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
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IV. 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.

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 in general and migrant workers in particular. 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. OVERVIEW OF THE TEMPORARY FOREIGN WORKER PROGRAM ("TFWP")

i. Recent Changes and Protection Gaps[3]

The TFWP runs parallel to Canada's standard immigration program. As of June 20th 2014, the TFWP includes "those streams under which foreign workers enter Canada at the request of employers following approval through a new Labour Market Impact Assessment (LMIA)."[4] As the name suggests, the TFWP is designed to allow foreign nationals to work in Canada for a limited

[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, Justicia 4 Migrant Workers; Susan Lockhart, Trade Union Research Bureau.

[3] For detailed discussion of the recent changes see: ESDC, "Overhauling the Temporary Foreign Worker Program: Putting Canadians First" Employment and Social Development Canada Catalogue No. WP-191-06-14E (Ottawa: 2014); for a critical examination of the legislative structure and vulnerabilities faced by each stream under the TFWP see: Devin Cousineau and Kaity Cooper, At Risk: The Unique Challenges Faced by Migrant Workers in Canada (November 2014). Continuing Legal Education Society of British Columbia

and prescribed 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, most employers are required to apply for and receive a positive Labour Market Impact Assessment ("LMIA")[5] from the federal government.[6] According to the Government, the LMIA is intended to assess whether there is a need for the foreign worker to fill the job offered and that there is no Canadian worker available to do the job.[7]

"In 2012, [the number of temporary foreign workers in Canada] reached 338,221, up from 101,078 on Dec. 1, 2002. That is a 235 per cent increase."

The Globe and Mail, "Everything you need to know about temporary foreign workers," May 2, 2014, online: <http://www.theglobeandmail.com/news/politics/temporary-foreign-workers-everything-you-need-to-know/article18363279/> (last accessed: August 20, 2014)

The TFWP was intended to relieve temporary labour market shortages in particular sectors and was designed to be largely employer driven. The Canadian government has recently reaffirmed its commitment to the TFWP as an employer-demand driven process for labour recruitment.[8] In addition, despite the recent changes to the TFWP, one of the primary factors considered in issuing a positive LMIA continues to be whether the employment of a migrant worker is likely to fill a labour shortage.[9]

However, the data and methodology used by the federal government to verify the existence of a labour shortage between 2002 and 2013 has been called into question by sources including the C.D. Howe institute, economists and labour.

For example, in 2014, the C.D. Howe Institute reported that the "federal government has not collected precise information about vacancies for decades". It concluded that policy changes

[4] ESDC "Overhauling the Temporary Foreign Worker Program: Putting Canadians First" Employment and Social Development Canada Catalogue No. WP-191-06-14E (Ottawa: 2014) p. 1

[5] The LMIA system replaced the Labour Market Opinion (LMO) process on June 20th 2014 (ESDC "Web Higlights" online: <http://www.esdc.gc.ca/eng/jobs/foreign_workers/reform/highlights.shtml> (last accessed: August 19, 2014); A review of the changes can be found in FW CanadaInc "Canada: New LMIA Process Introduced To Replace LMOs" online: <http://www.mondaq.com/canada/x/331566/work+visas/New+LMIA+Process+Introduced+to+Replace+LMOs> (last accessed: August 19, 2014)

[6] Three federal government agencies are involved in hiring TFWs, Employment and Social Development Canada (ESDC) – formerly Human Resources and Skills Development Canada (HRSDC), Citizenship and Immigration Canada (CIC) and Canada Boarder Services Agency ("CBSA"). ESDC assess the employer's LMIA 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.

[7] Citizenship and Immigration Canada, "Labour Market Impact Assessment Basics," online: < http://www.cic.gc.ca/english/work/employers/lmo-basics.asp > (last accessed: August 19, 2014)

[8] ESDC "Overhauling the Temporary Foreign Worker Program: Putting Canadians First" Employment and Social Development Canada Catalogue No. WP-191-06-14E (Ottawa: 2014) p. 1

[9] IRP Regulations, s. 203(3)(c)

between 2002 and 2013 relaxing the hiring conditions of TFWs, "actually accelerated the rise in unemployment rates in Alberta and British Columbia" and that the 2013 reversal of some of those changes was probably insufficient, "largely because adequate information is still lacking about the actual state of the labour market, and because the current uniform application fee employers pay to hire TFWs does not increase their incentive to search for domestic workers to fill job vacancies."[10]

In 2009, the Advisory Panel on Labour Market Information lead by Don Drummond provided the government with 69 recommendations to improve the quality of labour market information. The implementation of these recommendations would have cost Canadians about $49 million. While the Government of Canada has implemented reforms by publicly reporting more data, Canada still does not have a functioning labour market information system. Without this information it is almost impossible to design an effective program to address labour market needs or assess the effectiveness of existing programs.[11]

In the case of the TFWP, the Government of Canada seems resistant to use even the data that does exist. According to Karl Flecker, National Director of Canadian Labour Congress's Anti-Racism and Human Rights Department: [12]

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

Under the new LMIA process, employers are subject to stricter regulations and are required to provide more detailed information; however, a positive LMIA continues to be heavily reliant on employers meeting minimum advertising requirements.[13] This process, therefore, continues to be designed around the employer's failure to recruit domestic workers rather than proven rigorous methodology for assessing labour shortages.

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[10]Gross, Dominique M., Temporary Foreign Workers in Canada: Are They Really Filling Labour Shortages? (April 24, 2014). C.D. Howe Institute Commentary # 407, online < http://www.cdhowe.org/pdf/commentary_407.pdf> (last accessed: November 18, 2014)

[11] Drummond, Don., Wanted Good Canadian Labour Market Information. (June 11, 2014) Institute for Research on Public Policy, online <http://irpp.org/research-studies/insight-no6/> (last accessed: November 18, 2014)

[12] 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: August 18 2014)

[13] ESDC, "Stream for Lower-Skilled Occupations" online: <http://www.esdc.gc.ca/eng/jobs/foreign_workers/lower_skilled/index.shtml> (last accessed: August 18 2014)

Furthermore, the Canadian government recognizes that hiring TFWs has become standard for many employers. For example, of the 12, 162 employers who used the TFWP in 2013, there were 1,126 of them employing temporary foreign workers to the extent that these individuals composed 50% or more of the employer's workforce.[14] The proposed reforms consist of a 10% cap limiting the proportion of temporary foreign workers in low-wage positions that a business can employ, and employers will now report on the success of their transition plan upon reapplying.[15] However, lacking fundamental reform of the incentives that initially led to this employer reliance, the TFWP is likely to continue being a substitute for offering decent wages and working conditions, and for policies that would encourage permanent immigration and apprenticeship and training opportunities for Canadians.

> **"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."**
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> 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: August 20, 2014)

ii. The Impact of Limited Access to Permanent Residence

A further elemental problem with respect to obtaining fair working conditions for TFWs, which is largely outside the scope of provincial jurisdiction, is access to permanent resident status. While TFWs admitted under the Seasonal Agricultural Worker Program are unable to apply for permanent residency, the Live-in Caregiver Program, the Federal Skilled Worker Program, the Canadian Experience Class Program and the Provincial Nominee Program offer limited opportunities for other TFWs to pursue permanent residency in Canada. These programs, as Valiani argues, create a "carrot-stick" relationship between employers and TFWs as "migrant workers hoping to remain permanently in Canada and eventually sponsor their families are rendered yet more exploitable by employers well aware of their employees' precarious legal and economic status."[16]

The Federal Skilled Worker and the Canadian Experience Class programs are scheduled to be replaced by the Express Entry system in January 2015.[17] Currently, however, these programs offer limited opportunities for low-skilled workers to transfer from temporary to permanent

[14] ESDC "Overhauling the Temporary Foreign Worker Program: Putting Canadians First" Employment and Social Development Canada Catalogue No. WP-191-06-14E (Ottawa: 2014) p. 9

[15] Ibid. p. 13

[16] Valiani, Salimah. *The Shift in Canadian Immigration Policy and Unheeded Lessons of the Live-in Caregiver Program*. Ontario Council of Agencies Serving Immigrants, (2009). Online: <https://www.ccsl.carleton.ca/~dana/TempPermLCPFINAL.pdf> (last accessed: Nov 18, 2014)

[17] Citizenship and Immigration Canada, "Apply Under the Canadian Experience Class" (2014). Online: <http://www.cic.gc.ca/english/immigrate/cec/apply-how.asp> (last accessed: Nov 18 2014).

resident status by offering permanent residence to certain skilled temporary foreign workers, including National Occupational Classification ("NOC") Skill Level A and B (technical occupations and skill trades). For example, all applicants to the Federal Skilled Worker program must have one year of full-time work experience in a "high-skilled" occupation. This experience must also be in one of the 50 currently listed eligible occupations or the applicant must have an offer of arranged employment.[18]

Similarly, the Canadian Experience Class requires that applicants attain 12 months of full-time experience in a "high-skilled" occupation within Canada. Valiani has criticized the program for creating a dependency between the applicant and employer. She contends that the 12 month requirement, during which time the employers can test the suitability of a worker, places an applicant's ability to gain permanent residency at the mercy of their employer's approval.[19]

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[20] 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.

As of 2011, the Provincial Nominee Program was the second largest source of economic immigration to Canada and accounted for 20% of the economic immigrants arriving in British Columbia.[21] Currently, BC's Provincial Nominee Program ("PNP") limits its nomination to business nominations and the "Skills Immigration Stream", which permits nomination for 1) managers, professionals and skilled trades people, 2) health care professionals such as Registered Nurses, 3) skilled trades people, 4) international graduates, 5) "semi-skilled" workers in certain jobs in the hospitality, long-haul trucking and food processing industries, and 6) entry-level or semi-skilled workers who are living in the northeast region of the province.[22]

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[18] Citizenship and Immigration Canada, "Determine your eligibility – Federal skilled workers" (2014). Online: <http://www.cic.gc.ca/english/immigrate/skilled/apply-who.asp> (last accessed: Nov 18, 2014)

[19] Valiani, Salimah. "The Rise of Temporary Migration and Employer-Driven Immigration in Canada: Tracing policy shifts of the late 20th and early 21st centuries." In *workshop on "Producing and Negotiating Precarious Migratory Status in Canada." York University, Toronto: Research Alliance on Precarious Status.(2010). Online: <http://www. yorku. ca/raps1*. 2010.> (last accessed: Nov 18 2014)

[20] 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: August 19, 2014)

[21] Citizenship and Immigration Canada, "Fact Sheet – Provincial Nominee Program", online: <http://www.cic.gc.ca/english/resources/publications/employers/provincial-nominee-program.asp> (last accessed: October 1, 2014)

Most BCPNP 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 applicants leave the job during this period the nomination will be canceled and they will have to start from scratch by finding a new employer. In addition, if an individual is unable to attain 9 consecutive months with an employer within 4 years, she or he is subsequently barred from the TFWP for 4 years. Consequently, many PNP applicants are reluctant to leave their employers, even when the conditions are exploitative.

The Live-in Caregiver Program is the only stream for "low-skill" workers that offers a clear pathway to permanent residency. Live-in Caregivers are eligible for permanent residency after completing 24 months or 2900 hours of care-work within a four year period. As with the other pathways discussed, this forms the foundation to the "carrot-stick" relationship between caregivers and their employers.

Recent reforms have made a notable improvement to the Live-in Caregiver Program by eliminating the requirement that employees live with their employers. This change represents a significant step towards acknowledging and removing a major aspect of the program that has been linked to forced or underpaid overtime, excessive charges for room and board, and physical abuse; however, a significant concern is that employees may still elect to live with employers given that the wage of caregivers may be insufficient to live independently in many Canadian cities. In addition, the number of caregivers employed to tend children who can be accepted as permanent residents is now limited to 2,750 applicants per year. The reforms therefore also place new restrictions on access to permanent residency within the program given that this cap is below the number of workers accepted as permanent residents each year since 2005 by between 313 and 4,914.[23]

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. Conclusions

ESDC's reforms to HRSDC's management of the program explicitly aim to 1) reorganize the TFWP to provide greater clarity and transparency; 2) ensure Canadians are provided first access to available jobs; and 3) increase enforcement and strengthen penalties.[24] The commitment to improved enforcement and tougher penalties by inspecting 1 in 4 employers using the TFWP, expanding the authority of inspectors, and increasing the scope of inspections is a very promising

[22] WelcomeBC, "Entry Level and Semi-Skilled", onlinfe: < http://www.welcomebc.ca/Immigrate/About-the-BC-PNP/Skills-Immigration.aspx > (last accessed: August 19, 2014); Note: the Northeast Pilot Project is scheduled to expire in April 2015

[23] Valiani, Salimah. "Briefing Note: An analysis of the recently reformed Live-in Caregiver Program in Canada" (2014). Online: <http://salimahvaliani.wordpress.com/2014/11/04/briefing-note-an-analysis-of-the-recently-reformed-live-in-caregiver-program-in-canada/> (last accessed: Nov 18, 2014)

improvement to the current system. The recognition of the increased vulnerability migrant workers face when forced to live with their employers and subsequent removal of this requirement for Live-in Caregivers should also be recognized as a positive step towards ensuring that the rights of migrant workers are protected. However, given that the new system fails to alter fundamental aspects of the HRSDC program and continues to be an employer-driven process that ties workers to a single employer, it remains to be seen whether these reforms represent genuine protections for workers. Furthermore, the potential for these reforms to have a meaningful, positive impact decreases without a firm commitment to justice for migrants at the provincial level.

V. The Need for a Multi-Jurisdictional Approach to Migrant Worker Protections

As a federal program, there are a number of fundamental protection gaps within the current TFWP legislative regime that are outside the scope of the ESA. This issue is exacerbated by the jurisdictional labyrinth that applies to migrant workers and requires a multi-jurisdictional approach to ensure fundamental protections for migrant workers.

A. JURISDICTIONAL ISSUES

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

In addition, 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.

"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.

This division of powers means that 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.

[24] ESDC "Web Highlights" online: <http://www.esdc.gc.ca/eng/jobs/foreign_workers/reform/highlights.shtml> (last accessed: August 19, 2014)

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 the location and number of TFWs 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 streams of the TFWP, 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*[25] 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 (see sections 29 and 32).

B. EFFECTIVE PROTECTIONS FOR MIGRANT WORKERS AT FEDERAL AND PROVINCIAL JURISDICTIONS

The Coalition has identified 7 key policy areas within federal jurisdiction that are necessary for the adequate protection of migrant workers in both BC and Canada as a whole. These areas include: 1) freedom of movement and changing employers; 2) provision and enforcement of adequate housing where required; 3) pathways to permanent residence; 4) continued status to remain in Canada pending the outcome of an employment standards branch ("ESB") or human rights complaint; 5) public service availability, including EI, CPP and MSP; 6) facilitation of alternative employment agency models; and 7) information sharing between federal, provincial and municipal governments. For a more detailed discussion of these policy areas, please refer to the Coalition's White-Paper entitled Barriers to Effective Protection of Temporary Foreign Workers in Canada.

The remainder of this backgrounder and the MWRP focus on changes that can be made at the provincial level to improve the working conditions for TFWs. Within the broader context of the TFWP outlined above, the current ESA is failing to protect TFWs in BC. 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.

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

[25] [SBC 2002] C. 78, see ss.29 and 32 online: <http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_02078_01#section29> (last accessed: August 19, 2014)

enforcement is unlikely to result in much tangible change for workers. An effective and 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.

VI. Problems with the Current Employment Standards with Respect to Temporary Foreign Workers in British Columbia

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:

> 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. [26]

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.[27]

For example, Prince George Nannies and Caregivers Ltd. ("PG Nannies"), a company in the business of recruiting foreign Live-in Caregiver, charged its Live-in Caregiver recruits fees of between $4,000 and $5,500 each.[28]

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[26] 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/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/publication/wcms_201427.pdf> (last accessed: August 19, 2014)

[27] 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.

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.[29]

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.[30]

The Manitoba *Worker Recruitment and Protection Act* (the "Manitoba Act")[31] 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 or employers from receiving a fee (directly or indirectly) from the worker.[32]

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 licensed 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.**

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[28] *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: August 20, 2014). The Employment 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 > (last accessed: August 20, 2014)

[29] See also: *Gorenshtein & ICN Consulting Inc. v. Tagirova*, 2010 BCPC 384 (CanLII), online: <http://canlii.ca/t/2fwsr> (last accessed: August 20, 2014)

[30] 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.

[31] *Worker Recruitment and Protection Act* , CCSM c W197, online: <https://www.canlii.org/en/mb/laws/stat/ccsm-c-w197/latest/ccsm-c-w197.html> (last accessed: August 20, 2014)

[32] Government of Manitoba, "Fact Sheet" (2014). Online: http://www.gov.mb.ca/labour/standards/doc,wrpa-registration_info,factsheet.html#q1014 (last accessed: November 18 2014)

- **Prohibit recruitment agencies from charging any fees or 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 ESDC for an LMIA 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.[33] An LMIA 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.[34]

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 rights of TFWs. 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 that employers wishing to hire TFWs in BC register with the ESB as a condition of accessing the Temporary Foreign Worker Program. This registration should provide pertinent information regarding any recruitment agencies an employer 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.**

[33] Immigration, Diversit et Inclusion Quebec,"Recrutement de travailleurs peu sp cialis s" online: <http://www.immigration-quebec.gouv.qc.ca/fr/employeurs/embaucher-temporaire/travailleur-peu-specialise/index.html> (last accessed: August 20, 2014)

[34] ESDC, "Hiring Temporary Foreign Workers in Quebec" online: <http://www.esdc.gc.ca/eng/jobs/foreign_workers/quebec.shtml> (last accessed: August 20, 2014)

B. HOUSING

Under most streams of the TFWP, 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. [35] 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.[36]

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:[37]

> 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."

[35] 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.

[36] 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.

[37] 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.[38]

- **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.[39]

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 legislation. 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.

> The members of the Complainant Group [i.e., Latin American workers employed by entities responsible for the construction of the tunnel on the Canada Line project] were especially vulnerable during their work here in British Columbia on the Canada Line project. They lived and worked here for up to two years. During that time, they were far from home and their families, and dependent on their employer, not only for their work and wages, but for meals, accommodation, travel to and from work, and travel back to their homes. The effect of the Respondents' actions was to treat them differently from, and adversely in comparison to, their European colleagues performing the same or substantially similar work. They were paid less, they were housed in inferior accommodation, they were given less choice about where and what to eat, and were made to account for every expense incurred, rather than being given an allowance to do with as they wished. In every aspect of their relationship with the Respondents, members of the Complainant Group were treated worse than members of the comparator group, not because of any differences in their experience and skills, but because of who they are and where they are from, i.e. characteristics related to the prohibited grounds engaged by the complaint.[40]

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, social and geographic isolation, and insufficient access to available services.

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

[39] CLR, "BC Construction Camp Rules and Regulations," online: <http://www.clra-bc.com/documents/BCConstructionCampRulesandRegs_000.pdf > (last accessed: August 20, 2014)

[40] *C.S.W.U. Local 1611 v. SELI Canada and others (No. 8),* 2008 BCHRT 436 (para. 415) ("*SELI*")

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, housing rights 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.[41]**

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 Live-in Caregiver 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 the time of the review, the Live-in Caregiver Program was the only TFWP that BC agreed to participate in with the federal government. Since then, the TFWP and BC's use of migrant workers has expanded to include the SAWP, the AP and the Pilot Project. However, ESA protections have not kept up with this expansion. Currently, with the exception of the Live-in Caregiver 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 every stream within the TFWP require some form of employment contract to be signed by the employer and TFW, the primary purpose of such contracts is to facilitate the LMIA process and the entry of a TFW into Canada, rather than to protect the rights of TFWs. ESDC requires

[41] Alberta Ministry of Jobs, Skills, Training and Labour, "Temporary Foreign Workers", online: <http://work.alberta.ca/Immigration/temporary-foreign-workers.html> (last accessed: August 19, 2014)

only minimal content to be in the contracts, as laid out in the sample contracts under each TFWP.[42] 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.

Although it is technically illegal to change the terms of a contract, once in Canada, TFWs can be subject to additional employer demands that were not previously specified during the LMIA process. For example, once in Canada, employers in the SAWP are able to impose additional "rules of conduct" that the worker is obligated to "obey and comply with" during the training process.[43]

There are also jurisdictional issues with respect to enforcement of the employment contract signed as part of the LMO process. The ESDC website for the TFWP makes it clear that: [44]

> The Government of Canada is not a party to the contract. Employment and Social Development (ESDC)/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.

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 allegation, for example, in the Denny's restaurant litigation:

> the class members allege that despite contracts entered into between them and Denny's, Denny's failed to provide them with the agreed upon work hours as set out in those contracts. In addition, the class members allege that despite British Columbia legislation mandating a certain level of pay for overtime work, Denny's failed to reimburse the class members for overtime work performed by them. Many employment contracts provided that the workers were not required to pay for any travel or recruitment costs to obtain work with Denny's. However, class members allege they were never reimbursed for their airfare costs for travel between Canada and their home country in accordance with these contracts or other verbal commitments. Finally, many class members allege that they paid substantial amounts to Denny's Philippine agents, ICEA and Luzern International Manpower

[42] ESDC, "Temporary Foreign Worker Program: Annex 2" online: <http://www.esdc.gc.ca/eng/jobs/foreign_workers/lower_skilled/employment_contract.shtml> (last accessed: August 19, 2014)

[43] ESDC. "Agreement for the Employment in Canada of Seasonal Agricultural workers From Mexico in British Columbia for the Year 2014," online: <http://www.esdc.gc.ca/eng/jobs/foreign_workers/agriculture/seasonal/sawpmc2014_bc.pdf> (last accessed: Augurst 19, 2014)

[44] ESDC, "Temporary Foreign Worker Program", online: <http://www.esdc.gc.ca/eng/jobs/foreign_workers/lower_skilled/employment_contract.shtml> (last accessed: August 19, 2014)

> Services Corporation ("Luzern"), for recruitment fees and that airfare costs were similarly paid by them to these agents and not reimbursed.[45]

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 LMIA process.[46]

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.

The 2011 ILO *Convention Concerning Decent Work for Domestic Workers*[47], Article 7, and the associated Recommendations at section 6[48], provide guidelines for model employment contracts with respect to domestic workers[49]:

> 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;

[45] Dominguez v. Northland Properties Corporation, 2013 BCSC 468 (para. 9)

[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 244.

[47] 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: August 19, 2014)

[48] 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: August 19, 2014)

[49] 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: August 19, 2014)

(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.

(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 stream of the TFWP;**
- **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. First, they are entirely complaint driven. Second, they present a risk to the current employment, application for permanent residency, or future recruitment of the individuals involved; as those who file a complaint, or who are too closely linked to a complaint, are subject to intimidation and reprisals. Finally, they are often too expensive and lengthy for individual TFWs to pursue.

For example, the Denny's case described above, which deals with TFWs employed in BC as far back as December 1, 2006, was filed after an individual came forward in January 2011 and was certified as a class action consisting of 77 plaintiffs in March 2012. After embarking on dispute resolution proceedings, a settlement was ultimately approved in March of 2013. By the time the case was settled, a number of the plaintiffs had been subjected to intimidation from Denny's management. Specifically, the plaintiffs alleged that "it was suggested to them that they should decide to opt out of [the] proceedings rather than run the risk of losing their employment with Denny's or otherwise losing support from Denny's in relation to their work permits or in obtaining permanent residency status in Canada".[50] 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* case, 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.

"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/>

There are several other organizations that 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.

[50] Dominguez v. Northland Properties Corporation, 2013 BCSC 468 (para. 13)

For example, in 2008, three mushroom farmworkers in Langley died within moments of entering a pump house where toxic gases had accumulated.[51] 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.[52]

i. Complaint Driven Process Versus Pro-Active Enforcement and Investigation

Effective enforcement with respect to TFWs in BC requires proactive inter-agency cooperation to ensure that the rights and safety of TFWs are protected.[53] Currently, there is very little inter-agency cooperation and ESA enforcement is almost entirely complaint-driven.

Instead of a pro-active process of monitoring and investigation, the ESB introduced the 'Self-Help Kit' in 2002. This kit requires most workers to fill out a lengthy document and confront their employer before submitting a complaint. In the months following the adoption of the 'Self-Help Kit', the number of complaints received by the ESB decreased by 75% and was described by one Employment Standards Officer as "the turning off of a tap".[54] Being forced to confront one's employer before a complaint will be investigated or addressed is not consistent with a rigorous, independent system of enforcement and it is especially onerous for vulnerable workers such as TFWs.

TFWs are extraordinarily dependent 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 individual's work permit, and possible avenues for permanent residence are dependent, and the employer holds the TFW's plane ticket home. The ESB has recognized the uneven power relations this self-help requirement creates by exempting domestic workers, farm workers and individuals with language barriers. However, these exemptions have not kept pace with the expansion of BC's reliance on the TFWP.

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[51] 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/archive/2011/docs/2011-dec-20-tran-pham-cha.pdf> (last accessed August 19, 2014)

[52] 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: August 19, 2014)

[53] Otero, G, "Farmworker Health and Safety: Challenges for British Columbia," August 2010 online: <http://www.sfu.ca/~otero/docs/Otero-and-Preibisch-Final-Nov-2010.pdf> (last accessed: August 19, 2014)

[54] David Fairey, "Eroding Worker Protections: British Columbia's New 'Flexible' Employment Standards", Vancouver: Canadian Centre for Policy Alternatives – BC Office, November 23, 2005, p. 31. Online: https://www.policyalternatives.ca/publications/reports/eroding-worker-protections (last accessed: November 18, 2014)

Even for those groups who are exempt from the self-help requirement, there are still significant barriers to filing a complaint because of the absence of pro-active enforcement and investigation. In the case of the Live-in Caregiver Program, AP and SAWP workers, who live in their employer's home or on their employer's property, even the TFW's access to her or his home is at risk should they choose to file a complaint. 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."[55] Although 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, the perceived risk to an individual's employment is justified because of an inability to enforce provisions of the ESA that prohibit reprisals for TFWs. Because many TFWs work on short-term contracts, rather than take any overt punitive action, employers are simply able to send a worker home, sometimes never to be recruited to work in Canada again.

In these circumstances, it is not difficult to understand why a migrant worker might choose not to make a complaint; however, the ESB creates additional barriers to filing a complaint through its current limitation period. Once an employer violates a provision of the ESA, a worker only has 6 months after his or her employment has ended (or contravention in certain cases) to make a complaint.[56]

As discussed, all pathways to citizenship available to TFWs are dependent on fulfilling a minimum period of employment, often with a single employer. Employer support of an application for permanent residence may also be required in certain cases. The relationship of dependence between a migrant worker and her or his employer may therefore continue throughout processing and approval and, even when not legislated, it may be perceived to exist by the employee. With current average processing times for permanent residence applications ranging from 13 months for the Canadian Experience Class and 39 months for Live-in Caregivers[57], TFWs are further discouraged from making complaints to the ESB while their application for permanent residence is being processed and approved. If their employment ends during this time, the 6 month time-limit may prevent migrant workers from filing a complaint once they have the security of permanent resident status. In order to support the ability for TFWs to file an ESB complaint against an employer without fear of reprisal the 6 month time limit must be extended.

[55] Otero, G, "Farmworker Health and Safety: Challenges for British Columbia, August 2010" online: <http://www.sfu.ca/~otero/docs/Otero-and-Preibisch-Final-Nov-2010.pdf>, p. 5. (last accessed: August 19, 2014)

[56] *ESA*, sections 74(2) – 74(4).

[57] Citizenship and Immigration Canada, "Processing Times: Permanent Residence – Economic Classes" online: <http://www.cic.gc.ca/english/information/times/perm-ec.asp> (last accessed: November 19 2014)

Furthermore, 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. Therefore, TFWs' worksite safety is enforceable through WorkSafeBC, but WorkSafeBC has no authority over other matters that may well form part of an employment contract. The ESB, for example, is unable 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. Consequently, a compliance team comprised of all necessary agencies is required to perform random spot checks and independent investigations to ensure compliance in all aspects of the employment relationship for migrant workers including the work-site, transportation and housing.

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. Although resources and staff can and should be devoted to the elimination of the protection gaps caused by a complaint driven process, there are still significant improvements that can be achieved through amendments to the ESA. The Coalition therefore recomends that:

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

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.[58] 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 November 19, 2014 there have been only five employers listed.[59]

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 weak. 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.

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 Live-in Caregivers were found to go beyond "advertising services". However, not only did PG Nannies not have to fully repay the fees charged to the Live-in Caregivers, 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 Live-in Caregivers).

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:

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[58] *Immigration and Refugee Protection Regulations*, SOR/2002-227, section 203(5), 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: August 19, 2014)

[59] ESDC, "Employers who have broken the rules or been suspended from the Temporary Foreign Worker Program", online: <http://www.esdc.gc.ca/eng/jobs/foreign_workers/employers_revoked.shtml> (last accessed: August 19, 2014)

- **the ESA should be amended to eliminate the limitation on retroactive wage payment**
- **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.**

VII. Conclusion and Recommendations

A. CONCLUSION

The multi-jurisdictional 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

The ESA should be amended to:

1. **Prohibit recruitment agencies from collecting any fees, including receiving any money or benefit, from the TFWs they assist with employment.**
2. **Require recruitment agencies to be licensed 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.**
3. **Require that employers wishing to hire TFWs in BC register with the ESB as a condition of accessing the Temporary Foreign Worker Program. This registration should provide pertinent information regarding any recruitment agencies an employer used, and the names, terms of employment and accommodation of the TFWs they hire.**
4. **Prohibit any employer found to be in violation of the promised terms of employment or the ESA from continued registration or re-registration.**
5. **Establish minimum standards of housing for all TFWs as well as proper inspection and enforcement mechanisms.**

6. 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.

7. 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.

8. Establish and properly fund TFW advisory offices and advocacy services throughout the province.

9. Establish a temporary foreign workers' telephone helpline service in multiple languages.

10. Provide comprehensive model employment contracts consistent with BC legislation and the *Convention Concerning Decent Work for Domestic Workers,* for each stream of the TFWP.

11. Require employers to execute the appropriate model employment contract in conjunction with a TFW once the employee has arrived in BC.

12. Require employers to register a copy of the signed model contract and any contract signed during the immigration process with the ESB.

13. Ensure that employment contracts signed as part of a TFWP process are enforceable by the ESB and through the court system.

14. Ensure that copies of all employment contracts are provided to the signatory TFW.

15. Establish an employment compliance team, comprised of WorkSafeBC, RCMP/City Police, and ESB.

16. Require the work-place compliance team or ESB (where applicable) to conduct independent investigations and random spot-checks at worksites.

17. Return the limitation period to 24 months.

18. Eliminate the self-help requirement.

19. Eliminate the limitation on retroactive payment of wages.

20. Allow for group complaints and Court access.

21. Imply the minimum standards in all contracts of employment.

22. Make the rights contained therein enforceable through civil action and to remove limitations on remedies sought through civil actions.