

June 2017

WHO, HOW AND HOW MUCH? RECRUITMENT OF GUATEMALAN MIGRANT WORKERS TO QUEBEC

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on the move
partnership

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The main aim of this report is to inform policymakers and the public about the conditions under which temporary foreign workers (TFWs) are recruited to work in agriculture in Quebec, Canada and the role that recruitment intermediaries play in that process. This report presents the results of a field study conducted between June and November 2015 that sought to document recruitment practices in Guatemala of Guatemalan agricultural workers recruited to Quebec, and suggests steps that can be taken to improve this process. The mixed-methods approach combined qualitative and quantitative research including semi-directed interviews, focus groups and an anonymous survey.

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About the research: This research was supported by a research grant from UQAMs' Service aux collectivités (this institutional program supports collaborative research initiatives between community organizations, unions and researchers). The authors also wish to mention that this article partially stems from research conducted for a clinical project at UQAM's International Clinic for the Defense of Human Rights in collaboration with Justice in Motion (formerly Global Workers Justice Alliance). The authors therefore would like to thank Cathleen Caron, Executive director of Justice with Motion, and Pr Mirja Trilsch, director of UQAM's International Clinic for the Defense of Human Rights (CIDDHU) for their insightful comments. However, the authors are solely responsible for any errors or omissions.

The On the Move Partnership is a project of the SafetyNet Centre for Occupational Health & Safety Research at Memorial University of Newfoundland. On the Move is funded by the Social Sciences and Humanities Research Council of Canada, the Research & Development Corporation of Newfoundland and Labrador, the Canada Foundation for Innovation, and numerous university and community partners, www.onthemovepartnership.ca.



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Executive Summary

In Canada, a growing number of employers hire workers through various temporary migration programs (TMPs). Employers from the agricultural sector can acquire workers through the Seasonal Agricultural Worker Program (SAWP) or the Temporary Foreign Worker Program (TFWP), or both simultaneously. Under the TFWP, employers are not formally restricted to hire workers from specific sending countries; they can recruit available workers from the jurisdiction of their choice.

The choice of countries from which agricultural workers are recruited through the agricultural stream of the TFWP are a result of the strategies developed by private labour suppliers contracted by employers. These labour suppliers generally work in pairs, one operating in the sending country and another in Canada. Indeed, few agricultural employers conduct the recruitment of temporary foreign workers (TFWs) themselves. Employers will generally contract with a private labour supplier in Canada, also called a “liaison agency.” The liaison agency will pair with private recruiters located abroad, which will carry out the selection and assignation of workers to specific employers.

The results of our field study, which combined qualitative and quantitative research, confirm that the recruitment process can be a rough ride for TFWs hired in Quebec through the agricultural stream of the TFWP. Many TFWs take out loans to cover various expenses and fees, some of which are charged by recruitment intermediaries that operate abroad on behalf of the employer. We suggest that these debts may explain why TFWs are generally not inclined to act on their labour rights as they are unlikely to do or say anything that might, in their perception, jeopardize their employment and their ability to repay their debts.

We argue that despite provincial legislation aimed at the regulation of TFW recruitment intermediaries in some provinces, the Canadian regulatory framework does not comprehensively and fully foresee unlawful conduct that may occur during recruitment. Further, while Canadian provincial labour legislation applies to TFWs in theory, it cannot address abusive recruitment practices that happen abroad.

In addition to describing our research process and results, this report briefly reviews various international conventions and treaties that reflect concerns regarding the need for social protection of TFWs. We argue their ratification could generate more awareness of the particular rights at stake.

We also make various policy and practice recommendations for monitoring and enforcement that would hold recruiting intermediaries, liaison agencies and employers accountable to rules regarding recruitment.

Abbreviations:

SAWP	Seasonal Agricultural Worker Program
TFWP	Temporary Foreign Worker Program
TFW	Temporary Foreign Worker
IOM	International Organization for Migration
ESDC	Employment and Social Development Canada
MIDI	Ministry of Immigration, Diversity and Inclusion – Quebec
IRPA	Immigration and Refugee Protection Act
IRPR	Immigration and Refugee Protection Regulations
WRPA	Worker Recruitment and Protection Act – Manitoba
EABLR	Employment Agency Business Licensing Regulation – Alberta
EPFNA	Employment Protection for Foreign Nationals Act, 2009
MINTRAB	Ministry of Labor and Social Welfare – Guatemala
MINEX	Ministry of Foreign Affairs – Guatemala
ILO	International Labour Organization
MEC	Migration for Employment Convention
PEAC	Private Employment Agencies Convention
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
MWC	Migrant Workers (Supplementary Provisions) Convention

Introduction

In Canada, a growing number of employers hire workers through various temporary migration programs (TMPs). Employers from the agricultural sector can acquire workers through the Seasonal Agricultural Worker Program (SAWP) or the Temporary Foreign Worker Program (TFWP), or both simultaneously. Unlike the SAWP, which is an intergovernmental agreement, implementation of the TFWP does not require government participation and does not predetermine how or where the workers should be recruited. Therefore, under the TFWP, employers are not formally restricted to hire workers from specific sending countries; they can recruit available workers from the jurisdiction of their choice.

Pairing employers and workers across borders introduces what Philip Martin pointed out to be “an asymmetric information problem.” Thus, “the most efficient job-matching institution is the one with maximum information: one that collects and shares information on employers seeking workers and workers seeking jobs.”¹ Such pairing will generally be enabled by a third-party, such as public employment services or for-profit private recruiters. The “job-finding and worker-recruitment activities” are costly and “the general trend in the migrant recruitment business has been for costs to be shifted from employers to workers.”²

In Canada, studies have shown that the choice of countries from which agricultural workers are recruited through the agricultural stream of TFWP are a result of the strategies developed by private labour suppliers contracted by employers.³ These labour suppliers generally work as a pair, one operating in the sending country and another in Canada. Indeed, few agricultural employers conduct the recruitment of temporary foreign workers (TFWs) themselves. Employers will generally contract with a private labour supplier in Canada, also called a “liaison agency.” The liaison agency will pair with private recruiters located abroad, which will carry out the selection and assignment of workers to specific employers. Thus, the recruitment of workers is ensured by private

1 Philip L. Martin, “Merchants of Various Types: Yesterday and Today” in Christiane Kuptsch, ed., *Merchants of Labour*, Geneva, Institute for Labour Studies, 13 at p. 14.

2 Philip L. Martin, “Merchants of Labour: Agents of the Evolving Migration Infrastructure”, Discussion Paper DP1158/2005, Geneva, International Institute for Labour Studies, 2005 at p. 3.

3 Giselle Valazero, “Offloading Migration Management: The Institutionalized Authority of Non-State Agencies over the Guatemalan Temporary Agricultural Workers to Canada Project” (2015) *International Migration and Integration* 661.

for-profit entities that form a vertically integrated transnational network. The main protagonists of the employment relationship – employers and workers – are integrated into this network almost incidentally.⁴

The recruitment role assumed by FERME-Amigo Laboral, which operates mainly in Guatemala, shapes the make-up of TFWs working in Quebec hired through the TFWP as seasonal agricultural workers. In 2015, 4275 Guatemalans were hired to work in Quebec;⁵ they represented 45% of all agricultural TFWs in Quebec.⁶

If some have denounced the abusive recruitment practices that TFWs are likely to endure,⁷ little research, in Canada, has documented this reality empirically. This report will present the results of an empirical study conducted in 2015 that sought to document the recruitment practices that occurred in Guatemala. We will begin with the question at the heart of our research: what do we know about recruitment practices (I)? Next we will present the methodological framework of this research (II) and will then underpin its results (III). Finally, we look at the normative conundrum regulating the recruitment of TFWs (IV).

I. A Story of Debt and Broken Promises: What Do We Know About Recruitment Practices?

The use of recruitment intermediaries is now quite common in several contexts⁸ and some believe that the

4 Dalia Gesualdi-Fecteau, “Le système d’emploi des travailleurs agricoles saisonniers : portrait d’un rapport salarial multipartite” (2016) 71:4 *Relations industrielles/Industrial relations* 611.

5 Immigration, Refugees and Citizenship Canada, Temporary Residents as of March 31, 2016, <http://open.canada.ca/data/en/dataset/67fd1fae-4950-4018-a491-62e60cbd6974> (consulted on 5 November 2016).

6 FERME, Bilan statistique, 2015, online: FERME <http://www.ferme-quebec.ca/programme-de-travailleurs-etrangeurs-temporaires/#bilan> (consulted on 5 November 2016).

7 See Fay Faraday, *Profiting from the Precarious: How recruitment practices exploit migrant workers*, Metcalf Foundation, 2014, see online: <http://metcalfoundation.com/publications-resources/view/profitting-from-the-precarious-how-recruitment-practices-exploit-migrant-workers/> (consulted on 22 November 2016) and Sarah Zell, “Contracting out accountability? Third-Party agents in temporary foreign worker recruitment to British Columbia” (2011), in Eugénie Dépatie-Pelletier et Khan Rahi, “Mistreatment of temporary foreign workers in Canada: overcoming regulatory barriers and realities on the ground” (2011) 46 *Centre Métropolis du Québec: immigration et métropoles* 27

8 See Aziz Choudry and Mostafa Henaway, “Agents of Misfortune: Contextualizing Migrant and Immigrant Workers’ Struggle Against Temporary Labour Recruitment Agencies” (2012) 45:1 *Labour, Capital and Society* 36 and Guy Davidov, “Joint Employer Status in Triangular Employment Relationships” (2004) 42:4 *British Journal of Industrial Relations* 727; Véronique De Tonnancour et Guylaine Vallée, «Les relations de travail tripartites et l’application des normes minimales du travail au Québec» (2009) 64:3 *Relations industrielles* 399.

involvement of these entities has introduced new sources of vulnerability for TFWs.⁹ It appears that these entities can sometimes “collect fees from migrants for non-existent jobs, mislead migrants regarding expected earnings or their prospects for achieving landed immigration status, provid[e] contracts that are poorly translated or inconsistent with the one held by the employer, overcharg[e] for transportation, housing, translation services, or [for] obtaining an extension of their work permit.”¹⁰

Some have documented that workers are sometimes charged extortionate fees by recruiters and must take out thousands of dollars in loans and sign away the deeds of their homes.¹¹ Others have reported giving out half of their annual pay to recruiters;¹² some recruitment agents have charged workers up to \$15,000 CAN.¹³ It also appears that many workers have been promised fictional jobs¹⁴ while others have been falsely guaranteed access to permanent residency for them and their family.¹⁵

Before presenting the results that stem from our research, we will describe the research methodology that has guided us through the data collection. We will also discuss different challenges that the research team faced while in the field.

II. Documenting Recruitment Practices: Research Methodology

Our observations result from a field study conducted

9 Fay Faraday, *supra* note 7.

10 Kerry Preibisch, “Migrant Workers and Changing Work-place Regimes in Contemporary Agricultural Production in Canada” (2011) 19 *Int. Jnl. of Soc. of Agr. & Food* 62 at p. 74.

11 “Ottawa’s overhaul ignores abuse of migrant workers,” *The Toronto Star* (3 July 2014), see online: http://www.thestar.com/opinion/commentary/2014/07/02/ottawas_overhaul_ignores_abuse_of_migrant_workers.html (consulted on 19 November 2016); “Recruiters charging foreign workers in Ontario illegal fees as high as \$12,000 for jobs that might not exist, report finds,” *Financial Post* (10 April 2014), see online: <http://business.financialpost.com/2014/04/10/recruiters-charging-foreign-workers-in-ontario-illegal-fees-as-high-as-12000-for-jobs-that-might-not-exist-report-finds/> (consulted on 19 November 2016).

12 UFCW Canada, “The Status of Migrant Farm Workers in Canada 2010-2011” at p. 11, see online: http://www.ufcw.ca/templates/ufcwcanada/images/awa/publications/UFCW-Status_of_MF_Workers_2010-2011_EN.pdf (consulted on 22 November 2016).

13 “Law Leaves Migrant Workers Dangling Precariously,” *The Tyee* (9 January 2013), see online: <http://thetyee.ca/News/2013/01/09/Migrant-Worker-Laws/> (consulted on 19 November 2016).

14 *Financial Post*, *supra* note 11.

15 South Western Ontario, “Human trafficking in Perth County”, 2 May 2012, see online: <http://www.southwesternontario.ca/news/human-trafficking-in-perth-county/> (consulted on 22 November 2016); *The Tyee*, *supra* note 13.

between June and November 2015 which sought to document the recruitment of Guatemalan workers hired through the Agricultural Stream of the TFWP. Our mixed-methods approach combined qualitative and quantitative research. We began by conducting eight (8) semi-directed interviews with Guatemalan agricultural workers. We first proceeded in conducting three (3) focus groups, which allowed us to adjust our canvas.¹⁶ We subsequently conducted five (5) individual semi-directed interviews.¹⁷ The workers who were interviewed signed consent forms; they were given time to read the form and the research team made sure to be available to answer the workers’ questions. All the respondents were aware that they could withdraw from the research at any moment. These interviews, all conducted with non-unionized workers, allowed us to reach a comprehensive understanding of the recruitment practices with which the respondents had engaged.

We then sought to measure the recurrence of different phenomena identified in the interviews, and conducted a survey with a total of 87 workers: 15 respondents worked in unionized workplaces and 72 were non-unionized.

This data collection was enabled by the Agricultural Workers Alliance and UFCW, local section 501; these actors operate a workers’ center in St-Rémi, Québec. The non-unionized workers that participated in our research were recruited by the research team at the Workers’ Center located in St-Rémi. The unionized workers that took part in the survey were pre-identified by the UFCW. The research team then contacted the workers to confirm their interest. Throughout the data collection, the research team kept a detailed logbook of our observations.

It is important to emphasize that the issue of recruitment practices appeared to be a sensitive topic for the workers we interviewed and surveyed. Seiber and Stanley define research as “socially sensitive” when its outcome is susceptible to having consequences or implications on the participants or the social group represented by the research.¹⁸ The implications of dealing with a sensitive topic were noticed throughout the data collection, both while conducting the semi-directed interviews and in the context of the survey.

16 We will refer to these interviews as FG-1 to FG-3.

17 We will refer to these interviews as I-1 to I-5.

18 Joan E. Sieber et Barbara Stanley, “Ethical and Professional Dimensions of Socially Sensitive Research” (1988) 43:1 *American Psychologist* 48 at p 48.

In order to meet the requirements of research ethics, each worker who participated in a semi-directed interview was required to sign a consent form. In several cases the consent form itself constituted an obstacle as the request to disclose the workers' identity seemed to cause discomfort. Some workers who had shown interest in the research drew back when presented with the consent form. When workers agreed to be interviewed, despite measures ensuring anonymity of respondents stated in the consent form,¹⁹ it was often necessary to verbally reassure respondents – many were wary.

The research team also detected a certain degree of “collective insincerity”²⁰ while conducting the focus groups. Some workers were reluctant to give a point of view that diverged from the stance of their colleagues. When a respondent led the interview, the other workers generally simply confirmed the viewpoint expressed by their colleague.

Administration of the survey generated its own challenges; several workers seemed uncomfortable with the issues addressed in the survey. Though workers who were surveyed were not required to disclose their identity, some respondents were afraid of being recognized and reported to their employer or recruitment intermediary. In some cases, workers were not at ease with completing the questionnaire in the presence of other colleagues. For some respondents, the discomfort of answering questions that pertained, for example, to excessive recruitment fees, prompted them to leave some answers blank. To avoid a distortion of results, we systematically counted the number of responses left blank by isolating this category from the other response options.

It is also relevant to note that several workers did not understand the content of the survey, either because their Spanish level was insufficient or because they could not

19 The consent form that was presented to the workers states the following: “The information you provide will be kept confidential. No information that you may provide will be used in such a way that your identity will be revealed. Your anonymity will also be preserved. Your identity will be protected by an alpha-numeric code (eg I-1: individual worker, respondent 1) to which the researcher will refer in his work. The key of this code will be constituted and known only by the research team. No information identifying you in any way will be published in the articles, publications or communications that will result from this research or will be communicated in the exchanges between the research team and other researchers. The content of the interview will be transcribed without any reference being made to information that could lead to your identification. Respondent records and personal information will be destroyed five (5) years after the completion of the study. Only the depersonalized transcripts may be retained by the researcher after that date. These will be kept in a secure and locked place in the researcher's office.”

20 Jean Carbonnier, *Sociologie juridique*, 3^e ed, Paris, PUF, 2004 at p 209.

read or write. In these circumstances, the research team assisted the workers.

The participants surveyed were all men aged between 22 and 50 years old; the majority (65%) were between 23 and 36 years old. They came from various rural areas of Guatemala,²¹ but most were from Chimaltenango (36%), a region located about 50 kilometers from Guatemala's capital, Guatemala City. Some of our previous research has indicated that recruiters favour rural areas of Guatemala because of the presence of a high density of experienced agricultural workers, and that recruitment intermediaries are instructed to prioritize “the most underprivileged” areas of Guatemala.²²

61% of respondents said their first language was Spanish and 32% indicated that their first language was one of several indigenous Mayan languages spoken in different parts of Guatemala.²³ 26% of respondents were participating in the TFW program for the first time, 13% were participating for the second time, 7% were in their third participation, 10% in their fourth, and a further 10% were in their fifth.

III. Who, How and How Much? Mapping the Recruitment Practices of Guatemalan Agricultural Workers

*We sign a document that we don't understand. Still, we sign and we come to Canada to work. Our mentality is, it's all ok, because we are going to work in Canada.*²⁴

The quote above eloquently captures the way workers generally perceive the TFWP recruitment process. Their apprehension of their recruitment journey is inextricably linked to their primary goal, which is to obtain a job through the Agricultural Stream of the TFWP. If the workers grant little importance to the administrative formalities surrounding their recruitment, their experiential understanding of the different steps that lead them to an employment opportunity sheds light on the recruitment

21 Alta Verapaz (11%), Chichicastenango (9%), El Progreso (10%), Chimaltenango (36%), Jutiapa (5%), Sacatepequez (8%), San Marcos (7%), Santa Rosa (2%), Tacana San Marcos (1%), Tecpan (1%), Zaragoza (1%).

22 Dalia Gesualdi-Fecteau, “The Recruitment of Guatemalan Agricultural Workers by Canadian Employers: Mapping the Web of a Transnational Network”, (2014) 3:1 *International Journal of Migration and Border Studies* 291 at p. 297.

23 These respondents either spoke Kaqchikel (18%), Chichi (1%), Quiché (8%) and Q'eqchi (5%) as a first language.

24 I-4, p. 5.

process they experience. The data we collected showed certain patterns in the recruitment practices experienced by the workers. In this section we will explore: (A) who handles the recruitment of Guatemalan TFWs; (B) the formalization of their employment; and (C) the financial cost of an employment opportunity.

A. Who? Identifying the Guatemalan Recruitment Network²⁵

In Quebec most agricultural sector employers use the services of a liaison agency to assist them in recruiting seasonal workers. The liaison agency does not directly select or recruit workers; these operations are done by a recruitment intermediary which operates abroad. In Quebec, one liaison agency, FERME (Fondation des Entreprises en Recrutement de Main-d'œuvre agricole Étrangère), plays a fundamental role in this process. Since 2010, FERME has consistently transferred employers' requests to Amigo Laboral, a recruitment intermediary located in Guatemala.

Although Amigo Laboral handles recruitment on behalf of employers, legally, no contractual relationship formally unites the employer to this actor, as their relations are established through FERME. In Guatemala, FERME only engages with Amigo Laboral which, in turn, operates almost exclusively on behalf of FERME – they act in tandem.²⁵ Before their arrival in Canada, the workers interact solely with the recruitment intermediary located abroad, Amigo Laboral, which assists the workers with all procedures required by the Canadian authorities. For this to be feasible, workers will generally allow Amigo Laboral's agents to act on their behalf.

Our data reveals that in the past few years, the worker selection process is carried out in the offices of Amigo Laboral in Guatemala City. All workers – none said they were from the capital city – had to travel from their home to Guatemala City numerous times before coming to Canada to fulfil the administrative requirements. “Newly selected workers” were required to complete a variety of tests, including physical tests, which were administered by Amigo Laboral staff.

B. How? Contextualizing the Formalization of the Employment

The Agricultural Stream of the TFWP allows employers in this sector to recruit from abroad seasonal agricultural workers who will work on the employer's premises. Our previous research has revealed that, from a practical standpoint, it is the recruitment intermediaries who are responsible for the selection and assignment of the workers. These intermediaries will first create a pool of workers according to general criteria. Workers must pass a physical test (which consists of carrying a bag of corn weighing more than 100 pounds, an exercise that must be repeated 10 to 15 times) and show that they can summarily read, write and do basic mathematics. Once the worker is selected, the recruitment intermediary will pair workers and employers according to the specific demands set by the employer. For example, some employers will favour young workers while others will request tall men. For tasks requiring good dexterity, such as berry picking, some employers tend to demand female workers. We have previously argued that these practices suggest a form of outsourcing discrimination, which is carried out by the recruitment intermediary on behalf of the employers.²⁶

Once the worker is selected and assigned to a specific employer, from a legal stand point the employer and the employee will become bound by an employment contract. Almost all of the workers (98%) in our study signed an employment contract while they were still in Guatemala; the contract is signed in the presence of an agent of the recruitment intermediary.

A contract of employment is a contract by which a person, the employee, “undertakes, for a limited time and for remuneration, to do work under the direction or control of another person, the employer;”²⁷ the framework within which the employee executes his or her work performance is determined by the employer. Thus an employment contract is formed by a meeting of minds between the employer and the employee, and the termination of the employment contract is the result of one or the other.

Interestingly, Employment and Social Development Canada (ESDC) puts forward templates of employment contracts that employers should use when hiring workers

25 FERME. Mémoire présenté dans le cadre de la Consultation générale sur le Livre vert pour une politique bioalimentaire, août 2011. Annex 2. It is important to note that before 2010, FERME had an agreement with the International Organization for Migration (IOM). On the role of the IOM: Ishan Ashutosh et Alison Mountz, “Migration Management for the Benefit of whom? Interrogating the Work of the International Organization for Migration” 2011 15:1 *Citizenship Studies* 21

26 Dalia Gesualdi-Fecteau, “Le système d'emploi des travailleurs agricoles saisonniers : portrait d'un rapport salarial multipartite” (2016) 71: 4 *Relations industrielles/Industrial relations* 611.

27 *Civil Code of Quebec*, RLRQ 1991, c 64, art 2085 [CCQ].

through the Agricultural Stream of the TFWP.²⁸ Quebec's Ministry of Immigration, Diversity and Inclusion (MIDI) has produced a specific contract template for TFWs employed by Quebec employers, which is available in French, English and, most importantly for our study, Spanish.²⁹ The employment contract, which must be signed by both parties, must define the working conditions of the TFW, and include the duration of employment.

Most of our respondents signed their employment contracts in the Amigo Laboral offices (84%). However, some workers said they signed the contract at the airport before leaving Guatemala (8%). 56% of respondents said they never received a copy of the contract they signed. Only 48% of the workers signed a Spanish version of the document and many workers were only presented with an English or French version of the contract.³⁰

The research team that assisted workers who agreed to complete our survey noticed that questions regarding the date of the signature of the contract, the place of signature, the language of the contract, the explanations of details of the contract and the possibility to obtain a copy of the contract were not well understood by respondents – several workers recalled signing a paper but did not know what it was. While 70% said they received some information about the content of their contract, it was not always clear whether they were referring to written information contained in the contract itself or information they received orally in a pre-departure information session. This confusion suggests that the recruitment intermediary staff does not adequately ensure that workers understand the recruitment process. Moreover, it seems that recruiters do not take any measures to grant greater transparency to this process.

Our initial semi-directed interviews gave us an idea of the context in which the workers became aware of their employment contract. No workers that were interviewed received any information about the content of their contract and were simply asked to sign the document. Some of the surveyed workers also told the research team that

they were not given time to read their contract.³¹ As illustrated by one worker, “They make an X and you have to sign and sign and sign...but you cannot read...if one wishes to read, they will be told, gentlemen, here is the X. And that's it for the paperwork (*papelaria*).”³²

In sum, our data reveals that workers have very little time to acknowledge the content of their contracts, which is sometimes written in a language they do not speak or read. Moreover, many workers do not clearly understand the legal tenor of the document that they are requested to sign. While completing the survey, one respondent mentioned to a member of the research team that he believed that the Amigo Laboral staff “mistreated the workers” throughout the process. This worker strongly believed that workers feared asking questions to staff; the respondent had personally witnessed colleagues who had been “kicked out of the program” after complaining to Amigo Laboral staff about the process.³³ Similar discontent was expressed by an interviewed worker who resented the fact that workers paid money to the recruitment intermediary but were “not being well treated” by its agents.³⁴

C. How Much? The Cost of a Canadian Journey

In Canada, the federal immigration normative framework is shaped by the Immigration and Refugee Protection Act (IRPA)³⁵ and its regulations (IRPR).³⁶ One of the objectives of the IRPA is “[...] to facilitate the entry of [...] temporary workers for purposes such as trade, commerce, tourism, international understanding and cultural, educational and scientific activities.”³⁷

The IRPA provides that the “alien” must request and obtain visas and other required documents from the Canadian Visa Office; the “visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.”³⁸ The visa costs \$155.00 CAN.

28 ESDC, Agricultural Stream: Employment Contract, see online: Employment and Social Development Canada, <http://www.servicecanada.gc.ca/ft-if/index.jsp?app=prfl&frm=emp5510&lang=eng> (consulted on 22 November 2016) [Agricultural Stream Employment contract].

29 MIDI, *Model Employment Contract for Low-skilled Occupations in the Agricultural Stream and the Stream for Lower-skilled Occupations (Temporary Foreign Worker Program)*, 2014, see online: Ministry of Immigration, Diversity, and Inclusion <http://www.immigration-quebec.gouv.qc.ca/publications/en/form/employment-contract-low-skilled-dyn.pdf> [MIDI] (consulted on 19 November 2016).

30 FG-1, p.11, FG-3, p. 10, I-1, p. 6, I-3p. 8, I-4, p. 5 et I-5, p. 4.

31 This could probably explain why some of them (7%) did not know what to answer to the question about the language in which the contract was written.

32 FG-1, p. 12.

33 Survey #NS47

34 FG-3, p. 12.

35 Immigration and Refugee Protection Act, RSC 2001, c 27 [IRPA]

36 Immigration and Refugee Protection Regulations, SOR/2002-227 [IRPR]

37 IRPA, *supra* note 37, art 3(1)g.

38 *Ibid*, art 11 (1).

In addition to the visa, workers seeking employment in Quebec must obtain a Quebec Acceptance Certificate, which costs \$191.00 CAN.³⁹

Guatemalan workers must also undergo a medical examination.⁴⁰ The cost of this examination is paid by the worker. The medical examination fee is not set by the Canadian government and is therefore likely to vary.

All of the workers that we met interacted with Amigo Laboral. While some were originally hired by the IOM prior to 2010, they were subsequently transferred to Amigo Laboral. Those interviewed stated that in 2015, they paid an average of 3500Q (+/- \$600.00 CAN) to the intermediary for the required paperwork (“papeleria”). Workers who had returned to Guatemala for less than 6 months between contracts were not required to redo a medical exam and were required to pay an average amount of 2600Q (+/- \$450,00 CAN).⁴¹

This information was confirmed by the survey data. According to most respondents (91%), this price included the visa and medical exams. Though some respondents could not identify the exact amounts allocated for different expenses, our semi-directed interviews revealed that some workers knew that the total amount they paid included health insurance, which costs between 280Q and 300Q (+/- \$50.00 CAN);⁴² this health insurance plan was put forward by Amigo Laboral as of 2010. While workers were told that the purpose of this insurance was to protect their families⁴³ while they were away, many workers told us that the insurance was, in fact, useless.⁴⁴ According to some respondents, the insurance is pointless in several areas of Guatemala where there are no service providers.⁴⁵ For others, the insurance was not useful because you still had to “dar una cuota⁴⁶ (pay a fee)” when going for a medical consultation. The survey revealed that most workers believed they could not decline this insurance (70%);⁴⁷ 59%

39 Regulation respecting the selection of foreign nationals, RLRQ, c. I-0.2, r. 4, art 3 [RSRE].

40 IRPR, supra note 38, art 30 (1) c. Workers will be dispensed of the formality if their return to Guatemala between their professional sojourns to Canada of for less than 6 months

41 FG-3, p. 5. The workers estimate that the medical examinations costs +/- 800 to 850Q (+/- 140,00\$ CAN to 150,00\$ CAN).

42 FG-1, p. 7 et I-2, p. 7.

43 FG-1, p. 7.

44 FG-1, p. 7 et FG-3, p. 7 et I-2, p. 7.

45 FG-1, p. 8.

46 I-4, p. 4.

47 2% did not know and 16% did not answer the question.

of respondents did not seem to know why they couldn't decline the insurance plan and 11% thought the insurance was mandatory.

36% of respondents stated that they had paid “cargos administrativos” (“administrative fees”) to Amigo Laboral to compensate for their work. In addition to such “administrative fees,” 9% of respondents answered that they also had to pay a fee to a “middle person.”⁴⁸ The “middle person” is not an official agent of the recruitment intermediary. According to our data, the middle person is often an individual who has ties to staff of Amigo Laboral (a friend or an ex-colleague for instance), who promises a TFW that “he will get him hired.” Other workers witnessed situations in which workers paid fees to a “middle person” who seemed to be tied to employers in Canada.

Some workers seem to believe that the intervention of a middle person is inescapable, perhaps even mandatory. Here is how one of our respondents presented the situation:

In the office [of Amigo Laboral], indeed, they say, workers should not have to pay money [to a middle person]. But one is forced to pay [a middle person], because if you go to the office [of Amigo Laboral in Guatemala City] looking for information, they won't give it to you. You must go as recommended by “x” persons from different [Guatemalan] departments who have contacts with [Amigo Laboral] office workers.⁴⁹

Thus, such a “recommendation” comes with a cost. One TFW told the research team that the first time he came to Canada, he had paid 10,000Q (+/- \$1750.00 CAN) to a “middle person” albeit without any assurance that he would effectively obtain employment.⁵⁰ This respondent also paid a hefty amount a second time because he was not rehired by his first employer. Here is how he synthesized his experience:

In 2010, I had to pay the amount of 10,000Q. In 2011 the greenhouse fired me; we learned that the employer changed its staff for Hondurans. Since I was not rehired,

48 It has to be noted that 16% of the respondents refused to answer this question. This can be explained by the fact that many of these respondents commented that they were not comfortable with this question.

49 I-3, p. 2.

50 I-3, p. 3.

I waited. Suddenly I got a call from the same middle person who charged me in 2010. He asked for 15,000Q. To give my family well-being, I had to dig [up] that money to pay, and come here [to work]. Since the same company rehired me since then, I no longer had to spend such money.⁵¹

Several other workers reported similar experiences. One told the research team that many workers had to pay around 15,000Q (+/- \$2600.00 CAN) to a middle person to “secure a place in the program,” but with no guarantee of obtaining employment.⁵² A worker also reported that some of his colleagues had made “confidential payments” up to 15,000Q to “middle persons” and that the sum was supposedly shared between the middle person and Amigo Laboral’s staff.⁵³ The research team was also told that some workers have, in the past, paid agents of Amigo Laboral who, in return, promised to secure them “a place in the program.”⁵⁴

It is also important to note that all of the workers interviewed told us that the cost of traveling to the capital was hefty. To complete required administrative formalities, some workers had to travel to the capital up to nine times.⁵⁵ In addition to the transportation costs, which vary substantially according to where a worker resides, the workers had to pay for accommodation and food. Thus to complete the application process, most workers had to disburse from 1000Q to 2000Q (+/- \$175.00 CAN to \$350.00 CAN),⁵⁶ and some had to spend up to 7500Q to 8500Q (+/- \$1300.00 CAN to \$1500.00 CAN).⁵⁷

Considering that the average monthly wage in Guatemala was 2112Q (+/- \$380.00 CAN) in 2015,⁵⁸ how could workers afford these expenses? We found that many workers had to take out a loan, which often came with interest, to pay for these fees. To be able to pay the recruitment and procedure fees, 56% of respondents stated that they had to contract a loan, either with a friend (20%), a

family member (15%) or a financial institution (11%).⁵⁹ 32% of the workers who borrowed money paid interest to their lender. 18% stated that they had to provide their property titles as a loan guarantee. It is important to note that 45% of the respondents did not answer the question pertaining to interest and consequently, did not identify their borrower. As discussed earlier, we believe that fear prevented some respondents from answering this question.

The results of our research confirm that the recruitment process can be a rough ride for workers. In addition to the fees that the TFWP requires TFWs to pay,⁶⁰ Guatemalan workers are required to pay an undefined “administrative fee” to the recruitment intermediary; some also have to pay a “middle person.” Most workers are also required to pay for “useless” health insurance. Some workers needed loans to pay for these fees, which often came with interest. We strongly believe that this last finding may explain why TFWs are generally not inclined to act on their labour rights. Research has shown that TFWs often self-police and adjust their behaviour to ensure the continuation of their employment.⁶¹ We previously found that TFWs wish to comply with the expectations, real or perceived, of different actors, such as their employer or the recruitment intermediary; TFWs have strongly interiorized that they must “behave” if they wish to keep their job.⁶² If TFWs are indebted, it is very unlikely that they will voice concerns about their working conditions or do anything that might, in their perception, jeopardize their employment.

The fact that the recruitment of TFWs is transnational poses an eminent challenge to its regulation. It is therefore necessary to examine the normative framework that regulates the recruitment of TFWs.

51 I-3, p. 4

52 Survey #NS51.

53 Survey #NS61.

54 Survey #NS47.

55 I-2, p. 2.

56 FG-3, p. 7.

57 FG-3, p. 7 et I-4, p. 5.

58 Instituto Nacional de Estadísticas Guatemala, Tema/Indicadores, 2015, online: <https://www.ine.gob.gt/index.php/estadisticas/tema-indicadores> (consulted on 17 November 2016).

59 Among the unionized workers, the number of respondents who had contracted a loan with a financial institution was more significant (27%).

60 These fees pertain to the visa and the medical examination.

61 See Janet McLaughlin et Jenna Henneby, “Pathways to Precarity: Structural Vulnerabilities and Lived Consequences for Migrant Farmworkers in Canada” in Luin Goldring et Patricia Landolt, *Producing and Negotiating Non-Citizenship: Precarious Legal Status in Canada*, Toronto, University of Toronto Press, 2013, 175; Tanya Basok, Danièle Bélanger et Eloy Rivas, “Reproducing Deportability: Migrant Agricultural Workers in South-Western Ontario” (2014) 40:9 *Journal of Ethnic and Migration Studies* 1394.

62 Dalia Gesualdi-Fecteau, “Le droit comme rempart utile? L’usage par les travailleurs étrangers temporaires des ressources proposées par le droit du travail” (2015) 45:2 *Revue générale de droit* 531.

IV. The Regulation of the Recruitment of Temporary Foreign Workers: A Normative Conundrum?

As mentioned earlier, in Canada, the federal immigration normative framework is shaped by the Immigration and Refugee Protection Act (IRPA) and its regulations. One of the objectives of the IRPA is “[...] to facilitate the entry of [...] temporary workers for purposes such as trade, commerce, tourism, international understanding and cultural, educational and scientific activities.”⁶³ However, in Canada, labour relations are provincial jurisdictions and each Canadian province has its own labour legal framework. Hence, some provinces explicitly address the activities of recruitment intermediaries. The regulation of the recruitment intermediaries can also be governed by the normative and administrative frameworks of the various countries in which they operate. When such a framework exists, issues of compliance may arise.

The brief overview that follows underpins how the recruitment of TFWs is at the center of a normative conundrum. In this section, we will shed light on the normative framework applicable to the recruitment of TFWs. After presenting the Canadian legal framework (A), we will examine how the Guatemalan Labor Code specifically charges the Ministry of Labor and Social Welfare with the protection of the rights of Guatemalan workers abroad (B). We will conclude this section with an overview of the different international legal instruments aimed at protecting TFWs and will address the reasons why the promotion of international treaties should also be contemplated (C).

A. Exploring the nature and scope of the Canadian legal framework: a fragmented landscape

If the IRPA works to facilitate the entry of temporary workers, it does not specifically address recruitment issues. Notwithstanding, the website of ESDC offers templates of employment contracts that employers should use when hiring seasonal agricultural workers through the TFWP.⁶⁴ In these contracts, there are clauses stating that the employer “shall not recoup from the employee, through payroll deductions or any other means, any costs incurred from recruiting the employee.”⁶⁵ In addition to this clause, the contract regarding the Agricultural Stream states that this “includes but is not limited to, any amount

payable to a third-party representative/recruiter.”⁶⁶

In Canada, because labour issues are a provincial jurisdiction, each province has its own specific labour legislation. Thus, in many provinces, recruitment issues are addressed by labour law, which can regulate the activities of businesses (employment agencies or employment bureaus) that carry out recruitment activities and provide workers for client companies.⁶⁷

Quebec’s legislation provides the least regulation. Apart from the Charter of Human Rights and Freedoms, which states that employment bureaus cannot exercise discrimination, Quebec’s labour legislation does not oversee the activities of the staffing industry.⁶⁸

Manitoba’s legislation is more complete and specific. Section 2(1) of the Worker Recruitment and Protection Act (WRPA) states that any person engaging an “employment agency business” in the province must be in possession of a licence, unless they fall under an exemption.⁶⁹ The Manitoba regulation also states that all foreign worker recruiters must have a licence. If they were to hire without a licence, recruiters could be subject to substantial fines ranging from \$25,000, in the case of an individual, to \$50,000, in the case of a corporation.⁷⁰ Recruiters must also provide a substantial amount of information when registering, such as the name, address and business number of their clients, the name and address of every worker hired on behalf of their clients, and information about the position filled by the worker, etc.⁷¹ The WRPA clearly states that “an individual who is engaged in foreign worker recruitment must not directly or indirectly charge or collect a fee from a foreign worker for finding or attempting to find employment for him or her.”⁷² Moreover, section 11 of the WRPA regulates the registration of employers wishing to hire TFWs: “no employer shall recruit a foreign worker without first registering with the Director of

66 *Ibid.*

67 Delphine Nakache & Paula J. Kinoshita, “The Canadian Temporary Foreign Worker Program: Do Short-Term Economic Needs Prevail over Human Rights Concerns?” (2010) 5 *Institute for Research on Public Policy Study* at p 13

68 Charter of Human Rights and Freedoms, RLRQ c C-12, art 18.

69 The Worker Recruitment and Protection Act, CCSM c W197 [WRPA], art 2 (1). The term employment agency in Manitoba “means the activities of finding individuals — other than child performers or foreign workers — for employment, or finding employment for such individuals.”

70 *The Worker Recruitment and Protection Act*, S.M. 2008, c C-23, art. 28(2). See also Government of Manitoba. Foreign Recruitment Licence Information, see online: http://www.gov.mb.ca/labour/standards/doc/wrpa-license_info_factsheet.html#q992 (consulted on 22 November 2016).

71 WRPA, art 11 (3).

72 *Ibid.*, art 15 (4).

63 IRPA, *supra* note 37, art 3(1)g.

64 Agricultural Stream Employment contract, *supra* note 30.

65 *Ibid.*, art 4(3).

Employment Standards.”⁷³

In Alberta, the recruitment of TFWs is administered through regulations defined in the Employment Agency Business Licensing Regulation⁷⁴ (EABLR). Section 12(1) of the EABLR states that employers are not permitted to require recruitment fees from the workers or to deduct such fees from their salary. Employment agencies must be licensed by the government of Alberta, just as in Manitoba.⁷⁵ The Alberta government provides helpful online documentation to workers suffering from abuse, where the workers’ rights are explained in plain language.⁷⁶ Some of this documentation is translated in seven different languages;⁷⁷ the document Temporary Foreign Workers: a Guide for Employees is translated in its entirety in several languages.⁷⁸ The Guide clearly states that “[f]ees cannot be charged to potential or recruited workers to find a job.”⁷⁹

British Columbia’s legislation regarding employment agencies requires that these agencies be licensed.⁸⁰ Furthermore, section 11 of the provincial Employment Standards Act prohibits charging fees to employees to help them “find a job or to provide information about prospective jobs.” A TFW should not be required to pay for immigration assistance as a condition of being placed in a job and should not be required to post a bond or pay a deposit to ensure they will finish a work term or employment contract, or to pay a penalty if they do not.

In Nova Scotia, the Labour Standards Code⁸¹ was amended in 2011 to include stipulations concerning licensing of

73 *Ibid*, art 11 (1).

74 Employment Agency Business Licensing Regulation, Alta Reg 189/1999. [EABLR].

75 *Ibid*, art 2.

76 Government of Alberta, Information for Workers, 2014, see online: Alberta, Jobs, Skills, Training and Labour <http://work.alberta.ca/immigration/workers.html> (consulted on 22 November 2016).

77 Documentation is partially translated in English, Chinese, German, Hindi, Punjabi, Spanish and Tagalog

78 Temporary Foreign Workers: A Guide for Employees is fully translated in English, Chinese, French, German, Hindi, Korean, Polish, Punjabi, Romanian, Spanish, Tagalog, Thai, Ukrainian and Vietnamese.

79 Alberta Jobs, Skills, Training and Labour, Temporary Foreign Workers: A Guide for Employees, 2010, see online: <http://work.alberta.ca/documents/WIA-IM-tfw-employee.pdf> (consulted on 22 November 2016).

80 Employment Standards Act, RSBC 1996 c 113, art 12(1). The term “employment agency” in British Columbia means “a person who, for a fee [that employers shall pay], recruits or offers to recruit employees for employers.” Ministry of Job, Tourism and Skills Training and Responsible for Labour, Employment agencies, see online: <http://www2.gov.bc.ca/gov/content/employment-business/employment-standards-advice/employment-standards/licensing/licensing-employment-agencies> (consulted on 22 November 2016).

81 *Labour Standards Code*, RSNS 1989, c 246.

recruiters and registration of employers of foreign workers. Article 89H(1) provides that “No person shall engage in foreign worker recruitment unless the person is an individual who holds a licence under this Act that authorizes the person to do so.”⁸² Moreover, the employer has to be registered to recruit or engage the services of another person to recruit foreign workers for employment.⁸³

In Saskatchewan, the Foreign Worker Recruitment and Immigration Services Act (2013)⁸⁴ also requires recruiters to be licensed⁸⁵ and the employers of foreign nationals to hold a certificate of registration from the Minister of the Economy.⁸⁶ The Act also prohibits practices such as “tak[ing] possession of or retain[ing] a foreign national’s passport or other official document or property,”⁸⁷ “threaten[ing] deportation or other action for which there is no lawful cause”⁸⁸ or “tak[ing] action against or threaten[ing] to take action against a person for participating in an investigation or proceeding by any government or law enforcement agency or for making a complaint to any government or law enforcement agency.”⁸⁹ Moreover, the Act provides that “no person shall, directly or indirectly, charge any person other than an employer a fee or expense for recruitment services.”⁹⁰ Thus, the employers are prohibited from requiring a direct payment for or reducing the wages of a foreign worker to recover the cost of recruitment.⁹¹ Finally, the Act provides that all contracts for recruitment services must be in writing and written in a clear language. The recruiters must also “take reasonable measures to ensure that foreign nationals whose first language is not the language of the contract understand the terms and conditions of the contract before they enter into the contract.”⁹²

Finally, Ontario has the most recent legislation with regards to the business of TFW staffing. In 2009, a new chapter was inserted in the Employment Standards

82 *Ibid*, art. 89H(1).

83 *Ibid*, art. 89T.

84 The Foreign worker recruitment and immigration services Act, SS 2013, c F-18.1.

85 *Ibid*, art. 4.

86 *Ibid*, art. 14.

87 *Ibid*, art. 22(b).

88 *Ibid*, art. 22(d).

89 *Ibid*, art. 22(f).

90 *Ibid*, art. 23.

91 *Ibid*, art. 23 (4).

92 *Ibid*, art. 27.

Act (2000).⁹³ Several prohibitions are listed: the agency cannot prevent the hiring of an employee by a client, or charge fees to the employee for an assignment or for help provided to the employee or others.⁹⁴ If the agency violates these dispositions, the employee can get directly refunded.⁹⁵ Ontario also enacted the Employment Protection for Foreign Nationals Act (Live-in Caregivers and Others) in 2009. That legislation initially only regulated the recruitment of foreign nationals employed or seeking employment as live-in caregivers in Ontario. However, effective November 20, 2015, it was amended and renamed the Employment Protection for Foreign Nationals Act, 2009 (EPFNA). The change in the legislation expanded the application to all foreign nationals who, pursuant to an immigration or foreign temporary employee program, are employed or seek employment in Ontario.⁹⁶ The EPFNA prohibits recruiters from charging any fees to foreign nationals,⁹⁷ either directly or indirectly; generally prevents employers from recovering or attempting to recover from the foreign national any cost incurred in arranging to become the foreign national's employer;⁹⁸ prohibits employers and recruiters from taking a foreign national's property, including documents such as a passport or work permit;⁹⁹ prohibits a recruiter, an employer, or a person acting on their behalf from intimidating or penalizing a foreign national for asking about or asserting their rights under the EPFNA,¹⁰⁰ and requires recruiters and, in some situations, employers, to distribute information sheets to foreign nationals setting out their rights under the EPFNA and the Ontario Employment Standards Act.¹⁰¹ That said, the application of this legislation is complaint-driven, which can be a deterrent for TFWs.¹⁰²

Despite provincial legislation aimed at regulation of TFW recruitment intermediaries in some provinces, an important question remains: how can Canadian laws extend to activities occurring in another country's jurisdiction? Since

93 Employment Standards Act, LO 2000, c. 41.

94 *Ibid*, art 74.8(1).

95 *Ibid*, art 74.14(1).

96 *Employment Protection for Foreign Nationals Act*, 2009, S.O. 2009, c. 32 (EPFNA).

97 According to section 7 of EPFNA, recruiters are prohibited from "charging the foreign national...a fee for any service, good or benefit provided to the foreign national," which is deduced to include both recruitment and immigration assistance.

98 *Ibid*, art 8.

99 *Ibid*, art 9.

100 *Ibid*, art 10.

101 *Ibid*, art 11-12.

102 Fay Faraday, "Canada's choice: Decent work or entrenched exploitation for Canada's migrant workers?" (2016) Metcalf Foundation at p. 45.

the recruitment process of Guatemalan workers takes place in Guatemala, it seems doubtful that the Canadian legal framework can regulate the activities of recruiters operating in Guatemala. A further question then is whether Guatemalan laws adequately regulate the activities of recruitment intermediaries.

B. The Guatemalan regulatory framework: from formal standards to a compliance assessment

In Guatemala, section 34 of the Labor Code provides the Guatemalan government with legal authority for regulating the recruitment of temporary workers and specifically charges the Ministerio de Trabajo y Prevision Social (Ministry of Labor and Social Welfare) with the protection of the rights of Guatemalan workers abroad.¹⁰³ Section 34 specifically establishes the Ministerio's power to authorize the recruiting and departure of workers for jobs abroad – work contracts must have the written permission and authorization of the Ministerio – and explicitly prohibits the execution of contracts without the Ministerio's authorization.¹⁰⁴ The contract must establish that all expenses will be covered by the recruiter or the employer, including transportation, housing and border crossing expenses.¹⁰⁵ Workers should not incur any expenses for the placement services offered by the recruiting intermediary. Additionally, section 34 requires the recruiter or the employer to maintain a permanent office in Guatemala City for the duration of the contract¹⁰⁶ and post a bond to guarantee there will be money available for any repatriation costs or payment of claims if abuses or breaches of contract occur.¹⁰⁷ The Guatemalan Labour Code also considers "middle agents" and recruiters to be employer representatives and the employer is jointly responsible for their actions under the Guatemalan Constitution, the Code and its regulations.¹⁰⁸

Despite the explicit and strong protections of section 34, Guatemala does not have a specific regulation covering TFWPs that send Guatemalans abroad; without such regulation, there is, simply put, no government capacity to ensure that section 34 is implemented and enforced. Since

103 Labor Code, Decree No. 1441, July 2011 [Labour Code]. Available online: http://www.mintrabajo.gob.gt/images/organizacion/leyesconveniosyacuerdos/Leyes_Ordinarias/Codigodetrabajodeguatemala2011.pdf.

104 *Ibid*, art 34 paragraph (d).

105 *Ibid*, art 34 paragraph (b).

106 *Ibid*, art 34 paragraph (a).

107 *Ibid*, art 34 paragraph (c).

108 *Ibid*, art 5 and 6

2014, Guatemala has been on the verge of issuing regulations for intermediaries who recruit temporary foreign workers.¹⁰⁹ Various stakeholders, including recruitment intermediaries, government actors and civil society, have all contributed comments to these proposed regulations. However, as of the publication of this article, there are still no recruitment regulations in place.

That being said, “national sovereignty is not absolute, and the current context of globalization supports the management of migration policies at the global level.”¹¹⁰ If the importance of domestic policy reform should be stressed, the promotion of international treaties should also be contemplated.

C. The added value of international regulation: recruitment issues as foreseen by international law

Considering the singular situation of TFWs, several international conventions and recommendations have been developed to protect their rights under the aegis of the International Labour Organization (ILO) and the United Nations. Recruitment issues figure in the ILO’s Migration for Employment Convention (MEC)¹¹¹ and the Private Employment Agencies Convention (PEAC).¹¹² This issue is also taken up in the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW).¹¹³ Although the Migrant Workers (Supplementary Provisions) Convention (MWC)¹¹⁴ does not address recruitment issues specifically, it is useful to refer to it, as it is a key instrument with respect to migrant worker issues. Though several “sending States” have ratified these instruments, the vast majority of “receiving States,” including Canada, have yet to ratify these conventions.

The MEC and the ICRMW both stipulate that the right

109 Global Workers Justice Alliance, *RECRUITMENT RULES: COUNTRIES OF ORIGIN* (2015).

110 Ryszard Cholewinski, Paul De Guchteneire & Antoine Pécoud, ed, *Migration and Human Rights: The United Nations Convention on Migrant Workers’ Rights*, New York: UNESCO Publishing, 2009 at p 214.

111 *C097 - Migration for Employment Convention (Revised), 1949 (No. 97)*, 1 July 1949, ILO, Normlex (entered into force in 1952) [MEC].

112 *C181 – Private Employment Agencies Convention, 1997 (No. 181)*, 19 June 1997, ILO, Normlex (entered into force : 10 May 2000) [PEAC].

113 *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, 18 December 1990, 2220 UNTS 3, (entered into force 1 July 2003) [ICRMW].

114 *C143 – Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)*, 24 June 1975, ILO Normlex (entered into force 9 December 1978) [MWC].

to engage in recruitment operations shall be restricted to public employment offices or other public bodies of the territory in which the operations take place.¹¹⁵ However, the recruitment operations may be transferred to private entities, if supervised by public authorities.¹¹⁶ The PEAC, adopted in 1997, is aimed precisely at regulating the recruitment process undertaken by private agencies “where abuse and exploitation of migrants often begins.”¹¹⁷ As in the legislation of some provinces in Canada, this Convention states that the private agencies “shall not charge directly or indirectly, in whole or in part, any fees or costs to workers.”¹¹⁸ It also stipulates that the State “shall determine the conditions governing the operation of private employment agencies in accordance with a system of licensing or certification, except where they are otherwise regulated or determined by appropriate national law and practice.”¹¹⁹ The Convention also provides that the States shall “adopt all necessary and appropriate measures [...] to provide adequate protection and prevent abuses of migrant workers recruited or placed in its territory by private employment agencies. These include laws or regulations which provide for penalties, including prohibition of those private employment agencies which engage in fraudulent practices and abuses.”¹²⁰

From the 1950s until 1997, the ILO, through Convention No.96 Concerning Fee-Charging Employment Agencies, “had advocated the prohibition of for-profit, fee-charging employment agencies [...], a stance that rendered the placement of workers a de facto public service monopoly in ratifying countries.”¹²¹ Thus, with the adoption of the PEAC in 1997, the ILO now acknowledges the legality of their presence in the international labour market while encouraging States to regulate their activities.

Together with the MEC, the MWC is the second of two conventions that stem from the ILO and directly address the issue of migrant workers. While the MEC “aims to regulate the entire process of migration from entry to return [...] [and] establishes the principle of equal treat-

115 MEC, *supra* note 113 at Annex II, art 3(2); *ICRMW*, *supra* note 115, art 66.

116 *Ibid* at Annex II, art. 3(3); *ICRMW*, *supra* note 115, art 66..

117 Ryszard Cholewinski, “Human Rights of Migrants: The Dawn of a new era?” (2010) 24 *Georgetown Immigration Law Journal* 585 at p 590.

118 PEAC, *supra* note 114 at art. 7(1).

119 *Ibid* at art. 3(2).

120 *Ibid* at art. 8(1).

121 Jamie Peck, Nik Theodore and Kevin Ward, “Constructing markets for temporary labour: employment liberalization and the internationalization of the staffing industry” (2005) 5:1 *Global Networks* 4 at p 6.

ment with national workers for migrant workers,”¹²² the MWC was conceived “to address the growing problem of undocumented or illegal immigration, as well as to provide equal treatment of migrant workers.”¹²³ Although this Convention does not address the recruitment issue, together with the MEC, it constitutes the ILO’s normative framework concerning migrant workers. In accordance with the MWC, the State shall promote and guarantee “equality of opportunity and treatment in respect of employment and occupation, of social security, of trade union and cultural rights and of individual and collective freedoms for persons who as migrant workers or as members of their families are lawfully within its territory.”¹²⁴

In 1999 the ILO’s Committee of Experts stated in a report following its 87th session, that the MEC and the MWC “failed to adequately address the changed international context of labour migration.” The experts also observed that, “while the 1949 and 1975 instruments were originally conceived with a view to covering migration for settlement (immediate or gradual), today a rise in migration for short-term employment can be clearly seen.”¹²⁵ Thus, the experts noted that the MEC and the MWC were perhaps not appropriate to protect temporary migrant workers, their focus being migration for settlement rather than temporary labour migration.

To address this issue, the ILO adopted, in 2005, the Multilateral Framework on Labour Migration: Non-Binding Principles and Guidelines for a Rights-Based Approach to Labour Migration.¹²⁶ It was aimed precisely at addressing “the expansion and mounting complexity of labour migration.”¹²⁷ This instrument foresees the workers’ rights throughout their migration journey, which often involves interacting with a variety of parties.¹²⁸ The guidelines and principles included in this instrument go beyond the

122 Judy Judge, “Precarious migrant status and precarious employment: the paradox of international rights for migrant workers” (2012) 35 *Comparative Labour Law and Policy Journal* 95 at p 123.

123 *Ibid.*

124 MWC, *supra* note 116 at art. 10.

125 International Labour Office, *International Labour Conference: Migrant Workers*, 87th session (1999) at para 659.

126 Ryszard Cholewinski, *supra* note 119 at p 606. See also: Library of Congress, Government of the United States, “Guest workers programs: International Labour Organization” (2015) online: <https://www.loc.gov/law/help/guest-worker/internationallabourorganization.php> (consulted on 28 December 2016).

127 International Labour Office, *supra* note 127 at p V.

128 Leah F. Vosko, “Out of the shadows? The Non-Binding Multilateral Framework on migration (2006) and prospects for using international labour regulation to forge global labour market membership,” in Guy Davidov and Brian Langille. *The idea of labour law*, New York, Oxford University Press, 2011 at p 378.

principles contained in abovementioned instruments.¹²⁹ In fact, it “includes a number of principles and especially guidelines addressing previously neglected issues central to migrant workers’ protection,”¹³⁰ such as discrimination on the basis of nationality and migration.

Recruitment issues also figure in this non-binding instrument. For instance, principle no. 13 states that “Governments in both origin and destination countries should give due consideration to licensing and supervising recruitment and placement services for migrant workers in accordance with the PEAC and its recommendation no. 188.”¹³¹ The principle is followed by guidelines aimed at giving it practical effects. Among other things, it suggests to “implement legislation and policies containing effective enforcement mechanisms and sanctions to deter unethical practices, including provisions for the prohibition of private employment agencies engaging in unethical practices and the suspension or withdrawal of their licences in case of violation.”¹³² Although these principles are non-binding, this instrument calls “for global labour market membership, a notion that entails, in part, freeing key labour protections from the exclusive domain of nation states.”¹³³

Though Canada has not ratified any of the above-mentioned conventions or treaties, and thus, is not bound by them, they reflect concerns regarding the need for social protection of workers as expressed by the highest decision-making bodies.¹³⁴ Ratification of these instruments would have positive effects on the rights of migrant workers, especially regarding the recruitment process through private employment agencies.

Generally, the ratification of international human rights treaties can contribute to the “improvement in human rights of individuals and groups in the ratifying state.”¹³⁵ On one hand, some have argued that ratification of inter-

129 *Ibid* at p 377.

130 *Ibid* at p 378.

131 International Labour Organization, *ILO Multilateral framework on Labour Migration : non binding principles and guidelines for a rights based approach to labour migration* (2006) at p 24.

132 *Ibid* at p 25.

133 Leah F. Vosko, *supra* note 130 at p 380.

134 Jean Bernier. L’industrie des agences de travail temporaire: Avis sur une proposition d’encadrement, Collection Cahier de transfert – CT-2011-001, Québec, Cahiers de l’Alliance de recherche universités-communautés (ARUC), 2011 at p 29.

135 Natalie Baird, “To ratify or not to ratify? An assessment of the case for ratification of international human rights treaties in the Pacific” (2011) 12 *Melbourne of Journal International Law* 249 at p 257. See also Beth A. Simmons. *Mobilizing for human rights: international law in domestic politics*, New York, Cambridge University Press, 2009.

national treaties can influence the national agenda by “alter[ing] the substantive priorities of the legislative agenda compared to what it would have been in the absence of an exogenously presented treaty obligation.”¹³⁶ On the other hand, others have suggested that such ratification will generate more awareness of the particular rights at stake.¹³⁷

V. Conclusion: Seeking to address the normative conundrum: what regulatory pathway?

While the content of ESDC’s employment contract template forbids employers to recoup from TFWs any costs incurred from recruiting the employee,¹³⁸ the Canadian regulatory framework does not comprehensively and fully foresee unlawful conduct that may occur during recruitment. Moreover, what is the true betterment of these contracts? If its content is violated, its enforcement will require that a civil legal procedure be initiated. Will TFWs, considering their precarious migratory and employment status, initiate such a process? Without the support of third parties entitled to act in place of the workers, it seems unlikely that TFWs, whose resources, both linguistic and financial, are very limited, would begin such procedures. Hence, these contracts are unlikely to be perceived as highly binding.¹³⁹

Theoretically, Canadian provincial labour legislation applies to TFWs. However, they cannot address abusive recruitment practices that happen abroad. The question becomes: how can Canadian labour laws extend to activities occurring under a foreign jurisdiction? We believe that one of the main obstacles TFWs will face when seeking the protection of provincial regulations is the territorial limitations of national legislation.

In September 2016, Canada’s House of Commons Standing Committee on Human Resources, Skills and Social Development issued a report on the Temporary Foreign Worker Program in which the Committee underpins the specific areas of concern that should be addressed “to better ensure the TFWP functions in an effective manner that is not only responsive to labour market needs but that also fully respects the fundamental rights of those who use it.”¹⁴⁰

136 Beth A. Simmons, *supra* note 137 at p 149.

137 Natalie Baird, *supra* note 137.

138 See above at a pages 13/19.

139 On this issue, see Judy Fudge et Fiona MacPhail, “The Temporary Foreign Worker Program in Canada: Low-Skilled Workers as an Extreme Form of Flexible Labor” (2009) 31:1 *Comp Lab L & Pol’y J* 5.

140 House of Commons Standing Committee on Human Resources, Skills and Social Development, *Temporary Foreign Worker Program*, 42nd Parliament,

Among the observations brought forward in the report, the Committee specifically notes that witnesses identified loopholes in the monitoring and enforcement of measures in place to “deter unscrupulous recruitment practices.”¹⁴¹ The Committee therefore recommends the creation of an accreditation system for recruiters, “which requires compliance with the Temporary Foreign Worker Program rules and from which employers could exclusively select.”¹⁴² If the Committee’s recommendations are followed, we believe that close attention should be given to the normative and institutional architecture of the accreditation system.

We believe the activities of recruitment intermediaries operating abroad on behalf of Canadian employers should be formally regulated by the Canadian immigration legal framework. One of the IRPA’s objectives is to permit Canada to pursue “the maximum social, cultural and economic benefits of immigration”¹⁴³ and “promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks.”¹⁴⁴ The interpretation and the implementation of the Act must further “the domestic and international interests of Canada”¹⁴⁵ while ensuring that decisions taken under this Act “are consistent with the Canadian Charter of Rights and Freedoms”¹⁴⁶ and comply “with international human rights instruments to which Canada is signatory.”¹⁴⁷

Section 135 of the IRPA states that “[a]n act or omission that would by reason of this Act be punishable as an offence if committed in Canada is, if committed outside Canada, an offence under this Act and may be tried and punished in Canada.”¹⁴⁸ There is therefore a definite possibility that activities taking place abroad could be regulated by the IRPA.

The IRPA should therefore be amended to regulate the recruitment of TFWs. The specifics of the regulation could be foreseen in the IRPR; all “administrative fees” paid to recruitment intermediaries or “middle persons” by TFWs should be deemed unlawful. TFWs should also have a

1st session, 2016 at p 27, see online: <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&DocId=8374415> (Consulted on November 30th).

141 *Ibid* at p 26.

142 *Ibid* at p 34 (recommendation 20).

143 *IRPA*, *supra* note 37, art 3 (1) a).

144 *Ibid*, art 3 (1) i).

145 *Ibid*, art 3 (3) a).

146 *Ibid* art 3 (3) d).

147 *Ibid* art 3 (3) f).

148 *Ibid*, art 135.

positive right to withdraw from any additional “services” offered by the recruitment intermediary, such as health insurance plans.

Recruitment intermediaries operating abroad should be required to register with Canadian embassies. The obligation for the Canadian Embassy to maintain a register of recruitment intermediaries should be added to the IRPR, along with the rules entitling recruiters to be accredited. The IRPR should also include an obligation for Canadian liaison agencies to obtain a licence to operate. Canadian liaison agencies such as FERME should be prohibited from contracting abroad with non-accredited recruitment intermediaries. If cases of cooperation with unregistered foreign recruiters were documented, Canadian liaison agencies would be deprived of their licences. Consequently, employers should have to identify, in their Labour Market Impact Assessment, the mandated liaison agency they intend to engage. Employers availing of the services of a non-registered liaison agency should be subject to hefty fines. The list of licenced recruitment intermediaries and liaison agencies should be publicly accessible as well as the entities charging illegal fees.

Lastly, the IRPR should clearly state that employers are strictly liable for all unlawful fees paid by the workers, notwithstanding the context. As the recruitment intermediary acts on behalf of the employer, the employer should be held accountable for the acts of its mandatary. In order for this policy avenue to be effective, ESDC’s agents should be mandated to conduct onsite audits; ESDC should also have the power to make claims on behalf of workers.

Despite the control of the recruitment process that such measures would entail, some externalities and adverse effects are to be expected. It is the intermediary who is at fault, not the TFW, when an unlawful fee is demanded. Due to the position of power that the intermediary holds in accessing jobs in Canada, the TFWs have no choice but to comply with intermediaries’ demands, legal or not, if they want a job. When the unlawful practice is detected, the intermediary, not the TFW, should be subject to the consequences. The TFW should be granted the visa and be reimbursed by the employer. If the TFW is denied the visa, the worker is left in a very dire situation; likely in debt, and with no job in Canada to pay it off, this puts the TFW and their family at serious risk. It also sends a message to other TFWs not to admit to paying fees, obscuring the ability for authorities to root out these unlawful practices.

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