BC Employment Standards Coalition

Bringing together organizations, advocates and workers to campaign for decent wages, working conditions, respect and dignity in the workplace.

Backgrounder: Migrant Worker Recruitment & Protection – Model Legislation

Prepared by Linnsie Clark, Hospital Employees' Union
February 25, 2013

I) Introduction

The BC Employment Standards Coalition (the "Coalition") was established in November, 2010 to develop and advocate for public policy that protects fundamental workplace rights, improves employment standards, and ensures effective enforcement of those rights and standards.[1]

In British Columbia, the *Employment Standards Act* ("ESA") provides the minimum standards for working conditions in the province. Non-unionized employers cannot contract out of the ESA.

Not all workers in BC have the ability or bargaining power to negotiate fair and reasonable working conditions on their own behalf. Consequently, many workers in BC, especially non-unionized workers within the vulnerable worker groups (including Temporary Foreign Workers), rely solely on the ESA. As such, robust employment standards legislation is a critical tool in protecting and advancing workers' rights and working conditions.

However, the Coalition is of the view that the current ESA falls short in its protection of vulnerable worker groups. One of the objectives of the Coalition is to develop model legislation that modernizes the ESA through amendments in order to broaden the protection of workers. This backgrounder and the attached model legislation deal specifically with the ESA as it applies to Temporary Foreign Workers ("TFWs").[2]

A) The Temporary Foreign Worker Program ("TFWP")

The TFWP runs parallel to Canada's standard immigration program. As the name suggests, the TFWP is designed to allow foreign nationals to work in Canada for a limited and prescribed

[1]The Coalition has a diverse membership including migrant worker advocacy and assistance groups, child and youth advocates, unions, legal aid societies and lawyers, university professors and specialists working in the areas of employment, human rights and social policy. For more information on the Coalition, please visit our website at: <www.bcemploymentstandardscoalition.com>

[2] Thank you to: David Fairey, Labour Consulting Services; Rene-John Nicolas, Victory Square Law Office; Ai Li Lim, West Coast Domestic Workers' Association; Liza Guevara, West Coast Domestic Workers' Association; Christopher J. Foy, Kestrel Workplace Legal Counsel; Charles Gordon, Glavin Gordon Clements Law; David Ages, Gerardo Otero, Department of Sociology and Anthropology, SFU; Jonathan Hanvelt, Banister Law Corporation; Colin Gusikoski, Victory Square Law Office; Adriana Paz and Susan Lockhart, Trade Union Research Bureau.

period of time. Generally, a TFW's residence in Canada is attached to a specific employer and the TFW has little or no ability to change employers.

In order to hire a TFW, an employer is required to apply for and receive a positive Labour Market Opinion ("LMO") from the federal government.[3] According to Human Resources and Skills Development Canada ("HRSDC"), the LMO is intended to assess whether the offer of employment is genuine, whether the wages and working conditions are consistent with those offered to Canadians, and the impact that granting the application would have on the Canadian job market.[4]

"The number of temporary foreign workers in Canada has risen more than 50 per cent since 2007, when there were 199,165 workers in the country. In 2011, the number had increased to 300,111."

The Globe and Mail, "Ottawa looks to unemployed Canadians to fill labour shortages," April 19, 2012, online: <http://www.theglobeandmail.com/news/politics/ottawa-looks-to-unemployed-canadians-to-fill-labour-shortages/article2408394/> (last accessed: January 8, 2013)

The TFWP was intended to relieve temporary labour market shortages in particular sectors and it is largely employer driven. According to HRSDC, the TFW program "enables Canadian employers to hire foreign workers on a temporary basis to fill immediate skills and labour shortages when Canadians and permanent residents are not available."[5]

However, the methodology that the federal government uses to verify the existence of a labour shortage is grossly inadequate. Despite the fact that rigorous and proven methodologies are available for determining whether a labour shortage exists, the federal government does not use them. According to Karl Flecker, National Director of Canadian Labour Congress's Anti-Racism and Human Rights Department: [6]

> …no serious efforts are being made to verify if employers' claims of labour shortages are valid.

[3] Four federal government agencies are involved in hiring TFWs, Human Resources and Skills Development Canada, Service Canada, Citizenship and Immigration Canada (CIC) and Canada Boarder Services Agency ("CBSA"). HRSDC and Service Canada assess the employer's LMO application. CIC determines whether a given TFW is eligible to receive a work permit. CBSA screens foreign workers at ports of entry and has the final say with respect to entry into Canada.

[4] HRSDC, "Labour Market Opinion," online: <http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/ei_tfw/lmi_tfw.shtml> (last accessed: January 8, 2013)

[5] HRSDC, "Temporary Foreign Worker Program – Employer Compliance: Requirements for the Temporary Foreign Worker Program" online: <http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/pamphlet/ecr_pamphlet.shtml> (last accessed: January 8, 2013)

[6] Flecker, K., "No Fairness For Temporary Workers" June 1, 2012, CCPA Monitor, online: <http://www.policyalternatives.ca/publications/monitor/no-fairness-temporary-workers > (last accessed January 8, 2013)

In some cases, shortages of workers are related to poor working conditions and/or inadequate wage levels. But when employers can acquire migrant labourers who are economically desperate, vulnerable, and dependent on any income, there is little incentive for such employers to restructure their operations.

"At a time when we want to encourage young people to invest in skills, it seems odd to expect them to do so while sending them the message that if wages in their occupation ever rise, we will bring in TFWs to stop it. ... Looking at [the expansion of TFWs] it closely reveals a policy direction that is heavily focused on business interests to the detriment of workers' wages."

David Green, "Temporary foreign workers and the election: A major issue getting scant debate," April 26, 2011 online: < http://www.policyalternatives.ca/publications/commentary/temporary-foreign-workers-and-election>(last accessed: January 8,

Furthermore, hiring TFWs has become standard for many employers. Rather than a temporary fix to deal with immediate skills and labour shortages, the TFWP has become a substitute for offering decent wages and working conditions, and for policies that would encourage permanent immigration and apprenticeship and training opportunities for Canadians.

HRSDC also claims that the TFWP "supports economic growth, and in turn helps create more opportunities for all Canadians."[7] However, this is a peculiar statement given that TFWs accounted for almost 30% of net new positions created in Canada between 2007 and 2011,[8] despite the fact that almost 1.4 million Canadians were unemployed in 2011.[9]

It is unclear what evidence HRSDC is relying on in making its claim, but there is evidence to suggest that the TFWP, as it currently exists, is actually having an adverse impact on the Canadian labour market.[10]

HRSDC's claims become further suspect in light of the federal government's recent decision to allow employers to pay "high-skill" TFWs 15% less than the median regional wage rate and "low skill" TFWs (excluding agriculture workers and live-in caregivers) 5% less than the regional

[7] HRSDC, "Temporary Foreign Worker Program – Employer Compliance: Requirements for the Temporary Foreign Worker Program" online: <http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/pamphlet/ecr_pamphlet.shtml> (last accessed: January 8, 2013)

[8] The Progressive Economics Forum, "Temporary Foreign Workers and the Labour Market," (May 7, 2012) Posted by Jim Stanford, online: <http://www.progressive-economics.ca/2012/05/07/temporary-foreign-workers-and-the-labour-market/> (last accessed: January 8, 2013)

[9] Canadian Centre for Policy Alternatives, "Alternative Federal Budget 2012," at page 11, online: <http://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2012/03/AFB2012%20Budget%20Document.pdf> (last accessed: January 8, 2013)

[10] Gross, Dominique M., *Temporary Foreign Workers and Regional Labour Market Disparities in Canada* (January 2012), online: < http://www.sfu.ca/~schmitt/cpp_paper.pdf > (last accessed: January 8, 2013)

median wage rate, as long as the wage being paid to the TFW is the same as that being paid to their Canadian employees in the same job at the same location.[11]

This decision has negative implications for both TFWs and the Canadian labour market. Such a program seems to provide employers with an incentive to pay their Canadian employees less. In order to be able to pay TFWs at the lowest possible wage rate, an employer must also reduce the wages of its Canadian employees. And if an employer is willing or intends to employ TFWs, there is no reason for that employer to pay the median wage rate or higher, because it does not intend to compete for Canadian workers.

The existence of employers paying rates below the regional median wage rate could drive down Canadian wages and increase the use of TFWs in certain sectors, by forcing employers who wish to pay their workers a fair wage to compete with employers paying up to 15% less than the median regional wage rate. If the lower wage rate then becomes the new median regional wage rate, Canadian wage rates could be driven down even further.

As stated above, this backgrounder focuses on the assistance that can be provided to workers within the TFWP through the ESA. A more comprehensive discussion of the TFWP is provided in the Canadian Labour Congress paper, "Canada's Temporary Foreign Worker Program (TFWP): Model Program – or Mistake?"[12]

B) Model Migrant Worker Recruitment and Protection Legislation and White Paper

The Coalition drafted the *Migrant Worker Recruitment and Protection - Model Legislation* (the "MWRP") pursuant to its broader objective of modernizing the ESA. While the overarching goals of the Coalition are the same for all workers in BC, the MWRP is intended to address the inadequacies in the ESA that are unique to TFWs working in BC.

However, there are a number of fundamental problems with the current legislative regime that are outside the scope of the ESA. One of the most pervasive of these problems is the multi jurisdictional labyrinth that applies to TFWs.

i) Jurisdictional Issues

[11] HRSDC, "Temporary Foreign Worker Program: New wage structure" Online: <http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/communications/wage.shtml> (last accessed: January 8, 2013)

[12] Online: <Http://www.canadianlabour.ca/news-room/publications/canada-s-temporary-foreign-worker-program-tfwp-model-program-or-mistake> (last accessed: January 8, 2013)

The *Constitution Acts* establish the division of legislative power between the federal government and the provinces in Canada. While provincial governments have exclusive legislative power over matters of a local nature, including provincial employment standards, the federal government has exclusive jurisdiction over issuing work permits, citizenship, access to CPP and EI, and practical jurisdiction over immigration into BC.

BC does have some ability to nominate a foreign national for permanent residency through the *Canada – British Columbia Immigration Agreement*, 2010 but the final decision rests with the federal government.

This division of powers means that the federal government regulates how and when a TFW can come to Canada, where they can work, how long they can stay, when they must leave and whether they will have access to EI and CPP benefits.

Up to the point that a TFW arrives in Canada, the federal government even involves itself in the employment relationship between TFWs and their potential employer, including employment contracts and, in certain cases, the provision of housing. However, once a TFW arrives in Canada, the federal government does not engage in any enforcement regarding the employer/employee relationship, including the employment contracts they required for the purposes of immigration. At that point, the provincial government has jurisdiction over employment matters.

"Jurisdiction has been used as an excuse by the federal and some provincial governments for their failure to ensure that migrant domestic workers are not exploited by employment agencies."

Judy Fudge, "Global Care Chains, Employment Agencies, and the Conundrum of Jurisdiction: Decent Work for Domestic Workers in Canada" (2011) Canadian Journal of Women in Law, Vol. 23, No. 1. p 264.

But, while it is left up to the provinces to govern the employment relationship between TFWs and their employers, the government of BC has very little information with respect to where, or even how many TFWs are working in BC, or what working conditions were promised as part of the immigration process. The provincial government also has little to no authority to extend a TFW's stay in Canada or allow a TFW to change employers.

Furthermore, under certain TFWPs, the federal government creates employer obligations with respect to the provision of housing, but the province and municipalities have jurisdiction over housing conditions and tenancy. For example, the BC *Residential Tenancy Act*[13] limits how often a landlord can enter a rental unit and requires that rental units be suitable for occupation, while municipal by-laws regulate standards of maintenance.

[13] [SBC 2002] CHAPTER 78, Online: <http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_02078_01#section30> (last accessed: January 8, 2013)

In addition to the enforcement problems that this jurisdictional maze poses, it also limits a province's ability to establish structures that might improve working conditions for TFWs. For example, the development of employment agencies or hiring halls would diminish the dependency TFWs have on their employers. These agencies could deploy TFWs to worksites on an as needed basis and monitor the working conditions provided by the participating employers. However, such a structure would require the federal government to allow for greater flexibility in a TFW's employment relationship, for example, by making work permits sector specific rather than employer specific.

ii) Permanent Residency

A further elemental problem with respect to obtaining fair working conditions for TFW, which is largely outside the scope of provincial jurisdiction, is access to permanent resident status. With the exception of the Live-in Caregiver Program, low-skill TFWs have no avenue for permanent residency through the existing TFWPs.

The Canadian Experience Class program only allows certain skilled temporary foreign workers, including National Occupational Classification ("NOC") Skill Level A and B (technical occupations and skill trades), to apply for permanent residence.

As stated above, the federal government has granted the BC provincial government some limited authority to nominate TFWs for permanent residency pursuant to the *Canada-British Columbia Immigration Agreement,* 2010[14] but this agreement requires that economic factors provide the primary basis for the nomination. Candidates must be determined to be of significant benefit to the economic development of BC and have a strong likelihood of becoming economically established in BC. These criteria are likely too hard to meet for workers making close to minimum wage.

Currently, BC's Provincial Nominee Program ("PNP") limits its nomination to business nominations and "strategic occupations" including, Registered Nurses and skilled trades,[15] a

[14] Citizenship and Immigration Canada, "Canada- British Columbia Immigration Agreement, Annex B: Provincial Nominees" (2010). Online: <http://www.cic.gc.ca/english/department/laws-policy/agreements/bc/bc-2010-annex-b.asp> (last accessed: January 8, 2013)

[15] WelcomeBC, "Strategic Occupations," online: <http://www.welcomebc.ca/wbc/immigration/come/work/about/strategic_occupations/index.page?WT.svl=LeftNav> (last accessed: January 8, 2013)

"semi-skilled" category, including certain jobs in the hospitality, long-haul trucking and food processing industries, and the Northeast Development Region pilot project category.[16]

Most BCPNP class applications are contingent on a job offer and applicants have to do that job while the nomination is being confirmed and processed (approximately 7-9 months). If PNP class applicants leave the job during this period the nomination will be cancelled and they will have to start from scratch by finding a new employer. Consequently, many PNP class applicants are reluctant to leave their employers, even when the conditions are exploitative.

This lack of access to permanent residency is a serious problem because it exacerbates the power imbalance that exists between TFWs and their employers and increases the potential for downward pressure on the Canadian labour market.

iii) Multi-Employer Certification and Bargaining

One way to improve working conditions for TFWs that, while not within the scope of the ESA, is within the jurisdiction of the provinces, is sectoral or multi-employer certification/bargaining. Multi-employer certification/bargaining is a labour relations structure in which bargaining units are amalgamated to allow a trade union to bargain jointly with the employers of those units.

There are a number of ways that multi-employer certification/bargaining can be established. For example, the legislature can define a certain sector and require employers in that sector to bargain jointly with a trade union regarding wages and working conditions. The legislation can also, having defined a sector, require trade unions to organize each employer within that sector individually, but allow trade unions to merge the various bargaining units within the sector for the purpose of bargaining wages and working conditions. Multi-employer bargaining has enormous potential to alleviate many of the problems facing precariously employed individuals, including migrant workers.[17] However, in the past the provincial government has refused to pass such legislation.

Multi-employer certification and bargaining is most appropriately dealt with in labour relations legislation rather than employment standards legislation, so, it has not been included in the MWRP. However, a draft multi-employer certification provision is attached at Appendix "*".

iv) White Paper

[16] WelcomeBC, "Entry Level and Semi-Skilled", online: <http://www.welcomebc.ca/wbc/immigration/come/work/about/strategic_occupations/entry_level/who.page? > (last accessed: January 8, 2013)

[17] MacDonald, D. *Sectoral Certification: A Case Study of British Columbia*, (1997) 5 Can. Lab. & Emp. L.J. 243-286.

Some of the aforementioned issues are dealt with in the White Paper, Barriers to Effective Protection of Temporary Foreign Workers in Canada (Appendix "*"). The White Paper deals with the following issues:

- Freedom of Movement and Changing Employers;
- Freedom of Choice with respect to Housing (i.e., abolition of the live-in requirement);
- Provision and Enforcement of Adequate Housing where Required;
- Pathways to Permanent Residence;
- Continued Status to Remain in Canada Pending the Outcome of an Employment Standards Branch ("ESB") or Human Rights Complaint;
- Public Service Availability, including EI, CPP and MSP;
- Facilitation of Alternative Employment Agency Models; and
- Information Sharing between Federal, Provincial and Municipal governments.

v) Backgrounder and MWRP

This backgrounder and the MWRP focus on changes that can be made to the ESA to improve working conditions for TFWs. The Coalition proposes changes in the following areas, which are discussed in turn below:

- Recruitment and Hiring Practices;
- Housing;
- Access to basic rights;
- Employment Contracts; and
- Enforcement.

II) The TFWP Sub-Programs

Currently, TFWs access the various TFWPs according to their occupation and skill level. Skill level is determined by the National Occupation Classification coding system (the "NOC").[18]

The NOC identifies 4 occupational skill levels, "A" though "D". Generally:

[18] The National Occupation Classification scheme can be found on the HRSDC website at: <http://www5.hrsdc.gc.ca/noc/english/noc/2011/welcome.aspx> (last accessed: January 8, 2013)

- Skill Level A occupations require university education;
- Skill Level B occupations require college education or apprenticeship training;
- Skill Level C occupations require completion of secondary school and some job-specific training or courses directly related to the work done in that occupation; and
- Skill Level D occupations require some secondary school and on-the-job training.

NOC skill levels C and D are considered to be low skilled occupations. TFW in low skilled occupations are especially vulnerable because of their dependence on their sponsor employers. They also face language barriers, extremely limited access to permanent residency, limited information regarding Canadian laws and services, and inadequate access to rights enforcement mechanisms.

The TFWP contains the following low skill sub-programs:[19]

- **Stream for Lower-skilled Occupations (formerly known as the Pilot Project for Occupations Requiring a Lower Level of Formal Training** (the "Pilot Project");
- **Seasonal Agricultural Worker Program** ("SAWP");
- **Agricultural Stream (formerly known as the Agricultural Stream of the Pilot Project for Occupations Requiring a Lower Level of Formal Training)** ("AP");
- **Live-in Caregiver Program (NOC skill level D)** ("LCP").

Once in Canada, TFWs are subject to the same tax deductions as Canadian citizens and permanent residents. TFWs must also pay into Employment Insurance and Canada Pension Plan. However, access to the benefits is somewhat limited.

Regular and sickness EI benefits may only be collected while workers are in Canada. TFWs who have paid into EI can, at least in theory, collect maternity, parental and compassionate care EI benefits after they have left Canada.

TFWs who have made contributions to CPP are eligible to receive benefits as follows[20]:

[19] HRSDC, "Temporary Foreign Worker Program: Application Forms and Contracts," online: <http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/fwp_forms.shtml> (last accessed: January 8, 2013)

[20] HRSDC, "Seasonal Agricultural Worker Program," online: <http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/ei_tfw/sawp_tfw.shtml> (last accessed: January 8, 2013).

- **CPP pension** - TFW must make at least one valid contribution to CPP;

- **CPP disability benefits** - TFW must make contributions to CPP in at least four of the six calendar years immediately preceding the onset of the disability; and

- **CPP survivor benefit** – the deceased TFW must have made contributions to CPP for a minimum of three to ten years depending on the age of the deceased person at the time of her death.

A) Stream for Lower-skilled Occupations (formerly known as the Pilot Project for Occupations Requiring a Lower Level of Formal Training) (the "Pilot Project")

The Pilot Project is directed at workers in NOC Skill Level C and D occupations. Employer's hire TFWs through this program to fill a wide variety of jobs, such as, coffee shop workers, teacher assistants and care aides. Work permits under the Pilot Project are issued for a maximum of 24 months.

Employers hiring TFWs under the Pilot Project are required to have a signed contract with the TFW prior to their arrival in Canada, which outlines wages, duties, transportation, accommodation and occupational health and safety conditions. An employer under this program must also:[21]

- provide round trip transportation to and from the TFW's country of permanent residence (excluding hotels, meals and miscellaneous expenses during travel). These costs are not recoverable from the TFW and must not be passed on to the TFW.[22]

- provide private health insurance during the three-month BC Medical Services Plan ("MSP") waiting period and any other time that TFWs are not eligible to participate in MSP;

- enroll the TFW with WorkSafeBC;

[21] HRSDC, "Temporary Foreign Worker Program: Stream for Lower-skilled Occupations"," online: <http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/lowskill.shtml> (last accessed: January 8, 2013)

[22] HRSDC, "Temporary Foreign Worker Program: Stream for Lower-Skilled Occupations: Questions and Answers," online: < http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/questions-answers/general.shtml#01t> (last accessed: January 8, 2013).

- agree to review the TFW's wages after 12 months of employment and, if necessary, adjust them to ensure the worker continues to receive the prevailing wage rate of the occupation and region; and

- assist the TFW in finding suitable, affordable accommodation.

B) Agricultural Stream (formerly the Agricultural Stream of the Pilot Project for Occupations Requiring a Lower Level of Formal Training) ("AP")

The AP is an avenue for employers to hire foreign agricultural workers. Like the Pilot Project, the AP is limited to NOC Skill Level C and D and work permits are issued for a maximum period of 24 months.[23]

The LMO requirements are largely the same as the Pilot Project, including minimum recruitment efforts, a signed employment contract, round trip transportation from the TFW's country of origin, medical coverage until the worker is eligible for MSP, and enrollment with WorkSafeBC or a private insurance provider providing similar coverage.[24]

However, in addition to these requirements, an employer hiring a TFW under the AP must also provide suitable accommodations that have been approved by the appropriate provincial/municipal body or private inspection agency at a fee of $30/week[25].[26]

C) Seasonal Agricultural Worker Program ("SAWP")

The SAWP is another avenue for employers to hire foreign agricultural workers. The SAWP is limited to on-farm primary agriculture workers and operates according to bilateral agreements between Canada and Mexico, and certain Caribbean countries. Under the SAWP, an employer can hire seasonal agricultural workers for a minimum of 240 hours of work, within a period of six

[23] HRSDC, "Agricultural Stream: Description" online: <http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/agriculture/description.shtml> (last accessed: January 8, 2013)

[24] HRSDC, "Agricultural Stream: Requirements" online: <http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/agriculture/requirements.shtml> (last accessed: January 8, 2013)

[25] Employers can increase the $30/week fee by 1% each year, effective on January 1st of each year.

[26] HRSDC, "Agricultural Stream: Requirements" online: <http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/agriculture/requirements.shtml> (last accessed: January 8, 2013)

weeks or less, for a maximum duration of eight months between January 1 and December 15.[27] Workers under the SAWP can be transferred from one farm to another with the worker's consent.[28]

The requirements listed under the Pilot Project also apply to SAWP employers. However, with respect to the provision of private health insurance during the three-month MSP waiting period, employers hiring TFW from Mexico can recover insurances payments from the TFW through payroll deductions of $0.94 per day. [29] For Caribbean workers, medical insurance is paid for through a 25% wage deduction that covers fees and a mandatory personal savings fund. [30]

Additionally, a SAWP employer must pay a TFW's work permit fee. However, for TFW from Mexico, this fee can be recovered through payroll deductions. For TFW from the Caribbean countries, the fee is reimbursed by the TFW's government. SAWP employers are also permitted to deduct from a TFW's wages, a portion of costs for housing and meals, and other amounts to reflect utility costs in relation to the employment of the TFW.

Employers of TFW from Caribbean countries can deduct $7.00 per day for the cost of meals[31] and $3.95 per working day up to $474.00 for the TFW transportation costs. If, *in the opinion of the foreign government*, in consultation with the Employer, personal domestic circumstances exist, which make repatriation of a Caribbean TFW desirable or necessary, and less that 50% of the term of the work agreement has been completed, the TFW is responsible for the full cost of repatriation.[32]

---

[27] HRSDC, "Seasonal Agricultural Worker Program" online: <http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/sawp/description.shtml> (last accessed January 8, 2013)

[28] HRSDC, "Seasonal Agricultural Worker Program: Requirements" online: <http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/sawp/description.shtml> (last accessed January 8, 2013).

[29] HRSDC, "Agreement for the Employment in Canada of Seasonal Agricultural Workers from Mexico in British Columbia For the Year 2013," online: <http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/forms/sawpmcbc2013.pdf> (last accessed: January 8, 2013).

[30] HRSDC, "Seasonal Agricultural Worker Program: Requirements" online: <http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/sawp/description.shtml> (last accessed January 8, 2013).

[31] In Alberta, Manitoba, Ontario, New Brunswick, Prince Edward Island and Saskatchewan employers are also permitted to deduct $2.16 per working day to reflect utility costs.

[32] HRSDC, "Agreement for the Employment in Canada of Commonwealth Caribbean Seasonal Agricultural Workers - 2013" online: < http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/forms/sawpcc2013.pdf> (last accessed: January 8, 2013).

Employers of TFW from Mexico can recover 10% of gross earnings to a maximum of $589.00 in cost recovery deductions for accommodations and $6.50 per day for the cost of meals.[33]

D) Live-in Caregiver Program ("LCP")

A Live-in Caregiver ("LCG") is a person who resides in a private household and provides unsupervised care for children, seniors or persons with disabilities living in that household.[34]

The LCP is somewhat unique in terms of the qualification requirements of the potential employer and LCG. An employer wishing to hire a TFW under the LCP must meet the following eligibility requirements in order to qualify:[35]

- sufficient income to pay a live-in caregiver;
- acceptable in-home accommodations;
- a job offer that has primary caregiving duties for a child, elderly or disabled person; and
- proof that the employer or their dependant is in need of care.[36]

In turn, a potential LCG must meet the following eligibility requirements:

- completion of the equivalent of a Canadian secondary school;
- the ability to speak, read and understand English or French so that they can function on their own in an unsupervised setting;
- medical, security and criminal clearances; and
- at least six months of full-time classroom training, or
- at least one year of work experience as a caregiver (or related field) within the last three years, with at least six months of continuous employment with one employer;

---

[33] HRSDC, "Agreement for the Employment in Canada of Seasonal Agricultural Workers from Mexico in British Columbia For the Year 2013," online: <http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/forms/sawpmcbc2013.pdf> (last accessed: January 8, 2013).

[34] HRSDC, "Temporary Foreign Worker Program: Labour Market Opinion (LMO) Statistics," online: <http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/stats/glossary.shtml> (last accessed: January 8, 2013)

[35] Citizenship and Immigration Canada, "Determine your eligibility – Hiring a live-in caregiver," online: < http://www.cic.gc.ca/english/work/apply-who-caregiver.asp > (last accessed: January 8, 2013)

[36] HRSDC, "Live-in Caregiver Program: Requirements," <http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/caregiver/requirements.shtml > (last accessed: January 8, 2013)

Citizenship and Immigration Canada ("CIC") also requires that the contract between an employer and LCG contain terms regarding: mandatory employer-paid benefits, job duties, hours of work, wages, accommodation arrangements, holiday and sick leave entitlements, and terms of termination and resignation.

Like the other TFWPs, HRSDC provides a sample employment contract for the LCP.[37]

Unlike the other low-skill TFWPs, the LCP provides live-in caregiver foreign workers the opportunity to become permanent residents after they have been employed full time for 2 years (or 3900 hours after 22 months). [38]
Technically, live-in caregivers can also change jobs or lose their job, without having to leave Canada. However, the LCG must get a Record of Employment ("ROE") from her previous employer and apply for a new work permit. Getting a new work permit requires a new LMO and signed employment contract with the new employer.[39]

III) Problems with the Current Employment Standards with Respect to Temporary Foreign Workers in British Columbia

There are several areas in which the ESA is failing TFWs in BC. The MWRP proposes improvements in the following areas:

- Recruitment and Hiring Practices;
- Housing;
- Access to basic rights;
- Employment Contracts; and
- Enforcement.

While enforcement has its own section, it is a recurrent issue throughout the proposals. Weak and inaccessible enforcement mechanisms have rendered even the existing employment standards inert. Improving employment standards without corresponding improvements to enforcement is unlikely to result in much tangible change for workers. An effective and

[37] Citizenship and Immigration Canada, "The Live-in Caregiver Program: Employment Contract Template," online: <http://www.cic.gc.ca/english/work/caregiver/sample-contract.asp> (last accessed: January 8, 2013)

[38] HRSDC, "Live-in Caregiver Program: Description," <http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/caregiver/description.shtml > (last accessed: January 8, 2013)

[39]Citizenship and Immigration Canada, "The Live-In Caregiver Program: Extending your stay," online: <http://www.cic.gc.ca/english/work/caregiver/extend-stay.asp > (last accessed: January 8, 2013)

accessible enforcement regime, including adequate funding to support that regime, is quite possibly the single most important change that can be made to the existing ESA.

A) Recruitment and Hiring Practices

i) Recruitment Agencies

Before TFWs even get to Canada, they are often subject to the unscrupulous practices of recruitment agencies hired by Canadian employers to recruit foreign workers on their behalf. These exploitative practices are difficult to regulate because employment agencies operate in foreign countries and are often either unknown to, or untouchable by, provincial governments.

For example, under the Memorandum of Understanding between the Canadian and Mexican governments establishing the Mexican - Canadian SAWP, the Mexican Ministry of Labour is responsible for recruiting Mexican workers. Under this program:[40]

> initially, only married men, experience working in agriculture, with at least three and no more than 12 years of schooling, between the ages of 22 and 45, and from the Mexico City area could participate. After 1989, women aged 23 to 40 with dependent children could participate, and today about five percent of the migrants are women. Unmarried men have been allowed to participate since 2003.

While this kind of discriminatory hiring practice would be prohibited in Canada under the *Human Rights Code*, under the current legislative regime, agencies (including government agencies) recruiting abroad for employers in Canada are often able to discriminate in this way.

Other corrupt practices that have been used by recruitment agencies include providing false information regarding the work and working conditions being offered (see Employment Contracts below) and illegally charging fees for recruitment services.[41]

For example, Prince George Nannies and Caregivers Ltd. ("PG Nannies"), a company in the business of recruiting foreign LCG, charged its LCG recruits fees of between $4,000 and $5,500 each.[42]

---

[40] Martin, P., International Labour Organization, International Migration Papers, 89, "Towards Effective Temporary Worker Programs: Issues and Challenges in Industrial Countries", online: <http://www.ilo.org/public/english/protection/migrant/download/tempworkers_martin_en.pdf> (last accessed: January 8, 2013)

[41] International Labour Organization (ILO), *Report of the Tripartite Meeting of Experts on Future ILO Activities in the Field of Migration* (Geneva: ILO, 21-5 April 1997) Annex II, Article 3.1.

[42] *Prince George Nannies and Caregivers Ltd.* (2 June 2009), BC EST no. D055/09, BC Employment Standards Tribunal, online: <http://www.bcest.bc.ca/leading/d055_09.pdf> (last accessed: January 8, 2013). The Employment

The ESA, section 10, prohibits charging a fee to a person seeking employment for finding a job or providing information about available jobs. However, recruitment agencies are permitted to charge foreign workers for a variety of other services.

Recruitment agencies often attempt to characterize fees prohibited by section 10, as services outside the scope of section 10(1), such as resume preparation, liaising and immigration services, or within the scope of the section 10(2) advertising exception (as was the case with PG Nannies). This can complicate enforcement.[43]

Judy Fudge, a professor of law at the University of Victoria, recommends that BC follow the example of Manitoba by implementing a comprehensive regime to govern recruiters that specialize in placing migrant workers.[44]

The Manitoba *Worker Recruitment and Protection Act* (the "Manitoba Act")[45] prohibits anyone from charging or collecting fees from a foreign worker for finding or attempting to find the worker employment. According to their factsheets, the Manitoba Employment Standards Branch interprets this provision as placing an absolute ban on foreign worker recruiters from receiving "any money (directly or indirectly), or any other benefit, from a worker they assist with employment."[46]

The Manitoba Act also requires any person engaged in recruiting foreign workers to be licensed and, in order to be licensed, an individual must provide an irrevocable letter of credit or cash bond in the amount of $10,000.

The ESA should be amended to require recruitment agencies to be licenced with the ESB and provide collateral to be used in the event of a contravention of the ESA, in addition to having their license revoked.

Standards Tribunal refused to reconsider the Original Decision (October 21, 2009). PG Nannies then applied the BC Supreme Court to set aside the Original and Reconsideration Decisions. The petition was dismissed in *Prince George Nannies & Caregivers Ltd. v. British Columbia (Employment Standards Tribunal)*, 2010 BCSC 883 (CanLII), online: < http://canlii.ca/t/2b8r3 >

[43] See also: *Gorenshtein & ICN Consulting Inc. v. Tagirova*, 2010 BCPC 384 (CanLII), online: <http://canlii.ca/t/2fwsr> (last accessed January 8, 2013)

[44] Judy Fudge, "Global Care Chains, Employment Agencies, and the Conundrum of Jurisdiction: Decent Work for Domestic Workers in Canada" (2011) *Canadian Journal of Women in Law,* Vol. 23, No. 1, p. 261.

[45] *Worker Recruitment and Protection Act* , CCSM c W197, online: <http://canlii.ca/t/kw1l> (last accessed: January 8, 2012)

[46] Judy Fudge, "Global Care Chains, Employment Agencies, and the Conundrum of Jurisdiction: Decent Work for Domestic Workers in Canada" (2011) Canadian Journal of Women in Law, Vol. 23, No. 1, .p 262.

The ESA should also be amended to prohibit recruitment agencies from receiving any money or benefit from the TFWs they assist with employment.

ii) TFW Employer Registration

Employers of TFWs also operate under the radar to some degree because, with the exception of the LCP, the BC government has no knowledge of who is employing TFWs or what was promised to TFWs by a recruiter or employer during the immigration process.

Under the Manitoba Act, employers must register and provide information about themselves and the foreign worker recruiters they use. The CIC will not process an unregistered employer's immigration application for a TFW destined for Manitoba.

Quebec requires all employers applying to HRSDC for an LMO to submit an application for the approval of such to the Quebec Ministry of Immigration and Culture. The application to the Ministry contains the names and places of employment for all TFWs that an employer seeks to bring to the province.[47] An LMO and work permit will only be provided by the federal government after the Quebec Ministry of Immigration has approved the employer's application and terms of employment.[48]

Employers of TFWs must be required to register so that they are known to the provincial government and can be held accountable for violating the TFWs rights. An employer's ability to employ a TFW should be contingent on registration and their continued registration contingent on abiding by their contract with the TFW, the ESA and other BC legislation.

Therefore, the ESA should be amended to require employers who employ TFWs in BC to register with the ESB, provide pertinent information regarding any recruitment agencies they used, and the names, terms of employment and accommodation of the TFWs they hire. No employer should be permitted to hire TFWs without registering and any employer found to be in violation of the promised terms of employment or the laws of BC should be prohibited from continued registration or re-registration.

B) Housing

[47] Immigration et Communautes culturelles Quebec, online: "Recrutement international", online: <http://www.immigration-quebec.gouv.qc.ca/fr/employeurs/> (last accessed: January 8, 2013)

[48] HRSDC, "Temporary Foreign Worker Program: Hiring Temporary Foreign Workers in Quebec," online: <http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/tempwork_quebec.shtml > (last accessed: January 8, 2013); HRSDC, "Temporary Foreign Worker Program: Stream for Lower-skilled Occupations", online: <http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/lowskill.shtml > (last accessed: January 8, 2013)

Under most of the TFWPs, an employer must provide, or help the worker obtain, accommodation for the duration of the work permit. However, there are no federally or provincially legislated minimum standards for such housing and no regular inspection to ensure conformance with minimum standards of health, safety, decency and comfort.

In BC, there is ample evidence that the housing conditions for many TFWs are unacceptable. [49] However, the only housing policy and regulatory reviews to date have been with respect to farmworker housing situated on Agricultural Land Reserves or in existing farm buildings. The focus of these reviews has been on the maximum size of housing units that should be permitted on agricultural land, rather than reasonable minimum standards for decent living conditions or tenancy rights.[50]

According to the recent research of Luis Aguiar, et. al. the regulations regarding the provision of housing for TFWs is inadequate and again reflective of the jurisdictional confusion described above:[51]

> Within the SAWP, housing conditions are ambiguously regulated. … [The LMO process requires employers to] submit a Seasonal Housing Accommodation Inspection report or a contract with a commercial accommodation supplier. Housing workers within the work premises is preferred to housing them in commercial accommodations. Houses are expected to be inspected only once during the season, before the workers arrive. … The government does not include any further inspection, nor does it oversee inspectors, unless there is a formal complaint. … In British Columbia, private companies have the responsibility to inspect the large majority of the accommodations. The exceptions are the municipality of Abbotsford and the District of Pitt Meadows, which conduct their own inspections. Only one private company is in charge of the Okanagan. … Inspections cost the farmer eighty-five dollars, which is paid directly to the inspector onsite upon completion of the inspection (BCSAWP 2005). It is disconcerting that the government is not in charge of these tasks or at least of imposing a system to oversee private inspections of farms. In accordance with the neoliberal philosophy, more and more governments take a hands-off attitude with regard to the private sector. In this case, it is the private sector that selects the inspecting companies; it is the farmers who pay the private inspector directly for the inspections. In our view, there is potential for a conflict of interests in this process."

[49] See for example Luis LM Aguiar, Patricia Tomic and Ricardo Trumper, *Mexican migrant agricultural workers and accommodations on farms in the Okanagan Valley, British Columbia,* Metropolis British Columbia Working Paper Series, No. 11-04, April 2011.

[50] See for example BC Ministry of Agriculture, *Regulating Temporary Farm Worker Housing in the ALR, Discussion Paper and Standards*, March 2009. See also Community Social Planning Council (Vancouver Island), *Farm Worker Housing Policy Review,* August 2010.

[51] Luis LM Aguiar, Patricia Tomic and Ricardo Trumper, *Mexican migrant agricultural workers and accommodations on farms in the Okanagan Valley, British Columbia,* Metropolis British Columbia Working Paper Series, No. 11-04, April 2011, pp 24 – 25.

The Aguiar et al. report recommends greater provincial government attention to what constitutes appropriate accommodations.[52]

The ESA should be amended to establish minimum standards of housing for all TFWs as well as proper inspection and enforcement mechanisms.

In establishing legislated minimum standards of housing the model provided by the "BC Construction Camp Rules and Regulations" negotiated between the BC and Yukon Territory Building and Construction Trades Council and Construction Labour Relations of BC should be followed.[53]

C) Access to Basic Rights

Employment standards and human rights legislation is only effective when individuals are aware of the rights such legislation bestows upon them and have the ability to enforce those rights.

While ethical employers certainly do exist, employers cannot simply be relied upon to act in accordance with employment and human rights legation. For example, in 2006, SELI Canada and SNC Lavalin ("SELI and SNC") employed Latin American, European and Canadian workers for the construction of the Canada Line rapid transit project. These workers provided the same work to SELI and SNC but were compensated very differently according to their country of origin.[54]

> [T]he Latin American workers were paid less than Canadian market wages for their highly-skilled tunnelling work, and far less than European foreign workers on the project who had the same skills and did exactly the same jobs. For example, the highest-paid Latin American, a foreman with 27 years' experience, made just over half of what the lowest-paid European took home in pay. The Latin American workers also suffered from poorer working conditions in a number of other ways: Latin American employees were housed in cramped motel accommodations far from the jobsite while most Europeans were put up in luxury condos steps away from work; Latin Americans were forced to eat the same food in the same restaurants for up to a year and a half while Europeans

[52] Luis LM Aguiar, Patricia Tomic and Ricardo Trumper, Op. Cit., pp 24 – 25; 31 - 32.

[53] CLR, "BC Construction Camp Rules and Regulations," online: <http://www.clra-bc.com/documents/BCConstructionCampRulesandRegs_000.pdf > (last accessed: January 8, 2013)

[54] *C.S.W.U. Local 1611 v. SELI Canada and others* (No. 3), 2007 BCHRT 423, online: <http://www.bchrt.bc.ca/decisions/2007/pdf/nov/423_CSWU_Local_1611_v_SELI_Canada_and_others_(No_3)_2007_BCHRT_423.pdf > (last accessed: January 8, 2013)

> were given allowances to buy their food where they liked; the list of discriminatory treatment went on.[55]

Unfortunately, TFWs are often unaware of the rights that they have as workers in Canada. This is owing to a number of factors, including inadequate orientation, language barriers and insufficient access to available services.

Therefore, it is critical for the ESA to require orientation for all TFWs, provided in the first language of the worker, before they start employment at a BC workplace. This orientation should be developed by the ESB and WorkSafeBC, and should include information on employment standards, human rights, occupational health and safety, and available services.

Additionally, the ESA should require employers of TFWs to provide all written materials, instructions and signage at their workplace in both English and the first languages of their workers.

The ESA should also establish and properly fund TFW advisory offices and advocacy services throughout the province and a temporary foreign workers' telephone helpline service in multiple languages. Such services are already available in Alberta through its Temporary Foreign Worker Advisory Office's in Edmonton and Calgary and its Temporary Foreign Worker Helpline.[56]

D) Employment Contracts

Another simple way to increase rights awareness and access to work place justice is to require an employer to provide each TFW with an employment contract containing all terms and conditions of employment.

Following the 1994 review of the ESA, the ESA and *Employment Standards Regulation* ("ESR") were amended to require an employer to provide LCG employees with an employment contract outlining duties, hours of work, wages and rent, and to establish a maximum charge of $355/month for room and board (ESA section 14; ESR section 14). At that time, the LCP was the only TFWP that BC agreed to participate in with the federal government.

---

[55] Glavin Gordon Clements Lawyers, "Foreign Workers on Canada Line Project Fight Discrimination," online: <http://ggclaw.com/firm-news/foreign-workers-on-canada-line-project-fight-discrimination/ > (last accessed: January 8, 2013)

[56] Alberta Human Services, Employment and Immigration, online: "Temporary Foreign Workers", online: <http://employment.alberta.ca/Immigration/4548.html> (last accessed: January 8, 2013)

Since then, BC has entered into several other "low skill" TFW agreements with the federal government, including SAWP, the AP and the Pilot Project. However, the ESA has not kept up with this expansion. Currently, with the exception of the LCG program, the ESA does not require an employer to provide a TFW with an employment contract or outline the terms and conditions that must be in such a contract.

While all of the TFWPs require some form of employment contract to be signed by the employer and TFW, the primary purpose of such contracts is to facilitate the LMO process and entry of a TFW into Canada, rather than to protect the rights of TFWs. HRSDC requires only minimal content to be in the contracts, as laid out in the sample contracts under each TFWP.[57] The content varies but many important conditions of employment contained within the BC ESA and ESR are not contained in these contracts.

Furthermore, these contracts are signed prior a TFW's entry into Canada, without any knowledge of BC labour laws and without the ability to ask questions, obtain clarification or make changes to the contract.

Once in Canada, TFWs are also often faced with additional terms and conditions of employment that they did not agree to during the LMO process. For example, once in Canada, TFWs under the SAWP may receive additional "rules of conduct" that the worker is obligated to "obey and comply with".[58]

There are also jurisdictional issues with respect to enforcement of the employment contract signed as part of the LMO process. The HRSDC website for the TFWP makes it clear that:[59]

> The Government of Canada is not a party to the contract. Human Resources and Skills Development Canada (HRSDC)/Service Canada has no authority to intervene in the employer-employee relationship or to enforce the terms and conditions of employment. It is the responsibility of the employer and the worker to familiarize themselves with laws that apply to them and to look after their own interests.

[57] HRSDC, "Temporary Foreign Worker Program: Application Forms and Contracts," online: <http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/fwp_forms.shtml> (last accessed: January 8, 2013)

[58] HRSDC, "Temporary Foreign Worker Program: Agreement For The Employment In Canada Of Seasonal Agricultural Workers From Mexico In British Columbia For The Year 2013," online: <http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/contracts-forms/sawpmcbc2013.shtml > (last accessed: January 8, 2013)

[59] HRSDC, "Temporary Foreign Worker Program", online: <http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/contracts-forms/annex2.shtml> (last accessed: January 8, 2013)

And, as stated above, employers cannot be relied upon to regulate themselves. Invariably, there are certain employers that will chose not to abide by contracts signed with TFWs before they enter Canada. This was the case in the ongoing Denny's restaurant litigation:[60]

> The claim alleges that acting through their agents, the Defendants recruited members of the class to work in their Denny's restaurants. The Defendants entered into employment contracts with members of the class regarding wages, hours of work, overtime and other working conditions.
>
> The employment contracts further provided that the members of the class would not have to pay any costs related to their round trip air travel between the Philippines and Canada or any costs associated with their recruitment for work with the Defendants, including costs to any third party recruiters.
>
> In reliance upon and in consideration of these binding terms, the class members left their homes and spent considerable money and effort to travel to British Columbia to work for the Defendants.
>
> During the course of the class members' employment, the Defendants failed to provide as much work as promised, failed to pay overtime as promised, and failed to reimburse members of the class for expenses incurred on behalf of the Defendants, including recruitment and travel costs.

It is up to the province to enforce the employment relationship between a TFW and their employer. However, if the ESB does not have a copy of the employment contract between an employer and TFW, there is no way for the ESB to verify whether a TFW's conditions of employment are consistent with those offered during the LMO process.[61]

In order to ensure that employers of TFWs are providing at least what they promised during the immigration process, the ESA should be amended to require employers to register employment contracts signed during the immigration process, with the ESB.

Furthermore, in order to ensure that TFWs in BC are receiving fair working conditions that are consistent with the ESA and other BC legislation, the ESA should provide comprehensive standard contracts for each of the TFWPs and require that these contracts be executed in BC and registered with the ESB.

---

[60] Kestrel Workplace Legal Counsel LLP, "Denny's Temporary Foreign Workers' Class Action (Herminia Vergara Dominguez v. Northland Properties Corporation doing business as Denny's Restaurants, and Dencan Restaurants Inc.)," online: <http://kwlc.ca/cases/dennys-temporary-foreign-workers-class-action/overview-of-dennys-temporary-foreign-workers-class-action.html> (last accessed: January 8, 2013)

[61] Judy Fudge, "Global Care Chains, Employment Agencies, and the Conundrum of Jurisdiction: Decent Work for Domestic Workers in Canada" (2011) *Canadian Journal of Women in Law,* Vol. 23, No. 1, p 244.

The 2011 ILO *Convention Concerning Decent Work for Domestic Workers*[62], Article 7, and the associated Recommendations at section 6[63], provide guidelines for model employment contracts with respect to domestic workers[64]:

> Article 7
> Each Member shall take measures to ensure that domestic workers are informed of their terms and conditions of employment in an appropriate, verifiable and easily understandable manner and preferably, where possible, through written contracts in accordance with national laws, regulations or collective agreements, in particular:
>
> (a) the name and address of the employer and of the worker;
> (b) the address of the usual workplace or workplaces;
> (c) the starting date and, where the contract is for a specified period of time, its duration;
> (d) the type of work to be performed;
> (e) the remuneration, method of calculation and periodicity of payments;
> (f) the normal hours of work;
> (g) paid annual leave, and daily and weekly rest periods;
> (h) the provision of food and accommodation, if applicable;
> (i) the period of probation or trial period, if applicable;
> (j) the terms of repatriation, if applicable; and
> (k) terms and conditions relating to the termination of employment, including any period of notice by either the domestic worker or the employer.
>
> "6.(2) Further to the particulars listed in Article 7 of the Convention, the terms and conditions of employment should also include:
>
> (a) a job description;
> (b) sick leave and, if applicable, any other personal leave;
> (c) the rate of pay or compensation for overtime and standby consistent with Article 10(3) of the Convention;
> (d) any other payments to which the domestic worker is entitled;
> (e) any payments in kind and their monetary value;
> (f) details of any accommodation provided; and
> (g) any authorized deductions from the worker's remuneration.

[62] International Labour Organization, "PR No. 15A - Text of the Convention Concerning Decent Work for Domestic Workers," online: <http://www.ilo.org/ilc/ILCSessions/100thSession/reports/provisional-records/WCMS_157836/lang--nl/index.htm> (last accessed: January 8, 2013)

[63] International Labour Organization, "PR No. 15B - Text of the Recommendation Concerning Decent Work for Domestic Workers," online: <http://www.ilo.org/ilc/ILCSessions/100thSession/reports/provisional-records/WCMS_157835/lang--en/index.htm> (last accessed: January 8, 2013)

[64] International Labour Organization, "PR No. 15B - Text of the Recommendation Concerning Decent Work for Domestic Workers," section 6, online: <http://www.ilo.org/ilc/ILCSessions/100thSession/reports/provisional-records/WCMS_157835/lang--en/index.htm> (last accessed: January 8, 2013)

> (3) Members should consider establishing a model contract of employment for domestic work, in consultation with the most representative organizations of employers and workers and, where they exist, with organizations representative of domestic workers and those representative of employers of domestic workers.
> (4) The model contract should at all times be made available free of charge to domestic workers, employers, representative organizations and the general public. Sick leave and, if applicable, any personal leave;

These guidelines should form the basis of model contracts to be used in BC.

So, as stated above, the ESA should be amended to:

- provide comprehensive model employment contracts consistent with BC legislation and the *Convention Concerning Decent Work for Domestic Workers,* for each of the TFWPs;
- require employers and their TFW employees to execute the appropriate model employment contract once the TFW has arrived in BC;
- require employers to register a copy of this contract and any contract signed during the immigration process with the ESB;
- ensure that employment contracts between a TFW and their employer are enforceable by the ESB; and
- ensure that a copy of all employment contracts are provided to the signatory TFW.

E) Enforcement Mechanisms

The above proposals regarding changes to the ESA, while important, are not enough. Effective enforcement provisions are necessary to bring these provisions to life. The existing enforcement mechanisms available are woefully inadequate. They are entirely complaint driven and are often too expensive and lengthy for individual TFWs to access.

For example, the Denny's case described above, which deals with TFWs employed in BC as far back as December 1, 2006, was filed in January 2011 and was certified as a class action in March 2012 but will likely not be fully tried by the Court until late 2013. By the time the case is heard, many of the complainants may no longer be in Canada. Furthermore, such a case would be prohibitively expensive for an individual TFW. This case is being dealt with on a contingency fee basis by law firms, Kestral Workplace Legal Counsel and Glavin Gordon Clements.

The SELI and SNC case, which has already included several months of hearings, would also have been far too expensive for any individual TFW or even group of TFWs to take on. In this case, Construction and Specialized Workers' Union, Local 1611 provided the necessary support

to pursue the TFWs' Human Rights claim. Furthermore, none of the workers are still in Canada because they stood up to their Canadian employer.

TFWs who file a complaint, or who are too closely linked to a complaint, are unlikely to be recruited again.

Several other organizations also provide TFWs with much needed assistance, including RED Legal, MOSAIC, Migrante, Access Pro Bono, West Coast Domestic Workers Association, Philippine Women Centre of BC, West Coast LEAF, Vancouver Committee for Domestic Workers and Caregiver Rights, Organizing Centre for Social and Economic Justice, Justicia 4 Migrant Workers, Community Legal Assistance Society, South Okanagan Immigrant Services, AMSSA, Progressive Intercultural Community Services and trade-unions.

However, access to justice and enforcement of employment standards are too important to be entirely dependent on the involvement of community groups and pro bono advocates. Enforcement of employment standards, transportation and occupational health and safety are critical and failure to properly enforce workplace standards can have tragic consequences.

For example, in 2008, three mushroom farmworkers in Langley died within moments of entering a pump house where toxic gases had accumulated.[65] And in 2007, three farmworkers were killed in Abbotsford when an overloaded van operated by a farm labour contractor, with no seat belts and an untrained driver, went out of control and overturned. Many of the other 13 workers in the van were also seriously injured.[66]

> **Some of the most egregious injustices to vulnerable workers stem from the failing system of employment standards enforcement."**
>
> David Fairy, More Workplace Injustices Need to be Addressed, May 8, 2011, online:<http://bcemploymentstandardscoalition.com/media/letter-to-the-editor/workplace-injustices/>

i) Pro – Active Enforcement and Investigation

[65] BC Coroners Service, Media Advisory: Burnaby - The BC Coroners Service will hold a public inquest into the deaths of Ut Tran, Han Pham, and Chi Wai (Jimmy) Chan.," online: <http://www.pssg.gov.bc.ca/coroners/schedule/2011/docs/2011-dec-20-tran-pham-cha.pdf>(last accessed: January 8, 2013)

[66] BCPIAC, "Inquest to begin Monday into the deaths of 3 farm workers in March, 2007 on Highway 1 near Abbotsford," online: <http://bcpiac.com/news/inquest-to-begin-monday-into-the-deaths-of-3-farm-workers-in-march-2007-on-highway-1-near-abbotsford/#more-206>(last accessed: January 8, 2013)

Effective enforcement with respect to TFWs in BC requires proactive inter-agency cooperation to ensure that the rights and safety of TFWs are protected.[67]

Currently, there is very little inter-agency cooperation and ESA enforcement is almost entirely complaint driven. Despite the fact that the ESB has the authority to conduct investigations to ensure compliance without a complaint (sections 76(2) and 85), there is virtually no pro-active enforcement done by the ESB. However, in the case of TFWs and many other vulnerable workers, a complaint driven process just doesn't make sense (see "Filing a Complaint" below).

Furthermore, TFWs' worksite safety is enforceable through WorkSafeBC, but WorkSafeBC has no authority to issue violation tickets for commercial vehicle infractions or conduct random checks of vehicles on the road. These functions are performed by RCMP/City Police. Therefore, a compliance team comprised of all necessary agencies is required to perform random spot checks and independent investigations to ensure compliance.

The ESA should be amended to establish an employment compliance team, comprised of WorkSafeBC, RCMP/City Police, and ESB. The ESA should also require the compliance team to perform independent investigations and random spot-checks at worksites.

ii) Filing a Complaint

Once an employer violates a provision of the ESA, a worker only has 6 months from the date of termination (or contravention in certain cases) to make a complaint.[68]

Section 74 of the ESA and Section 47 of the ESR, limit enforcement to Parts 2 to 8 of the ESA and Sections 6, 14, 18(2), 22, 23, 35(2) and 127(2)(l) of the ESR. Other matters, which may well form part of an employment contract, will not be enforced by the ESB.

The ESB also requires most workers to fill out and confront their employer with a lengthy self help kit before the ESB will deal with the complaint. Domestic workers, farm workers and individuals with language barriers are exempt from the self help requirement. Regardless of whether the self help requirement applies, the onus of proof is on the complainant. This means that it is up a TFW to build a case against their employer and ensure that there is enough evidence to sustain a complaint.

---

[67] Otero, G, "Farmworker Health and Safety: Challenges for British Columbia," August 2010 online: <http://www.sfu.ca/~otero/docs/Otero%20and%20Preibisch%20Final%20Nov-2010.pdf>(last accessed: January 8, 2013)

[68] *ESA*, sections 74(2) – 74(4).

TFWs are extraordinarily dependant on their Canadian employers. While only the federal government has the legal authority to remove a person from Canada, the reality is that TFWs are at the mercy of their employers. A TFW's employer can terminate the employment upon which the TFW's work permit relies, and the employer holds the TFW's plane ticket home.

In the case of LCGP, AP and SAWP workers, who live in their employer's home or on their employer's property, even the TFW's access to their home is at risk.

This fear and dependence is further exacerbated where employers improperly hold personal documents belonging to TFWs such as passports, visas and health cards, or threaten to 'blacklist' TFWs who try to access their rights.

According to Gerardo Otero, of Simon Fraser University, "Farmworkers seldom refuse work or transportation that they perceive as dangerous because they fear that they may jeopardize their current and future employment opportunities."[69]

Technically, the ESA, section 83, prohibits an employer from mistreating an employee for making a complaint under the ESA or providing information to the ESB, but it is impossible to enforce this when a TFW is sent home never to be recruited to work in Canada again.

In these circumstances, it is not difficult to understand why it might take some time for a TFW to decide to make a complaint or simply choose not to make a complaint at all.

The ESA should be amended to return the limitation period to 24 months and eliminate the self-help requirement.

iii) Remedies and Penalties

If a TFW does work up the courage to make a complaint, it can take weeks or months for their complaint to be processed. Furthermore, the jurisdiction of the ESB is ambiguous and sometimes the ESB will refuse to take jurisdiction over complaints that do not relate to wages.

If a TFW's work permit expires before the complaint is processed they are not able to participate in the resolution of their claim, including giving evidence during an investigation or hearing.

[69]Otero, G, "Farmworker Health and Safety: Challenges for British Columbia, August 2010" online: <http://www.sfu.ca/~otero/docs/Otero%20and%20Preibisch%20Final%20Nov-2010.pdf>, p. 5. (last accessed: January 8, 2013)

Even where a TFW is still in BC when their complaint is dealt with by the ESB, there are further limitations on their access to justice. For example, there is often a great deal of pressure from the employer and Employment Standards Officers to settle, often for less than that what they are entitled to. Furthermore, in the event that an employer fails to comply with the terms of a settlement, the remedy is for the Director to file the settlement agreement with the Supreme Court for enforcement, rather than simply voiding the agreement and making an order.

The ongoing time pressure of an expiring work permit works against TFWs in the settlement process and encourages unfair settlements. If a TFW does not settle quickly, they may end up with nothing when their work permit expires and they are sent home before the conclusion of the settlement process. If TFWs do not reach a settlement, they risk no longer being around when it comes time to access their rights through the Employment Standards Tribunal.

Furthermore, on April 1, 2011 federal legislation came into effect that prohibits employers from participating in the TFWP for a period of two years if that employer fails, without reasonable justification, to provide substantially the same wages and working conditions as those set out in the employer's offer of employment and that maintains a list of these offending employers on the CIC website.[70] If the matter is settled offending employers are very unlikely to be prohibited from participation in the TFWP or be placed on this list. In fact, as of September 17, 2012, there are no employers listed.[71]

Supposing a TFW actually does make it through the ESA process and gets a remedy, the current remedies available fall short. An employer is only liable for retroactive wages of 6 months from the date of a complaint or the termination, whichever is earlier (section 80). So, if an employer under pays an employee for a year before the employee files a complaint, that employer gets away with 6 months of stealing from its employee, without consequence.

The administrative penalties for a contravention of the ESA are similarly pathetic. The ESR sets out these penalties at section 29. The fine for a first offence is $500, $2,500 for a second offence and a maximum fine of $10,000 for offences thereafter. However, an employer only moves up the penalty scale if it is penalized under the same provision of the ESA within three years and penalties do not apply where a settlement agreement is reached.

---

[70] *Immigration and Refugee Protection Regulations*, SOR/2002-227, section 203, online: <http://canlii.org/eliisa/highlight.do?text=%22Substantially+the+same%22+AND+%22offer+of+employment%22&language=en&searchTitle=Canada+%28Federal%29&path=/en/ca/laws/regu/sor-2002-227/latest/sor-2002-227.html> (last accessed: January 8, 2013)

[71] CIC, "List of Ineligible Employers – Temporary Foreign Worker Program", online: <http://www.cic.gc.ca/english/work/list.asp> (last accessed: January 8, 2013)

Furthermore, contraventions of the ESA with respect to multiple employees can be lumped into the same "first offence" penalty. For example, in PG Nannies, the fees charged to 14 LCG were found to go beyond "advertising services". However, not only did PG Nannies not have to fully repay the fees charged to the LCGs, owing to the limitation period, the administrative penalty ordered against PG Nannies was a mere $500, despite the fact that there were multiple offences (i.e., fees were illegally charged to 14 LCG).

In order for an enforcement scheme to be effective, the remedies and penalties available must be sufficient to deter bad behaviour. Under the current ESA, employers found to have contravened the ESA may still come out ahead.

Therefore, the ESA should be amended to eliminate the limitation on retroactive wage payment.

And as stated above, the ESA should require all employers wishing to employ TFWs in BC to register with the ESB prior to being permitted to employ TFWs. If an employer is found to be in violation of the ESA with respect to its employment of a TFW, that employer should be terminated from registration and prevented from further participation of the program. (Also see the White Paper section on Continued Status to Remain in Canada Pending the Outcome of an Employment Standards Branch Complaint).

The ESA should also be amended to allow for group complaints and Court access.

IV) Conclusion and Recommendations

A) Conclusion

The multijurisdictional quagmire that governs TFWs presents a variety of problems. However, this backgrounder and the MWRP focus on changes that can be made to the ESA to improve working conditions for TFWs. Importantly, legislated employment standards only have value in the context of an accessible and effective enforcement regime, including adequate funding to support that regime.

B) Recommendations

Recommendation 1: the ESA should be amended to prohibit recruitment agencies from charging any fees to the TFWs they are recruiting.

Recommendation 2: the ESA should be amended require recruitment agencies to be licensed with the ESB and provide collateral to be used in the event of a contravention of the ESA.

Recommendation 3: the ESA should be amended to require employers that employ TFWs in BC to register with the ESB and provide pertinent information regarding any recruitment agencies they used, and the names, terms of employment and accommodation of the TFWs they hire.

Recommendation 4: the ESA should be amended to prohibit an employer from hiring TFWs without registering and any employer found to be in violation of the promised terms of employment or the ESA should be prohibited from continued registration or re-registration.

Recommendation 5: the ESA should be amended to prohibit any employer found to be in violation of the promised terms of employment or the ESA from continued registration or re-registration.

Recommendation 6: the ESA should be amended to establish minimum standards of housing for all TFWs as well as proper inspection and enforcement mechanisms.

Recommendation 7: the ESA should be amended to require orientation for all TFWs, provided in the first language of the worker, before they start employment at a BC workplace. This orientation should be developed by the ESB and WorkSafeBC, and should include information on employment standards, human rights and occupational health, safety and available services.

Recommendation 8: the ESA should be amended to require employers of TFWs to provide all written materials, instructions and signage at their workplace to be provided in both English and the first languages of its workers.

Recommendation 9: the ESA should be amended to establish and properly fund TFW advisory offices and advocacy services throughout the province.

Recommendation 10: the ESA should be amended to establish a temporary foreign workers' telephone helpline service in multiple languages.

Recommendation 11: the ESA should be amended to provide comprehensive model employment contracts consistent with BC legislation and the *Convention Concerning Decent Work for Domestic Workers,* for each of the TFWPs;

Recommendation 12: the ESA should be amended to require TFWs and their employers to execute the appropriate model employment contract once the TFW has arrived in BC;

Recommendation 13: the ESA should be amended to require employers to register a copy of the signed model contract and any contract signed during the immigration process with the ESB;

Recommendation 14: the ESA should be amended to ensure that employment contracts between a TFW and their employer are enforceable by the ESB and through the court system;

Recommendation 15: the ESA should be amended to ensure that copies of all employment contracts are provided to the signatory TFW;

Recommendation 16: the ESA should be amended to establish an employment compliance team, comprised of WorkSafeBC, RCMP/City Police, and ESB;

Recommendation 17: the ESA should be amended to require the work-place compliance team or ESB (where applicable) to conduct independent investigations and random spot-checks at worksites;

Recommendation 18: the ESA should be amended to return the limitation period to 24 months;

Recommendation 19: the ESA should be amended to eliminate the self-help requirement;

Recommendation 20: the ESA should be amended to eliminate the limitation on retroactive payment of wages; and

Recommendation 21: the ESA should be amended to allow for group complaints and Court access.