported that, globally, over 232 million migrants are living outside their country of birth.<sup>46</sup> Some 105 million of these are economic migrants — women and men in almost equal numbers who have

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that case schoolteachers from the Philippines: *Nunag-Tanedo et al v. East Baton Rouge Parish School Board*, 2012 U.S. District Court for the Central District of California.

<sup>44</sup> See, for example, Dovelyn Rannveig Agunias, *What We Know: Regulating the Recruitment of Migrant Workers* (September 2013), Migration Policy Institute, Policy Brief No. 6 at p. 2; Philip Martin, “Regulating private recruiters: The core issues,” *Merchants of Labour*, above note 6. As Martin writes at p. 15: “If workers are ranked by their level of education or skill from low to high on the X-axis, and if the share of job-matching fees paid by workers is on the Y-axis, the line showing the cost of recruitment paid by the worker falls from left to right, as lower-skill migrants tend to pay a higher percentage of any job matching fees (if the share of fees paid by employers are on the right-hand side Y-axis, the share-of-cost paid by the employer line rises from left to right).” In fact, rather than charging recruitment fees, in some cases employers competing for higher-skill workers offer premiums or bonuses for them to migrate: interview with Ligaya Lindio-McGovern, Indiana University Kokomo (June 2013).

<sup>45</sup> Nilim Baruah, “The regulation of recruitment agencies: Experiences and good practices in countries of origin in Asia,” *Merchants of Labour*, above note 6 at p. 39.

<sup>46</sup> United Nations General Assembly, 2013 *High-level Dialogue on International Migration and Development, Roundtable 2 Background Paper* (October 2013) at p. 1. Approximately 15% of these migrants — some 35 million — are under the age of 20.



migrated transnationally in search of work.<sup>47</sup> Transnational labour migration programs depend upon and are sustained by the persistent and growing structural and income inequalities between developing and developed economies. Underdevelopment, unemployment, underemployment, violence, environmental devastation, and restrictions on individual freedoms are primary drivers that lead most workers to seek employment outside their countries of origin.<sup>48</sup> Recruitment of migrant labour is inherently transnational. To ensure the law does not facilitate exploitation, it is necessary to remain keenly aware of how the power imbalance generated by these structural inequalities operates and resonates for an individual worker throughout the labour migration cycle.

Low-wage migrant workers who come to Canada often arrive from relatively impoverished communities — particularly impoverished rural communities — with limited economic opportunities. Both the workers and their local communities depend heavily upon the income earned through migrant labour and the remittances that workers send home.<sup>49</sup> For example, the Philippines is the country of origin for the largest group of migrant workers in Canada.<sup>50</sup> Since 1974, the Philippines has pursued an aggressive labour export policy that currently sees more than 4,000 Filipinos a day leave the country for work overseas.<sup>51</sup> The Philippines census in 2012 reported that some 2.2 million Filipino migrant workers were deployed overseas between April and September of that year.<sup>52</sup> As Robyn Rodriguez writes, “While Marcos’ introduction of a policy of labor export [in 1974] was supposed to have been a temporary solution to the state’s economic and political crises at the time, overseas employment has become a more permanent feature of the Philippine economy providing jobs,

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<sup>47</sup> International Organization for Migration, <http://www.iom.int/cms/en/sites/iom/home/what-we-do/labour-migration.html> (accessed 6 December 2013). This number has increased from 86 million economic migrants in the year 2000: Manolo Abella, *Policies and Best Practices for Management of Temporary Migration* (Geneva: International Labour Organization, 2006) at p. 6. To get a sense of the scale of the global migrant population, at 232 million, the global population of migrants would rank 6th among the world’s most populous countries, and the 105 million migrant workers would tie for 13th: CIA World Fact Book, “Country comparison — population” (current to July 2013), <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2119rank.html> (accessed 7 December 2013).

<sup>48</sup> International Labour Organization, *Towards a Fair Deal for Migrant Workers in the Global Economy*, Report no. VI at the International Labour Conference, 92nd Session, 2004, Sixth item on the agenda (ILO: Geneva, 2004) at p. 24.

<sup>49</sup> The United Nations reports that “annual remittances to developing countries alone surpass \$400 billion, triple the amount of Official Development Assistance”: United Nations General Assembly, *2013 High-level Dialogue on International Migration and Development, Roundtable 1 Background Paper* at p. 1.

<sup>50</sup> In 2012, 47,470 migrant workers from the Philippines were working in Canada: CIC, “Canada — Foreign workers present on December 1st by source country,” *Facts and Figures 2012*, above note 27 at p. 72.

<sup>51</sup> Asia Pacific Mission for Migrants, *Global Migration 2012: Trends, Patterns and Conditions of Migration* (Hong Kong: Asia Pacific Mission for Migrants, January 2013) at p. 27.

<sup>52</sup> Republic of the Philippines, National Statistics Office, *2012 Survey on Overseas Filipinos* (4 September 2013), online at <http://www.census.gov.ph/content/2012-survey-overseas-filipinos> (accessed 7 December 2013).

increasing household incomes and generating foreign exchanges significant to funding trade deficits.”<sup>53</sup> Remittances from overseas Filipino workers worldwide account for roughly 10% of the annual gross national product of the Philippines<sup>54</sup> and “it is estimated that one-third to one-half of the Philippines’ population is directly dependent on remittances from family members working overseas.”<sup>55</sup>

In this context, for many workers, “temporary” labour migration is not temporary. Economic options that would allow them to *choose not to migrate* are not available.<sup>56</sup>

Many of the migrant workers interviewed for this report had already been working outside their home countries for years before coming to Canada. For example, many Filipina live-in caregivers who were interviewed had worked in Hong Kong, Saudi Arabia, Europe, and elsewhere — some for up to ten years — before coming to Canada. Canada’s new four-year in/four-year out rule exacerbates workers’ insecurity. The first restricted four-year work terms will expire in 2015, requiring thousands of workers under the Agricultural Stream and Stream for Lower-skilled Occupations to leave Canada. Without pathways that allow them to apply to immigrate with permanent status, despite their extended service in the Canadian labour market — and the continued need for their labour in Canada — these workers will be forced to continue migrating internationally for work.

Migrant workers repeatedly mention the extended separation from their families as a source of considerable personal suffering. The years of separation corrodes their relationships with family members, resulting in many relationship breakdowns and troubled relationships with children upon family reunification. It also distorts family and community relationships in origin countries, as spouses who are left behind and extended family bear the burden

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<sup>53</sup> Rodriguez, “Migrant heroes,” above note 23 at p. 346. See also Asia Pacific Mission for Migrants, *Global Migration 2012*, above note 51 at p. 26: “Major labor-sending countries in the South and Southeast Asia rely heavily on the systematic migration of their own people to keep afloat their crisis-ridden economies and also quell the political and social instability brought about by poverty, widespread unemployment and skyrocketing prices of basic commodities, education and health services. As previously stated, sending countries include remittances in the national GDP to have a positive impact on the Balance of Payments and prop up the hype about the economic development benefits of migration.”

<sup>54</sup> Philip F. Kelly, Mila Astorga-Garcia, Enrico F. Esguerra, and the Community Alliance for Social Justice, *Explaining the Deprofessionalized Filipino: Why Filipino Immigrants Get Low-Paying Jobs in Toronto*, (Toronto: CERIS — The Ontario Metropolis Centre, October 2009), CERIS Working Paper No. 75 at p. 14.

<sup>55</sup> Jenna Hennebray, “Who has their eye on the ball? ‘Jurisdictional fútbol’ and Canada’s Temporary Foreign Worker Program,” *Policy Options* (July–August 2010) 62 at p. 63.

<sup>56</sup> As Jennifer Gordon writes, “[w]hen there is sustainable development in nations of origin, the decision not to migrate will become a more viable economic option. Until then, the struggle to make ‘staying put’ a choice that more want to make, must go hand in hand with the struggle for migration on fair terms.” See, Jennifer Gordon, “Towards Transnational Labor Citizenship: Restructuring Labor Migration to Reinforce Workers’ Rights: A Preliminary Report on Emerging Experiments” (Fordham Law School: January 2009) at p. 4. Also, Martin, “Regulating Private Recruiters”, above note 43 at p. 24. See also, *IAMR4 Declaration 2013*, above note 23.

of maintaining family cohesion.<sup>57</sup> And yet, the structural inequality in their origin country combines with the temporary labour migration policy in Canada to ensure they remain migrants.

It is important to recognize this underlying economic and power imbalance that defines the context in which transnational recruitment occurs. It creates the ultimate precariousness that colours migrant workers' experience through every stage of the labour migration cycle. And it provides the advantage that allows recruiters to extract profit from the workers' precariousness, particularly when workers are led to believe they are being offered a chance to secure permanent residence.

For this reason, many migrant organizations and advocates at the international level argue that structural reforms are urgently required so that migration becomes a real *option*, not an *imperative* for workers globally. They strongly argue that "migration" must not be uncritically equated with "development" and considered a "social good." Instead, they assert that the massive levels of economic migration are in fact a profound *social problem* that must be addressed through economic policies that place human security and sustainable development at the forefront.<sup>58</sup>

It is in this context of severely constrained options that individuals make the decision to migrate for work. The decisions are significant and are often made collectively, as a family. Families may determine which member or members have the best potential to secure work transnationally — either due to skills and training, English-language skills, adaptability, and other capacities of that family member, or because of the gendered options that are available to them.<sup>59</sup> In some cases, migrant workers described how their spouses also work abroad — often in different countries — while their children are raised by grandparents or other relatives. Just as the decision to migrate may be made collectively by an extended family, the migrant worker's remittances support a large network of extended family members. As a result, any decision a migrant worker makes to resist exploitative treatment in Canada — and thereby risk their continued

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<sup>57</sup> Interviews with migrant workers (April 2013 to November 2013).

<sup>58</sup> See, for example, Civil Society's proposal for an outcome and follow up to the UN High Level Dialogue on International Migration and Development 2013, [The 5-Year Action Plan: 5 Years, 8 Priorities, Collaboration, Action](http://www.hldcivilsociety.org) (October 2013) available online at [www.hldcivilsociety.org](http://www.hldcivilsociety.org); People's Global Action Development and Human Rights, *Final Declaration and Recommendations* released by the PGA following the 2013 UN HLD, online at <http://hld2013.gcmigration.org/media/pga-2013-declaration-recommendations/> (accessed 6 December 2013); IAMR4, *Declaration 2013*, above note 23.

<sup>59</sup> For example, thousands of Filipina women migrate each year as live-in caregivers, even though this is deeply disruptive to cultural and community norms. By contrast, women workers from Latin America who were interviewed expressed how difficult it was for them to obtain work in the SAWP and in the Agricultural Stream where the overwhelming majority of workers selected are men (97% in the SAWP). It is important to highlight that unregulated practices of private recruitment are producing deeply gendered and racialized constructions of particular jobs in the Canadian labour market.

employment — has very direct implications not just for themselves but for an extended family network that is dependent on their continued employment. The weight of this collective obligation — exacerbated by the precariousness of temporary immigration status — presents an almost insurmountable obstacle to enforcing individual workplace rights.<sup>60</sup>

Any failure to take this reality into account in designing the legal regulation of migrant worker recruitment will yield a policy that remains inert in practice, failing to provide any meaningful protection for the worker's security and minimum standards of decent work.

## 2. How recruitment relationships are structured

Labour recruiters can leverage the precariousness outlined above to their profit because they typically enjoy significant advantages in terms of some or all of the following:

- contacts with employers and information on how to access jobs abroad,
- information on how to navigate the complex immigration/migration procedures,
- English-language capacity,
- mobility within the country of origin, and
- familiarity with Canadian society.

Recruiters hold these advantages on both an individual level relative to a migrant worker and on a broader level relative to a community. For example, labour brokers who recruit workers from deeply impoverished rural communities can exercise a disproportionate degree of control over workers from those communities. They may recruit large numbers of workers from a small community, with the result that remittances become critical to the stability of the community as a whole. Recruiters can then use this community dependence on overseas jobs to impose discipline on workers who resist unfair treatment. Migrant workers from both Asia and Latin America, working in different communities and different industries in Ontario, described a very similar dynamic in which the community as a whole is punished if an individual worker complains of unfair treatment. Workers described a similar practice in which the recruiter deliberately cuts off the pipeline to overseas work for the whole community as a reprisal when an individual worker complains.

This report does not suggest that all recruiters leverage the advantages outlined above to exploit migrant workers. However, these forms of exploitation are notoriously widespread. It is therefore important to identify some of the precise points of leverage available to those who wish to profit from

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<sup>60</sup> This obstacle is particularly insurmountable when, as is typically the case, migrant workers are not unionized and must bring claims forward individually.

precariousness in order to assess whether laws are appropriately designed to guard against this profiteering.

Transnational recruitment can operate through a wide variety of relationship structures. Some recruitment agencies are very large multinational corporations with offices both in Canada and the origin country. Some recruiters operate very small, informal businesses that draw on personal connections in Canada and the origin country.<sup>61</sup> Many fall along the spectrum in between.

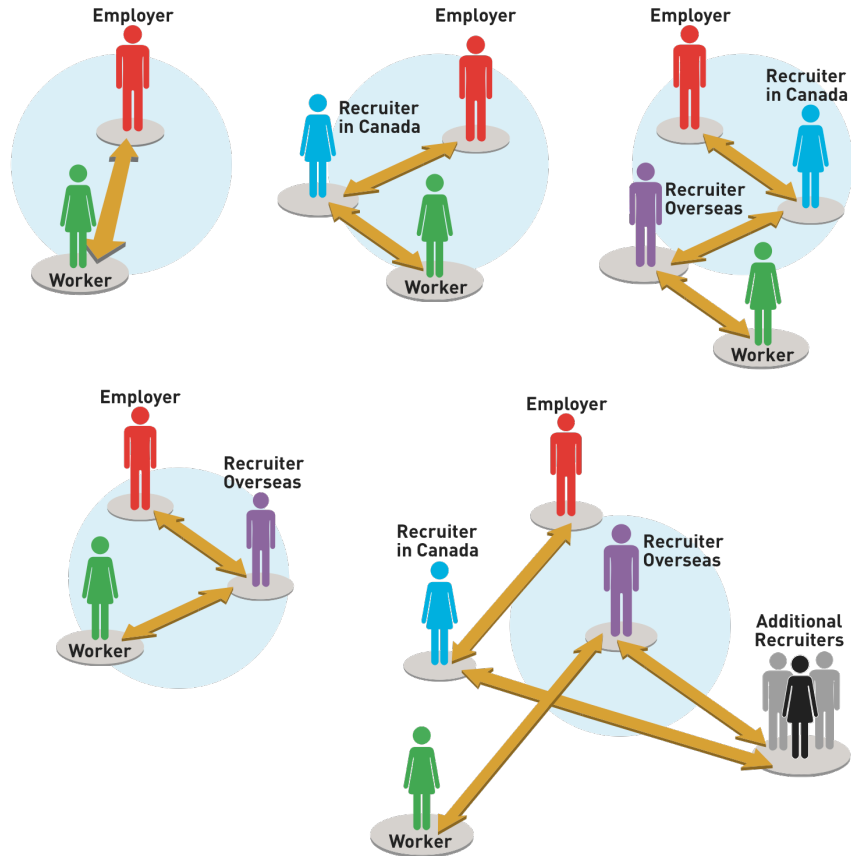
The length of the recruiter supply chain can also vary considerably. The shortest supply chain exists when an employer hires a worker directly. More frequently, an employer will contract with either a Canadian-based recruiter or a recruiter based overseas to locate workers abroad. In many cases, the primary recruiter, whether based in Canada or overseas, will have one or more partners, affiliates, agents, or “helpers” located in Canada and/or overseas who participate in identifying and recruiting workers. The Centro de los Derechos del Migrante, a transnational migrant workers’ rights organization operating in the United States and Mexico, diagrammed the supply chain structures in USA-Mexico recruitment in five broad models.<sup>62</sup> Adapting those five models to the Canadian context, they can be illustrated as follows:

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<sup>61</sup> As Philip Martin has observed, “Private recruiters can get into the job-matching business with few start up costs; their major asset is their contacts with workers seeking jobs and employers seeking workers”: Martin, “Regulating private recruiters,” above note 44 at p. 15.

<sup>62</sup> Centro de los Derechos del Migrante, Inc., *Recruitment Revealed* (January 2013) at pp. 11–12, available online at [www.cdmigrante.org](http://www.cdmigrante.org).

## Recruiter Supply Chain Models



There are three additional variations that can be added to these models.

First, in some cases, a single private employer has signed a tripartite agreement with an intergovernmental organization and the government of the origin country to recruit labour. For example, in Canada, Maple Leaf Foods has signed such tripartite agreements with the IOM and the governments of Honduras and Mauritius. In these cases, the IOM in conjunction with the local government identify, recruit, document, prepare, and arrange the travel of workers from those countries to work in Maple Leaf's food processing plants.<sup>63</sup>

Second, in some cases, a group of employers can sign an agreement with an international recruiter to recruit workers on a sectoral basis. Guatemalan workers who migrate to Canada under the Agricultural Stream have, at various times, been subject to this model of private bilateral agreements. At various

<sup>63</sup> Global Forum on Migration and Development, *Compendium of Good Practice Policy Elements in Bilateral Temporary Labour Arrangements*, follow-up to GFMD 2007 Roundtable 1.2; International Organization for Migration, <http://www.iom.int/cms/privatesector> (accessed 6 December 2013). Maple Leaf Foods also has a bilateral agreement with the IOM for recruitment in Colombia.

times, provincial employer organizations that were developed to manage producers' requests for foreign labour<sup>64</sup> have signed bilateral agreements with the IOM. Under these agreements, the IOM has operated as the exclusive or primary recruiter for the sector in accordance with the specific memorandum of agreement signed with each provincial producer organization.<sup>65</sup>

Third, under the governmental bilateral agreements that create the SAWP, recruitment in the origin country is conducted by the local government. Reflecting on the supply chain modelling above, this government-to-government arrangement introduces the variation of a government or public employment service as an alternative that links employer and worker.

This modelling is helpful in thinking critically about the nature of the pipeline that brings migrant workers to Canada. One end of the pipeline is inevitably in the origin country. **But, from a regulatory perspective, it is very important that one end of the pipeline is always in Canada.** Thinking critically about the location, the shape, and the length of the pipeline helps to identify the opportunities to build security for workers into that system. It also helps reveal if a regulatory model facilitates a “chain of deniability” — in which a Canadian-based recruiter or employer can disavow responsibility for the actions of its “helpers” — or if the laws enforce accountability along the supply chain.

In this respect, it is valuable to reflect on the lessons learned from reforming sweatshops in the garment trade in the early twentieth century. As Bruce Goldstein writes, “the origins of the ‘sweatshop’ ... are in labor contracting.”<sup>66</sup> As with present-day recruiters of transnational migrant workers, labour contractors compete on price and then, directly and through subcontractors, “sweat” their profit out of workers. (This is done in the garment trade by lowering pay, employing child labour, reducing safety and environmental standards; and in transnational migration through recruitment fees, interest, and rent.) The response in the garment industry — both historically and currently, with renewed focus in the wake of the 2012 Rana Plaza factory collapse — was to impose accountability up the supply chain to the ultimate employer. As is outlined in Part VI, publicly revealing the links in the recruitment supply chain

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<sup>64</sup> The employer groups are the Foreign Agricultural Resource Management Services (FARMS) in Ontario, Fondation des Entreprises en Recrutement de Main-d'œuvre agricole Étrangère (FERME) in Quebec, and the Western Agricultural Labour Initiative (WALI) in Alberta and British Columbia. FERME terminated its agreement with the IOM in 2011, at which point FERME opened its own office to conduct recruitment directly in Guatemala: Christine Hughes, “Costly benefits and gendered costs: Guatemalans' experiences of Canada's 'Low-Skill Pilot Project,’” *Legislated Inequality*, above note 4 at p. 141. For current practices in Ontario, see FARMS' website at <http://www.farmsontario.ca/lowskill.php> (accessed 7 December 2013).

<sup>65</sup> GFMD, *Compendium of Good Practice Policy Elements*, above note 61; Hughes, “Costly benefits and gendered costs,” above note 62 at p. 141.

<sup>66</sup> Bruce Goldstein, “‘Merchants of labor’ in three centuries: Lessons from history for reforming 21<sup>st</sup> century exploitation of migrant labor,” *Merchants of Labour*, above note 6 at p. 32.

and imposing accountability up the supply chain characterizes current best practices in transnational labour recruitment.

### 3. Paying to work

As is detailed in Part IV, a longstanding tripartite international consensus roundly condemns the practice of charging workers — and in particular migrant workers — for access to jobs. Recruitment is a normal part of running a business. International labour and human rights norms therefore recognize that employers alone should bear the cost of recruitment.

Nevertheless, recruiters (and employers) continue to charge migrant workers fees to get a job. Even though these practices have been documented and condemned in Canada, they persist and remain systemic. Despite an Ontario law that prohibits recruitment fees for live-in caregivers, the Caregivers' Action Centre reports that two-thirds of its members have been charged fees *after* the law was introduced. And while comprehensive data on the practice is not available, interviews with workers in other low-wage sectors — including agriculture, food processing, warehouses, and restaurants — confirm that the practice is widespread, even routine.

#### i. Recruitment fees

Expressed in Canadian currency, the fees that recruiters charge vary significantly depending on the origin country and the type of work into which the worker is being placed. Fees can start at around \$1,000 for workers but most frequently range between \$4,000 and \$10,000. Some workers, however, have paid as much as \$12,000 to \$15,000 for jobs in Ontario that pay at or near minimum wage.

Recruiters generally do not break down the recruitment fee with an explanation of charges. Rather, workers are typically charged a lump sum to “process an application.” Sometimes, recruiters demand an initial fee to begin the application process, a second instalment when the LMO is approved, and a third instalment in order to receive the work permit. Some workers reported that after paying an initial fee to begin the application, the recruiter delayed the process, sometimes for a year or more, and then demanded an extra fee — essentially a second application processing fee — before they actually began the application process. Some workers' recruitment fees were classified as payment for “training” or preparation of resumes even though no training was requested or provided and no resumes were required.

In some cases, workers pay the recruitment fees directly to an individual or a company or bank account located in Canada. In other cases, they pay the fee to the recruiter agent located overseas. In some cases, they pay one or more initial



instalments to a recruiter agent overseas and one or more instalments after they have arrived in Canada.

Some workers are provided with documents and receipts upon payment of the fees, including documents showing that fees are transferred to individuals in Canada. More frequently, recruiters refuse to provide any receipts or they provide receipts that inaccurately describe their purpose. Moreover, workers reported that recruiters routinely warn them not to disclose that they have paid fees and to deny that they have done so if they are asked. Workers also reported that recruiters also routinely and explicitly warn them to stay away from unions and community organizations. As a result, the migrant workers who were interviewed expressed very high levels of fear about discussing recruitment practices. They expressed fear that the recruiters' Canadian-based agents would find out that they had disclosed this information. And they expressed deep fears about the repercussions for their families back home. Even after the recruitment fees had been paid off, many workers continued to express fear of their recruiters.

While recruitment fees of \$4,000 to \$10,000 are remarkable enough in Canadian currency, their true impact only becomes apparent when the fees are converted into the workers' home currency. In reality, **these fees typically represent between six months to two years' earnings in the workers' home currency and in some cases considerably more.** The examples outlined below are representative of the impact of fees that workers are being charged for work in various sectors.

Live-in caregivers typically reported being charged between \$3,500 to \$5,000 *plus airfare* for work in Ontario.<sup>67</sup> Some caregivers reported paying fees in the range of \$7,000 to \$9,000. The highest fee reported by a live-in caregiver was \$12,000.<sup>68</sup> Recalling that \$3,500 is at the lowest end of the fee scale charged to caregivers, the treatment of live-in caregivers arriving from Hong Kong helps illustrate what a \$3,500 recruitment fee actually signifies for the workers. Expressed in Hong Kong dollars, workers arriving from Hong Kong were charged recruitment fees ranging from HK\$22,000 to HK\$28,000.<sup>69</sup> **Workers reported that these fees were equivalent to their entire salary earned over eight to twelve months. On top of the recruitment fee, these workers paid thousands of dollars more in Canadian currency for their flights to Canada, despite the fact the LCP mandates that employers pay these costs.**

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<sup>67</sup> Interviews with migrant workers, March 2013 to November 2013.

<sup>68</sup> Data provided by Caregivers' Action Centre.

<sup>69</sup> At current exchange rates, HK\$22,000 is equivalent to just over CAN\$3,000 and HK\$28,000 is equivalent to CAN\$3,850. See Bank of Canada, "Daily currency converter," <http://www.bankofcanada.ca/rates/exchange/daily-converter/> (accessed 7 December 2013).

Guatemalan workers reported paying recruitment fees between \$1350 and \$2,500 for work in the agricultural sector. Expressed in Guatemalan quetzals, workers paid from Q10,000 to Q20,000.<sup>70</sup> In some cases, workers reported that the payments would be staged: an initial payment of Q10,000 would entitle a worker to be considered for a placement overseas, a second payment of Q7,000 would ensure that the worker actually received a job placement, and a third payment of Q3,000 would give the worker the opportunity to choose the kind of work into which they would be placed. Some workers were not charged an initial fee to enter the program but upon receiving a placement were charged Q13,000 plus additional fees of Q3,600 for “paperwork.” Some workers reported being charged twice that amount. The workers reported that the **entire earnings over six months at a good job** would be needed to make Q10,000 in Guatemala. Those “good jobs” were not in fact available in the rural communities from which the workers migrated.

Filipino workers being brought to work in food processing jobs in Ontario are currently being charged recruitment fees of \$7,000. Converted into Philippine pesos at current exchange rates, this is equivalent to nearly ₱295,000.<sup>71</sup> These fees have increased from the \$3,750 to \$5,000, or ₱150,000 to ₱220,000, that workers were paying over the last five years. The workers interviewed reported that in the Philippines they were earning only ₱300 to ₱350 *per day* — wages that fall within the range of daily minimum wage rates set by the Philippine Department of Labor and Employment’s National Wages and Productivity Commission.<sup>72</sup> **At these wage rates, it would take the entire wages that a worker earned over two to three full years at home to match what they paid in recruitment fees.**

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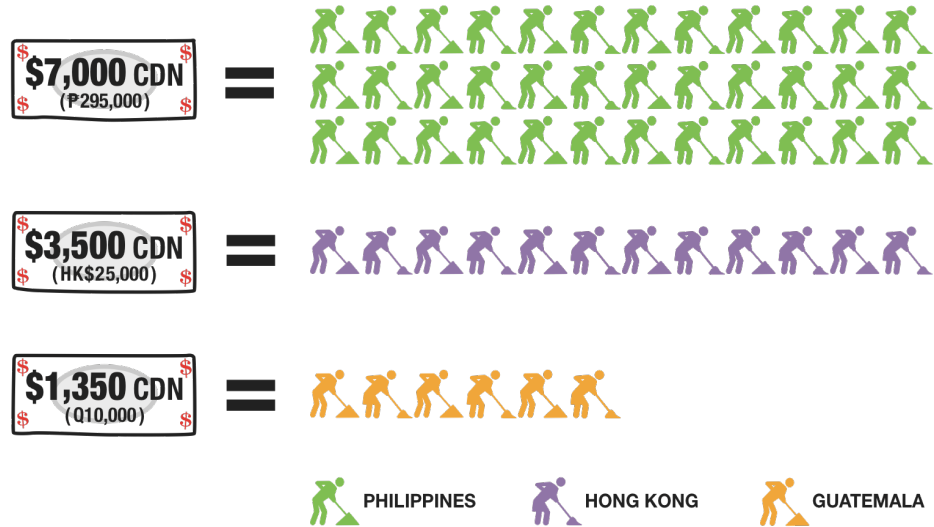
<sup>70</sup> At current exchange rates, Q10,000 is equivalent to CAN\$1,350 and Q20,000 is equivalent to CAN\$2,700. Bank of Canada, “Daily currency converter,” <http://www.bankofcanada.ca/rates/exchange/daily-converter/> (accessed 7 December 2013).

<sup>71</sup> Bank of Canada, “Daily currency converter,” <http://www.bankofcanada.ca/rates/exchange/daily-converter/> (accessed 4 January 2014).

<sup>72</sup> Government of Philippines, Department of Labor and Employment, National Wages and Productivity Commission, *Summary of Current Regional Daily Minimum Wage Rates — Non-Agriculture, Agriculture as of October 2013*, online at [http://www.nwpc.dole.gov.ph/pages/statistics/stat\\_current\\_regional.html](http://www.nwpc.dole.gov.ph/pages/statistics/stat_current_regional.html) (accessed 7 December 2013).

**Typical Lower-end Recruitment Fees**

**Salary Equivalence in Months of Work Needed at Home to Match Recruitment Fees**



The fees reported by workers in this research are consistent with recruitment fees that have been publicly reported across Canada for years. As early as 2007, the Alberta Federation of Labour’s (AFL) Temporary Foreign Worker Advocate reported that, in over 70% of the cases handled by the Advocate, labour brokers were demanding fees of \$3,000 to \$10,000 from individual migrant workers in addition to fees the brokers had charged to the employer.<sup>73</sup> Two years later, the AFL reported that practices had “actually gotten much worse,” as recruiters shifted their practices to demand payment in the worker’s home country before arriving in Canada and “brokers based in the home country frequently use threats of violence against the worker or their family to coerce full payment of the fees or to ensure the worker does not complain to authorities about the illegal charges.”<sup>74</sup>

In Ontario, as early as 2009, the Caregivers’ Action Centre, Workers’ Action Centre, and Parkdale Community Legal Services, in submissions to the Ontario government, reported that migrant workers were being charged \$500 to \$10,000 for jobs in Ontario.<sup>75</sup> In that same year, the House of Commons Standing Committee on Citizenship and Immigration heard evidence that recruiters were charging between \$2,000 and \$25,000 for jobs in Canada.<sup>76</sup> In 2011, the United Food and Commercial Workers Union Canada (UFCW Canada)

<sup>73</sup> AFL, *Alberta’s Disposable Workforce*, above note 4 at p. 11.

<sup>74</sup> AFL, *Entrenching Exploitation*, above note 4 at p. 13.

<sup>75</sup> Caregivers’ Action Centre, Workers’ Action Centre, and Parkdale Community Legal Services, *Proposed Amendments to Bill 210, An Act to protect foreign nationals employed as live-in caregivers and in other prescribed employment* (30 November 2009) at pp. 6–7.

<sup>76</sup> Standing Committee on Citizenship and Immigration, *Temporary Foreign Workers and Non-Status Workers*, above note 3 at p. 30, note 74.

reported that, in the agricultural sector, “fees to employment brokers ... can equal half the worker’s annual pay or more.”<sup>77</sup> In 2011, the Law Commission of Ontario reported that migrant workers in minimum wage jobs in Ontario had paid \$5,000 to \$12,000 in recruitment fees.<sup>78</sup>

Very few legal claims have proceeded against recruiters in Canada. Where workers have come forward, their legal claims identify significant recruitment fees, including \$4,000 fees charged to live-in caregivers in British Columbia<sup>79</sup> and \$6,000 to \$7,000 in fees plus a further \$1,000 for airfare charged to restaurant workers.<sup>80</sup>

## ii. *Recruitment debts*

Because the recruitment fees are so disproportionate to the workers’ earnings in their home countries, workers almost always need to borrow money to pay the recruiters. Workers described three broad strategies they and their families pursue in order to pay off the recruitment fees.

Workers in the most advantageous position had relatives — often a sibling, cousin, aunt, or uncle — already working as migrants in Canada, the United States, or Europe. After paying off their own recruitment fee, those relatives saved money earned in the foreign currency to cover the next family member’s recruitment fee.

In some cases, extended families pooled their collective savings to pay the fees to send one family member abroad. This leaves the extended family in very precarious circumstances because, having exhausted their own reserves, they are heavily dependent on the one migrant worker for ongoing support.

In many cases, migrant workers must borrow money to pay recruiters. Again, because the fees charged are so disproportionate to the workers’ earnings in their home countries, banks will not lend them the money they need. Workers are then forced to borrow from informal money lenders. Often, it is the recruiter who facilitates the connection with the money lender. Sometimes, the recruiter lends the money to the worker. In all cases, workers who have borrowed money report paying oppressive compound interest rates ranging from 3% to 8% *per month*. Workers from various countries reported that they are required to sign over the deeds to their family homes or lands, or give the money lender a share of a family business. If they are unable to repay the loan, the family property is lost.<sup>81</sup>

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<sup>77</sup> UFCW Canada, *The Status of Migrant Farm Workers in Canada 2010–2011*, above note 4 at p. 11.

<sup>78</sup> Law Commission of Ontario, *Vulnerable Workers and Precarious Work*, above note 11 at p. 85.

<sup>79</sup> *Prince George Nannies and Caregivers Ltd. v. British Columbia (Employment Standards Tribunal)*, 2010 BCSC 883.

<sup>80</sup> *Dominguez v. Northland Properties Corporation*, 2012 BCSC 328.

<sup>81</sup> See also Centro de los Derechos del Migrantes, *Recruitment Revealed*, above note 60 at p. 18.

As a result, low-wage migrant workers are arriving in Ontario under a significant debt burden. What must be remembered is that **these recruitment fees are being paid to secure minimum-wage jobs in the province.** Most of the workers interviewed were being paid the hourly minimum wage of \$10.25. Some workers were paid *below* minimum wage. The highest-paid worker interviewed was earning just above \$11.00, after working full time for the same employer for more than five years. According to the 2013 prevailing wage set for the LCP, live-in caregivers are supposed to receive \$10.77 per hour. However, all of the caregivers who were interviewed reported being paid a flat monthly fee ranging from \$1,000 to \$1,300 per month, regardless of the number of hours they worked. Many reported regularly working 60 hours or more per week and none were paid overtime. Beyond this, many were regularly “asked” to do additional unpaid “babysitting” in the evenings and on weekends.

So it is from these low wages that workers are required to repay their recruitment fees and the mounting interest burdens. Some workers whose fees converted more favourably to Canadian currency were able to pay back recruitment fees in their first six months. More typically, workers reported that it took one to two years to repay the recruitment fees. Many workers said that the first two years of their contract is needed to pay off the fee and the second two years are when they hope to earn enough to make the transnational migration worthwhile. In the meantime, the fees bind them tightly to both the recruiter and the employer who brought them to Canada.

The workers who were in the worst position were those whose contracts in Canada were terminated earlier than promised (sometimes after only a few months, when they had been promised two years of work). As a result, these workers returned to their home country still owing almost their full recruitment fees, but without the Canadian income stream that would enable them to pay off the debt. Instead, they had to promptly borrow even more money, this time at even higher interest rates, in order pay the recruitment fees to secure a second overseas placement that would allow them to pay off their initial recruitment debt.

#### 4. How recruitment practices exacerbate insecurity created by the temporary labour migration programs

A recruiter’s influence does not end when a worker is placed in a job in Ontario. Instead, an abusive recruiter can extract further profit by exacerbating insecurities created by the conditions imposed by Canada’s temporary labour migration programs. It is important to understand how these different legal conditions — some imposed through the federal temporary migration programs, others through provincial law — intersect to create the space within which exploitative recruitment flourishes.

**Tied work permits** create a prime source of insecurity that recruiters and employers exploit. As outlined in Part II, the work permits issued through the federal temporary labour migration programs tie a worker to a single employer. They only allow a migrant worker to work for the specific employer named on the permit, in the location named on the permit, in the job named on the permit, for the period named on the permit. If the migrant worker performs work that is inconsistent with those restrictions, the worker is working “without status” — contrary to the *Immigration and Refugee Protection Act*.

Some workers described arriving in Ontario and being placed with the employer named on the permit. The employer in turn provides the worker with an “interest-free loan” with which to repay the debt to their recruiter or money lender. The employer then deducts the amount of the loan from the worker’s paycheque until it is repaid, effectively placing the worker in debt bondage. Even if such a loan is provided with no ill intent on the part of the employer, for the worker it creates both a financial tie and sense of moral obligation to the employer that reinforce the pre-existing dependence created by the tied permit. This allows an employer to make increased demands on the worker and very effectively prevents the worker from complaining about mistreatment.

Much more frequently, the tied work permit gives the recruiter enormous power to immediately deprive the migrant worker of authorized status by placing them in jobs that fail to match the conditions on the permit.

Many workers find that, after depleting their families’ savings or borrowing money to pay recruitment fees, they arrive in Canada to find that the job they were promised does not exist, that it is significantly different from what they were promised, that it is different from what appears on their work permit, or that it is for a much shorter period than promised. The worker does not learn of this contract substitution until after they are physically in Canada. Having been deliberately forced out of status by the recruiter, the worker is isolated from a support system, without the funds to support themselves or return home, and yet subject to a debt that they must immediately start repaying. The Canadian-based recruiter or agent leverages the worker’s now-irregular status to place the worker in employment with even more oppressive conditions.

UFCW Canada described this dynamic in private recruitment in the agricultural sector as establishing a system of “indentured labour” in which workers’ “income in Canada largely returns in fees to the recruiters.” The Union, which operates multiple agricultural worker support centres in Ontario and across Canada, reports that

sometimes TFW’s [temporary foreign workers] discover when they arrive that the jobs they were recruited for don’t exist; or the year of employment they expected turns into only months and they are terminated. Meanwhile, the debt they owe forces

them into an illegal, under-the-table contractor system that feeds them back at a lower rate, sometimes to the same employers who let them go.<sup>82</sup>

This practice of being forced out of status is also widely reported among live-in caregivers. In fact the practice is so common it has its own name — “**Release on Arrival.**” Data from the Caregivers Action Centre indicates that at least 19% of members surveyed arrived in Ontario to find the job they were promised was false.<sup>83</sup>

Release on Arrival typically follows this pattern: A caregiver will arrive in Canada and be picked up at the airport by the Canada-based recruiter. The recruiter will immediately tell the caregiver that the employer is no longer available or has gone away on vacation, or will hand the caregiver a termination letter from an “employer” who the caregiver has never even met. The so-called “employer” may be either a fictitious person or a real person who never had any intention of hiring a caregiver but who receives money from the recruiter to allow their name to be used. In 2009, in its investigative series on exploitation of caregivers, the *Toronto Star* confirmed this practice, describing how a recruiter approached a *Toronto Star* editor in a city park and offered her \$300 to use her name and address on an LCP application.<sup>84</sup>

This toxic interaction between tied work permits and recruiter debt is exacerbated by requirements for **tied housing** that are also imposed by the temporary migration programs.

Under the LCP, caregivers are required to live in their employer’s homes. When subject to Release on Arrival, these workers are not only jobless and out of status, they are also homeless. The recruiter then uses this as further leverage for exploitation. At this stage, the recruiter will typically take the caregiver to the recruiter’s home and promise to find them another employer. Sometimes, the caregiver will be without work and without pay for weeks or months, during which time the pressure of their debt mounts. The recruiter may send the caregiver out to work on a series of different jobs. It can be caregiving work or other work, such as house cleaning, until a caregiving position “becomes available.”

Even where the recruiter subsequently places the caregiver in a legitimate caregiving position, it can take up to six months for a new employer to apply for and receive an LMO and for the worker to apply for and receive a new work permit. Throughout this period, the caregiver is forced to work without status at

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<sup>82</sup> UFCW Canada, *Status of Migrant Farm Workers in Canada 2010–2011*, above note 4 at pp. 16–17.

<sup>83</sup> Data provided by Caregivers’ Action Centre. One quarter of members surveyed did not answer the question about release on arrival. Of the members who did answer the question, 26% were released on arrival.

<sup>84</sup> Brazao and Cribb, “Nanny blacklist proposed,” *Toronto Star* (22 March 2009), above note 7.

rates well below the mandatory prevailing wages. Because the work is performed out of status, it is undocumented and cannot be counted toward the 24 months that a caregiver must complete in order to apply for permanent resident status.

In some cases, caregivers reported that recruiters would exploit this precariousness to cycle them through multiple jobs, keeping them out of status for extended periods while collecting multiple fees for the same placement. For example, Caregiver A who is Released on Arrival may subsequently be placed with Family X who legitimately applied for a worker under the LCP. However, the position with Family X is in reality supposed to be filled by Caregiver B. Caregiver A is told that her new LMO and work permit are being processed. Meanwhile, when Caregiver B arrives in Ontario, she is told that her employer is no longer available and, now without status, is shifted on to Family Y. Caregiver A is then moved again before receiving papers that would regularize her status with Family X and is replaced by Caregiver C. And the pattern continues. Every time the caregiver is replaced, the recruiter earns a new recruitment fee.

**Tied housing** also affects workers in the Agricultural Stream who must live in employer-provided housing and workers in the Stream for Lower-skilled Occupations for whom tied housing is not mandatory but who in practice often live in employer-provided housing. Some workers in these programs reported that the recruiter who placed them in their job also manages housing arrangements for the employer. In these circumstances, the recruiter extracts money from the workers not only through charging recruitment fees but also through rent. This increases the incentive for the recruiter to maximize the number of workers in each house. Workers commonly report having 8 to 10 workers in a two-bedroom house or 16 workers in a four-bedroom house. Some workers report having up to \$50 per week each deducted from their paycheques for these housing conditions, with the result that recruiters were receiving \$3200 per month in rent on a single house.<sup>85</sup>

Recruiters may also charge fees to workers when they need to **renew their work permits**. Work permits can in fact be renewed online by workers directly for a cost of \$150.<sup>86</sup> However, workers do not always have this knowledge, access to the Internet, or the English literacy skills to do these renewals on their own. Moreover, workers whose prior contract has finished and who are seeking a new employer often lack the information that will allow them to connect directly with

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<sup>85</sup> There are many reports of this kind of practice across the country. For example, see Jeremy Nuttall, "Why 'abuse' of temp foreign workers is hard to stop" (20 January 2014), *The Tyee*, reporting that four migrant workers sharing a one-bedroom apartment were charged \$2,000 per month for an apartment that was leased by the employer for only \$900, online at <http://thetyee.ca/News/2014/01/20/Why-Abuse-is-Hard-to-Stop/> (accessed 8 March 2014).

<sup>86</sup> CIC, "Extend your temporary work permit," online at <http://www.cic.gc.ca/english/work/extend-stay.asp> (accessed 8 December 2013).



employers who want to hire migrant workers. This information gap can be worse for workers in rural communities.

Ontario-based recruiters have at times charged fees as high as \$1,500 to renew or extend work permits. A community organizer reports that a recruiter in southern Ontario demanded that workers pay \$300 to \$600 each for their names to be included on a list of employees on an LMO renewal application. Workers who refused to pay were left off the application and were forced to leave the country.<sup>87</sup> Workers, particularly those whose first language is not English, reported that they needed to maintain good personal relationships with Canadian-based recruiters who do speak their language. Where workers were compliant with employer demands, paid their recruitment fees, and did not complain about treatment, the recruiter would put forward their relatives' names for future contracts (upon payment of a further recruitment fee). Where workers complained, the recruiter denied the workers permit renewals and their relatives were cut off from access to jobs in Canada.

Finally, the impact of exploitative recruitment practices echoes right through to the final stages of a worker's labour migration cycle. At a collective level, the burden of recruitment fees combines with the impact of the four-year in/four-year out rule to effectively undermine leadership within the migrant worker community. As noted above, permits are granted for two years and can be renewed for a further two years. Workers often spend the first one to two years of their contract paying back their initial recruitment fees and hoping to secure a renewal of their contract. It is only after they have been in Canada for a few years that they are free of their debt burden, have extracted themselves from initial placements that were abusive, and have developed the knowledge and connections in the community to know what their rights are and how to enforce them. It is typically only then that they begin to speak out about ill treatment. Just as they are reaching this point where they have acquired the knowledge and security to speak out and provide leadership and voice within their communities, the four-year rule will force them to leave the country. Workers who have spoken out earlier have been denied permit renewals or transfers to other jobs, and as a result, some have been forced to leave Canada.

## 5. Interprovincial recruitment

While the analysis above has focused on the transnational aspects of temporary labour recruitment, the movement of transnational migrant workers across provincial borders must also be noted. Two different scenarios are significant.

The first is a variation of the contract-substitution dynamic described above. Community organizers report cases of workers who have paid fees for work in

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<sup>87</sup> Interview with Cathy Kolar, Legal Assistance Windsor (November 2013).

one province but, instead, on arrival are taken to employers in a different community or even a different province.<sup>88</sup> Again, because the jobs the workers are placed into are different from the ones identified on their work permits, the workers are out of status and forced into extremely precarious circumstances. Where there are differences between provincial regulation of recruiters, workers may be brought into a province that scrutinizes recruitment fees less strictly and later moved across borders. For this reason, rigorous standards that are consistent across provinces and that establish interprovincial agreements on information sharing are necessary to prevent exploitation.

The second is a variation of the permit-renewal dynamic. Workers whose current contracts have terminated and who are looking for subsequent work may be charged as much as \$2,000 to \$3,000 for jobs in another province. Sometimes these are fees paid to transfer to jobs in Ontario. Sometimes they are fees for jobs in other provinces, such as Alberta, that have some, albeit limited, opportunities for low-wage workers to apply for permanent resident status through their Provincial Nominee Programs. Finally, in some cases, recruiters charge fees to workers to connect them to jobs that will allow them to transfer from either the Agricultural Stream or Stream for Lower-skilled Occupations into the LCP, again in order to provide the worker with access to a job that may lead to the opportunity to apply for permanent status.

## B. Seasonal Agricultural Worker Program

As mentioned in Part II, the recruitment and transfer of workers under the SAWP is regulated in Canada, Mexico, and the Caribbean by the designated government and non-governmental agencies. Within this framework, the workers' home governments are responsible for recruiting and selecting employees who will participate in the SAWP. This model of bilateral government-to-government agreements that regulate temporary labour migration is considered a best practice by the ILO because it provides for organized migration and prevents exploitation by private recruiters.<sup>89</sup>

While the SAWP's bilateral agreements are a best-practice model, the specifics of how they are implemented do not wholly eliminate the insecurity and possibility of unfair treatment. Three particular areas of concern are repeatedly raised by workers.

First, contrary to the international labour and human rights norms prohibiting recruitment fees, SAWP workers from the Caribbean pay a portion of their earnings in fees that cover their recruitment. Caribbean workers are subject to a **25% holdback** on each payroll, which is submitted to the government agent of

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<sup>88</sup> Interviews with Justicia for Migrant Workers.

<sup>89</sup> See, for example, ILO Convention 97, *Migration for Employment Convention (Revised)* (1949) at Article 10 and Annex II.

their home country. Under the terms of the contract, a “specified percentage of the 25% remittance to the government agent shall be retained by the GOVERNMENT to defray administrative costs associated with the delivery of the program.”<sup>90</sup> The portion of the 25% holdback that is not remitted to the government for “administrative costs” effectively operates as a deposit that the employee can only recoup upon completion of the contract. This operates as a disincentive to a worker raising concerns about poor working or housing conditions.

Second, workers under the SAWP face a cycle of **perpetual recruitment**. Apart from a few bargaining units of migrant workers that have been unionized outside of Ontario, workers under the SAWP have no job security, regardless of how long they have been in the program. As a result, they are tremendously dependent upon the goodwill of their employer who has the power to “name” them to return the following year. While naming can provide a degree of job security and allow a worker’s return to Canada to be processed more quickly, the power to name is exercised unilaterally by, and at the discretion of, the employer. It is not a right to recall based on seniority. It has been repeatedly reported that this dependence on their employer to name them (and to provide good reports back to their home government) makes workers under the SAWP reluctant to criticize working or living conditions or complain about rights violations.<sup>91</sup>

The precariousness created by this perpetual recruitment is exacerbated by the institutionalized competition between Mexico and the Caribbean countries that is built into the structure of the SAWP. Employers can, and at times do, strategically change the source countries from which they recruit workers. This serves to dampen workers’ resistance to poor treatment and to dampen pressure from sending countries to improve conditions. This competition has intensified over the past decade with the introduction of the Agricultural Stream.<sup>92</sup> Workers from countries beyond the SAWP participants — such as Guatemala, Honduras, Thailand, Peru, and the Philippines — are increasingly being brought in to work in Ontario agriculture. This substitution of SAWP workers with workers under

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<sup>90</sup> *SAWP Contract — Caribbean — 2012*, Article IV(1).

<sup>91</sup> See, for example, North-South Institute Policy Brief, *Migrant Workers in Canada: A Review of the Canadian Seasonal Agricultural Workers Program* (Ottawa: North-South Institute, 2007) at p. 4.

<sup>92</sup> The nature of this competition is apparent in an advertisement posted by the Government of Honduras in an agricultural production magazine in 2011. The advertisement provides both a 1-800 number and a website through which employers are invited to “report problems with workers” and promises that “in case of contract default by worker, replacement costs covered in Honduras 2011 budget.” See discussion of this advertisement in Kerry Preibisch, “Development as remittances or development as freedom?” in *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case*, Fay Faraday, Judy Fudge, and Eric Tucker, eds. (Toronto: Irwin Law, 2012) at pp. 98–99. See also the evidence of Mexican consular employees in *Certain Employees of Sidhu & Sons Nursery Ltd. and Sidhu & Sons Nursery Ltd v. United Food and Commercial Workers International Union Local 1518*, (20 March 2014) B.C. LRB B56/2014; 2014 CanLII 12415 (BC LRB), esp. at para. 24 and 67.

the Agricultural Stream also serves to undermine the leadership that has grown among long-term SAWP workers.

Third, the precariousness of perpetual recruitment leaves workers vulnerable to being blacklisted from the SAWP if their conduct fails to meet the employer's or government's demand for a "compliant" workforce. Community organizers and SAWP workers in Ontario report that when workers who have been in the program for a number of years begin to assert leadership in the migrant worker community an employer may decide not to name them in future. These worker leaders are either transferred to another province or excluded from the SAWP altogether. Similarly, when groups of migrant workers who have worked together for several years begin collectively to assert their rights and raise concerns about mistreatment or act as advocates and leaders within the migrant worker community, the group may be dispersed between different farms and across different provinces.

The issue of blacklisting has been hotly contested in British Columbia where Mexican migrant workers under the SAWP have unionized in bargaining units represented by UFCW Canada. The Union filed complaints at the B.C. Labour Relations Board alleging that the Mexican government and its Vancouver consulate had colluded with employers to blacklist migrant workers who were union supporters.<sup>93</sup> Three former employees of the Mexican consulate in Vancouver who had been responsible for administering the SAWP voluntarily gave evidence in the hearing about the instructions they were given by senior Mexican officials. Their evidence supported the Union's complaint. After years of litigation, in March 2014 the B.C. Labour Relations Board confirmed that Mexican authorities responsible for administering the SAWP had a policy to identify SAWP workers who were Union supporters or who had even contacted the Union and to block them from returning to Canada. The Board further found that the Mexican authorities had in fact blocked an employee because of his support for the Union and had altered entries in his employee file with the Mexican Ministry of Labour "after the fact to cover the truth of what actually occurred". The Union's complaint against the employer was not made out. But the Board found that conduct by the Mexican authorities constituted "a clear case of improper interference under the Code" which "would have a dramatic chilling effect on the Union's members" and which prevented them from expressing their true wishes on union certification. The Board further found that part of the senior Mexican officials' motivation in blacklisting union supporters was their fear that if Mexican workers unionized, Canadian

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<sup>93</sup> For detailed information about the case, including copies of the complaints that were filed at the labour board, evidence, legal submissions and media reports, see UFCW Canada, "Stop the Blacklisting of Migrant Workers," online at [http://www.ufcw.ca/index.php?option=com\\_content&view=article&id=2564&Itemid=342&lang=en](http://www.ufcw.ca/index.php?option=com_content&view=article&id=2564&Itemid=342&lang=en)

employers would replace them with workers from Guatemala.<sup>94</sup> There is no doubt, then, that the insecurity created through perpetual recruitment is a direct impediment to workers' capacity to exercise their fundamental human rights, including their freedom of association.

While problems faced by workers under the SAWP are structurally different from those faced by workers subject to private recruitment, the recruitment dynamics create a similar experience of precariousness. This leaves workers hesitant to speak out against unfair and illegal treatment for fear that doing so will jeopardize their opportunities to work and stay in Canada.

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<sup>94</sup> *Certain Employees – and – Sidhu & Sons Nursery Ltd. v. UFCW Canada Local 1518*, above note 92, esp. at para. 24-25, 60-80.

## PART IV: A Rights-Based Framework for Regulating Recruitment

While challenges faced by transnational migrants are complex, there is a strong and well-established rights-based framework anchored in both Canadian and international law that should guide policy development in this area. This rights-based framework also provides a benchmark against which existing laws can be measured.

In Canadian law, this rights-based framework is rooted in the *Canadian Charter of Rights and Freedoms* and in the statutory human rights codes that have been enacted at the federal level and within each province and territory. Though migrant workers have temporary immigration status in Canada, they are still protected by these laws. They are also protected — on the same basis as Canadian citizens and permanent residents — under labour and employment standards laws.

All government laws, policies, and actions in Canada must comply with the fundamental rights and freedoms guaranteed in the *Charter*. All the laws, policies, and government practices that shape Canada's temporary labour migration programs must, therefore, protect fundamental *Charter* rights, including freedom of expression, freedom of assembly, and freedom of association. Freedom of association also includes constitutional protection for workers' rights to join a union and to bargain collectively. Under the *Charter*, government laws, policies, and actions must also conform with the rights to life, liberty, and security of the person and the right to equality. For migrant workers, what is most significant is that the right to equality includes protection against discrimination based on race, national, or ethnic origin and citizenship, or combinations of those rights.

Ontario's *Human Rights Code* applies both to government and to private entities, including employers and recruiters. The *Code* protects every person's right to equal treatment without discrimination in various social areas including services, goods and facilities, housing, and employment. Discrimination is prohibited on a wide range of grounds including race, place of origin, ethnic origin, and citizenship. Like the *Charter*, human rights law also takes into account how these different grounds intersect. For example, the grounds of race,

place of origin, and citizenship could intersect to protect the distinct disadvantages faced by racialized workers with temporary immigration status.<sup>95</sup>

Governments, employers, and recruiters who have duties to uphold human rights under the *Charter* or *Code* are not permitted to ignore or exploit the precarious status of the people who will be subject to their laws and policies or business practices. The *Charter* requires government to take into account and accommodate the systemic disadvantage and marginalization of those who will be subject to the law and requires government to design laws and policies so that they secure effective protection of fundamental rights.<sup>96</sup> Meanwhile, employers and service providers — including recruiters — have a proactive legal obligation to acknowledge and accommodate these systemic disadvantages in order to ensure that their practices effectively protect human rights.<sup>97</sup>

The bedrock human rights norms that are expressed in the *Charter* and *Human Rights Code* must be made real. They must not express empty promises. As a result, they represent standards that laws regulating the treatment of migrant workers must meet in practice.

In 2013, the United Nations reaffirmed that a rights-based framework must govern transnational labour migration and, specifically, transnational recruitment practices. The UN's rights-based framework recognizes that “migrants are not commodities.”<sup>98</sup> It requires that labour migration policies be assessed against the global agenda for decent work and a development agenda that is anchored in the principles of human rights, equality, and sustainability.<sup>99</sup> This rights-based framework must analyze and address “inequalities, discriminatory practices and unjust power relations” that undermine sustainable development. It must be “normatively based on international human rights standards and operationally aimed at promoting and protecting human rights.” It must enhance “the capacity of duty bearers to meet their obligations and of rights holders to claim their rights.”<sup>100</sup> In summary,

a human rights–based approach to the design and implementation of migration policies means that States are

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<sup>95</sup> See also Marie Carpentier and Carole Fiset, *Systemic Discrimination Towards Migrant Workers* (Québec: Commission des droits de la personne et des droits de la jeunesse, December 2011).

<sup>96</sup> See, for example, *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016.

<sup>97</sup> *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*, [1999] 3 S.C.R. 3 (“*Meiorin*”); *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 (“*Grismer*”).

<sup>98</sup> United Nations, “Report of the Secretary-General on the promotion and protection of human rights, including ways and means to promote the human rights of migrants” (9 August 2013), United Nations General Assembly, A/68/292 at pp. 3–5.

<sup>99</sup> United Nations System Task Team on the Post-2015 UN Development Agenda, *Realizing the Future We Want for All: Report to the Secretary General* (New York, June 2010) at p. 23.

<sup>100</sup> UN, “Report of the Secretary-General on the promotion and protection of human rights,” above note 95 at p. 3.

obliged to formulate and scrutinize all such policies by measuring against human rights standards and benchmarks, and to strive to ensure that they are responsive to the human rights of all migrants, with a particular focus on the most vulnerable.<sup>101</sup>

In October 2013, the UN General Assembly High-level Dialogue on Migration and Development (UN HLD) confirmed that this rights-based framework must govern recruitment of low-wage migrant workers. In his remarks, Secretary-General Ban Ki-moon deplored the exploitation of “countless migrants [who] pay their life savings, and those of their families, to unethical recruiters and end up in debt bondage.”<sup>102</sup> The General Assembly adopted a Declaration that reaffirms “the need to promote and protect effectively the human rights of all migrants,” including through the recruitment process.<sup>103</sup> Civil Society stakeholders also participated in the formal UN HLD process. Civil Society’s proposal for an outcome and follow-up to the UN HLD specifically identified the need to regulate the migrant labour recruitment industry as one of the eight key priorities for the coming five years.<sup>104</sup>

These developments are significant because they highlight an international consensus that abuse in transnational labour recruitment must be addressed as a priority and that all laws and policies on transnational labour recruitment must be guided by a rights-based framework. As Canada and Ontario develop their domestic laws, they must also pursue compliance with these human rights-based norms.

The international human rights instruments that build the rights-based framework consist of the *United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*,<sup>105</sup> two *Conventions* and two *Recommendations* adopted by the International Labour Organization that are focused on the rights of migrant workers,<sup>106</sup> and a further ILO *Convention* and *Recommendation* focusing on the

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<sup>101</sup> UN, “Report of the Secretary-General on the promotion and protection of human rights,” above note 95 at p. 17.

<sup>102</sup> UN, Secretary-General, “Announcing ambitious eight-point agenda, Secretary-General urges international community to ‘make migration work’ for all” (3 October 2013), SG/SM/15367, GA/11435, DEV/3046.

<sup>103</sup> UN General Assembly, *Declaration of the High-level Dialogue on International Migration and Development* (1 October 2013), A/68/L.5. See also, United Nations, Office of the High Commissioner for Human Rights, *Migration and Human Rights: Improving Human Rights-Based Governance of International Migration* (Geneva: UN OHCHR, 2013).

<sup>104</sup> Civil Society, “5 years, 8 priorities, collaboration, action,” *The Five Year Action Plan* (2013), online at <http://hldcivilsociety.org/download-5-year-action-plan>.

<sup>105</sup> UN, *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, adopted by General Assembly resolution 45/158 of 18 December 1990.

<sup>106</sup> Convention 97, *Migration for Employment Convention (Revised)* (1949), adopted Geneva, 32nd ILC session (1 Jul 1949) and Convention 143, *Migrant Workers (Supplementary Provisions) Convention* (1975), adopted Geneva, 60th ILC session (24 Jun 1975).



rights of domestic workers, including migrant caregivers.<sup>107</sup> The ILO's *Private Employment Agencies Convention*, 1997, is also directly relevant to transnational worker recruitment.<sup>108</sup> The ILO has also published numerous reports and policy documents that provide detailed principles and practical guidance on how to develop laws, policies, practices, and actions to protect decent working conditions for migrant workers, including specific guidance on recruitment practices.<sup>109</sup>

Canada has not ratified the UN *Convention*, the ILO *Conventions* and *Recommendations* dealing with migrant workers, or the ILO *Convention* and *Recommendation* dealing with domestic workers. Nor has Canada incorporated any of them into Canadian law. While these instruments do not have the status of binding, enforceable law in Canada, they represent a broad, considered, global consensus on fundamental human rights norms. Even where Canada has not signed international human rights instruments, courts rely on them as persuasive sources for interpreting the scope and meaning of rights under the *Charter* and human rights laws.<sup>110</sup>

Moreover, these international instruments provide important practical policy guidance because the rights, values, principles, and best practices expressed in them represent a tripartite consensus on the part of the foremost international governance and international labour bodies. So, in assessing how to regulate labour recruitment in accordance with a human rights-based framework,

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<sup>107</sup> Convention 189, *Domestic Workers Convention* (2011), adopted 100<sup>th</sup> ILC session (16 June 2011); Recommendation 201, *Domestic Workers Recommendation* (2011), adopted 100<sup>th</sup> ILC session (16 June 2011). There are also detailed background reports and analyses addressing the need for international labour standards to protect decent work for domestic workers with particular attention to the needs of migrant domestic workers. See, for example, José Maria Ramirez-Machado, "Domestic work, conditions of work and employment: A legal perspective" (Geneva: ILO, 2003), Conditions of Work and Employment Series Paper No. 7; Asha d'Souza, *Moving Toward Decent Work for Domestic Workers: An Overview of the ILO's Work* (Geneva: ILO, 2010), Bureau for Gender Equality Working Paper No. 2; ILO, *Decent Work for Domestic Workers* (Geneva: ILO, 2010), Report no. IV(1) at the International Labour Conference, 99<sup>th</sup> Session, 2010, Fourth item on the agenda. See also the excellent collection of international and Canadian essays in the *Canadian Journal of Women and the Law's* special issue, "Regulating Decent Work for Domestic Workers" *Canadian Journal of Women and the Law* (2011), 23:1.

<sup>108</sup> Convention 181, *Private Employment Agencies Convention* (1997), adopted Geneva, 85<sup>th</sup> ILC session (19 Jun 1997).

<sup>109</sup> See, for example: ILO, *Towards a Fair Deal for Migrant Workers in the Global Economy*, above note 48; ILO *Multilateral Framework on Labour Migration: Non-binding principles and guidelines for a rights-based approach to labour migration* (Geneva: ILO, 2006) adopted by the Tripartite Meeting of Experts on the *ILO Multilateral Framework on Labour Migration* (Geneva, 31 October–2 November 2005); and *ILO Declaration on Social Justice for a Fair Globalization*, adopted by the International Labour Conference, 97<sup>th</sup> Session, Geneva (10 June 2008). The ILO website also has useful links to databases with statistics and research papers on international labour migration and a database of international good practices in labour migration: <http://www.ilo.org/public/english/protection/migrant/index.htm> (accessed 21 March 2012).

<sup>110</sup> For an analysis of how Canadian courts use international human rights law in interpreting domestic rights, see Patrick Macklem, "The international constitution" in *Constitutional Labour Rights in Canada*, above note 90 at pp. 261–285.

Canada and Ontario are not starting from scratch. Comprehensive principled and practical guidance, benchmarks, and best practices are available.

Each of the international instruments provides detailed statements on rights and protections that should be available to migrant workers. The summary that follows identifies seven key principles, pertinent to transnational labour recruitment, that emerge from these instruments.



### **International best practice #1: No recruitment fees**

It is recognized that recruiting employees is a normal part of running a business and employers must bear these costs. The ILO's *Private Employment Agencies Convention, 1997*, states: "Private employment agencies shall not charge directly or indirectly, in whole or in part, any fees or costs to workers."<sup>111</sup>

Convention 97 provides that public employment services must also be available to migrant workers free of charge.<sup>112</sup> The ILO's *Multilateral Framework on Labour Migration* also expressly states that laws must provide that "fees or other charges for recruitment and placement are not borne directly or indirectly by migrant workers."<sup>113</sup>



### **International best practice #2: Recruiter licensing and regulation**

Governments must regulate the process of recruitment, introduction, and placement of migrant workers.<sup>114</sup> In this respect, best practices advocate:

- restricting and supervising who may act in the recruitment, introduction and placement of migrant workers;
- implementing a standardized system of licensing or certification of recruiters;
- requiring recruiters to provide security deposits, such as a bond or insurance, "to compensate migrant workers for any monetary losses resulting from the failure of a recruitment or contracting agency to meet its obligations to them;"<sup>115</sup>

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<sup>111</sup> Convention 181, *Private Employment Agencies Convention, 1997*, Article 7(1). In Article 7(2) and 7(3), the *Convention* allows for some exceptions to this rule where the exception is "in the interest of the workers concerned" and is made following government consultations with the most representative organizations of employers and workers. In addition, the government must, in its annual reports under the ILO Constitution, identify and provide reasons for the exception. Canada has not ratified Convention 181.

<sup>112</sup> Convention 97, Articles 2 and 7(2) and Annex II, Article 4(2).

<sup>113</sup> ILO, *Multilateral Framework on Labour Migration*, above note 106 at p. 25.

<sup>114</sup> Convention 97, Annex I, Article 3; see also ILO, *Multilateral Framework on Labour Migration*, above note 106.

<sup>115</sup> ILO, *Multilateral Framework on Labour Migration*, above note 106 at p. 25.

- adopting effective laws that enforce accountability along the full length of the employment/recruitment supply chain, including “remedies from any or all persons and entities involved in the recruitment and employment of migrant workers for violation of their rights”,<sup>116</sup> and
- ensuring migrant workers have access to public employment placement services free of charge.



### **International best practice #3: Security of workers' property and documents**

Migrant workers have the right to security of their property, including the right that their identity, immigration, and work documents such as passports, work permits, and visas not be confiscated or destroyed (except by a public official who is duly authorized by law).<sup>117</sup>



### **International best practice #4: Security from exploitation**

Governments are required to safeguard the human rights of migrant workers and ensure effective protection from a wide range of abusive practices, including

- “private employment agencies which engage in fraudulent practices or abuses,”<sup>118</sup>
- forced labour,
- debt bondage, and
- human trafficking in labour.<sup>119</sup>

Governments also have an obligation to combat misinformation that is provided to migrant workers.<sup>120</sup>



### **International best practice #5: Employer registration and proactive supervision**

Governments must supervise the contracts between employers and employees. Before departing from their origin country, migrant workers must be provided with a written copy of their contract with clear information on the terms and conditions of work, including the occupation in which they will be engaged,

<sup>116</sup> ILO, *Multilateral Framework on Labour Migration*, above note 106 at p. 20.

<sup>117</sup> UN, *International Convention on the Protection of the Rights of All Migrant Workers*, above note 102, Article 21.

<sup>118</sup> Convention 181, *Private Employment Agencies Convention*, 1997, Article 8(1).

<sup>119</sup> See also the UN *Convention against Transnational Organized Crime* and Palermo Protocol, above note 18.

<sup>120</sup> Convention 97, Articles 2 and 3. See also UN, *International Convention on the Protection of the Rights of All Migrant Workers*, above note 102, Article 37.

conditions of work, and the minimum wages to which they are entitled.

Governments must establish mechanisms for the registration of contracts, and for providing information to workers about how employment contracts shall be enforced. Workers must have access to effective and accessible enforcement mechanisms, effective remedies, and legal services. The *Multilateral Framework* emphasizes “extending labour inspections to all workplaces where migrant workers are employed in order to effectively monitor their working conditions and supervise compliance with employment contracts,” and ensuring that labour inspectorates “have the necessary resources” and training to enforce rights.<sup>121</sup>



### **International best practice #6: Bilateral agreements**

Where the number of migrant workers going from one state to another is significant, international law recommends that states enter into agreements to regulate this migration.<sup>122</sup>



### **International best practice #7: Multilateral cooperation**

To enhance protection against exploitation, international instruments explicitly recognize the need for transnational and multilateral cooperation involving both state-to-state cooperation, government cooperation, and the support of civil society partners.

The instruments emphasize the importance of “creating and strengthening channels or structures for information exchange and international cooperation to address abusive migration conditions.”<sup>123</sup>

They also encourage governments to consult with social partners to formulate and implement measures to prevent and protect against abusive migration practices. They encourage facilitating the networking of workers’ organizations at a transnational level, between origin and destination countries, “to ensure that migrant workers are informed of their rights and are provided with assistance throughout the migration process.”<sup>124</sup>

In addition to these best practices, the international instruments recognize that labour migration is a process that continues over an extended period with many identifiable stages. They stress that protections must be available through all stages, including “preparation for migration, departure, transit and the entire

<sup>121</sup> Convention 97, Annex I, Article 5; ILO, *Multilateral Framework on Labour Migration*, above note 106 at p. 19.

<sup>122</sup> Convention 97, Article 10.

<sup>123</sup> ILO, *Multilateral Framework on Labour Migration*, above note 113 at p. 22.

<sup>124</sup> ILO, *Multilateral Framework on Labour Migration*, above note 113, pp. 20–25.

period of stay and remunerated activity in the State of employment as well as return to the State of origin or the State of habitual residence.”<sup>125</sup> In this respect, the United Nations has also recognized the danger of tied work permits. In his 2013 report the UN Secretary-General noted:

Many migrants, in particular low-skilled workers or migrants in a temporary or irregular situation, are vulnerable to exploitation and abuse in the context of employment. ... Tying migrants to specific employers encourages labour exploitation, prevents migrants from finding better opportunities and is therefore both undesirable from a rights-based perspective and economically inefficient.<sup>126</sup>

This detailed, rights-based framework illustrates that legal regulation of the conditions under which people migrate for work must take a holistic view that identifies all the different relationships engaged in labour migration and the power imbalance in those relationships in order to both guard against abuse and identify relationships that can provide support to migrant workers. It is with this framework in mind that this report turns to analyze the Ontario law that regulates migrant worker recruitment.

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<sup>125</sup> UN, *International Convention on the Protection of the Rights of All Migrant Workers*, above note 109, Article 1.

<sup>126</sup> UN, “Report of the Secretary-General on the promotion and protection of human rights,” above note 102 at p. 14.

## Rights-based Framework for Migrant Worker Recruitment



### 1. No Recruitment Fees

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### 2. Licensing and Regulation of Recruiters

- a. Restriction on who may act as a recruiter
  - b. Mandatory licensing of recruiters
  - c. Security Deposit paid by recruiters
  - d. Recruiter and Employer Liability along the full supply chain
  - e. Access to public employment placement services
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### 3. Security of Workers Property and Documents

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### 4. Security From Exploitation

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### 5. Registration and Supervision of Employment Contracts

- a. Mandatory registration of employment contracts
  - b. Proactive government inspection and supervision for contract compliance
  - c. Effective enforcement mechanisms
  - d. Legal support for migrant workers
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### 6. Bilateral agreements on recruitment

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### 7. Multilateral Cooperation

- a. Information sharing
- b. International cooperation to supervise recruitment practices
- c. Government cooperation with civil society partners
- d. Facilitation of transnational networking of worker organizations

## PART V: Protecting Migrant Workers from Exploitation in Recruitment

As set out in Part II, the **conditions imposed by the temporary labour migration schemes at the federal level** have a direct impact on workers' experience of security or insecurity as they move through the migration cycle. Do Canada's federal programs allow for permanent or temporary migration? Do they follow models of public employment placement services, bilateral government agreements, or privatized recruitment? Do conditions regarding work permits, housing, time limits, or accessible information constrain workers' capacities to resist exploitation? All of these factors affect the experience of recruitment.

In addition, **how the federal and provincial regulatory schemes interact** is also critical. Do federal and provincial schemes work together to provide active and effective multidirectional oversight that builds security? Do they appropriately engage the opportunities and actors who can contribute to building security?

Finally, the **regulatory model adopted at the provincial level** is of critical importance because provinces have direct responsibility for establishing standards for both employers and recruiters and establishing enforcement mechanisms.

While Part V focuses on analyzing Ontario's regulatory model under the *Employment Protection for Foreign Nationals Act*, some observations about the federal provisions on recruitment are warranted.

### A. Reflections on federal provisions on recruitment

As set out in Part II, the federal government, through Employment and Social Development Canada (ESDC), provides template contracts that employers and workers sign when applying for LMOs and work permits. These template contracts contain clauses that prohibit an *employer* from recouping *from an employee* the recruitment costs that the *employer has paid*. The language differs somewhat in the template contracts under each of the LCP, the Stream for Lower-skilled Occupations, and the Agricultural Stream. The broadest language appears in Article 6 of the LCP template contract, which prohibits the employer from recouping fees and requires an employer to reimburse an employee for fees paid to a recruiter *where an employee has proof* that they have paid those fees:

*The EMPLOYER shall not recoup from the EMPLOYEE, through payroll deductions or any other means, the fees they have paid to a third party recruiter or recruitment agency, or their authorized representative(s) for services related to hiring and retaining the EMPLOYEE.*

*NOTE: Should the EMPLOYER'S third party recruiter or recruitment agency, or their authorized representative(s) charge the EMPLOYEE for any recruitment fees, the EMPLOYER must reimburse the EMPLOYEE in full for any such costs disclosed with proof by the EMPLOYEE.<sup>127</sup>*

Article 11 of the template contract under the Stream for Lower-skilled Occupations states:

*The EMPLOYER shall not recoup from the EMPLOYEE, through payroll deductions or any other means, any costs incurred from recruiting the EMPLOYEE.<sup>128</sup>*

Article 4.3 of the template contract under the Agricultural Stream states:

*The employer shall not recoup from the temporary foreign worker, through payroll deductions or any other means, any costs incurred in recruiting or retaining the temporary foreign worker. This includes, but is not limited to, any amount payable to a third-party representative/recruiter.<sup>129</sup>*

While such provisions signal what should be appropriate employer conduct, they fail to provide effective protection for migrant workers for several reasons. First, the contract language does not actually touch the typical practice by which recruitment fees are extracted from workers. Typically, workers are required to pay fees directly to private recruiters — not to employers — and often they are required to pay in the origin country prior to departure. An employer who uses a private recruiter, and particularly a private recruiter with agents, partners, or affiliates located outside Canada, can entirely avoid the effect of the contract clause by requiring payment directly to the recruiter.

Second, although the LCP contract requires employers to reimburse workers for fees paid directly to a third-party recruiter, this is only required when a

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<sup>127</sup> ESDC, "Live-in Caregiver Program — Contract Template," above note 37.

<sup>128</sup> ESDC, "Stream for Lower-skilled Occupations: Annex 2 — Instruction sheet to accompany employment contract," online at [http://www.hrsdc.gc.ca/eng/jobs/foreign\\_workers/lower\\_skilled/employment\\_contract.pdf](http://www.hrsdc.gc.ca/eng/jobs/foreign_workers/lower_skilled/employment_contract.pdf) (accessed 10 December 2013).

<sup>129</sup> ESDC, "Agricultural Stream: Instruction sheet to accompany the employment contract," (HRSDC EMP5510 (2012-07-003)E), online at <http://www.servicecanada.gc.ca/efoms/forms/forms/hrsdc-emp5510%282012-07-003%29e.pdf> (accessed 10 December 2013).



worker can provide proof of these payments. Increasingly, private recruiters refuse to provide documentation of payments or provide documentation that does not accurately describe the nature of the service provided (i.e., by providing receipts for “training” or “resume preparation,” rather than for job matching).

Third, while the federal government sets out these terms in the template contracts — and also notes on the ESDC website that fees cannot be recovered<sup>130</sup> — the federal government plays no role in contract enforcement. Instead, the information in the template contracts is reviewed by ESDC and CIC “to assess whether the employment is likely to have a neutral or positive effect on the labour market in Canada”<sup>131</sup> and whether the employer and migrant worker “have agreed to the terms and conditions of employment that are consistent with TFWP standards and those identified in the LMO application.”<sup>132</sup> The government’s instructions for completing the contracts under the Stream for Lower-skilled Occupations and the Agricultural Stream explicitly state that workers must “look after their own interests:”

The Government of Canada is *not a party to the contract*. [...] It is the *responsibility of the employer and worker to familiarize themselves with laws that apply to them and to look after their own interests*. [emphasis added]<sup>133</sup>

In 2013, the federal government enacted new regulations (effective 31 December 2013) that give ESDC authority to conduct inspections to verify whether an employer is in compliance with the LMO and Regulations under the *IRPA*.<sup>134</sup> It is too early to assess the effectiveness of this power. In light of the statements above, however, the regulatory system still primarily depends upon individual workers themselves initiating legal proceedings at the provincial level

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<sup>130</sup> For example, the ESDC website notes the following with respect to the Stream for Lower-skilled Occupations: “It is the policy of the Government of Canada, that under no circumstances, can employers and third-party representatives recover the LMO processing fees from temporary foreign workers.” See, ESDC, “Stream for Lower-skilled Occupations” at [http://www.hrsdc.gc.ca/eng/jobs/foreign\\_workers/lower\\_skilled/index.shtml](http://www.hrsdc.gc.ca/eng/jobs/foreign_workers/lower_skilled/index.shtml) (accessed 10 December 2013); ESDC, “Agricultural Stream” at [http://www.hrsdc.gc.ca/eng/jobs/foreign\\_workers/agriculture/general/index.shtml](http://www.hrsdc.gc.ca/eng/jobs/foreign_workers/agriculture/general/index.shtml) (accessed 10 December 2013); ESDC, “Hiring Live-in Caregivers and Nannies” at [http://www.hrsdc.gc.ca/eng/jobs/foreign\\_workers/caregiver/index.shtml](http://www.hrsdc.gc.ca/eng/jobs/foreign_workers/caregiver/index.shtml) (accessed 10 December 2013).

<sup>131</sup> ESDC, “Live-in Caregiver Program — Contract Template,” above note 37.

<sup>132</sup> ESDC, “Agricultural Stream: Employment Contract,” above note 126.

<sup>133</sup> ESDC, “Stream for Lower-skilled Occupations: Employment Contract,” above note 125. Very similar language also appears in the instructions for the Agricultural Stream contract: “It is the responsibility of the employer and the temporary foreign worker to familiarize themselves with laws that apply to them and to look after their own interests. The Government of Canada is not a party to the employment contract. HRSDC/Service Canada has no authority to intervene in the employer-worker relationship or to enforce the terms and conditions of employment. Should a conflict arise between the parties, the provincial Labour Board is the body responsible for assisting in resolving the issue.” See ESDC, “Agricultural Stream: Employment Contract,” above note 126.

<sup>134</sup> See ESDC, “Regulatory amendments and ministerial instructions coming into force,” above note 31.

to address any breaches of their own rights under the employment contract. Accordingly, it remains to examine whether that provincial regulation provides appropriate security for workers.

## B. Ontario's *Employment Protection for Foreign Nationals Act*

In 2009, the Ontario government introduced the *Employment Protection for Foreign Nationals Act (Live-in Caregivers and Others), 2009*,<sup>135</sup> which aimed to protect migrant live-in caregivers from exploitation by recruiters. The *Act*, referred to either as EPFNA or Bill 210, was proclaimed in effect on 22 March 2010.

EPFNA was enacted in response to high-profile reports about live-in caregivers who were being exploited by recruiters.<sup>136</sup> As a result, when it was proclaimed in effect, the *Act* applied *only* to live-in caregivers, their employers, and the people who recruited them.<sup>137</sup> EPFNA granted Cabinet the power to make regulations to extend the *Act*'s protection to "foreign nationals" working in other positions or sectors, however, this power has never been exercised.<sup>138</sup> At the time of writing in March 2014, EPFNA continues to apply only to live-in caregivers. Bill 146, which received First Reading in December 2013, proposes to amend the *Act* so that it would apply to all foreign nationals under any immigration or transnational temporary labour migration program.<sup>139</sup> No other substantive changes to EPFNA are proposed. Accordingly, the description of the legislative model below remains current, even in view of Bill 146. Where the term "foreign national" is used in Part V, it reflects the specific terminology and definition used in the statute under discussion.

### 1. *Scope of protection under the Ontario law*

EPFNA provides caregivers with protection in four areas:

1. recruitment fees,

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<sup>135</sup> S.O. 2009, c. 32.

<sup>136</sup> See above note 7.

<sup>137</sup> EPFNA, s. 3(1) provides as follows [emphasis added]:

This Act applies to the following persons:

1. Every foreign national who is employed in Ontario as a live-in caregiver or in such other position or section *as may be prescribed* or who is attempting to find such employment.
2. Every person who employs a foreign national in Ontario as a live-in caregiver or in other prescribed employment.
3. Every person who acts as a recruiter in connection with the employment of a foreign national in Ontario as a live-in caregiver or in other prescribed employment.
4. Every person who acts on behalf of an employer described in paragraph 2 or a recruiter described in paragraph 3.

<sup>138</sup> EPFNA, s. 50(1)(a).

<sup>139</sup> Bill 146 (First Reading), above note 9, Schedule I, s. 3 would amend s. 3(1) of the EPFNA to read: "This Act applies to the following persons: 1. Every foreign national who, pursuant to an immigration or foreign temporary employee program, is employed in Ontario or is attempting to find employment in Ontario."

2. security of workers' property,
3. access to information, and
4. reprisals.

In addition, the Act addresses a fifth area of note: mandatory record keeping. Each of these is examined in more detail below.

#### *No recruitment fees*

In Ontario, the law prohibits a recruiter from charging a migrant live-in caregiver any fees for “any service, good or benefit provided to the foreign national.” The fees cannot be charged directly or indirectly.<sup>140</sup> This blanket prohibition on fees is good because it pre-empts known practices that some recruiters have adopted to skirt bans on recruitment fees by characterizing their fees as covering “settlement” services, “training,” or “resume preparation.”

In Ontario, an employer is also barred from recovering any costs from a foreign national that the employer incurred in arranging to employ the worker. Again, these costs cannot be recovered either directly or indirectly.<sup>141</sup>

The law expressly prohibits recruiters, employers, and workers from contracting out of the *Act*. Even if a migrant worker has signed an employment or recruitment contract that requires the worker to pay these fees, the contract would be unenforceable.<sup>142</sup>

#### *Security of workers' property and documents*

A recruiter and an employer are both prohibited from taking possession of or retaining property that belongs to the migrant worker. In particular, they are prohibited from taking possession of or retaining the migrant worker's passport or work permit.<sup>143</sup>

#### *Access to information about rights*

EPFNA imposes a duty on an employer or a recruiter to provide the foreign national with a copy of documents published by the Director of Employment Standards setting out the rights of workers and obligations of employers and recruiters under EPFNA and setting out the rights and obligations of employees and employers under the *Employment Standards Act, 2000*. The employer has a duty to provide this information before employment begins and the recruiter has a duty to provide it “as soon as is practical after first making contact” with the foreign national.<sup>144</sup>

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<sup>140</sup> EPFNA, s. 7.

<sup>141</sup> EPFNA, s. 8.

<sup>142</sup> EPFNA, s. 5.

<sup>143</sup> EPFNA, s. 9.

<sup>144</sup> EPFNA, s. 11 and s. 12.

### *Protection from reprisals*

Foreign nationals covered by the *Act* are protected from reprisals by either employers or recruiters for seeking information about their rights under the *Act*, seeking to enforce their rights under the *Act*, giving information to an employment standards officer or testifying in proceedings under the *Act*. Where a reprisal is alleged, there is a reverse onus on the employer or recruiter to prove that they did not contravene the anti-reprisal provision.<sup>145</sup>

### *Mandatory record keeping*

Employers are required to keep a record of the name of any person who the employer paid in connection with recruiting a migrant worker. Recruiters are required to keep a record of the name of the migrant worker recruited; the fees paid to the recruiter, including the date and reason for the payment; the name and address of every employer for whom a migrant worker was recruited; the name and address of every employer with whom a migrant worker was placed; and the amount of money paid to the recruiter by an employer, including the date of the payment and reason for the payment. Employers and recruiters are required to make these records available for inspection if required by an employment standards officer.<sup>146</sup>

## *2. Are the rights effectively enforceable?*

In view of the rights that are outlined above, the key questions to ask are these:

- (a) Are these rights enforceable by migrant workers in a meaningful way?
- (b) Have these rights been designed in a way that can eradicate the exploitative practices that are known to exist?

As is detailed below, the answer is largely “no.” The main barrier is that the law is reactive. It depends primarily on an individual worker with precarious status to come forward to file a formal legal complaint against their employer.

The legislation is enforced by Ministry of Labour employment standards officers. Employment standards officers have the power to conduct both reactive investigations in response to a complaint and proactive inspections.<sup>147</sup> When the *Act* first came into effect, the Ministry of Labour operated a toll-free line for live-in caregivers to leave a tip about possible violations of the *Act*.<sup>148</sup>

Although the *Act* requires employers and recruiters to keep records on their recruitment of migrant workers, this information is not proactively filed

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<sup>145</sup> EPFNA, s. 10.

<sup>146</sup> EPFNA, s. 14 and s. 15.

<sup>147</sup> EPFNA, s. 35, 22.

<sup>148</sup> Ontario, Ministry of Labour, “Employment Protection for Foreign Nationals Act (Live-in Caregivers and Others), 2009: FAQs,” online at <http://www.labour.gov.on.ca/english/es/faqs/epfna.php#enforce> (accessed 27 March 2012). However, see Law Commission of Ontario, *Vulnerable Workers and Precarious Work*, above note 11 at p. 84, which notes that the hotline has been discontinued.

with the Ministry. It only needs to be produced in response to a request from an employment standards officer. The *Act*, then, does not provide the Ministry with the database of who is recruiting migrant workers and who is employing them which would be necessary in order to pursue proactive enforcement. As a result, the primary mechanism for the *Act*'s enforcement is reactive.

A migrant worker can file a complaint with the Ministry of Labour alleging a breach of the *Act*. The complaint must be filed within three-and-a-half years of the contravention.<sup>149</sup> The complaint is investigated by an employment standards officer. The employment standards officer has some capacity to expand an investigation or inspection beyond an initial complaint. If, in the course of an investigation or inspection, the employment standards officer finds that a person has contravened the *Act* in respect of another individual or individuals who have not complained, the employment standards officer may make an order to repay fees or costs, but only if the contravention occurred less than three-and-a-half years before the complaint was filed or the inspection commenced.<sup>150</sup>

If a contravention of the *Act* is found, the employment standards officer has the authority to order recruiters to repay fees, to order employers to repay costs that were recouped, to order that compensation be paid to the foreign national for any loss incurred as a result of the contravention, to order that a foreign national be reinstated, and to make orders against directors of a corporation where the officer finds that a corporation is in contravention of the *Act*.<sup>151</sup> Related businesses or activities carried out by or through an employer or recruiter and one or more other persons, with the intent or effect of directly or indirectly defeating the intent or purpose of EPFNA, are treated as a single entity under the *Act* and are jointly and severally liable for any contravention of the *Act*.<sup>152</sup> The employment standards officer can also issue a notice of contravention, which subjects the offending party to a penalty ranging from \$250 to \$1,000.<sup>153</sup> Persons or corporations who contravene the *Act* or fail to comply with an order made under the *Act* are guilty of an offence and are liable upon conviction of fines up to \$50,000 or imprisonment of not more than 12 months (for an individual) or fines up to \$100,000 for a corporation, with fines escalating for a corporation on subsequent convictions.<sup>154</sup>

While these provisions appear relatively comprehensive on paper, their promise has not been met in practice.

In response to a Freedom of Information (FOI) request, in October 2013, the Ministry of Labour provided information on the *Act*'s enforcement. When

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<sup>149</sup> EPFNA, s. 20.

<sup>150</sup> EPFNA, s. 25.

<sup>151</sup> EPFNA, s. 24.

<sup>152</sup> EPFNA, s. 4.

<sup>153</sup> EPFNA, s. 27, 28.

<sup>154</sup> EPFNA, s. 41.

EPFNA was introduced, no new positions were created within the Ministry’s Employment Standards Program to administer the new legislation. Ten existing employment standards officers in various locations around the province were trained to respond to claims and to carry out proactive investigations.<sup>155</sup>

Since the *Act* took effect on 22 March 2010, there have been a total of only **28 claims filed against recruiters and a total of only \$12,100 in illegal fees have been recovered for employees**. There are only eight ongoing investigations against recruiters under the legislation.<sup>156</sup> The data provided through the FOI request are set out in the chart below.

### Summary of EPFNA Claims against Recruiters March 2010 to October 2013

	2010–2011	2011–2012	2012–2013	Total
Number of Claims against Recruiters	8	11	9	28
Amount of Fees Claimed against Recruiters	\$38,400.00	\$23,359.80	\$26,300.00	\$88,659.80
Amount of Fees Assessed as Owing	-	\$10,559.80	\$14,300.00	\$24,859.80
Amount of Fees Recovered for Live-in Caregivers	-	\$7,300.00	\$4,800.00	\$12,100.00

Since 22 March 2010, there have been a total of 59 claims filed against employers, although the nature of the claims was not disclosed. Out of these 59, there have only been a **total of 3 claims filed against employers with respect to recouping prohibited costs, and a total of only \$800 has been recovered for employees**. No information was provided by the Ministry about how much the employees claimed from their employers.<sup>157</sup> The data regarding employers provided through the FOI request is set out in the chart below.

<sup>155</sup> Ministry of Labour, Response to FOI request, above note 13.

<sup>156</sup> Ministry of Labour, Response to FOI request, above note 13.

<sup>157</sup> Ministry of Labour, Response to FOI request, above note 13.

## Summary of EPFNA Claims against Employers March 2010 to October 2013

	2010–2011	2011–2012	2012–2013	Total
Number of Claims against Employers (nature of claims unidentified)	21	24	14	59
Number of Claims Filed against Employers Attempting to Recover Employer (Prohibited) Costs under the Act from Caregivers	0	1	2	3
Amount Assessed for Employer Costs	-	-	\$800.00	\$800.00
Amount Recovered for Employer Costs	-	-	\$800.00	\$800.00

Accordingly, after three-and-a-half years, the total recovery to live-in caregivers under EPFNA from recruiters and employers combined has been less than \$13,000. And yet, the practice of charging and/or recouping illegal recruitment fees continues to be very widespread even among the caregivers to whom the *Act* applies. As noted above, the Caregivers' Action Centre reports that two-thirds of its members have been charged fees since the *Act* was introduced.<sup>158</sup>

The concerns workers raised about the legislation fall into five broad categories:

1. the complaint-based enforcement mechanism,
2. the *Act's* failure to address the information gap that leads workers into exploitative recruitment arrangements,
3. the impact of indebtedness and financial obligations to support their families,
4. the difficulty in documenting recruiter misconduct, and
5. the tension between protecting individual rights and providing for the individual's family's collective needs.

### 3. *Why a complaint-based model fails to provide effective protection*

The major design element that prevents EPFNA from providing meaningful and effective protection for workers is that **the Act is complaint-driven**. It

<sup>158</sup> In interviews conducted for this research, other organizers and community groups working with live-in caregivers reported that recruitment fees were similarly common among the groups with whom they worked.

depends upon migrant workers to come forward to make formal legal complaints after the recruitment practices have placed them in exceedingly precarious circumstances. Many workers interviewed for this research were aware that the recruitment fees they had been charged were illegal and were also well aware that the wages they were paid fell below what they were owed under their contracts or under employment standards law. But, as a practical matter, they felt powerless to assert their legal claims due to fear of their recruiters and employers, their indebtedness, their temporary status, and their need to complete work within their limited authorized work term. Workers expressed fears that Ontario-based recruiters would exact reprisals against them personally and fears that recruiters and recruiter agents abroad would exact reprisals against their families and communities in their origin countries. Caregivers also expressed fear that filing a legal claim would lead to them losing their jobs and so being unable to complete the 24 months' work needed within the time limit to apply for permanent resident status.

For all the workers interviewed, the fact that they hold only temporary status to remain in Canada was an insurmountable barrier to enforcing their legal rights. Employers and recruiters routinely use the threat of deportation to enforce workers' silence and compliance. Some caregivers also specifically identified that, because they are not unionized, they must bring these claims forward as isolated individuals, which heightens their vulnerability.

It is well known that for low-wage workers in general, complaints that their basic employment rights have been breached are typically not filed until *after* an employee has left the employment in question and secured work elsewhere. This vulnerability is amplified exponentially when a migrant worker has temporary status and is living in the employer's home or in employer-provided accommodations. Caregivers identified that it is, in itself, stressful living in the employer's house. The added tension generated by bringing a legal claim would be unbearable. They fully expected that filing a legal claim would lead to their prompt dismissal and loss of housing.

This vulnerability was recognized at the time EPFNA was introduced. In 2009, the LCP gave live-in caregivers three years to complete the work necessary to apply for permanent residence. In view of this, EPFNA gave workers a three-and-a-half year window to file a complaint to "allow a live-in caregiver to make a complaint after she or he has obtained permanent residency status." The aim was that the worker could wait to file a claim until after she was no longer vulnerable to deportation.<sup>159</sup> Since EPFNA was passed, though, the LCP was amended to give live-in caregivers four years to complete the work required to apply for permanent residence. In recent years, it has been taking as much as

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<sup>159</sup> See Hon. Peter Fonseca in Legislative Assembly of Ontario, *Hansards* (21 October 2009).



three more years for live-in caregivers to secure permanent residence after completing the LCP and submitting applications for permanent residence.<sup>160</sup> Meanwhile, if EPFNA is extended to workers in the other temporary migration streams, it will be important to recognize that these workers are employed for up to four years with temporary status. In both circumstances, the existing three-and-a-half year limitation period fails to accommodate their actual status-based insecurity. The limitation period should be extended to at least five years if it is to remain responsive to the original concerns about practical barriers to engaging the legal system while holding temporary status.

*A complaint-based model does not resolve the information gap*

The second major concern workers raised is that **EPFNA does not resolve the information gap that leads workers into exploitative recruitment arrangements in the first place.** Ontario's legal model does not address the problems that workers face when initially seeking jobs in the province. In the absence of a public job-matching service, workers generally cannot access jobs without going through a private recruiter. Federal government websites warn workers to beware of fraud. But, the temporary labour migration programs do not establish a means to identify whether a recruiter or employer is legitimate or has a history of bad practices. The legal model and government practices also fail to provide workers with information about and connections to groups that can help them when they arrive in Ontario. And the sections in EPFNA that require employers and recruiters to provide workers with information about their rights depend on good faith compliance by the very actors against whom the legislation would be enforced.

In effect, EPFNA only comes into play for the workers *after* they have already been subject to unlawful treatment. As outlined in Part III, it can take a worker years to disentangle themselves from the abusive recruiter/employer relationships that arise when they have been charged oppressive fees and/or have been released on arrival. It can also take a long time before a worker connects with community groups that can support them in addressing unlawful treatment. In the meantime, these actions take a toll not only financially but on a personal level. They deeply erode a worker's sense of personal security and trust in the legal system.

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<sup>160</sup> In November 2013, the federal government announced that it would be addressing some of that backlog and anticipated granting permanent status to some 17,500 live-in caregivers in 2014: see Government of Canada, "News release — Live-in caregiver admissions to reach an all-time high in 2014" (29 October 2013), online at <http://www.cic.gc.ca/english/department/media/releases/2013/2013-10-29a.asp> (accessed 5 January 2014).

#### 4. *The Act does not relieve the debt of recruitment fees*

Workers stressed that, even if they make a complaint about a recruiter, they must still pay off their **debt to the money lender**. Workers cannot take any actions that may put them at risk of losing their jobs because they need to continue earning in order to pay off their debt. The failure to repay their debt not only puts them at risk but puts their families at risk, including, in some cases, risk of violence.

#### 5. *The worker's burden to prove recruiter misconduct*

As part of its complaint-driven process, EPFNA places the **onus on workers to prove their rights have been violated**. As set out above, this becomes increasingly difficult because recruiters who want to avoid the legislation alter their practices either by refusing to provide documentation of the recruitment fees, by providing inaccurate documentation, or by requiring workers to pay the fees in another jurisdiction before entering Ontario. The Caregivers' Action Centre reports that, even where they have helped caregivers file complaints under the *Act*, many of these claims were dismissed because the fees were paid outside of Canada.<sup>161</sup>

These practices have also been documented in other provinces that use complaint-based enforcement models. The Alberta Federation of Labour's Temporary Foreign Worker Advocate found that, in the two years after the Advocate began her mandate, "brokers have craftily shifted their strategy and are now often demanding payment in the originating country before the worker ever gets to Canada."<sup>162</sup> Similar tactics have arisen in British Columbia. In that province, some private employment agencies recruiting live-in caregivers, organized in a group called the Association of Caregiver & Nanny Agencies Canada (ACNA Canada), have openly advocated that migrant caregivers should pay recruitment fees. On their website they have expressly taken the position that "it is important that caregivers coming to Canada do so with some form of investment made by them personally," by which they mean the payment of recruitment fees.<sup>163</sup> Daniel Parrot reports that ACNA Canada has pursued a variety of strategies to impose recruitment costs on migrant caregivers, including (a) recruiting caregivers in jurisdictions that do not prohibit fees and charging the fees "offshore"; and (b) blurring the distinction between legal and illegal fees by charging caregivers for a mandatory bundled package of services,

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<sup>161</sup> See Liza Draman, Caregivers' Action Centre, in Laurie Monsebraaten, "Ontario proposes sweeping new law to protect workers," *Toronto Star* (4 December 2013), online at [http://www.thestar.com/news/immigration/2013/12/04/proposed\\_ontario\\_labour\\_law\\_extends\\_to\\_foreign\\_workers.html](http://www.thestar.com/news/immigration/2013/12/04/proposed_ontario_labour_law_extends_to_foreign_workers.html) (accessed 4 December 2013).

<sup>162</sup> See, for example, AFL, *Entrenching Exploitation*, above note 4 at p. 13.

<sup>163</sup> Association of Caregiver & Nanny Agencies Canada, "Advocacy & Issues," online at <http://www.acnacanada.ca/government-affairs/advocacy-issues/> (accessed 10 December 2013).

including advertising, resume preparation, image consulting, interview preparation, immigration settlement services, and liaison services, regardless of whether the services were requested or provided.<sup>164</sup>

#### 6. *The tension between protecting individual rights and serving collective needs*

Finally, underpinning all four of the dynamics outlined above is the fact that migrant workers feel constrained in pursuing legal complaints, as doing so puts their jobs at risk. In addition to repaying money lenders, they must continue earning so that they can send money to support their families in the origin countries. This was the very reason they entered the labour migration program, and they are under considerable pressure to fulfil the obligation to their families. In this context, workers repeatedly sacrifice their own rights to protect their families. They have difficulty justifying taking individual actions that put that collective interest at risk.

Despite knowing that they have been mistreated, some workers also feel a complex sense of obligation to their recruiter because, by finding them a job in Canada, the recruiter has given them a chance to support their families and, for live-in caregivers, a chance to pursue permanent residence. Many workers said that they did not have the security to take action to assert their own rights but wanted reforms that would protect other workers from going through the experiences they had faced. Other workers expressed concerns that the more legal scrutiny was brought to bear on recruiters, the more difficult and dangerous it became for the workers themselves because the recruitment practices were increasingly being driven underground where they could be even more abusive. Community advocates confirmed these dynamics and expressed concerns that, while workers had in previous years been willing to speak about recruitment practices, they are increasingly afraid to make these concerns public.

#### C. *Proactive enforcement: The Manitoba model and its evolution*

In light of this gap between the promise of the law and its practical effect, it is important to ask whether there are other models that can provide more meaningful and effective protection for migrant workers. The most significant shift must come from leveraging the federal and provincial governments' capacity to pursue proactive regulation and supervision of recruiters and employers. The goal should be to eradicate exploitative practices pre-emptively,

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<sup>164</sup> Daniel Parrott, *The Role and Regulation of Private, For-Profit Employment Agencies in the British Columbia Labour Market and the Recruitment of Temporary Foreign Workers* (Victoria: University of Victoria, 2011), LLM Thesis, at pp. 85–94.

so that a worker *begins* an employment relationship in a position of security rather than insecurity.

In the Canadian context, Manitoba has pioneered the best-practices model that makes this shift. The Manitoba model is built on a platform of proactive licensing of recruiters, proactive registration of employers, mandatory financial security provided in advance by recruiters, and proactive investigation and enforcement by the provincial employment standards branch. The Manitoba model adopts many of the best practices identified in the international rights-based framework for labour migration.<sup>165</sup> Since Manitoba introduced this approach in 2008, it has been adopted and expanded upon in Nova Scotia and Saskatchewan and a variation is currently being considered in New Brunswick.

Ontario has also made a tentative overture in this direction. In February 2014, the Ontario government introduced Bill 161 — the *Ontario Immigration Act, 2014* — for First Reading.<sup>166</sup> If passed, Bill 161 would give Cabinet discretion to create registries of certain prescribed employers who hire migrant workers and some individual recruiters of migrant workers. The two relevant provisions in the Bill are minimalist. They are more in the nature of permissive placeholders. Cabinet may establish registries at its discretion but is not required to do so. All details about the registries would only be developed in future regulations.<sup>167</sup> Under the Bill, the registries would fall within the jurisdiction of the provincial Ministry of Citizenship and Immigration rather than the Ministry of Labour. At this point, Ontario's overture is significantly less developed than the best-practice models that are outlined below. But its interest in considering the model makes the analysis below particularly relevant.

This section reviews the Manitoba model and that province's practical experience with proactive enforcement. It then reviews the enhancements that have been added to that model in Nova Scotia and Saskatchewan. The review of the three laws tracks the international best practices outlined in Part IV.

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<sup>165</sup> See Part IV, above.

<sup>166</sup> Bill 161, *An Act with respect to immigration to Ontario and a related amendment to the Regulated Health Professions Act, 1991*, First Reading (19 February 2014). Section 5 of the Bill gives Cabinet the discretion to make regulations to establish a registry of employers who are eligible to make an offer of employment to a foreign national under a new selection program for permanent immigration or temporary work and "who is identified in another prescribed program." Section 6 of the Bill gives Cabinet the discretion to make regulations to establish "a registry of recruiters who are individuals." An individual recruiter who is a "member of a prescribed organization" would be exempt from registration.

<sup>167</sup> Bill 161, s. 36(1)(c) would give Cabinet authority to make regulations (i) establishing classes of employers or recruiters for the purpose of the registry; (ii) governing the eligibility of persons or bodies to be registered in the registry; (iii) governing the process that the Minister is required to follow in deciding whether to register a person or body in the registry and the rights of persons or bodies that apply for registration in the registry; (iv) requiring that persons or bodies registered in the registry post a performance bond as specified in the regulations as a condition of registration; and (v) governing the use that the Minister may make of the performance bond.

Provincial law cannot address the social, economic, and political push factors in workers' origin countries that draw them into transnational migration. But, it can have a meaningful impact by ensuring workers receive fair treatment while in Canada. Strong domestic legislation can make a difference to recruitment practices on the ground. And the legal model that is chosen makes a profound difference to the workers who travel the labour migration path. As one Filipino worker reported to an Ontario legal clinic, the recruiter who placed them in their job in Canada charged \$8,500 for a job in Alberta, \$7,000 for a job in Ontario, but charged *no fees at all* for a job in Manitoba because the proactive licensing and registration regime in that province prevented the recruiter from charging fees.<sup>168</sup>

### 1. *Manitoba's Worker Recruitment and Protection Act*

Manitoba's *Worker Recruitment and Protection Act* (WRAPA)<sup>169</sup> was passed in 2008, and detailed regulations under the *Act* were made in early 2009.<sup>170</sup> Subject only to limited exceptions,<sup>171</sup> WRAPA applies to migrant workers in all immigration and temporary labour migration programs in Manitoba, not just live-in caregivers.



#### **International best practice #1: No recruitment fees**

Manitoba prohibits recruiters from charging fees to migrant workers, either directly or indirectly, “for finding or attempting to find employment.”<sup>172</sup>

Manitoba also prohibits employers from recovering costs of recruitment. An exception exists, however, that allows an employer to recover costs where a worker (a) fails to report for work; (b) engages in wilful misconduct, violence in the workplace, or dishonesty in the course of employment; or (c) fails to complete substantially all of the term of employment.<sup>173</sup>

The Director of Employment Standards has the power to recover fees that are improperly charged and costs that are improperly recovered.<sup>174</sup>

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<sup>168</sup> Interview with Cathy Kolar, Legal Assistance of Windsor (November 2013).

<sup>169</sup> C.C.S.M., c. W197.

<sup>170</sup> *Worker Recruitment and Protection Regulation*, Regulation 21/2009 (*WRAP Regulations*).

<sup>171</sup> Under s. 4 of the *WRAP Regulations*, WRAPA does not apply to workers who, in accordance with the *IRP Regulations* do not require a work permit, or has been granted a work permit under an international agreement, to promote Canadian interests, as a refugee claimant with no other means of support or for humanitarian reasons. Apart from these exceptions, s. 1 of WRAPA defines a “foreign worker” as “a foreign national who, pursuant to an immigration or foreign temporary worker program, is recruited to become employed in Manitoba.”

<sup>172</sup> WRAPA, s. 15(4).

<sup>173</sup> WRAPA, s. 16.

<sup>174</sup> WRAPA, s. 20.



## International best practice #2: Recruiter licensing and regulation

Manitoba's law also meets several key elements of the international best practices on recruiter licensing.

1. Manitoba **restricts the pool of people who can be licensed as recruiters** to lawyers, paralegals, Quebec notaries, and immigration consultants, all of whom must be in good standing of their respective professional regulatory bodies.<sup>175</sup> This parallels the restrictions on who can be paid to provide advice under the federal IRPA.<sup>176</sup> It adds multidirectional oversight, as licensed recruiters are supervised under WRAPA and can also be subject to professional standards oversight by their professional governing bodies.
2. Manitoba requires **mandatory licensing** of all recruiters.<sup>177</sup> The Director of Employment Standards has broad power to investigate the character, history, and key business relationships of the recruiter applying to be licensed to evaluate their eligibility.<sup>178</sup> A recruiter licence is valid for one year, ensuring ongoing government oversight. The licence is personal and is not transferrable or assignable.<sup>179</sup> If there is a change in business entity, the recruiter cannot continue to engage in foreign worker recruitment without the Director's consent in writing.<sup>180</sup> All licensed recruiters are identified in a **public registry**.<sup>181</sup> Only recruiters listed on the public registry may engage in foreign worker recruitment.
3. Before a recruiter is licensed, they must provide the government with an irrevocable **security deposit of \$10,000**. If a recruiter contravenes the *Act*, the security deposit is forfeited and the proceeds used to reimburse the migrant worker for improper fees.<sup>182</sup>
4. Recruiters are also required to keep **detailed records** of every agreement entered into to recruit a foreign worker and of every foreign

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<sup>175</sup> WRAP Regulations, s. 6.

<sup>176</sup> IRPA, s. 91(1) and (2). Under s. 91(5), effective 30 June 2011, the Immigration Consultants of Canada Regulatory Council was designated as the relevant regulatory body with respect to immigration consultants.

<sup>177</sup> WRAPA, s. 2(4). The only persons or entities exempt from the licensing requirement are individuals who, on behalf of their employer, engage in activities to find employees, including employees who may be foreign workers (i.e., this would cover, for example, the employer's own human resources employees); a person who, without a fee, finds employment for a foreign worker who is a family member; an agency of the government or municipality (for example, this would exempt the sending governments that recruit workers for the SAWP); or other person or class of persons exempted under the regulations: see WRAPA, s. 2(5).

<sup>178</sup> WRAPA, s. 6.

<sup>179</sup> WRAPA, s. 7(2) and (3).

<sup>180</sup> WRAPA, s. 8.

<sup>181</sup> WRAPA, s. 27.

<sup>182</sup> WRAPA, s. 5 and 20(4); WRAP Regulations, s. 9.

worker they have recruited.<sup>183</sup> These records must be made available for inspection by the Director upon request.

Both the Manager of Manitoba's Special Investigations Unit and labour organizers in Manitoba confirm that proactive recruiter licensing has virtually eliminated exploitative recruiters from operating in the province.<sup>184</sup> Nearly 75% of recruiters who initially applied for licensing dropped out before completing the licensing process.<sup>185</sup> All recruiters licensed to operate in Manitoba are listed publicly on the Manitoba Employment Standards website, including contact information, the professional regulatory body governing their professional practice (Law Society or Immigration Consultants of Canada Regulatory Council), and when their recruiting licence expires.<sup>186</sup> Making this information publicly and readily available helps bridge the information gap between migrant workers and recruiters. Compared to the federal government's more passive warning to avoid bad recruiters, this approach proactively empowers migrant workers to identify whether a recruiter is legitimate. Manitoba's use of security deposits is also significant. In Ontario, it bears noting that less than half of the illegal fees that have been assessed as owing by recruiters have in fact been recovered for workers.<sup>187</sup>



### **International best practice #5: Employer registration and proactive supervision**

As is analyzed below, proactive registration and supervision of employers provides another avenue to curtail the market for exploitative recruitment. In this respect, Manitoba also meets several international best practices on employer registration and proactive enforcement:

1. No employer in Manitoba can recruit a foreign worker unless they first **register** with the provincial Director of Employment Standards. No employer can use a recruiter who is not licensed under the *Act*. When applying for registration, the employer must provide detailed information about the employer's business, who will be engaged in foreign worker recruitment for the employer, and information about the

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<sup>183</sup> *WRAP Regulations*, s. 15(1)(c).

<sup>184</sup> Interview with Jay Short, Manager, Special Investigations Labour Program — Employment Standards, Winnipeg (July 2013); Interview with Cindy Murdoch, Canadian Labour Congress (Manitoba), Winnipeg (July 2013).

<sup>185</sup> Interview with Jay Short (July 2013).

<sup>186</sup> As of 29 November 2013, 17 recruiters are licensed to recruit migrant workers in Manitoba. On the list, the government clearly and repeatedly indicates that "Employment Standards has the authority to revoke a Licence so please consult this page regularly." Manitoba, Employment Standards, "Valid licence holders" (updated to 29 November 2013), online at [http://www.gov.mb.ca/labour/standards/asset\\_library/pdf/wrapa\\_valid\\_licensees.pdf](http://www.gov.mb.ca/labour/standards/asset_library/pdf/wrapa_valid_licensees.pdf) (accessed on 10 December 2013).

<sup>187</sup> Ministry of Labour, Response to FOI request, above note 13.

work to be done by the foreign worker.<sup>188</sup> Employer registration is valid for one year only,<sup>189</sup> which ensures ongoing supervision of the employer's conduct and need to recruit foreign labour.

2. When a migrant worker is hired, the employer must **file detailed information** with the Director of Employment Standards providing each worker's name, address, and telephone number; the worker's job title; and the location where he or she performs the majority of his or her employment duties. Upon request, the employer must also provide the Director with complete and accurate records regarding expenses incurred by the employer in recruiting the worker, any contract or agreement under which the employer retains or directs an individual to recruit foreign workers, and any contract or agreement the employer has entered into with the migrant worker.<sup>190</sup>
3. Manitoba's law operates primarily on a model of **proactive government enforcement**.<sup>191</sup> The law has been effective because the province has **dedicated staff and resources** specifically to engage in proactive investigation and enforcement. Enforcement is conducted through "projects" that audit all or a significant percentage of employers in particular sectors or regions at the same time. Projects target sectors and regions where concerns have been raised. In addition, the Unit investigates approximately 80 more individual employers each year.<sup>192</sup>

Mandatory employer registration enhances protection for workers in a variety of ways. First, employer registration can reduce the market for abusive recruitment. Through the registration process, the Employment Standards Office meets with prospective employer registrants and provides education about exploitative practices that can occur in transnational recruitment. This increases employers' own awareness and vigilance around the issue and

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<sup>188</sup> WRAPA, s. 11; *WRAP Regulations*, s. 12.

<sup>189</sup> *WRAP Regulations*, s. 14(2).

<sup>190</sup> *WRAP Regulations*, s. 14(2).

<sup>191</sup> WRAPA, s. 19.

<sup>192</sup> Interview with Jay Short (July 2013). Recent projects have targeted all sushi restaurants in the province, 8 manufacturing firms employing a total of 250 migrant workers in the Pembina Valley, the 25 largest farms employing 70% of migrant farm workers in the province, and families that have hired live-in caregivers. The projects have uncovered and been able to rectify significantly widespread employment standards violations. For example:

- A. an audit of 20 families with live-in caregivers revealed that 35% had failed to comply with employment standards;
- B. 95% of sushi restaurants audited were not in compliance;
- C. 5 of the 8 manufacturing firms failed to comply with employment standards; and
- D. only 11 of the 25 largest farms were in compliance with employment standards; 6 had minor errors and 8 (or 32%) "were more seriously violating employment standards, including not paying minimum wage, making illegal deductions from workers' paycheques, and not keeping proper records to show when and how much workers are paid."

Manitoba, Employment Standards, Special Investigations Unit, "Worker Recruitment and Protection Act/Foreign Workers," online at [http://www.gov.mb.ca/labour/standards/siu\\_worker\\_recruitment.html](http://www.gov.mb.ca/labour/standards/siu_worker_recruitment.html) (accessed 10 December 2013).



decreases the market for unlicensed recruiting. Through this education process, a significant number of employers opted not to complete registration and chose to hire and train workers locally rather than recruit internationally.<sup>193</sup>

Second, mandatory registration ensures employer compliance with existing laws. When an employer seeks to register, the Employment Standards Office uses its database on employment standards claims, payroll audits, and additional investigation to determine whether the employer has any unresolved employment standards violations or has a history of violations. The employer is required to bring its existing employment practices into full compliance with the law before it can be registered to hire any migrant workers.

Third, the mandatory registration, licensing, and reporting requirements provide the database that allows the enforcement branch to conduct effective proactive enforcement. Proactive enforcement provides security in the recruitment process and also ensures strict compliance with the *Employment Standards Act*, the LMO, and any other contract terms. While individual complaints are possible under WRAPA, in practice *all* of the enforcement that has been conducted has been as a result of proactive investigation. Even where there have been violations, individual workers have not filed complaints, highlighting the urgency for proactive enforcement.<sup>194</sup>



### **International best practice #7: Multilateral cooperation**

In practice, Manitoba's model provides multiple examples of multilateral cooperation:

1. The legislation expressly allows for information sharing between the Director and a department or agency of the government of Manitoba, of Canada, or of another province.<sup>195</sup>
2. The Manitoba model enables the provincial and federal jurisdictions to work together in a more integrated way to provide front-end protection against migrant worker abuse. The federal government will not process a Manitoba employer's application for an LMO unless and until the employer receives provincial registration. In addition, the LMO will only be processed if the LMO requested is consistent with the employer's provincial certificate of registration.<sup>196</sup> This is an example of how the federal and provincial systems can work together to reinforce worker security. This collaboration also suggests that it is entirely possible for the federal government to establish national standards as a precondition for employer participation in the temporary labour migration programs.

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<sup>193</sup> Interview with Jay Short (July 2013).

<sup>194</sup> Interview with Jay Short (July 2013).

<sup>195</sup> WRAPA, s. 23(1).

<sup>196</sup> See, Fudge, "Global care chains," above note 4 at 261.

National standards of this sort can also provide protection against the practice of interprovincial recruitment and transfer outlined above in Part III.

3. In practice, the Special Investigations Unit's proactive investigations depend heavily on connections and collaboration with community organizers, settlement offices, and advocacy groups that provide services and support directly to migrant workers. Half of the proactive investigations in any year are conducted in response to tips received from these community-level networks, and violations are found in 80% of the cases.<sup>197</sup>

Adopting the WRAPA model would represent an advance toward providing security for migrant workers in a number of respects:

- The WRAPA model allows for more communication and coordination between the federal immigration system and the provincial employment standards system, and allows each system to play a more active supervisory role to ensure employer and recruiter compliance with the law.
- The WRAPA model places responsibility for supervising legal compliance with an agency that has greater capacity to do so. Proactive enforcement by the Director of Employment Standards is an improvement over reliance on reactive investigations in response to complaints from precariously situated workers. It builds a culture of public responsibility for the treatment of migrant workers and a culture in which there is an expectation of compliance with standards for decent work. Moreover, the experience under WRAPA underscores the importance of building in mechanisms to engage third-party community organizations in strengthening enforcement.
- The mandatory proactive requirement for employers and recruiters to keep detailed records and to file information with the Director of Employment Standards provides the data that are necessary to engage in meaningful proactive monitoring. The data should facilitate identification of trends in particular sectors that are hiring migrant workers, particular employers that are hiring over an extended period of time, particular jobs in which migrant workers are being placed, locations from which migrant workers are being recruited, and so on. Apart from facilitating monitoring and enforcement, collecting such data can support evidence-based research and policy development, and could be used to build in other systems of support at other stages of the

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<sup>197</sup> Interview with Jay Short (July 2013).

labour migration cycle and build policy development around permanent, rather than temporary, immigration.

## 2. *Enhancement of the Manitoba model*

Manitoba's model of proactive licensing, registration, financial security, and proactive investigation has been adopted in two more provinces. Nova Scotia amended its *Labour Standards Code* in 2011 to introduce a mandatory licensing and registration system that largely parallels the Manitoba model. Licensing of recruiters became mandatory as of 1 May 2013 and registration of employers became mandatory as of 1 August 2013. Saskatchewan enacted its mandatory licensing and registration system in the *Foreign Worker Recruitment and Immigration Services Act* (FWRISA), which came into effect on 11 October 2013.<sup>198</sup> As of 12 November 2013, all employers who hire foreign workers are required to be registered with the Government of Saskatchewan. As of 13 December 2013, all recruiters who previously provided services to Saskatchewan employers are required to apply for a recruitment licence. All other recruiters must apply for a licence before providing services to employers.<sup>199</sup>

At the time of writing, New Brunswick's Bill 22, which would introduce a system of proactive employer registration, has had Second Reading.<sup>200</sup> In early 2013, the BC Employment Standards Coalition also released model legislation for migrant-worker recruitment protection that builds on the Manitoba model.<sup>201</sup> In February 2014, Ontario introduced its Bill 161 for First Reading. As the New Brunswick and Ontario bills are still in preliminary stages, the analysis below focuses on the laws that are in place in Nova Scotia and Saskatchewan.



### **International best practice #1: No recruitment fees**

Both Nova Scotia and Saskatchewan prohibit recruiters from charging recruitment fees to migrant workers<sup>202</sup> and prohibit employers from

<sup>198</sup> *Foreign Worker Recruitment and Immigration Services Act*, S.S. 2013, c. F-18.1 (FWRISA).

<sup>199</sup> Government of Saskatchewan, "Foreign Worker Recruitment and Immigration Services Act, Employer Responsibilities fact sheet," online at <http://www.saskimmigrationcanada.ca/FWRIS-act-fact-sheet-for-employers> and "Recruiter responsibilities fact sheet," online at <http://www.saskimmigrationcanada.ca/FWRIS-act-fact-sheet-for-recruiters> (accessed 11 December 2013).

<sup>200</sup> Bill 22, *An Act to Amend the Employment Standards Act*, 4th Session, 57th Legislature, New Brunswick, 62–63 Elizabeth II, 2013–2014, First Reading (3 December 2013), Second Reading (6 December 2013).

<sup>201</sup> BC Employment Standards Coalition, *Backgrounder: Migrant Worker Recruitment & Protection — Model Legislation* (25 February 2013), online at <http://bcemploymentstandardscoalition.com/wp-content/uploads/2011/12/ESA-Migrant-Worker-Provisions-Backgrounder.pdf> and *Migrant Worker Recruitment & Protection — Model Legislation* (25 February 2013), online at <http://bcemploymentstandardscoalition.com/wp-content/uploads/2011/12/ESA-Migrant-Worker-Model-Legislation.pdf> (accessed 11 December 2013).

<sup>202</sup> *Labour Standards Code*, R.S.N.S. 1989, c. 249, s. 89B; FWRISA, s. 23(1).

recovering recruitment costs from workers.<sup>203</sup> Saskatchewan also requires recruiters to clearly disclose to a foreign national when the recruiter is receiving a fee or compensation for referring the foreign national to another person.<sup>204</sup>

Saskatchewan does, however, permit fees to be charged for “settlement services” provided under a contract for “immigration services.”<sup>205</sup>

Nova Scotia and Saskatchewan provide enhanced protection because an illegal recruitment fee can be recovered from the recruiter who charged it or from the employer when an unlicensed recruiter has been used.<sup>206</sup> This provides real incentive to employers to ensure that they are dealing with legitimate recruiters. It brings the employer’s self-interest to bear in enforcing compliance with fair recruitment practices.



## **International best practice #2: Recruiter licensing and regulation**

Like Manitoba, both Nova Scotia and Saskatchewan have systems of mandatory recruiter licensing.<sup>207</sup> Nova Scotia restricts the pool of people eligible to be recruiters in line with Manitoba’s restrictions. Recruiters hold individual, non-transferable licences that are time limited.<sup>208</sup> In both provinces, the registries of licensed recruiters are publicly available on government websites.<sup>209</sup>

Before being licensed, recruiters in both provinces must submit a security deposit to be used to compensate workers where the *Act* is violated. The security deposit in Saskatchewan is \$20,000 — double the Manitoba rate.<sup>210</sup>

As in Manitoba, both provinces require recruiters to keep detailed records about their recruitment practices, including workers who have been recruited and employers to whom services have been provided.<sup>211</sup>

<sup>203</sup> *Labour Standards Code (N.S.)*, s. 89E, s. 89F.

<sup>204</sup> FWRISA, s. 24.

<sup>205</sup> FWRISA, s. 23(2). In s. 1 of FWRISA, “settlement services” are defined as “services provided by a foreign worker recruiter or immigration consultant to assist a foreign national in adapting to Saskatchewan’s society or economy or in obtaining access to social, economic, government or community programs, networks or services.” “Immigration services” are defined as “services that assist a foreign national in immigrating to Saskatchewan, including: (i) researching and advising on immigration opportunities, laws or processes; (ii) preparing or assisting in the preparation, filing and presentation of applications and documents related to immigration; (iii) representing a foreign national to or before immigration authorities; and (iv) providing or procuring settlement services.”

<sup>206</sup> *Labour Standards Code (N.S.)*, s. 89B(3) (a), FWRISA, s. 46(3) (a)

<sup>207</sup> *Labour Standards Code (N.S.)*, s. 89H; FWRISA, s. 4.

<sup>208</sup> The recruiter licence is valid for three years in Nova Scotia and five years in Saskatchewan: *Labour Standards Code (N.S.)*, sections 89H, 89I, 89M and 89N; FWRISA, s. 5, s. 10(2) and s. 11.

<sup>209</sup> See, for example, Government of Nova Scotia, Employment Rights, “List of licensed recruiters,” online at <http://novascotia.ca/lae/employmentrights/FW/LicensedRecruiters.asp> (accessed 11 December 2013).

<sup>210</sup> FWRISA, s. 7; *Foreign Worker Recruitment and Immigration Services Regulations (FWRIS Regulations)*, R.R.S. c. F18.1, Reg. 1, s.5; Government of Saskatchewan, “Recruiter Responsibilities fact sheet,” above note 195. The security deposit in Nova Scotia is \$5,000: *Labour Standards Code (N.S.)*, s. 89J(b); *General Labour Standards Code Regulations (N.S.)*, s. 17.

One variation and three enhancements to the Manitoba model are worth noting:

1. Nova Scotia's licensing system does not apply to recruiters who are *exclusively* engaged in recruiting professional and managerial jobs. The scheme also does not apply to government reporting entities, municipalities, and universities.<sup>212</sup> For recruiters engaged in the employment of foreign workers in occupations at NOC levels B (high-skilled), C (semi-skilled), and D (low-skilled), the full registration and licensing system applies. This focuses the supervision on the groups of workers who are most vulnerable to exploitation by recruiters.
2. Nova Scotia makes it an independent offence for an employer to use a recruiter who does not have a valid and subsisting licence under the *Act*.<sup>213</sup> In this way, Nova Scotia again leverages employer's interest to ensure recruiter compliance with the law.
3. Both Nova Scotia and Saskatchewan collect much more extensive information from recruiters who apply for licensing than does Manitoba. These enhancements aim to uncover the full extent and location of the recruiter's supply chain both in Canada and abroad.

Saskatchewan requires that every recruiter "shall disclose to the director the names and addresses of all of his or her partners, affiliates, or agents located or operating inside or outside of Saskatchewan." This information must be provided when applying for a licence and must be updated any time there is a material change in the information.<sup>214</sup> In addition, all contracts for recruitment services must be in writing, be written in clear and unambiguous language, identify the services provided and the expenses and fees that relate to each service, and contain any other terms required by the director or prescribed in regulations.<sup>215</sup>

Nova Scotia requires an even more detailed disclosure of the recruiter's operations and supply chain, including

- (a) whether the recruiter intends to live in the province full-time and, if not, "the applicant's plans for engaging in recruitment, how those plans are to be carried out and what portion of the applicant's business will involve placing workers in the Province";
- (b) a list of all countries from which the recruiter plans to recruit "and the names of any companies or individuals in those countries with which the applicant or the applicant's employer intends to deal and

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<sup>211</sup> *FWRIS Regulations*, s. 8(1); *General Labour Standards Code Regulations (N.S.)*, s. 22.

<sup>212</sup> *General Labour Standards Code Regulations, N.S. Re. 298/90*, s. 13 and s. 14.

<sup>213</sup> *Labour Standards Code (N.S.)*, s. 89D

<sup>214</sup> *FWRISA*, s. 26.

<sup>215</sup> *FWRISA*, s. 27.

- from which a benefit is expected to be received in relation to recruitment”;
- (c) “a list of all bank accounts, both domestic and foreign, maintained by the applicant or by any other person or entity on the applicant’s behalf in which the applicant has a current or anticipated future benefit in relation to recruitment work”;
  - (d) a list of all businesses, both domestic and foreign, associated with the applicant’s recruitment work; and
  - (e) “a description of the legal relationship between the foreign worker recruitment business and any other businesses, whether incorporated or unincorporated, that own, are owned or operated by, or affiliated with the foreign worker recruitment business.”<sup>216</sup>

By fully uncovering the recruiter’s supply chain, these enhanced laws seek to ensure that the licensed recruiter or the employer can be held accountable for all actions in breach of the law at all stages. It ensures that a worker can have effective remedies for breaches all along the recruitment pipeline.

4. Saskatchewan has also introduced a *Code of Conduct for Foreign Worker Recruiters*, which aims to establish standards of professional conduct for licensed recruiters.<sup>217</sup> Under the *Code*, no recruiter shall engage in any unlawful activity; provide advice or create false expectations that would lead a foreign national to divest assets, quit his or her job, or relocate without certainty of the right to work in Canada; or represent either expressly or by implication that the services provided are endorsed by the Government of Saskatchewan.<sup>218</sup> The *Code* outlines professional responsibilities on issues such as providing fair, honest, open, timely, and competent services and communicating promptly.<sup>219</sup> The *Code* imposes a duty on recruiters to “report to the director any conduct the recruiter reasonably believes is a contravention of the *Act*, the regulations made pursuant to the *Act* or this code.”<sup>220</sup> If asked to engage in dishonest, fraudulent, criminal, or illegal conduct in relation to recruitment, the recruiter is obliged to advise the person that the proposed conduct is dishonest, unlawful, and must stop, and the recruiter must withdraw from acting if the person intends to pursue that unlawful course of conduct.<sup>221</sup> The *Code* also mandates that “A licensed

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<sup>216</sup> *General Labour Standards Code Regulations (N.S.)*, s. 15(3)

<sup>217</sup> FWRISA, s. 55(1)(j); *FWRIS Regulations*, s. 11. *The Code of Conduct for Foreign Worker Recruiters (Recruiters Code of Conduct)* is set out in the Appendix to the *FWRIS Regulations*.

<sup>218</sup> *Recruiters Code of Conduct*, s. 4.

<sup>219</sup> *Recruiters Code of Conduct*, s. 5, 7, 8, 9, 11, and 12.

<sup>220</sup> *Recruiters Code of Conduct*, s. 6.

<sup>221</sup> *Recruiters Code of Conduct*, s. 8.

foreign worker recruiter is fully responsible for all work entrusted to his or her employees, partners, affiliates and agents.”<sup>222</sup>



### **International best practice #3: Security of workers’ property and documents**

Like Ontario, Nova Scotia and Saskatchewan both prohibit an employer or recruiter from taking possession of or retaining the migrant worker’s property, including their passport and work permit.<sup>223</sup>



### **International best practice #4: Security from exploitation**

Saskatchewan explicitly prohibits a much broader range of exploitative conduct than the other provincial legislation. Section 22 of the *Saskatchewan Act* prohibits the following conduct:

*22. No foreign worker recruiter, employer or immigration consultant shall:*

- (a) produce or distribute false or misleading information;*
- (b) take possession of or retain a foreign national’s passport or other official documents or property;*
- (c) misrepresent employment opportunities, including misrepresentations respecting position, duties, length of employment, wages and benefits or other terms of employment;*
- (d) threaten deportation or other action for which there is no lawful cause;*
- (e) contact a foreign national or a foreign national’s family or friends after being requested not to do so by the foreign national;*
- (f) take action against or threaten to take action against a person for participating in an investigation or proceeding by any government or law enforcement agency or for making a complaint to any government or law enforcement agency; or*
- (g) take unfair advantage of a foreign national’s trust or exploit a foreign national’s fear or lack of experience or knowledge.*

In combination with the *Code of Conduct*, which aims to reduce fraud and other illegal activities, Saskatchewan’s model most directly addresses the international best practices of eradicating conduct that preys on migrant

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<sup>222</sup> *Recruiters Code of Conduct*, s. 10.

<sup>223</sup> *Labour Standards Code (N.S.)*, s. 89G; FWRISA, s. 22(b).

workers' vulnerabilities in Canada and in the origin countries. It aims to transform the predatory culture.



### **International best practice #5: Employer registration and proactive supervision**

Both Nova Scotia and Saskatchewan have mandatory systems for registration of employers who seek to hire migrant workers.<sup>224</sup> The employers must register before seeking an LMO from the federal government. The registration is time limited — one year in Nova Scotia, five years in Saskatchewan.<sup>225</sup> As in Manitoba, once registered, employers must provide detailed information to the enforcement branch regarding their employment of migrant workers, including filing employment contracts and recruitment contracts.<sup>226</sup>

The following variations on the Manitoba model should be noted:

1. As it does with recruiters, Nova Scotia does not require employers who exclusively hire foreign nationals in professional and managerial jobs (NOC levels O and A positions) to register. The obligation to register applies only to employers hiring migrant workers at NOC levels B, C, and D.
2. Unlike the other provinces, Saskatchewan's licensing and registration system falls within the mandate of the provincial immigration ministry rather than the provincial ministry of labour. However, the legislation expressly provides for information sharing with the Director of Labour Standards and for **joint enforcement through joint inspections, examinations, audits, and investigations** under FWRISA and the *Labour Standards Act*.<sup>227</sup>
3. Unlike other provinces, Saskatchewan publicly posts information regarding both licensed recruiters and registered employers. This enhances a worker's capacity to ensure that an employer who seeks to hire them is legitimate or that a job promised by a recruiter is with a legitimate employer. It also allows for broader public accountability around the hiring of migrant labour.

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<sup>224</sup> *Labour Standards Code (N.S.)*, s. 89T; FWRISA, s. 15. In Saskatchewan, employers are exempt from the legislation if they employ workers who hold open work permits or who are exempt from applying for a work permit or an LMO: *FWRIS Regulations*, s. 6.

<sup>225</sup> Government of Nova Scotia, "Foreign Workers — Employer Registration Fact Sheet," online at [http://novascotia.ca/lae/employmentrights/FW/ForeignWorker\\_Employer\\_Registration\\_Information.asp#qWhendoIneed](http://novascotia.ca/lae/employmentrights/FW/ForeignWorker_Employer_Registration_Information.asp#qWhendoIneed) (accessed 11 December 2013); FWRISA, s. 18, s. 19.

<sup>226</sup> *General Labour Standards Code Regulations (N.S.)*, s. 25; *FWRIS Regulations*, s. 8(2).

<sup>227</sup> FWRISA, s. 34, s. 35 and Division 2.





### **International best practice #7: Multilateral cooperation**

As outlined above, Saskatchewan’s immigration and labour ministries have joint authority to conduct inspections, examinations, audits, investigations, and enforcement regarding recruiter and employer compliance with the *Foreign Worker Recruitment and Immigration Services Act* and the *Labour Standards Act*.

Saskatchewan’s law also expressly allows for information sharing with other ministries or agencies of the Government of Saskatchewan; departments or agencies of the Government of Canada; departments or agencies of another province or territory, or another country or state within that country; a police service; and any other person or body that governs or regulates the conduct of individuals who provide immigration or recruitment services to foreign nationals entering Canada.<sup>228</sup> The *Act* also enables the director to enter into agreements with any person or body empowered by a federal law, the legislature of a province or territory, and the government of any other country or jurisdiction within that country to administer or regulate foreign worker recruitment and immigration services programs.<sup>229</sup>

These provisions recognize that because labour migration is a transnational process, cross-jurisdictional cooperation is necessary to ensure that the entire migration pathway is secure for workers. These provisions also recognize that cross-jurisdictional cooperation is necessary within Canada to ensure that recruiters do not seek to evade provincial regulation by transferring workers across provincial borders.

### *3. Other models for cross-jurisdictional cooperation*

As set out above, it is possible to design legislation and practices to ensure that the federal and provincial jurisdictions work together to use multidirectional oversight. The federal government’s refusal to process LMOs until an employer has secured provincial registration is one example of such collaboration. Coordination between federal and provincial governments could also ensure that migrant workers — before they depart their origin countries — are provided with information, in a language they understand, about their rights in the applicable labour migration program, their employment social and human rights in the applicable province, mechanisms for enforcing those rights, and government and community organizations and services that are available to assist them in the appropriate province. More formal models of cross-jurisdictional collaboration also exist.

Illustrated by the SAWP, bilateral government-to-government agreements can provide protection from exploitation by private recruiters. However, greater

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<sup>228</sup> FWRISA, s. 32.

<sup>229</sup> FWRISA, s. 33.

transparency and accountability about how these bilateral agreements operate is necessary. The documents that structure the SAWP are not publicly available. Moreover, as set out above, details of how such bilateral agreements operate are also important for determining whether they provide protection for workers in practice or whether they create their own dynamics of insecurity. A significant way to enhance security is to ensure that workers have collective representation and participation in the consultations to develop and design these programs and associated contracts.

Even where strong proactive provincial legislation exists, supplementary bilateral agreements with origin countries may be important for ensuring that the migration process is protected at both ends of the journey. For example, British Columbia, Alberta, Saskatchewan, and Manitoba have all signed bilateral Memoranda of Understanding (MOU) with the Philippines Department of Labor and Employment concerning “Cooperation in Human Resource Deployment and Development.”<sup>230</sup> These MOUs provide for government oversight of the licensing/accreditation of recruiters, selection of employers, recruitment and selection of workers, information exchange, and for cooperation to protect the welfare of workers and address human resource development and training in the Philippines. They expressly identify the “cooperation priority” to “promote sound, ethical, and equitable recruitment and employment practices” and expressly prohibit the charging of any recruitment fees to workers. For example, Manitoba’s current MOU with the Philippines states that:

*The Participants intend that Employers will cover the costs related to hiring of Workers. Employers and Philippine-based Recruitment Agencies must not request, charge or receive, directly or indirectly, any payment from a person seeking employment in Manitoba, which contravenes The Employment Standards Code and/or The Worker Recruitment and Protection Act.*<sup>231</sup>

It is beyond the scope of this report to investigate and analyze the practical implementation of these provincial-level bilateral agreements. It is also

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<sup>230</sup> British Columbia and Alberta both signed bilateral MOUs with the Philippines in 2008. Manitoba originally signed an MOU with the Philippines in 2008 that was updated in 2010 after the passage of WRAPA. Saskatchewan originally signed an MOU with the Philippines in 2006 that was updated in October 2013 after the passage of FWRISA: see Government of Philippines, Department of Labor and Employment, “DOLE upgrades labor agreement with Saskatchewan” (10 October 2013), news release, online at <http://www.dole.gov.ph/news/view/2228> (accessed 11 December 2013). The bilateral MOUs and respective guidelines can be accessed on the website of the Government of Philippines, Department of Labor and Employment, online at <http://www.poea.gov.ph/lmi/agreements.htm> (accessed 11 December 2013).

<sup>231</sup> *Memorandum of Understanding between the Department of Labor and Employment of the Government of the Republic of the Philippines and the Department of Labour and Immigration of the Government of Manitoba, Canada, Concerning Cooperation in Human Resource Deployment and Development* (21 September 2010), Article 6.

important to stress the grave concerns that arise from appearing to institutionalize permanent programs of temporary migration. As outlined at the beginning of this report, many migrant workers and migrant worker advocates see their home government's pursuit of labour export policies as an abdication of the responsibility to build sustainable development and human security in their home countries. Admittedly, an origin country's interest in pursuing a bilateral agreement is influenced by a desire to secure a "market share" of labour and remittances and may not be primarily concerned with protecting the rights of migrants.<sup>232</sup> This latter concern is particularly heightened in view of the B.C. labour relations board's findings that anti-union conduct by Mexican authorities under the SAWP was in part motivated by a desire to ensure Mexican workers were not replaced by Guatemalan workers.<sup>233</sup> Bilateral agreements are, however, another model that is available to supplement collaborative enforcement across the length of the migration chain.

Finally, unions and non-governmental organizations have for years been playing a leading and innovative role in advancing the rights of transnational migrant workers. As set out in Part IV, the international rights-based framework specifically encourages the facilitation of such transnational networking of worker organizations. UFCW Canada has signed numerous bilateral mutual cooperation agreements with state governments in Mexico to establish a framework for transnational cooperation to increase protection for migrant farm workers from the signatory Mexican states before, during, and after the workers' stay in Canada. UFCW Canada provides training workshops so that workers know their rights before they come to Canada.

In Canada, the Union operates a network of ten migrant farm worker support centres across Canada in association with the Agricultural Workers Alliance that provide legal support services and training in human rights, labour rights, housing, and health and safety problems for workers while in Canada. Through this transnational cooperation, the Union assists workers to access benefits to which they are entitled under Canadian law, even after they have returned to their origin countries. Through a further transnational mutual cooperation agreement with the National Farm Workers Confederation (CNC) in Mexico, UFCW Canada and CNC are "developing a comprehensive database and analytical reports on the conditions facing migrant agriculture workers in Mexico, United States and Canada."<sup>234</sup>

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<sup>232</sup> The conflicting interests of the government in the origin country have for years also been raised in the context of the SAWP as undermining the capacity and willingness of liaison officers to advocate for workers' rights in Canada.

<sup>233</sup> See *Certain Employees – and – Sidhu & Sons Nursery Ltd. v. UFCW Canada Local 1518*, above note 92.

<sup>234</sup> See, for example, UFCW Canada, "UFCW Canada and CNC sign historic agreement" (13 April 2013), online at [http://www.ufcw.ca/index.php?option=com\\_content&view=article&id=3389%3Aufcw-canada-and-mexicos-cnc-sign-historic-agreement&catid=6%3Adirections-](http://www.ufcw.ca/index.php?option=com_content&view=article&id=3389%3Aufcw-canada-and-mexicos-cnc-sign-historic-agreement&catid=6%3Adirections-)

Similarly, the Canadian Labour Congress has been developing agreements with various unions and community organizations in countries across Asia to develop transnational cooperation. Again, these agreements enable labour organizations to monitor recruitment practices, provide information to workers before they depart the origin country, and ensure that they have union contacts on the ground in Canada when they arrive.<sup>235</sup>

Trade unions and a wide range of civil society organizations are also developing international collaborations to monitor and map transnational recruitment practices, identify exploitative recruiters, and provide protection to migrant workers globally.<sup>236</sup> And there are other international and transnational collaborations that are working to develop an international migrant workers bill of rights.<sup>237</sup>

## Comparison of Provincial Legislation

	Ontario	Manitoba	Nova Scotia	Saskatchewan
<b>Recruitment Fees</b>				
• no recruitment fees	✓	✓	✓	✓
• no fees for other settlement services	✓			
• employer prohibited from recovering recruitment cost from employee	✓	✓ (some exceptions)	✓	✓
• employer liable for fees charged by unlicensed recruiter			✓	✓
<b>Security of Personal Documents</b>	✓		✓	✓
<b>Prohibition on Exploitative Practices</b>				✓
<b>Proactive Recruiter Licensing</b>		✓	✓	✓
• restricted pool of persons eligible to act as recruiters		✓	✓	

newsletter&Itemid=6&lang=en; UFCW Canada, "UFCW Canada and the Mexican state of Guerrero sign cooperation agreement on migrant workers' rights" (12 January 2013), online at [http://ufcw.ca/index.php?option=com\\_content&view=article&id=2626%3Aufcw-canada-and-the-mexican-state-of-guerrero-sign-cooperation-agreement-on-migrant-workers-rights&catid=6%3Adirections-newsletter&Itemid=6&lang=en](http://ufcw.ca/index.php?option=com_content&view=article&id=2626%3Aufcw-canada-and-the-mexican-state-of-guerrero-sign-cooperation-agreement-on-migrant-workers-rights&catid=6%3Adirections-newsletter&Itemid=6&lang=en); UFCW Canada, "Oaxaca's government and UFCW Canada sign agreement to protect Mexican migrant workers in Canada," online at [http://www.ufcw.ca/index.php?option=com\\_content&view=article&id=2624%3Aoaxacas-government-and-ufcw-canada-sign-agreement-to-protect-mexican-migrant-workers-in-canada&catid=6%3Adirections-newsletter&Itemid=6&lang=en](http://www.ufcw.ca/index.php?option=com_content&view=article&id=2624%3Aoaxacas-government-and-ufcw-canada-sign-agreement-to-protect-mexican-migrant-workers-in-canada&catid=6%3Adirections-newsletter&Itemid=6&lang=en) (accessed 11 December 2013).

<sup>235</sup> Interview with Karl Flecker, Canadian Labour Congress (October 2013).

<sup>236</sup> See, for example, International Labor Recruitment Working Group, [www.fairlaborrecruitment.org](http://www.fairlaborrecruitment.org).

<sup>237</sup> See, for example, International Migrants Bill of Rights Initiative, Georgetown University, online at <http://www.law.georgetown.edu/academics/centers-institutes/isim/imbr/> (accessed 11 December 2013). See also Jennifer Gordon, "Towards transnational labor citizenship: Restructuring labor migration to reinforce workers' rights," *A Preliminary Report on Emerging Experiments* (New York: Fordham Law School, 2009).

	Ontario	Manitoba	Nova Scotia	Saskatchewan
• mandatory recruiter licensing		✓	✓ (NOC B, C and D jobs only)	✓
• time-limited license		✓	✓	✓
• public recruiter registry		✓	✓	✓
• security deposit		✓	✓	✓
• mandatory reporting of information about recruiter supply chain in Canada			✓	✓
• mandatory reporting of information about recruiter supply chain outside Canada			✓	✓
• recruiter liable for actions of actors in the recruiter's supply chain				✓
• mandatory reporting of recruiter's financial information inside and outside Canada			✓	
• mandatory record keeping re migrant workers recruiter and employers for whom recruited	✓	✓	✓	✓
• Recruiter Code of Conduct				✓
• Directors' liability for improper fees	✓			
<b>Proactive Employer Registration</b>		✓	✓	✓
• mandatory employer registration		✓	✓ (employment exclusively in NOC B, C and D jobs)	✓
• time-limited registration		✓	✓	✓
• public employer registry				✓
• employer liable if uses unlicensed recruiter		✓	✓	✓
• mandatory filing of information on migrant workers hired and work to be performed		✓	✓	
• mandatory record keeping re migrant worker contracts		✓	✓	✓
• mandatory record keeping re use of recruiters	✓	✓	✓	✓
• Directors' liability for improper cost recovery or fees	✓			
<b>Proactive Focus on Enforcement</b>		✓	✓	✓
• cross jurisdictional information sharing		✓		✓
• information sharing with recruiter's professional regulatory body		✓		✓
• cross-jurisdiction cooperation				✓

## PART VI: Concluding Analysis and Recommendations

Ultimately, it is important to ask whether and to what extent the law actually recognizes and responds to migrant workers' lived experience. Does the law recognize and address the power imbalances that infuse the entire labour migration dynamic or does it exacerbate those insecurities? Does the law seize opportunities to build security for workers on a rights-based framework or does it facilitate a commodification of labour and a degradation of human security? These concluding comments address six themes that arise from migrant workers' lived reality and the law's capacity to respond to them.

First, any regulatory model must recognize the reality of how disturbingly similar and commonplace the recruitment exploitation experienced by migrant workers is. Low-wage workers from vastly disparate parts of the globe, working in very different industries, in very different communities across southern Ontario, told migration stories that were achingly similar. Regardless of whether they arrived under the LCP, the Agricultural Stream, or the Stream for Lower-skilled Workers, recruiters were able to exploit the same vulnerabilities to extract profit from the workers' precariousness. For this reason, **any legal framework to regulate transnational labour recruitment must provide protection to all migrant workers — particularly low-wage migrant workers — regardless of the temporary migration stream through which they arrive.**

Second, a rights-based legal framework must squarely recognize and confront the extreme power imbalance that produces and sustains transnational labour migration. Canada's temporary labour migration programs are fed by and profit from deep structural and income inequalities between Canada and the economies from which workers migrate. A rights-based framework must acknowledge and be responsive to the ways in which that underlying economic and power imbalance defines and exacerbates the power imbalance between recruiter/employer and worker. A complaint-driven regulatory model that depends on the most disempowered actor in the system to police compliance of the most powerful actors fails to recognize this reality. Moreover, it exacerbates the inequality by forcing a worker who is already precarious to risk everything — job, housing, capacity to remain in Canada, retribution by money lenders — in order to secure decent treatment that was their entitlement from the outset. For this reason, a **proactive regulatory model that is enforced by the**

**employment standards branch and that builds in federal/provincial multidirectional oversight is both necessary and a best practice.**

Third, in accordance with a rights-based framework, effective and meaningful legislation should be proactively aimed at eliminating exploitative recruitment practices from arising. As has been long recognized and advocated at the international level, eliminating exploitation from the recruitment process **must involve proactive licensing of recruiters, registration of employers, and the requirement that, before being licensed, recruiters must post significant financial security to ensure that funds are available to compensate workers whose rights have been violated.**

On one hand, the **details of how a system of proactive licensing and registration is designed must aim to rectify conditions that create workers' actual disempowerment.** In this respect, proactive licensing and registration can **address the significant information gap** that recruiters and employers exploit. Registries with significant, meaningful information about recruiters, recruiters' supply chains, and employers must be publicly available and easily accessible. Information empowers workers. Publicly identifying all recruiters who are licensed to operate in a province — and publicly listing all the partners, affiliates, agents, and sub-agents in their entire recruitment chain both domestically and in the origin country — gives workers the data to verify whether the recruiter or employer they are dealing with is legitimate. Information also empowers enforcement agencies. Proactive licensing and registration creates the database that is crucial to enable the provincial employment standards branch to enforce the law. Creating a public registry of both recruiters and employers, as is done in Saskatchewan, also provides greater public accountability and empowers community and labour organizations to better support migrant workers and assist in monitoring compliance at a community level. Another significant option for closing the information gap would be to follow international best practices to provide public employment services to facilitate the matching of employers seeking LMOs with migrant workers both abroad and in Canada.

Moreover, the details of a proactive enforcement system must **address the full range of exploitation that workers face.** The legislation must prohibit the charging and recovery of recruitment fees and the seizing of personal documents as EPFNA already does. It must also provide protection through all stages of the labour migration cycle to prevent recruiter abuse in the initial placement, in subsequent placements, renewals, or transfers, and ultimately provide support for workers who are able to apply for permanent residence. Saskatchewan's prohibition of other abusive conduct (providing false information, threatening deportation, contacting workers' families, and so on) is a worthy enhancement because it targets behaviour that is abusive in itself, that

is widespread, and that also significantly undermines workers' capacity to enforce their rights to decent work.

On the other hand, **a proactive system must be designed in a way that recognizes government's opportunities for leverage.** In this respect, it must recognize that any pipeline that brings transnational migrant workers into the province has two ends, one of which — whether recruiter or employer — is *always* located in the province. The recruiter or employer in the province is readily subject to provincial jurisdiction and should be made accountable for all actions that occur within the labour recruitment chain. In this respect, enhancements to the Manitoba model that have been adopted in Saskatchewan and Nova Scotia are very important to the extent that they (1) require a recruiter to publicly identify every partner, affiliate, agent, or entity that may be involved in the recruitment chain both in Canada and in the origin country; (2) explicitly hold the recruiter liable for any conduct by any individual in the recruitment chain; (3) explicitly provide that it is an independent offence for an employer to use an unlicensed recruiter; and (4) make employers and recruiters jointly and severally liable for violations of the law.

Fourth, **a rights-based framework must acknowledge the ways in which laws that regulate different stages of the labour migration cycle interact with each other to exacerbate insecurities.** As set out above, the mandatory tied work permits, tied housing, and lack of access to permanent status all create distinct opportunities for exploitation by recruiters that heighten workers' insecurity.

Fifth, because labour migration is inherently trans-jurisdictional, rigorous domestic law must be supplemented by transnational agreements and collaboration to enforce best practices and rights at all points along the route from departure, through transit, and to arrival at destination. The details of these bilateral or multilateral agreements, however, must themselves ensure that workers have collective representation in the process that develops and governs these frameworks and that the terms of any agreements are informed by the rights-based framework and meet best-practice standards. In this respect, elements of the SAWP agreements that fall below these best-practice standards must be rectified.

Ultimately, though, the entire process of transnational labour recruitment must be examined critically for the role that it plays in supporting and sustaining Canada's temporary labour migration programs. Indecent profiteering is not restricted to unscrupulous recruiters. As indicated at the outset, the most fundamental question that must be asked is: who profits from the precariousness that is created and sustained by the larger economic system built on temporary migration? A system of laws and policies that continues to construct particular work and particular workers as "temporary," "foreign," and



“unskilled” fails to acknowledge and respect the work they do in permanent jobs that are core to the economy and critical to the functioning of our communities. It perpetuates a profound precariousness that undermines the security not only of the migrant workers themselves, but of the broader communities of which they are a part – in Canada and abroad. An economy built on the labour of a perpetually revolving working class of low-wage workers with no capacity to enforce their rights to decent work, no security of status, and no right to participate democratically in shaping the laws that govern them is unsustainable and destabilizing. It tears at the social fabric domestically and internationally. Fundamentally, a critical examination of the economic policies that demand transnational migration must inform the broader debate about the evolution of Canada’s immigration policy, the need to provide secure and safe avenues for workers of all skill levels to apply for permanent residence and strong multidimensional protection for the right to decent work.

Elaborating on the recommendations from *Made in Canada*, which are included in the Appendix, this report makes the following specific recommendations for building security into the recruitment phase of the labour migration cycle.

## Recommendations

1. Legislation must be extended to ensure that *all* migrant workers have effective protection against exploitation by migrant worker recruiters.
2. Legislation to protect migrant workers from exploitation by recruiters and employers must be designed on a proactive platform that meets international best practices and domestic best practices represented by the Manitoba’s *Worker Recruitment and Protection Act* and the enhancements developed in Saskatchewan and Nova Scotia.
3. Ontario should adopt a proactive system of employer registration, recruiter licensing (including the mandatory provision of an irrevocable letter of credit or deposit), mandatory filing of information about recruitment and employment contracts, and proactive government inspection and investigation in line with the best practices model adopted in Manitoba’s *Worker Recruitment and Protection Act* and the enhancements developed in Saskatchewan and Nova Scotia.
4. Specific enhancements to the Manitoba model that should be adopted in Ontario include:
  - (a) mandatory reporting of all individuals and entities that participate in the recruiter’s supply chain in Canada and abroad;
  - (b) mandatory reporting of detailed information regarding a recruiter’s business and financial information in Canada and abroad as developed in Nova Scotia’s legislation;

- (c) explicit provisions that make a licensed recruiter liable for any actions by any individual or entity in the recruiter's supply chain that are inconsistent with the Ontario law prohibiting exploitative recruitment practices;
  - (d) public registries of both licensed recruiters and registered employers;
  - (e) explicit provision that makes it an independent offence for an employer to engage the services of a recruiter who is not licensed under the legislation;
  - (f) explicit provisions that make an employer and recruiter jointly and severally liable for violations of the law and employment contract;
  - (g) protections against the broader range of exploitative conduct that is prohibited under s. 22 of FWRISA in Saskatchewan (i.e., distributing false or misleading information, representing employment opportunities, threatening deportation, contacting a migrant worker's family without consent, threatening a migrant worker's family, etc.); and
  - (h) provisions allowing for information sharing that enhances cross-jurisdictional enforcement of protections against exploitative recruitment practices, including information sharing with other ministries or agencies of the provincial government, department or agencies of the federal government, departments or agencies of another province or territory or another country or state within the country as developed in Saskatchewan's legislation.
5. Legislative and policy amendments must be made at the federal level to eliminate restrictive terms and conditions on labour migration that are exacerbating factors in recruitment exploitation. This would include replacing tied work permits with open, provincial, or sectoral permits; eliminating mandatory tied housing; eliminating the four-year in/four-year out rule; and providing pathways to permanent residence for workers at all skill levels.
  6. The federal government must pursue specific amendments to the SAWP to eliminate the 25% holdback under the contract for Caribbean workers and to ensure workers under the SAWP are entitled to job security, including seniority and right to recall.
  7. The Ontario government should consider supplementary bilateral agreements with origin countries to pursue monitoring and transnational protection against exploitative recruitment practices along the full length of the recruitment supply chain.
  8. Ontario should implement a comprehensive migrant worker bill of rights.

9. Ontario's initiatives to build protection for migrant workers must provide support for migrant worker organizations and community-based organizations that provide advocacy and support for migrant workers.

## Appendix A: Labour Migration Statistics

### Economic Class Permanent Residents, Temporary Foreign Worker Entries, and Temporary Foreign Workers Present, 2000–2012<sup>238</sup>

Year	Permanent Residents (Economic Immigrants)	Temporary Foreign Worker Entries*	Temporary Foreign Workers Present**
2000	136,282	116,250	89,628
2001	155,716	119,375	96,361
2002	137,863	110,613	101,078
2003	121,046	102,932	109,660
2004	133,746	112,228	125,005
2005	156,313	122,365	140,640
2006	138,248	138,450	160,740
2007	131,244	163,527	199,045
2008	149,068	190,739	249,502
2009	153,491	176,745	280,746
2010	186,916	179,075	281,923
2011	156,117	190,568	299,399
2012	160,819	213,573	338,213

Source: Figures compiled from Citizenship and Immigration Canada, *Facts and Figures 2012: Immigration Overview Permanent and Temporary Residents* (Ottawa: CIC, 2012) at pp. 4–5 (Canada — Permanent residents by gender and category, 1988–2012), pp. 52–53 (Canada — Temporary residents by yearly status, 1988–2012), and pp. 58–59 (Canada — Temporary residents present on December 1<sup>st</sup> by gender and yearly status, 1988–2012).

<sup>238</sup> The numbers reported in Table 1 in this report differ slightly from those reported in Table 1 in *Made in Canada*, because Citizenship and Immigration Canada revises its figures on an ongoing basis. CIC publishes a caution at the outset of its annual *Facts and Figures* report as follows: “The numbers appearing in this report for the period prior to 2012 may differ from those reported in earlier publications. These differences reflect adjustments to CIC’s administrative data files that normally occur over time”: Citizenship and Immigration Canada, *Facts and Figures 2012: Immigration Overview Permanent and Temporary Residents* (Ottawa: CIC, 2012) at p. iii.

\* "Temporary Foreign Worker Entries" refers to the sum of all temporary workers who enter Canada for the first time (initial entry) on a valid immigration document, such as a work permit, and all temporary workers who re-enter Canada in the calendar year with a new work permit.

\*\* "Temporary Foreign Workers Present" refers to all temporary workers with a valid work permit who are present in Canada on 1 December of a given year and includes workers whose permit began in an earlier year but remains valid in the observation year.

## Temporary Foreign Worker Entries and Present in Canada, Ontario and Toronto, 2000–2012

Year	Canada Entries	Canada Present	Ontario Entries	Ontario Present	Toronto Entries	Toronto Present
2000	116,250	89,628	59,196	46,465	22,061	16,984
2001	119,375	96,361	60,230	49,483	20,693	17,467
2002	110,613	101,078	55,038	50,466	19,331	18,176
2003	102,932	109,660	49,476	53,369	15,750	19,057
2004	112,228	125,005	51,920	58,811	16,412	21,108
2005	122,365	140,640	53,943	64,606	16,650	23,191
2006	138,450	160,740	58,673	71,779	18,952	27,083
2007	163,527	199,045	63,012	82,140	22,207	33,159
2008	190,739	249,502	65,647	90,796	25,789	40,074
2009	176,745	280,746	60,126	94,580	25,019	44,657
2010	179,075	281,923	65,628	99,897	30,063	49,891
2011	190,568	299,399	67,731	106,956	30,611	53,964
2012	213,573	338,213	71,245	119,903	33,365	64,284

Source: Figures compiled from Citizenship and Immigration Canada, *Facts and Figures 2009, Facts and Figures 2012*, pp. 52–53 (Canada — Temporary residents by yearly status, 1988–2012) at pp. 58–59 (Canada — Temporary residents present on December 1<sup>st</sup> by gender and yearly status, 1988–2012), pp. 75–76 (Canada — Total entries of foreign workers by province or territory and urban area), and p. 77 (Canada — Foreign workers present on December 1<sup>st</sup> by province or territory and urban area).

## Migrant Workers Present in Lower-Skilled Jobs in Canada, 2000–2012

	2000	2006	2012
Live-in Caregivers	7,451	24,428	19,830
Seasonal Agricultural Workers Program	16,688	21,263	25,509
Stream for Lower-Skilled Occupations	0	4,307	30,267
<b>TOTAL</b>	<b>24,139</b>	<b>49,998</b>	<b>75,606</b>

Source: Figures compiled from Citizenship and Immigration Canada, *Facts and Figures 2012: Immigration Overview Permanent and Temporary Residents* (Ottawa: CIC, 2012) at p. 64 (Canada – Temporary residents present on December 1<sup>st</sup> by yearly sub-status) and *Facts and Figures 2009: Immigration Overview Permanent and Temporary Residents* (Ottawa: CIC, 2009) at p. 62 (Canada – Temporary residents present on December 1<sup>st</sup> by yearly sub-status).

## Appendix B: Recommendations from *Made in Canada: How the Law Constructs Migrant Workers' Insecurity*

### Recruitment

1. Legislation must be extended to ensure that all migrant workers have effective protection against the charging of recruitment fees and to ensure that employers will be jointly and severally liable for recruitment fees that have been collected by private recruiters.
2. Ontario should adopt a proactive system of employer registration, recruiter licensing (including the mandatory provision of an irrevocable letter of credit or deposit), mandatory filing of information about recruitment and employment contracts, and proactive government inspection and investigation in line with the best practices adopted under Manitoba's *Worker Recruitment and Protection Act* and *Regulations*.
3. The limitation period for filing complaints about improper recruitment fees should be extended to reflect the current four-year period that live-in caregivers have to complete their qualifying work to apply for permanent residence.
4. Workers under the SAWP should be entitled to job security, including seniority and a right to recall.

### Work permits

5. Work permits should be sector-specific or province-specific and must be framed in a way that allows a worker to engage in alternate work or modified duties in the event of injury or illness.
6. Work permits should not prohibit migrant workers from enrolling in educational or training programs outside of working hours.
7. Public employment services should be developed to facilitate the matching of employers seeking LMOs with migrant workers presently in Ontario.
8. Employment insurance benefits must be made accessible in practice to migrant workers.

## Information prior to and upon arrival in Ontario

9. Canadian government officials should provide migrant workers with information about their rights in the applicable labour migration program; their employment, social, and human rights in Ontario; mechanisms for enforcing their rights; and government and community organizations and services that are available to assist them in Ontario. This information should be provided both in person and in writing, in the language spoken by the migrant worker, before a migrant worker departs their country of origin and again upon arrival in Ontario.
10. A comprehensive, plain-language guide for migrant workers should be developed and made readily accessible, outlining their rights through each stage of the labour migration cycle; identifying the relevant enforcement mechanisms and contact information for enforcement agencies; and providing contact information for established and recognized community organizations and worker advocates who can assist migrant workers through their labour migration cycle.
11. Migrant workers and worker advocates should be provided with transparent information about how prevailing wage rates are determined. Migrant workers must not be paid less than the prevailing wage.

## Working and living in Ontario

12. Provincial legislation should be amended to ensure that migrant workers in all sectors — including agriculture and caregiving — have access to effective and meaningful legal protection for the right to unionize and bargain collectively.
13. Resources should be devoted to emphasize proactive enforcement of employment standards in sectors and workplaces employing migrant workers. Proactive enforcement should be supplemented by collaboration with community organizations, inspections targeted at sectors at risk for non-compliance, the ability to expand reactive investigations beyond the initial complaint when evidence demonstrates a broader pattern of violations, and monitoring after a hearing to ensure remedies are implemented.
14. Ontario should establish an independent, publicly funded Office of the Migrant Worker Advocate to provide information and advice to migrant workers free of charge, including information about rights; how to enforce them; legal support in making claims to enforce rights; a hotline; outreach to migrant worker communities; and coordination



with community groups, advocates, and legal clinics supporting migrant workers.

15. The Ontario Ministry of Labour should develop innovative partnerships, including funding arrangements, with established community organizations who are working with migrant workers to collaborate on identifying rights violations.
16. Provincial legislation, including the *Employment Standards Act, 2000*, should be amended to ensure that anonymous complaints can trigger investigations and to permit complaints to be filed by third parties, such as community organizations and public interest groups.
17. Employee voice should be enhanced by facilitating worker representation and consultation in developing the contracts that apply to migrant workers, including workers under the SAWP.
18. Provincial legislation, including the *Employment Standards Act, 2000*, should be amended to ensure that all terms of migrant workers' contracts — including disputes about unjust termination — can be heard before a single expert administrative body (i.e., employment standards officers and Ontario Labour Relations Board) in an expedited process.
19. Where terminated, SAWP workers must be provided with the right to a hearing prior to repatriation.
20. Workers should be provided with protection for their security of status, security of housing, and security of employment under open or sector-specific work permits while a legal dispute about their employment is ongoing.

#### Renewal/expiry of work permits

21. Rather than being excluded from Canada after four years of work with temporary status, migrant workers should have a right to apply for permanent residence.

#### Pathways to permanent residence

22. NOC skill-levels C and D migrant workers — including workers in the SAWP and NOC C and D Pilot Project — must be provided with pathways to permanent residence.

## **Profiting from the Precarious**

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How recruitment practices exploit migrant workers

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