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Résumé de l'article

Au cours des deux dernières décennies, le nombre de migrants admis au Canada est demeuré relativement stable, alors que le nombre de travailleurs admis avec un permis de travail temporaire a constamment augmenté. Ce phénomène s'explique par la modification des politiques publiques canadiennes qui ont facilité la gestion de la main-d'oeuvre immigrante. De récentes recherches ont mis en lumière les ramifications complexes de réseaux transnationaux facilitant l'embauche de travailleurs étrangers temporaires. Les travailleurs agricoles guatémaltèques sont embauchés en vertu du programme des travailleurs étrangers temporaires et embauchés par l'entremise d'un processus de recrutement contrôlé par des intermédiaires privés. Des pratiques de recrutement abusives sont constamment rapportées. Cet article vise à présenter les résultats d'une étude empirique qui avait pour but de documenter le recrutement de travailleurs agricoles guatémaltèques par des employeurs québécois et évaluer le corpus normatif de régulation encadrant le recrutement de ces travailleurs.

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A STORY OF DEBT AND BROKEN PROMISES? THE RECRUITMENT OF GUATEMALAN MIGRANT WORKERS IN QUEBEC

Dalia Gesualdi-Fecteau, Andréanne Thibault, Nan Schivone, Caroline Dufour, Sarah Gouin, Nina Monjean and Éloïse Moses[*]

For the past two decades, the number of immigrants admitted to Canada has remained relatively stable while the number of workers admitted with a temporary work permit has steadily increased. This phenomenon is explained by a shift in Canadian public policies that direct the management of labour migration. Recent research has shed light on the complex and highly ramified transnational network that allows the recruitment of temporary foreign workers. Agricultural Guatemalan workers are hired through the Temporary Foreign Worker Program and the recruitment process is controlled by private recruitment intermediaries. Some abusive recruitment practices have been consistently reported. This article seeks to present the results of an empirical study documenting the recruitment by Quebec employers of Guatemalan agricultural workers and will discuss the normative framework regulating the recruitment of Guatemalan temporary foreign workers.

Au cours des deux dernières décennies, le nombre de migrants admis au Canada est demeuré relativement stable, alors que le nombre de travailleurs admis avec un permis de travail temporaire a constamment augmenté. Ce phénomène s'explique par la modification des politiques publiques canadiennes qui ont facilité la gestion de la main-d'œuvre immigrante. De récentes recherches ont mis en lumière les ramifications complexes de réseaux transnationaux facilitant l'embauche de travailleurs étrangers temporaires. Les travailleurs agricoles guatémaltèques sont embauchés en vertu du programme des travailleurs étrangers temporaires et embauchés par l'entremise d'un processus de recrutement contrôlé par des intermédiaires privés. Des pratiques de recrutement abusives sont constamment rapportées. Cet article vise à présenter les résultats d'une étude empirique qui avait pour but de documenter le recrutement de travailleurs agricoles guatémaltèques par des employeurs québécois et évaluer le corpus normatif de régulation encadrant le recrutement de ces travailleurs.

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En el curso de las dos últimas décadas, el número de inmigrantes admitidos en Canadá permaneció relativamente estable, mientras que el número de trabajadores admitidos con un permiso de trabajo temporal aumentó constantemente. Este fenómeno se explica por la modificación de las políticas canadienses públicas que facilitaron la gestión de la mano de obra inmigrante. Las investigaciones recientes pusieron en evidencia las ramificaciones complejas de redes transnacionales que facilitaban la contratación temporal de trabajadores extranjeros. Los trabajadores agrícolas guatemaltecos son contratados en virtud del programa de los trabajadores extranjeros temporales y contratados por la intervención de un proceso de contratación controlado por intermediarios privados. Se reportan constantemente prácticas abusivas de contratación. Este artículo pretende presentar los resultados de un estudio empírico que tenía por objeto documentar la contratación de trabajadores agrícolas guatemaltecos por empleadores quebequeses y evaluar el corpus normativo de regulación que encuadra la contratación de estos trabajadores.

In Canada, a growing number of employers hire workers through various temporary migration programs (TMPs). Employers from the agricultural sector can hire workers through the Seasonal Agricultural Worker Program (SAWP) or the Temporary Foreign Workers Program (TFWP), or under both programs. Unlike the SAWP, which is an intergovernmental agreement, the implementation of the TFWP does not require government participation and does not predetermine how or where the workers should be recruited.

Pairing employers and workers across borders introduce what Philip Martin described as "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] Pairings of this kind 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 workers are recruited is a result of the strategies developed by private labour suppliers with whom employers' contract.[3] Indeed, employers rarely recruit temporary foreign workers (TFW) themselves. They generally contract with third parties, which offer a "turnkey" recruitment service.

In Quebec, seasonal agricultural workers hired through the TFWP arrive mainly from Guatemala. In 2016, 4,606 Guatemalans were hired to work in Quebec; they represented 46% of all the agricultural TFW in Quebec.[4] Guatemalan TFWs are recruited locally by private entities that carry out the recruitment and allocation of workers to specific employers.

To date, little research has documented the abusive recruitment practices that TFWs are at risk of enduring.[5] What is the nature of those practices? When unlawful practices are in place, to which regulatory framework can workers resort?

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1 Philip Martin, "Merchants of Various Types: Yesterday and Today" in Christiane Kuptsch, ed, *Merchants of Labour* (Geneva: International Institute for Labour Studies, 2006) 13 at 14.

2 Philip Martin, "Merchants of labor: Agents of the evolving migration infrastructure" (2005) International Institute for Labour Studies, Discussion Paper No DP1158/2005 at 3, online: ILO <www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_193617.pdf>.

3 Giselle Valazero, "Offloading Migration Management: The Institutionalized Authority of Non-State Agencies over the Guatemalan Temporary Agricultural Worker to Canada Project" (2015) 16:3 International Migration and Integration 661.

4 FERME, "Bilan statistique" (2016), online: Fermequebec <www.fermequebec.ca/programme-de-travailleurs-etrangers-temporaires/#bilan>.

5 See Fay Faraday, *Profiting from the Precarious: How recruitment practices exploit migrant workers* (Toronto, Metcalf Foundation, 2014), online: Metcalffoundation <https://metcalffoundation.com/wp-content/uploads/2014/04/Profiting-from-the-Precarious.pdf> [Faraday, *Profiting from*]; Sarah Zell, "Contracting out accountability? Third-Party agents in temporary foreign worker recruitment to British Columbia" (2011), in Eugenie Depatie-Pelletier & Khan Rahi, eds, *Mistreatment of temporary foreign workers in Canada: overcoming regulatory barriers and realities on the ground* (Montreal: Centre Métropolis du Québec — Immigration et métropoles, 2011) 27.

This article seeks to present the results of an empirical study of the recruitment of Guatemalan agricultural workers by Quebec employers. Before detailing this research and its implications (II), we first contextualize our research question (I). Finally, we discuss the legal framework that is applicable to the recruitment of TFWs (III).

I. The recruitment of migrant workers : unpacking the "human supply chain"[6]

The use of recruitment intermediaries is now quite common in several contexts[7] and some believe that the involvement of these entities has introduced new sources of vulnerability for TFWs.[8] Recruiters who pair workers and jobs are paid for their services, sometimes by employers or workers and often by both: these "merchants of labour are the glue of international labour markets."[9] Recruiters 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]

The International Labour Organization (ILO) has expressed concern about "the growing role of unscrupulous employment agencies, informal labour intermediaries and other operators acting outside the legal and regulatory framework [sometimes leading] to debt bondage linked to repayment of recruitment fees."[11] Gordon's analysis of the "transnational human supply chain" reveals the forces driving the recruitment process, and stresses that "labor migration is a fundamental aspect of production in the global economy—as fundamental as the outsourcing of manufacturing and services, which also takes place through a supply chain structure."[12]

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6 This expression has been coined by Jennifer Gordon, "Regulating the Human Supply Chain" (2017) 102:2 Iowa Law Review 445 [Gordon].

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

8 See Philip Martin, *Merchants of Labor* (Oxford: Oxford University Press, 2017) at 99, ff [Martin, *Merchants of Labor*]; *Faraday*, *supra* note 5.

9 *Martin*, *supra* note 8 at 101.

10 Kerry Preibisch, "Migrant Workers and Changing Work-place Regimes in Contemporary Agricultural Production in Canada" (2011) 19:1 Int. Jrnl. of Soc. of Agr. & Food 62 at 74.

11 ILO, "Fair Recruitment Initiative", (30 March 2015), online: ILO <www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_320405.pdf>.

12 Gordon, *supra* note 6 at 469.

In Canada, very few empirical studies have been carried out on that recruitment process. Some have documented the plight of workers who are sometimes charged extortionate fees by private recruiters and forced to take out thousands of dollars in loans and sign away the deeds of their homes.[13] Some have reported the case of recruitment agents charging workers up to $15,000 CAN,[14] forcing employees to fork out half of their annual pay to recruiters.[15] Workers have been promised fictional jobs while others have been assured that they will obtain permanent residency.[16]

Although the core actors in the recruitment process are workers, recruiters and employers, the international recruitment process often involves a chain of subcontracting arrangements.[17] This is exemplified in Quebec by the way the Agricultural Stream of the TFWP is implemented. Most agricultural sector employers use the services of a private entity to assist them in recruiting seasonal workers.[18] Such entities do not directly select or recruit workers; those tasks are carried out by recruiters operating abroad. In Quebec, the *Fondation des entreprises de recrutement de main-d'œuvre étrangère* (*FERME*) plays a key role. *FERME* is a non-profit organization that offers its labour movement and human resources management services to employers who hire TFWs. In 2010, *FERME* began to transfer employers' requests to Amigo Laboral, a private recruiter located in Guatemala.[19] In 2017, those responsibilities seem to have been re-assigned to

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13 Humera Jabir, "Ottawa's overhaul ignores abuse of migrant workers", *The Toronto Star* (2 July 2014), online: TheStar <www.thestar.com/opinion/commentary/2014/07/02/ottawas_overhaul_ignores_abuse_of_migrant_workers.html>; Special To Financial Post, "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), online: <http://business.financialpost.com/executive/management-hr/recruiters-charging-foreign-workers-in-ontario-illegal-fees-as-high-as-12000-for-jobs-that-might-not-exist-report-finds> [Financial Post].

14 Krystle Alarcon, "Law Leaves Migrant Workers Dangling Precariously", *The Tyee* (9 January 2013), online: < https://thetyee.ca/News/2013/01/09/Migrant-Worker-Laws/> [The Tyee].

15 UFCW Canada, "The Status of Migrant Farm Workers in Canada 2010-2011" Report at 11, online: UFCW <www.ufcw.ca/templates/ufcwcanada/images/awa/publications/UFCW-Status_of_MF_Workers_2010-2011_EN.pdf>.

16 Sarah R. Champagne, "Des travailleurs agricoles guatémaltèques disent avoir perdu des milliers de dollars", *Le Devoir* (3 October 2017), online: LeDevoir <www.ledevoir.com/societe/509457/une-agence-sous-enquete-et-poursuivie-par-17-travailleurs-toujours-en-activite>;; *Financial Post*, *supra* note 13; *Alarcon*, *supra* note 14.

17 *Gordon*, *supra* note 6 at 469, ff.

18 We have previously documented the contours of the recruitment network that is active in Guatemala. See Dalia Gesualdi-Fecteau, "The Recruitment of Guatemalan Agricultural Workers by Canadian Employers: Mapping the Web of a Transnational Network", (2014) 1:3 International Journal of Migration and Border Studies 291 [Gesualdi-Fecteau, The Recruitment]; Dalia Gesualdi-Fecteau, "Le système d'emploi des travailleurs agricoles saisonniers: portrait d'un rapport salarial multipartite" (2016) 71:4 Relations industrielles 611.

19 It is important to point out that before 2010, FERME had an agreement with the International Organization for Migration (IOM). It is also the IOM who initiated this relationship in 2003 at the request of the Government of Guatemala to facilitate the recruitment of Guatemalan workers by Canadian employers. But in 2010, the IOM decided to increase their fees. This decision prompted FERME to cease contracting with the IOM and motivated the liaison agency to create Amigo Laboral. For an overview of the role of the IOM, see Ishan Ashutosh & Alison Mountz, "Migration

ComuGuate.[20]

If recruiters operating abroad handle recruitment on behalf of employers, legally, no contractual relationship exists between the employer and those recruiters: at the recruitment stage, the relationship between employers and recruiters operating abroad is established through *FERME*. Conversely, before their arrival in Canada, Guatemalan workers only deal with the recruiter operating in Guatemala, which assists workers with all the administrative procedures required by the Canadian authorities.

But concretely, how does the recruitment of Guatemalan TFWs work in practice? An empirical study conducted in 2015 gives an insight into the perspective of Guatemalan TFWs hired through the Agricultural stream of the TFWP.

II. Documenting recruitment practices of guatemalan TFWs : results from an empirical study

> 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.[21]

This quote encapsulates with eloquence the way Guatemalan TFWs generally perceive the recruitment process. Their apprehension of their recruitment "journey" is inextricably linked to their primary goal, which is to obtain employment through the Agricultural Stream of the TFWP. While the workers attach little importance to the administrative formalities surrounding their recruitment, their experience of the different steps that lead them to an employment opportunity sheds light on the recruitment process.

Before presenting the results of our research (B), we will first explain the methodology used in the collection of data and discuss the different challenges that the research team faced in the field (A). We will conclude this section by discussing the implications of these research results (C).

A. Research methodology

The research findings presented here stem from a field study conducted between June and November 2015 which sought to document the recruitment of Guatemalan workers hired through the Agricultural Stream of the TFWP. It combines both a qualitative and a quantitative approach. We first conducted three focus groups

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management for the benefit of whom? Interrogating the work of the International Organization for Migration" (2011) 15:1 Citizenship Studies 21.

20 FERME, "Cultiver des liens, Rapport d'activités 2016" (2016) at 2, online: FermeQuebec <www.fermequebec.ca/wp-content/uploads/2015/11/RA_FERME_2016_Web.pdf>.

21 See the text accompanying note 23, I-4 at 5.

with Guatemalan Agricultural workers;[22] we subsequently conducted five individual semi-directed interviews with workers.[23] The interviews, all conducted in Spanish with non-unionized workers, allowed us to reach a comprehensive understanding of the recruitment practices experienced by the respondents.

We then sought to measure the recurrence of different phenomena identified in the interviews. We surveyed 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. Throughout the data collection phase, the research team kept a detailed logbook of their findings.

It is important to emphasize that the issue of recruitment practices appears to be, for these workers, a "sensitive topic". Seiber and Stanley define "socially sensitive research" as research whose outcome is susceptible of having consequences or implications on the participants or the social group represented by the research.[24] The indications that workers were dealing with a sensitive topic were evident throughout the data collection phase.

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.[25] The workers were given adequate time to read the form and the research team made sure to be available to answer their questions. All respondents were aware that they could withdraw from the research at any moment.

In several cases, the consent form, in and of itself, was an obstacle: workers were reluctant to give their identity despite the guarantee of anonymity. Some workers, who had initially expressed interest in the research, wished to withdraw when presented with the consent form. The carrying out of the survey generated its own challenges. Several workers seemed uncomfortable with the issues addressed in the survey. For some respondents, questions regarding excessive recruitment fees were left unanswered.[26]

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22 These are referred to here as FG-1 to FG-3.

23 These are referred to here as I-1 to I-5.

24 Joan E. Sieber & Barbara Stanley, "Ethical and professional dimensions of socially sensitive research" (1988) 43:1 American Psychologist 49 at 49.

25 The consent form signed by the workers contained 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."

26 In order not to skew our results, we systematically counted the number of blanks.

It is also worth noting that several workers did not understand the content of the survey, either because their level of Spanish was insufficient or because they could not read or write. In those cases, the research team had to assist workers without diverging from the content of the questionnaire; the research team therefore adjusted the timeline of the field study.

The participants surveyed were all men aged between 22 and 50. The great majority (65%) were between 23 and 36 years old. Participants were from various rural areas of Guatemala,[27] but most of them were from Chimaltenango (36%), a region located about 50 kilometers away from Guatemala's capital, Guatemala City. Some of our previous research revealed that recruiters favour the rural areas of Guatemala because of the high density of experienced agricultural workers; it would also appear that recruitment agents are instructed to prioritize "the most underprivileged" areas of Guatemala.[28]

In terms of native language spoken, 61% of respondents stated their first language as Spanish and 32% responded that their first language was one of the several indigenous Mayan languages that are spoken in different parts of Guatemala.[29] In total, 26% of respondents were participating in the program for the first time, 13% were going to Canada for the second time, 10% were participating for the fourth time and 10% were participating for the fifth time.

The data collection allowed the research team to identify certain patterns in the recruitment practices experienced by workers.

B. Who, how and how much? mapping the recruitment practices of Guatemalan agricultural workers

The Agricultural Stream of the TFWP allows employers to recruit seasonal agricultural workers who will work on an employer's premises abroad. Our previous research revealed that, from a practical standpoint, it is the private recruiters operating abroad who select the workers.[30] These recruiters first create a "pool" of workers according to general criteria. Once a worker is selected, recruiters will pair workers and employers according to the specific "demands" of the employer; some employers will specify that they need young workers; others will request, for example tall men. For tasks requiring good dexterity, such as berry picking, some employers tend to request female workers. We have previously argued that these practices imply a form of outsourced discrimination, which is carried out by recruiters on behalf of employers.

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27 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%).

28 *Gesualdi-Fecteau*, *supra* note 18 at 297.

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

30 *Gesualdi-Fecteau*, *supra*, note 18.

The empirical evidence collected in 2015 gives us (a) a better understanding of the extent to which employment through the TFWP is formalized and (b) gives us an idea of the human cost for TFWs seeking work in Canada.

1. HOW? THE FORMALIZATION OF THE EMPLOYMENT PROCESS THROUGH THE TFWP

Once a worker is selected and assigned to a specific employer, the employer and the employee are bound by an employment contract. The employment is "formalized" when the workers sign the employment contract: nearly all the respondents (98%) signed the contract while they were in Guatemala, with a representative of the recruiter present. All respondents to our study dealt with Amigo Laboral. Some were originally hired by the International Organization for Migration (IOM), which did recruitment for Quebec employers until 2010. The respondents were "transferred" to Amigo Laboral in 2010.

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, employer."[31] Employment and Social Development Canada (ESDC) provides employment contract templates for use by employers when hiring workers through the Agricultural Stream of the TFWP.[32] The parties to the employment contract (which must be signed by both parties) must define therein the working conditions of the TFW, including the duration of employment.

Most respondents appear to have signed the contract in the Amigo Laboral offices (84%). Nevertheless, some respondents said they signed the contract at the airport before leaving Guatemala (8%). In total, 56% of them said they never received a copy of their contract. Only 48% signed a Spanish version of the document; many respondents were only presented with an English or a French version of the contract.[33]

The semi-directed interviews that were first conducted gave us an idea of the context in which Guatemalan workers become aware of their employment contract. No interviewee received information about the content of the contract: they were all just asked to sign the document. Some of the respondents also told the research team that they were not given enough time to read the contract.[34] 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 is it for the *papeleria* (paperwork)."[35]

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31 Art 2085 CCQ.

32 Employment and Social Development Canada, "Agricultural Stream — Contract Template", ESDC Form No EMP5510 (Ottawa: ESDC, January 2018), online: Service Canada <https://catalogue.servicecanada.gc.ca/apps/EForms/pdf/en/ESDC-EMP5510.pdf> [ESDC, Agricultural Stream].

33 See *ibid*, FG-1 at 11; FG-3 at 10; I-1 at 6; I-3 at 8; I-4 at 5; I-5 at 4.

34 This could probably explain why some of the respondents (7%) did not know how to respond to the question about the language in which the contract was written.

35 *Employment and Social Development Canada*, *supra* note 32, FG-1 at 12.

2. HOW MUCH? THE COST OF A CANADIAN EMPLOYMENT OPPORTUNITY

In Canada, the federal immigration normative framework is shaped by the *Immigration and Refugee Protection Act*[36] and its regulations.[37] 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."[38] The *IRPA* provides that the "alien" must request and obtain from the Canadian Visa Office, visas and other required documents; 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."[39] The visa costs $155.00 CAN. In addition to the visa, workers seeking work in Quebec must obtain a Certificate of acceptance of Quebec, which costs $191.00 CAN.[40]

Guatemalan workers must also undergo a medical examination.[41] The costs of this examination are borne by the worker. The medical examination fee is not set by the Canadian government and is therefore likely to vary.

In 2015, respondents paid an average amount of 3,500Q (+/$- 600.00 CAN) to the recruiter for the required *papeleria*. Workers that had returned to Guatemala for less than 6 months between contracts were not required to pass a medical exam and were therefore required to pay an average amount of 2,600Q (+/$- 450.00 CAN).[42]

Where respondents could not specifically identify the exact break-down of different costs, the semi-directed interviews revealed that several respondents knew that the total amount included the payment for health insurance which costs between 280Q and 300Q (+/$- 50.00 CAN);[43] this health insurance plan was put forward by Amigo Laboral as of 2010. While they were told that this insurance was aimed at "protecting their family,"[44] many respondents told us that the insurance was, in fact, useless.[45] The insurance was even deemed pointless in several areas of Guatemala where there are no service providers.[46] For others, it was not worth resorting to this insurance because they still had to *dar una cuota*[47] (pay a fee) when attending a medical consultation. The survey revealed that most respondents believed they could not decline this insurance (70%) and 11% thought the insurance was mandatory.[48]

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36 *Immigration and Refugee Protection Act*, RSC 2001, c 27 [*IRPA*].

37 *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*].

38 *IRPA*, *supra* note 36, s 3(1)(g).

39 *Ibid*, s 11(1).

40 *Regulation respecting the selection of foreign nationals*, CQLR, c I-0.2, r 4, s 3.

41 *IRPR, supra* note 37, s 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

42 *Employment and Social Development Canada*, *supra* note 32, FG-3 at 5. The workers estimate that the medical examinations costs +/- 800 to 850Q (+/- 140.00$ CAN to 150.00$ CAN).

43 *Ibid*, FG-1 at 7; I-2 at 7.

44 *Ibid*, FG-1 at 7.

45 *Ibid*, FG-3 at 7; I-2 at 7.

46 *Ibid*, FG-1 at 8.

47 *Ibid*, I-4 at 4.

48 2% did not know and 16% did not answer the question. 59% of the respondents did not seem to know why they couldn't decline the insurance plan.

36% of the respondents stated that they had paid "*cargos administrativos*" ("administrative fees") to Amigo Laboral in return for their work. In addition to such "administrative fees", 9% of respondents stated that they also had to pay a fee to a "middle person."[49] The "middle person" is not an official agent of Amigo Laboral. According to our data, the middle person can be an individual that has ties with the company's staff (a friend or an ex colleague for instance). This "middle person" promises a TFW that "he will get him hired". Other respondents witnessed situations in which colleagues paid fees to a "middle person" who seemed to be tied to employers in Canada. Thus, a "middle person" can either be an individual somewhat associated with Amigo Laboral or one that is linked to employers in Canada.

Some workers seem to believe that the involvement of a "middle person" is inevitable, perhaps even mandatory. Here is how one of our respondents described the situation:

> In the office [Amigo Laboral's], 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 office workers [Amigo Laboral].[50]

Thus, such a "recommendation" comes at a cost. One worker told the research team that the first time he came to Canada, he paid 10,000Q (+/$- 1,750.00 CAN) to a "middle person" without any assurance that he would effectively obtain employment.[51] The same respondent also paid a hefty sum on a second occasion because he was not rehired by the employer. Here is how he summed up 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, I waited. Suddenly I got a call from the same middle person who charged me in 2010. He asked for 15,000 Q. To keep my family well-being, I had to come up with that money, and come here [to work]. Since the same company rehired me since then, I no longer had pay out that sum of money.[52]

Several other respondents reported similar experiences. One told the research team that many workers had to pay around 15 000Q (+/$- 2,600.00 CAN) to a middle person to "secure a place in the program" with no guarantee of obtaining employment.[53] A respondent also reported that some of his colleagues had made "confidential payments" up to 15,000Q to a "middle person" and that the sum was

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

[50] *Ibid*, I-3 at 2.

[51] *Ibid* at 3.

[52] *Ibid* at 4.

[53] See Survey #NS51.

supposedly shared between the middle person and the Amigo Laboral staff.[54] 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."[55]

All respondents interviewed, none of which said they were from the capital city, told us that the cost of traveling to the capital to complete all the administrative formalities was substantial: some respondents had to go to the capital several times, sometimes up to nine times.[56] In addition to the transportation costs, which vary greatly according to where they reside in Guatemala, workers must pay for accommodation and food. Most respondents therefore had to disburse from 1,000Q to 2,000Q (+/- $175,00 CAN to $350.00 CAN),[57] some had to spend up to 7,500Q to 8,500Q (+/$- 1,300.00 CAN to $1500.00 CAN).[58]

Considering that the average monthly wage in Guatemala was 2,131Q (roughly $380 CAN) in 2016,[59] how do workers manage to meet those expenses? Several respondents had to take out a loan to cover those fees, a loan that often came with interest. To be able to pay the recruitment and procedure fees, 56% of respondents stated that they had to take out a loan, either from a friend (20%), a family member (15%) or a financial institution (11%)[60]. 32% of the respondents who borrowed money also paid interest to their lender. 18% also stated that they had to provide the lender the deeds to their property as a guarantee.

C. A story of debts and broken promises: research implications

These research findings raise a number of questions. What are the impacts of the recruitment process, a system in which employees have little control? Are the recruitment expenses that workers incur likely to affect behaviours during sojourns in Quebec? What are we to read into the workers' discomfort in relation to the research topic?

Although surveyed workers were not required to disclose their identity, numerous respondents feared that the disclosure of information about the recruitment process would have negative consequences. Some respondents were afraid of being identified and being reported to employers or recruiters. Several TFWs were reluctant to take part in the survey and who did agree often needed reassurance. 45% of the respondents did not identify their moneylenders. The research team also detected a certain degree of "collective insincerity"[61] while conducting the focus groups. Some

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54 See Survey #NS61.

55 See Survey #NS47.

56 *Employment and Social Development Canada*, *supra* note 32, I-2 at 2.

57 *Ibid*, FG-3 at 7.

58 *Ibid*, I-4 at 5.

59 Guatemala, Instituto Nacional de Estadísticas, "*Tema/Indicadores*", (Guatemala: INE, 2015), online: INE <www.ine.gob.gt/index.php/estadisticas/tema-indicadores>.

60 Among the unionized workers, the number of respondents who had contracted a loan with a financial institution is much more important (27%).

61 Jean Carbonnier, *Sociologie juridique*, 2nd ed (Paris: Presses Universitaires de France, 2004) at 209.

workers were reluctant to give a point of view that diverged from the standpoint of their colleagues. When a respondent led the interview, the other respondent generally simply confirmed the viewpoint expressed by their colleague. Workers were also reluctant to complete the survey in the presence of other colleagues.

The fear generated by the research topic should be understood in the wider context of the recruitment process. Our data reveals that workers have very little time to familiarize themselves with their contract, 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 they are requested to sign. Survey questions regarding the date and place of the contract's signing, the language of the contract, the existence of explanations regarding the details of the contract and the possibility of obtaining a copy of the contract were not well understood by workers: several respondents recalled signing a paper but did not know what it was. While 70% of them said they received some information about the content of the contract, it was not always clear if they were talking about the written information contained in the contract itself or if it was information they received orally in a pre-departure information session.

Thus, workers soon realize the degree of "conditionality" surrounding their employment in Canada.[62] Their sojourn as well as their employment contract is temporary and of fixed duration. Workers must be paired with employers who have previously been authorized to hire TFWs. Our data suggests that the recruitment process reinforces a feeling of conditionality. One respondent mentioned that he believed workers are afraid to ask questions of recruiters; he had personally witnessed colleagues who had been "kicked out of the program" after complaining about the process.[63] Many respondents expressed discontent and resented the fact they paid money to the recruiter while "not being well treated."[64] The lack of transparency in the hiring process along with the practices engaged in by the recruiter cast workers as "passive subjects" who must abide by the process imposed by the recruiter and avoid voicing their discontent.

Our results also reveal that, in 2015, Guatemalan TFWs hired by Quebec employers paid an average amount of 3,500Q (+/$- 600.00 CAN) to recruiters while abroad. In addition to fees that the TFWP requires TFWs to pay,[65] Guatemalan workers are required to pay an "administrative fee" and a health insurance contribution to recruiters, considered "useless" by most respondents to be; some also have to pay a "middle person". Several respondents had to take out a loan to pay for those fees, loans upon which interest was often owed.

Fees and debt often incurred throughout the recruitment process are likely to impact on the strategies deployed by Guatemalan TFWs during the course of their

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62 Luin Goldring, "Resituating Temporariness as the Precarity and Conditionality of Non-citizenship" in Leah F. Vosko, Valerie Preston & Robert Latham, eds, *Liberating Temporariness? Migration, Work, and Citizenship in* an *Age of Insecurity* (Montreal: McGill-Queen's University Press, 2014) 218.

63 See Survey #NS47.

64 *Employment and Social Development Canada*, *supra* note 32, FG-3 at 12.

65 These fees pertain to the obtainment of a visa and the medical examination.

employment in Quebec. Previous research has shown that TFWs often self-discipline and adjust their behaviour to ensure the continuation of their employment; TFWs are generally not inclined to mobilize their labour rights.[66] TFWs wish to comply with the expectations, real or perceived, of different actors, such as those held by employers or recruiters; TFWs often internalize that they must "behave" if they wish to keep their jobs.[67] Thus, if TFWs are indebted, it is very unlikely that they will voice concerns about their working conditions or do anything that might, in their eyes, jeopardize their employment.

Given these findings and in light of the central role played by recruiters, it is necessary to take a look at the legal framework regulating the recruitment of TFWs. The fact that TFWs recruitment is transnational in nature poses a serious challenge to its regulation.

III. The regulation of the recruitment of temporary foreign workers: a normative conundrum?

As aforementioned, in Canada, the federal immigration framework is shaped by the *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."[68] However, in Canada, labour relations fall under the exclusive jurisdiction of the provinces; the Federal Parliament has exceptional jurisdiction over employment relations in worplaces that fall under its jurisdiction. Thus, each Canadian province has developed its own labour legal framework. Hence, some provinces explicitly address the activities of recruiters. Their regulation may also be governed by the normative and administrative frameworks of the various countries in which they operate.

This brief overview illustrates the manner in which the recruitment of TFWs is at the heart of a normative conundrum. In this section, we will shed light on the framework applicable to the recruitment of TFWs. After presenting the (A) Canadian legal framework, we will examine (B) how the *Código de Trabajo de Guatemala*[69] specifically tasks the Ministry of Labor and Social Welfare with the protection

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

67 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.

68 *IRPA*, *supra* note 36, s 3(1)(g).

69 Ministerio de Trabajo y Previsión Social, Gobierno de la República de Guatemala, *Código de Trabajo de Guatemala*, Decreto no. 1441 (2011), online: <www.mintrabajo.gob.gt/images/organizacion/leyesconveniosyacuerdos/Leyes_Ordinarias/Codigodetrabajodeguatemala2011.pdf> [*Labor Code*].

of Guatemalan workers' rights abroad. This section concludes with reflections on how best to address the legal challenges posed by this normative conundrum.

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

Although the *IRPA* and its regulations are aimed at facilitating the entry of temporary workers, it does not specifically address recruitment issues. Notwithstanding, the website of ESDC provides an employment contract template that employers should use when hiring seasonal agricultural workers through the TFWP.[70] The template states that the "employer shall not recoup from the temporary foreign worker, through payroll deductions or any other means, any costs incurred from recruiting […] the temporary foreign worker. This includes […] any amount payable to a third-party representative/recruiter."[71] However, this provision does not foresee expenses incurred by TFWs but rather those incurred by the employer.

In Canada, each Canadian provinces all have their own specific labour legislation. Thus, in many provinces, recruitment issues are addressed by labour law, which can regulate the activities of the temporary staffing business (employment agencies or employment bureaus) that engage in recruitment activities and provide workers for client companies.[72]

Up until June 2018, of all the Canadian provinces, Quebec was the one in which the activities of recruiters are the least regulated. Apart from the *Charter of Human Rights and Freedoms*,[73] which states that employment bureaus cannot engage in discrimination, Quebec's labour legislation did not oversee the activities of the staffing industry. In June 2018, the *Act to amend the Act respecting labour standards and other legislative provisions mainly to facilitate family-work balance* requires temporary work agencies and recruitment agencies for temporary foreign workers to hold a licence and provides for the implementation of regulations concerning such agencies. Thus, these provisions will enter into force when a regulation detailing the nature of scope of the obligations of such agencies will be introduced[74].

Manitoba's legislation is more complete and detailed. Section 2(1) of the *Worker Recruitment and Protection Act* 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.[75] The Manitoban legislation also states that all

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70 *Employment and Social Development Canada*, *supra* note 32.

71 *Ibid*, at para 4.3.

72 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 13.

73 *Charter of Human Rights and Freedoms*, CQLR c C-12, s 18.

74 *Act Respecting Labour Standards*, CQLR c N-1.1, s 92.5 and ff.

75 *The Worker Recruitment and Protection Act*, SM 2008, c 23, CCSM c W197, s 2(1) [*WRPA*]. 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."

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.[76] Recruiters must also provide a large quantity of information when registering, such as the name and address of their clients, the business number of their clients, the name and address of every worker hired, information about positions filled by the worker, "etc."[77] 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."[78] 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."[79]

In Alberta, TFWs' recruitment is administered through the *Employment Agency Business Licensing Regulation*.[80] Section 12(1) of the *EABLR* states that employers are not permitted to require recruitment fees from workers by deducting such fees from their salary. Employment agencies must be licensed by the government of Alberta,[81] just as is the case in Manitoba. The Albertan government provides helpful online documentation to workers suffering from abuse, as workers' rights are explained in clear words.[82] Only part of this online documentation is translated (into six languages).[83] However, several language versions of the *Temporary Foreign Workers: a Guide for Employees*[84] document exist. The Guide clearly states that "[f]ees cannot be charged to potential or recruited workers to find a job."[85]

British Columbia's legislation requires employment agencies to be licensed.[86] Section 11 of the BC *Employment Standards Act* prohibits the charging of fees which serve to help workers "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

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76 *Ibid*, s 28(2). See also Manitoba, Growth, Enterprise and Trade, "Foreign Recruitment Licence Information", (Winnipeg: GET, 21 February 2017), online: Manitoba <www.gov.mb.ca/labour/standards/doc,wrpa-license_info,factsheet.pdf>.

77 *WRPA*, *supra* note 6, s 11(3).

78 *Ibid*, s 15(4).

79 *Ibid*, s 11(1).

80 *Employment Agency Business Licensing Regulation*, Alta Reg 45/2012 [*EABLR*].

81 *Ibid*, s 2.

82 Alberta, Ministry of Labour, "Information for Workers", (Calgary: Ministry of Labour, 19 January 2018), online: Alberta <https://work.alberta.ca/Immigration/workers.html>.

83 Documentation is partially translated in Chinese, German, Hindi, Punjabi, Spanish and Tagalog.

84 Alberta, Ministry of Labour, "Temporary Foreign Workers: A Guide for Employees" (Calgary: Ministry of Labour, November 2010), online: Alberta <https://work.alberta.ca/documents/WIA-IM-tfw-employee.pdf>. This Guide is available in English, Chinese, French, German, Hindi, Korean, Polish, Punjabi, Romanian, Spanish, Tagalog, Thai, Ukrainian and Vietnamese.

85 *Ibid*.

86 *Employment Standards Act*, RSBC 1996 c 113, s 12(1). In section 1(1), the term "employment agency" means "a person who, for a fee [that employers shall pay], recruits or offers to recruit employees for employers."

deposit to ensure they will finish a work term or employment contract, nor should they be required to pay a penalty if they do not.

In Nova Scotia, the *Labour Standards Code*[87] was amended in 2011 to include stipulations concerning the licensing of recruiters and the registration of employers of foreign workers. Section 89H(1) provides that "[n]o 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."[88] Moreover, the employer has to be registered to recruit or engage the services of another person to recruit foreign workers for employment.[89]

In Saskatchewan, the *Foreign worker recruitment and immigration services Act*[90] also requires foreign recruitment agencies to be licensed.[91] It also requires the employers of foreign nationals to hold a certificate of registration.[92] 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"[93], "threaten[ing] deportation or other action for which there is no lawful cause"[94] 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."[95] 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."[96] Thus, employers are prohibited from directly requiring a payment, or reducing the wages of a foreign worker, to recover the cost of the recruitment.[97] 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."[98]

Finally, Ontario has the most recent legislation regarding "staffing business". In 2009, a new chapter was inserted into the *Employment Standards Act*[99]. It contained several new prohibitions; an agency cannot prevent a client from hiring an employee, or impose fees on the worker for an allocation of employment.[100] If the

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87 *Labour Standards Code*, RSNS 1989, c 246.
88 *Ibid*, s 89H(1).
89 *Ibid*, s 89T.
90 *The Foreign Worker Recruitment and Immigration Services Act*, SS 2013, c F-18.1.
91 *Ibid*, s 4.
92 *Ibid*, s 14.
93 *Ibid*, s 22(b).
94 *Ibid*, s 22(d).
95 *Ibid*, s 22(f).
96 *Ibid*, s 23.
97 *Ibid*, s 23 (4).
98 *Ibid*, s 27.
99 *Employment Standards Act*, SO 2000, c. 41.
100 *Ibid*, s 74.8.

agency violates these dispositions, the employee can be refunded directly.[101] Ontario also enacted the *Employment Protection for Foreign Nationals Act (Live-in Caregivers and Others)*[102] in 2009. Initially, this legislation only regulated the recruitment of foreign nationals employed or seeking employment as live-in caregivers in the province. However, in 2015 it was amended and renamed the *Employment Protection for Foreign Nationals Act*: the change expanded the application of the legislation to all foreign nationals who, pursuant to an immigration or foreign temporary employee program, are employed or seek employment in Ontario.[103] The *EPFNA* prohibits recruiters from charging foreign nationals any fees,[104] either directly or indirectly; it generally prevents employers from recovering or attempting to recover fees from the foreign national;[105] it prohibits employers and recruiters from taking a foreign national's property, including documents like passports or work permits;[106] it prohibits a recruiter, an employer, or a person acting on their behalf from intimidating or penalizing a foreign national for their query into a right of an assertion of their rights under the *EPFNA*;[107] it requires that recruiters and, in some situations, employers, distribute information to foreign nationals which sets out workers' rights under the *EPFNA* and the Ontario's *Employment Standards Act*.[108] The application of Ontario's legislation is complaint-driven, which can be a deterrent for TFWs.[109]

A question remains: how can Canadian laws extend to activities that occur in another jurisdiction? Could we consider lifting the "corporate veil" in order to shift the responsibility for unlawful practices to entities located in Canada? In Canada,

> *the courts will disregard the separate legal personality of a corporate entity where it is completely dominated and controlled and being used as a shield for fraudulent or improper conduct; in such cases, the courts may allow to lift the "corporate veil."*[110]

The Supreme Court of Canada, in *Buanderie centrale de Montréal*, determined that "a corporation may be regarded as the alter ego of another corporation when there is such a close relationship between them that what apparently

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101 *Ibid*, s 74.14.

102 *Employment Protection for Foreign Nationals Act*, SO 2009, c 32 [*EPFNA*]

103 *Ibid*.

104 *Ibid*, s 7. Accordingly, 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.

105 *Ibid*, s 8.

106 *Ibid*, s 9.

107 *Ibid*, s 10.

108 *Ibid*, s 11-12; *Employment Standards Act*, SO 2000, c 41.

109 Fay Faraday, *Canada's choice: Decent work or entrenched exploitation for Canada's migrant workers?* (Toronto, Metcalf Foundation, 2016) at 45, online: Metcalffoundation <https://metcalffoundation.com/wp-content/uploads/2016/06/Canadas-Choice-2.pdf>.

110 See *Choc v Hudbay Minerals Inc*, 2013 ONSC 1414; *642947 Ontario Ltd v Fleischer* (2001), 56 OR (3d) 417 (CA); *Yaiguaje v Chevron Corporation*, 2017 ONSC 135.

concerns one actually pertains to the activities of the other."[111] Thus, an undertaking is considered the alter ego of another where it can be established that, by virtue of very close ties between the two, they are not separate persons.

In light of the above considerations, it is appropriate to examine the legislative framework that governs recruitment activities in Guatemala.

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

In Guatemala, section 34 of the *Labor Code*[112] provides the Guatemalan government with legal authority to regulate the recruitment of temporary workers and specifically enables the Ministry of Labor and Social Welfare (MINTRAB) with the protection workers' rights abroad. Section 34 specifically establishes MINTRAB's power to authorize the recruiting and departure of workers for jobs abroad, stating employment contracts must have the MINTRAB's written authorization. In fact, section 34 explicitly prohibits the execution of contracts without the MINTRAB's authorization.[113] The contract must establish that all expenses, including transportation, housing, and border crossing, are covered by the recruiter or employer.[114] Workers are not to incur any expenses for the placement services offered by the recruiter. Additionally, section 34 requires the recruiter or the employer to maintain a permanent office in Guatemala City for the duration of the contract[115] and post a bond to guarantee there will be money available for any repatriation costs or payment of claims if abuses or breaches of the contract occur.[116] The *Labor Code* also deals with employers' representatives who meddle in the foreign employment process. It states that the employer is jointly responsible for the actions of their representatives under the *Guatemalan Constitution*, the *Labor Code* and its regulations.[117]

Despite the explicit and strong protections contained in section 34 of the *Labor Code*, Guatemala does not specifically regulate temporary migration programs that send Guatemalans abroad. Specific regulation is necessary to enable the MINTRAB or the Ministry of Foreign Affairs to exercise institutional control over recruiters in Guatemala. Without clearly identified regulation, there is, simply put, no government capacity to ensure that section 34 is implemented and enforced. Since 2014, Guatemala has been developing its regulation of recruiting agencies in the field

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111 *Buanderie centrale de Montréal Inc c Montréal (Ville)*; *Conseil de la santé et des services sociaux de la région de Montréal métropolitain c Montréal (Ville)*, [1994] 3 SCR 29 at 49.
112 *Labor Code*, *supra* note 69.
113 *Ibid*, s 34(d).
114 *Ibid*, s 34(b).
115 *Ibid*, s 34(a).
116 *Ibid*, s 34(c).
117 *Ibid*, s 5-6.

of temporary foreign work.[118] Various stakeholders, including recruiters, government actors, and civil society, have all contributed to the proposed regulations. These legislative proposals have yet to yield concrete results.

C. Regulating the recruitment process of TFWs : addressing effectively the normative conundrum

Over time and in different contexts, labour recruitment has "earned a reputation as not only ungoverned but ungovernable". The "normal response" to the regulatory gaps that result in the "abuse of migrants" is to call "on governments to ratify the International Labour Organization (ILO) and United Nations (UN) conventions and translate them into national laws and regulations effectively enforced."[119] As such, several international conventions and recommendations have been developed to protect workers' rights under the aegis of the ILO and the UN. Recruitment issues figure in the ILO's *Migration for Employment Convention*[120] and the *Private Employment Agencies Convention*.[121] This issue is also mentioned in the UN's *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*.[122] If several "sending states" have ratified these instruments, the vast majority of "receiving States", such as Canada, have yet to ratify them.

To address the "expansion and mounting complexity of labour migration",[123] in 2005, the ILO adopted the *Multilateral Framework on Labour Migration: Non-binding principles and guidelines for a rights-based approach to labour migration*.[124] This instrument seeks to safeguard workers' rights throughout their migration journey, a sojourn which often involves interacting with a variety of actors.[125]

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118 Global Workers Justice Alliance, "Recruitment Rules: Countries of Origin" (August 2016), online: GlobalWorkers <www.globalworkers.org/our-work/publications/recruitment-rules-countries-origin>.

119 Martin, *Merchants of Labor*, *supra* note 8 at 117.

120 *Convention (No 97) concerning migration for employment (revised 1949)*, 1 July 1949, 120 UNTS 71 (entered into force: 28 January 1952).

121 *Convention (No 181) concerning private employment agencies*, 19 June 1997, 2115 UNTS 249 (entered into force: 10 May 2000) [*PEAC*].

122 *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).

123 International Labour Office*, International Labour Conference: Migrant Workers*, 87th session (1999) at p V.

124 International Labour Organization, *ILO Multilateral Framework on Labour Migration: Non Binding Principles and Guidelines for a Rights-Based Approach to Labour Migration* (Geneva: ILO Publications, 2006) at 24, online: ILO <www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/publication/wcms_146243.pdf> [ILO, *Multilateral Framework*]; Ryszard Cholewinski, Paul De Guchteneire & Antoine Pécoud, eds, *Migration and Human Rights: The United Nations Convention on Migrant Workers' Rights* (New York: UNESCO Publishing), 2010 at 214; Library of Congress, Government of the United States, "Guest Workers Programs: International Labour Organization" (31 July 2015), online: LOC.gov <www.loc.gov/law/help/guestworker/internationallabourorganization.php>.

125 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"

Concerns related to recruitment also figure in this soft-law instrument. Principle no. 13 states that "[g]overnments 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)."[126] The principle is followed by guidelines aimed to give it practical effect. Among other things, it suggests that governments "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."[127] 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."[128]

Finally, on September 19, 2016 the United Nations General Assembly unanimously adopted the *New York Declaration for Refugees and Migrants*,[129] a political declaration that is directed at improving the way in which the international community responds to large movements of refugees and migrants. In February 2018, a draft version of the "Global Compact for safe, orderly and regular migration" was published and its sixth objective aims to "facilitate fair and ethical recruitment and safeguard conditions that ensure decent work."[130]

In September 2016, the House of Commons Standing Committee on Human Resources, Skills and Social Development issued a report on the Temporary Foreign Worker Program. The committee identifies 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."[131] Amongst the observations brought forward, the committee specifically mentions that witnesses identified loopholes in the monitoring and enforcement of measures that were in place to "deter unscrupulous recruitment practices."[132] 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."[133] If the committee's recommendations are to be acted upon, we believe that close attention

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in Guy Davidov & Brian Langille, eds, *The Idea of Labour Law* (New York: Oxford University Press, 2011) at 378 [Vosko].

126 *International Labour Organization*, *supra* note 5 at 24.

127 *Ibid* at 25.

128 *Vosko*, *supra* note 126 at 380.

129 *New York Declaration for Refugees and Migrants*, GA Res 71/1, UNGAOR, 71st Sess, UN Doc A/RES/71/1 (2016), online: UN <www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/71/1>.

130 UNHCR, "Global Compact for safe, orderly and regular migration: Zero Draft" (5 February 2018), online: UN <https://refugeesmigrants.un.org/sites/default/files/180205_gcm_zero_draft_final.pdf>.

131 House of Commons, Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities, *Temporary Foreign Worker Program* (September 2016) at 27 (Chair: Bryan May), online: OurCommons.ca <www.ourcommons.ca/DocumentViewer/en/42-1/HUMA/report-4>.

132 *Ibid* at 26.

133 *Ibid* at 33-34 (recommendation 20).

should be given to the normative and institutional architecture of the accreditation system.

We believe that explicit provision should be made in the Canadian immigration legal framework for the regulation of the foreign worker recruitment process. One of the *IRPA*'s objectives is enable Canada to gain from "the maximum social, cultural and economic benefits of immigration"[134] 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."[135] The interpretation and the implementation of the *IRPA* must further "the domestic and international interests of Canada"[136] while ensuring that decisions taken under the Act "are consistent with the *Canadian Charter of Rights and Freedoms*"[137] *and* comply "with international human rights instruments to which Canada is signatory."[138]

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."[139] It is therefore probable that activities taking place abroad are subject to the *IRPA*.

The *IRPA* should be amended to explicitly regulate the recruitment of TFWs. Specific provisions could be made in the *Immigration and Refugee Protection Regulations* all "administrative fees" paid to recruiters should be deemed unlawful. TFWs should also have a positive right to withdraw from any additional "services" offered by recruiters, such as health insurance plans.

Private entities that offer employment services to Canadian employers should be required to register, regardless of whether those services are offered in Canada or abroad. To ensure adequate follow-up, employers should have to identify, in the *Labour Market Impact Assessment*, the private entities acting on their behalf. The list of private entities that offer employment services should be largely accessible as well as the entities charging illegal fees.

The *Immigration and Refugee Protection Regulations* should clearly state that employers are strictly liable for all unlawful fees paid by the workers, no matter the context. As stated previously, recruiters act on behalf of employers. The latter should be accountable for the acts of their agents; shared liability should exist "as a complement to direct regulation of recruiter, not a replacement."[140] In order for this policy option to be effective, ESDC's agents should be mandated to conduct onsite audits.

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134 *IRPA*, *supra* note 36, s 3(1)(a).
135 *Ibid*, s 3(1)(i).
136 *Ibid*, s 3(3)(a).
137 *Ibid*, s 3(3)(d); *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
138 *Ibid*, s 3(3)(f).
139 *Ibid*, s 135.
140 *Gordon*, *supra* note 6 at 491.

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In Quebec, few agricultural employers recruit TFWs themselves. The choice of countries from which agricultural workers are recruited through is 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 Quebec. The results of our mixed-methods research reveal that the recruitment of Guatemalan TFWs hired through the Agricultural stream of the TFWP is expeditious and that workers must cover various expenses and fees.

As with other types of migrants, the practices that Guatemalan TFWs are confronted with take place in a "vacuum of effective regulation." We argue that despite provincial legislation aimed at regulating the activities of recruiters, the Canadian regulatory framework does not comprehensively and fully address unlawful conduct that occurs during recruitment.

Like the House of Commons Standing Committee on Human Resources, Skills and Social Development, we believe that the *IRPA* and its regulations must address the recruitment process of workers hired through the TFWP. In this article, we have sought to propose certain regulatory solutions to this problem.

Although these measures would allow for a more effective control of recruitment processes, some adverse effects would be expected. Where an unlawful fee is requested, the responsibility lies with the recruiter, not the TFW. Due to the position of power that recruiters enjoy as gatekeepers to jobs in Canada, TFWs have no choice but to comply with their demands, licit or otherwise. When such unlawful practices are reported, the recruiter should suffer the consequences. TFWs who are denied visas are left in a very precarious situation, most likely burdened with debt, with no prospect of a job in Canada to pay it off. These dire circumstances send a message to other TFWs, warning them not to acknowledge that fees were requested of them, further complicating the task of rooting out unlawful practices for authorities.