



May 31, 2016

## **Temporary Foreign Worker Program:**

A submission by the West Coast Domestic Workers' Association to the Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities

## Introduction

Founded in 1986, the West Coast Domestic Workers' Association (WCDWA) is a non-profit association dedicated to providing legal aid to workers in the Live-in Caregiver and Temporary Foreign Worker Programs in British Columbia. The WCDWA provides full legal representation and summary legal advice in the areas of immigration and employment law, and is engaged in public legal education, law reform and systemic advocacy initiatives. The WCDWA has a membership of over 300 worker members.

The WCDWA welcomed the announcement that the Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities (HUMA) would be undertaking a review of the Temporary Foreign Worker Program (TFWP). In the WCDWA's 30 years of operation, it has seen how the structures of the "low-wage" streams of Canada's Temporary Foreign Worker Program, including the now-defunct Live-in Caregiver Program (LCP), the Seasonal Agricultural Worker Program (SAWP) and the Stream for Low-wage Occupations (SLO) create conditions which render the workers in these programs extremely vulnerable to abuse and exploitation. This submission focuses on TFWs in the "low-wage" streams.

### 1. Access to permanent residency

Temporary foreign workers (TFWs) come to Canada with temporary status which excludes them from opportunities and rights regimes.<sup>1</sup> These workers have limited or no access to permanent residency. Canada purports to select permanent residents based on their capacity to take part in the Canadian economy.<sup>2</sup> Yet, the federal government asserts that the Canadian economy has a critical need for workers classified as low-wage, and justifies the use of the TFWP on that basis.<sup>3</sup> Researchers have observed that the expansion of the "low-wage" streams of the TFWP reflects a shift in Canadian policy away from permanent migration to using temporary workers to fill permanent labour demands.<sup>4</sup>

TFWs contribute to the Canadian economy by providing critical labour. They help grow Canadian businesses and contribute labour that is necessary for the functioning of Canada's economy and society. Yet, their temporary status means that they are not invited to lay roots in Canada. Unlike permanent residents and "high-wage" TFWs, "low-wage" TFWs are effectively barred from bringing their families with them to Canada, and they have limited or no access to

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<sup>1</sup> Rajkumar et al, "At the temporary-permanent divide: how Canada produces temporariness and makes citizens through its security, work, and settlement policies" (2012) 16 Citizenship Studies 483 at 484.

<sup>2</sup> Immigration, Refugees and Citizenship Canada, "Immigrate as a skilled worker through Express Entry", online: <<http://www.cic.gc.ca/english/immigrate/skilled/index.asp>>

<sup>3</sup> Jason Foster, "Making Temporary Permanent: The Silent Transformation of the Temporary Foreign Worker Program" (2012) 19 Just Labour: A Canadian Journal of Work and Society 22 at 22.

<sup>4</sup> *Ibid* at 37-39.

the benefits and services that permanent residents and citizens enjoy. This creates an underclass of workers who are “low-wage” and “low-rights.”

The elimination of the LCP in 2014 took away caregivers’ guaranteed pathway to permanent residence, replacing it with two new pathways that are each capped at 2,750 applications that will be processed by IRCC. New eligibility criteria including language, education and medical requirements for permanent residence was introduced with the result that caregivers may be eligible to work in Canada as caregivers, but may not qualify for permanent residence. Even if caregivers meet the new eligibility requirements, their applications for permanent residence may not be processed due to the “caps.” They also compete with highly skilled professionals, included nurses registered in Canada, through the introduction of 3 NOC at the A and B levels in the caring for people with high medical needs pathway. This increases the insecurity of caregivers who may feel compelled to continue working under abusive conditions in order to complete their 24 months of work as quickly as possible in order to maximize their chances to apply for permanent residence in the event they are “capped out” on their first attempt.

## ***Recommendations***

- All TFWs should be granted permanent residency immediately upon entry in Canada.
- Pathways to permanent residency should be provided to all TFWs currently working in Canada.
- Reinstate guaranteed pathways to permanent residency for caregivers.

## **2. Employer-specific work permits**

TFWs enter and work in Canada under tied work permits which authorize them to work for a single employer. These tied work permits, coupled with inadequate monitoring and enforcement of employment standards at the provincial and territorial level, facilitate severe power imbalances between employers and TFWs and create the conditions that allow unscrupulous employers and recruiters to abuse and exploit TFWs.

Although TFWs are legally entitled to apply to change employers while in Canada, this process is lengthy and uncertain. In order to change jobs, a worker must find a new employer willing to hire them and pay the \$1,000 Labour Market Impact Assessment (LMIA) application fee. Next, they must wait for the LMIA application to process, and then apply and wait for a new work permit. This process takes from 6 to 10 months and applications may be unsuccessful at either the LMIA or work permit stage. TFWs’ access to Employment Insurance during periods of unemployment are uncertain at best. As a result, TFWs may spend 6 to 10 months unemployed with no source of income. The lengthy processing times make changing jobs the least desirable option for TFWs, especially for TFWs who are supporting family members back home.

With no access to the labour mobility enjoyed by “high-skilled” TFWs, permanent residents and citizens of Canada, TFWs do not effectively have the choice to leave jobs that are discriminatory, abusive or making them sick.

## ***Recommendations***

- TFWs should be issued open work permits rather than tied work permits.
- In the alternative, TFWs should be issued sector-wide work permits.

## **3. Cumulative Duration Rule**

TFWs who come to Canada are only permitted to work for a maximum of four years. After they have worked in Canada for four years, they are not eligible to work in Canada until another period of four years has lapsed.<sup>5</sup>

## ***Recommendations***

- The cumulative duration rule should be eliminated.
- TFWs currently out of status or nearing their four-year maximum should have their status regularized.

## **4. Eliminate the Need for Labour Market Impact Assessments (LMIA)**

The LMIA application process is burdensome on employers and on TFWs, who are required to submit a positive LMIA with their applications for work permits in Canada. TFWs typically endure delays from 6-10 months for LMIA and work permit applications to process. During this time period, they are not permitted to work for another employer. Granting permanent resident status on arrival in Canada or issuing open work permits rather than tied work permits would replace the need for the government to process high numbers of individual LMIA applications made by individual employers with proactive, comprehensive labour market assessments by region and industry by government departments.

## ***Recommendation***

- Eliminate the need for LMIA's to hire TFWs and replace LMIA's with proactive, comprehensive labour market assessments by region and industry.

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<sup>5</sup> Immigration, Refugees and Citizenship Canada, “Four year maximum – work in Canada,” online at <<http://www.cic.gc.ca/english/work/apply-who-eligible/four-year-maximum.asp>>

## 5. Recruitment of TFWs

The industry around the recruitment of TFWs has grown profusely over the past decade as Canada's temporary foreign worker program expanded.<sup>6</sup> Most TFWs enter Canada through third-party recruiters. Researchers have long documented widespread abuse of TFWs by unscrupulous recruiters who charge illegal recruitment fees, often for jobs that are different than promised or that do not exist at all. Acting as gatekeepers to prospective employment in Canada, recruiters are in a position of absolute control that often leads to abuse and exploitation. Inadequate and uneven regulation at the provincial level of employment agencies create a permissive environment for recruiters to engage in illegal practices.

Payments to recruiters average several thousand dollars. TFWs typically borrow money from relatives and moneylenders to be able to pay recruitment fees, with the result that they are indebted upon entry to Canada. These illegal fees are difficult for TFWs to recover once in Canada as they are typically paid in the country of origin, and partner agencies in Canada refuse to be held responsible for the actions of actors in the supply chain of TFWs. Recruitment debt, coupled with tied work permits, results in TFWs being vulnerable to debt bondage and human trafficking.

Caregivers and workers in the SLO are commonly subject to a type of fraud known as "release upon arrival" in the recruitment process whereby in exchange for high recruitment fees, they receive a job offer, employment contract and LMIA for an employer in Canada only to discover that the employer no longer requires their services upon arrival in Canada.<sup>7</sup> This leaves caregivers and workers in the SLO in an exceedingly vulnerable position, as they are ineligible for EI during the lengthy process it takes to search for a new employer and obtain authorization to begin work.

### **Recommendation**

- The federal government should work with the provinces and territories to legislate protections for workers in the recruitment process using the examples of Manitoba and Saskatchewan as models for best practices.
- TFWs should be granted permanent residency on arrival or issued open work permits rather than tied work permits, which would eliminate the need for third-party recruiters.

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<sup>6</sup> Fay Faraday Fay, *Profiting from the Precarious: how recruitment practices exploit migrant workers*. (Summary Report) Metcalf Foundation. (2014) at 5.

<sup>7</sup> West Coast Domestic Workers Association, "Labour Trafficking & Migrant Workers in British Columbia," online at: <[http://www.wcdwa.ca/wp-content/uploads/2014/03/WCDWA\\_Labour\\_Trafficking\\_Report\\_May\\_2014.pdf](http://www.wcdwa.ca/wp-content/uploads/2014/03/WCDWA_Labour_Trafficking_Report_May_2014.pdf)> at 38.

## 6. Enforcement

Enforcement of employer compliance with the rules of the TFWP are complaint-driven rather than proactive. There are numerous disincentives for TFWs to make complaints due to their extreme vulnerability under the TFWP. Making a complaint against their employer puts TFWs' employment in jeopardy. Employers may retaliate against TFWs for having made a complaint by terminating their employment and/or reporting the TFW to CBSA, especially if the TFW has engaged in work outside of the confines of their work permit. In addition, if an employer has their LMIA revoked, then the TFW will no longer be able to legally work for that employer.

There are no protection mechanisms available to workers who lose their jobs as the result of filing a complaint. On the contrary, for TFWs who have been compelled by employers or recruiters to engage in work outside the confines of their work permit, filing a complaint leaves them vulnerable to being investigated, arrested, detained and deported by the CBSA. Proactive monitoring of the TFWP would act as a disincentive for employers to abuse or exploit TFWs.

TFWs face significant challenges in filing complaints. TFWs are typically not aware of their labour or human rights or where to access help if they are abused or exploited in Canada, as this information is not provided to them on arrival in Canada. TFWs are not eligible to receive settlement services, which could be an avenue for them to learn about their rights and receive referrals to agencies who may be able to assist them with filing a complaint. Even if TFWs file a complaint against an employer or recruiter, they could be forced to leave Canada before the complaint is resolved due to the Cumulative Duration Rule. Employment Standards complaints, Human Rights complaints, law enforcement investigations and court cases take a minimum of one year to process, but frequently take much longer.

### ***Recommendations***

- The federal government should work with the provinces and territories to ensure that all TFWs are registered with the province, and that random, proactive labour inspections regularly occur at the workplaces where TFWs are employed.
- The federal government should provide TFWs with information about their labour and human rights and resources on where to access help upon arrival in Canada.
- The federal government should expand eligibility criteria for settlement services to include TFWs.
- The federal government should fund a national helpline and centres across the country for TFWs who have been abused or exploited to access resources to regularize their immigration status and file complaints against employers and recruiters.

## 7. Access to Benefits and Services

TFWs pay income taxes at the same rates as other Canadians, yet they are denied access to services and benefits those taxes are meant to pay for. TFWs are not eligible for provincial income assistance should they become unemployed. This exclusion means that if an employment relationship falls apart, a worker who lives in the employer's home or other premises will suddenly find him or herself unemployed, homeless, and completely without emergency social assistance. Workers fleeing situations of exploitation and abuse, including human trafficking, are particularly vulnerable to crises of this kind.

TFWs may have some ability to access EI; however, these benefits are severely restricted. SAWP workers are wholly excluded from access to EI regular benefits because they receive non-renewable work permits. They remain in Canada for the duration of their work contract and are removed from Canada if their employment is terminated early.<sup>8</sup> They therefore pay into EI without ever having any opportunity to obtain the most-used form of the benefit.

Due to their time-limited stays in Canada, TFWs have difficulty meeting the required hours of work to become eligible for regular EI benefits. Even if this requirement is met, it is not entirely clear whether and when TFWs with employer-specific work permits are "available for work." Some umpires have ruled that TFWs do not meet this criterion, while others consider the fact that TFWs may obtain new work permits once they secure new employers to indicate that TFWs do not meet the requirement of being "available for work."<sup>9</sup>

Service Canada policy guidelines are equally unclear.<sup>10</sup> These state that a worker with an employer-specific work permit is normally not considered available for work, and is therefore disentitled from benefits. However, they further state that "the simple fact that the work permit restricts the worker to one employer is not the only factor to be considered." Guidelines suggest, but do not clearly state, that if the claimant can show that CIC will issue a new work permit once a new employer is secured, then the claimant may be eligible. While it is generally the case that LCP and LSO workers are eligible to apply for changed work permits with new employers, there is never any guarantee that these will be approved. The eligibility of TFWs who have unexpired but employer-specific work permits remains unclear.

TFWs are excluded from accessing federally-funded settlement services for newcomers to Canada. Being unable to access these critical services restricts TFWs' ability to access help when they find themselves in crisis situations and/or when they are being abused or exploited. Having no access to settlement services, which could provide them with critical support, information and referrals, exacerbates their vulnerability.

### ***Recommendations***

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<sup>8</sup> Service Canada, "Digest of Benefit Entitlement Principles – Chapter 10" at 10.2.4.2.

<sup>9</sup> Delphine Nakache and Paula J Kinoshita, "The Canadian Temporary Foreign Worker Program: Do Short-Term Economic Needs Prevail over Human Rights Concerns?" (2010) *IRPP Study* No. 5 at 19-21.

<sup>10</sup> Service Canada, "Digest of Benefit Entitlement Principles – Chapter 10" at 10.2.4.3.

- The federal government should work with the provinces and territories to ensure that all TFWs are granted access to provincial social assistance programs.
- TFWs should explicitly be granted access to EI benefits, regular or special, regardless of their work permit status.
- Eligibility for settlement services should be expanded to allow all TFWs to access federally-funded services.

### 8. Protection for Victims of Human Trafficking

Labour trafficking is a serious crime and gross violation of human rights. BC's Action Plan to Combat Human Trafficking 2013-2016 identifies temporary foreign workers and other vulnerable workers as a priority group that requires focused action and attention.<sup>11</sup> Research by Public Safety Canada found that "the experience to date and the consultations recently conducted make it abundantly clear that the most likely labour trafficking victims are irregular migrants and migrant workers whose immigration status is precarious or has been compromised by illegal activities. These illegal activities are often the results of the deceitful and exploitative practices of recruiters and employers."<sup>12</sup>

The authors conclude that it is difficult to provide a "guarantee to victims that their coming forward to denounce a serious crime will not result in their deportation or attract other sanctions".<sup>13</sup> The authors conclude that "labour trafficking is best addressed through preventive measure that tackle victimization before it occurs".<sup>14</sup> TFWs who are victims of trafficking are commonly compelled to perform work outside of the confines of their tied work permits. This renders them vulnerable to deportation from Canada, which is effectively a deterrent to coming forward for help.

TFWs who are trafficked may apply for temporary resident permits (TRP) as victims of trafficking in persons (VTIP). According to IRCC's Ministerial Instructions, these permits may be issued to individuals where "the recruitment of the individual was fraudulent or coerced, and for the purposes (actual or intended) of exploitation; the individual was coerced into employment or other activity; the conditions of employment or any other activities were exploitative; or the individual's freedom was restricted."<sup>15</sup> TRPs allow victims to regain

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<sup>11</sup> British Columbia Ministry of Justice, "BC's Action Plan to Combat Human Trafficking 2013-2016" (2013) at 12.

<sup>12</sup> Yvon Dandarand and Vivienne Chin, "Uncovering Labour Trafficking in Canada: Regulators, Investigators, and Prosecutors" (2014) at 5.

<sup>13</sup> *Ibid* at 5.

<sup>14</sup> *Ibid* at 5.

<sup>15</sup> Immigration, Refugees and Citizenship Canada, "Ministerial Instructions: Temporary Resident Permits (TRPs): Considerations specific to victims of human trafficking." Online at <<http://www.cic.gc.ca/english/resources/tools/temp/permits/victim.asp>>



immigration status, access critical health care and social services such as counseling, and open work permits.

However, the issuance of TRPs for VTIPs is highly discretionary and the application of the Ministerial Instructions by IRCC Officers is uneven. WCWA has seen a sharp decline in the number of VTIP TRPS that have been approved by IRCC Officers since 2013.

### ***Recommendations***

- Strengthen training for officials working for the Canada Border Services Agency and Immigration, Refugees, and Citizenship Canada on the identification and provision of assistance to trafficking victims.
- End the practice of deporting TFWs who are victims of trafficking.
- Allow victims of trafficking to reunite with their families in Canada while investigations and prosecutions of their traffickers are ongoing.
- Adopt measures to prevent labour trafficking from occurring, including granting permanent residency on arrival, or issuing TFWs open work permits rather than tied work permits, which facilitate employer control.

### **9. Canada Border Services Agency's "Project Guardian" and other initiatives targeting vulnerable workers**

Project Guardian is a CBSA initiative specific to British Columbia and the Yukon that unfairly targets caregivers. This targeting of caregivers by CBSA is very heavy handed and penalizes caregivers who are victimized by employers and recruiters. Since the start of Project Guardian in January 2014, CBSA officers have shown up unannounced at the homes of caregivers to investigate allegations of work performed outside of the confines of their work permits. As of October 2015, 38 caregivers had been investigated under the initiative. These investigations have resulted in arrests, detention, and deportation of caregivers. The consequences for caregivers who have been deported are devastating. Having to leave Canada means they will no longer be able to apply for permanent residence under the now-eliminated LCP. For caregivers who have incurred recruitment debt, leaving Canada means leaving behind the income that would have allowed them to re-pay their debt. Employers of caregivers who have been deported have also been detrimentally impacted by being left in the lurch without care for their loved ones.

Caregivers who have performed work outside of the confines of their work permit, such as starting to work for a new employer while their work permit is still processing, have the right to disclose this work and apply to have their status "restored." Project Guardian curtails this right.

### ***Recommendations***

- Project Guardian and other CBSA initiatives targeting vulnerable TFWs should be disbanded.
- Eliminate the CBSA's anonymous tip line.

### 10. Ratify International Conventions

#### *Recommendations*

- Canada should ratify the *International Migration Convention* and the *Domestic Workers Convention*



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