THE FIVE CORRIDORS PROJECT - **CORRIDOR 5**

Mexico to Canada:

Fair recruitment in review

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ABOUT THIS DOCUMENT

The Five Corridors Project is an initiative led by FairSquare Projects, which aims to identify key measures that governments can take to ensure that migrant workers can migrate safely and with dignity. FairSquare Projects is a non-profit human rights organisation that tailors rigorous research with communication and advocacy work to promote systemic change. The Five Corridors Project is supported by Open Society Foundations, Humanity United and Porticus. The organisations that funded this project played no role in the design or execution of the research, and our conclusions and recommendations may not necessarily reflect the viewpoints of Humanity United, OSF or Porticus.

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Cover photograph: Mexican migrant workers picking strawberries, Quebec, July, 2020.

Assessment against the Five Corridors indicators:

2. Legal and regulatory framework relating to fair recruitment

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"Recognizing [agricultural] workers as essential implies the need to address their exemption from labour laws."

INTERNATIONAL LABOUR ORGANIZATION REPORT ON COVID-19 AND AGRICULTURAL WORKERS, 2020.

Summary

Mexico is party to all the core UN human rights conventions including the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, all 8 ILO core conventions and the domestic workers convention. Largely due to Mexico's long history of emigration to the United States for work, the 1917 Constitution itself includes specific provisions relating to fair recruitment, requiring employment placement services to be free, contracts with foreign employers to be notarised by a government entity, and specifying that foreign employers must cover the cost of workers' repatriation. More detailed regulation of private recruiters of migrant workers was developed relatively recently, with Mexico enacting significant changes to the Federal Labour Law and the Regulation of Worker Placement Agencies (RACT) in 2012 and 2014 respectively. The RACT regulates the role of employment agencies at various stages of the recruitment process, including in relation to advertisements, information dissemination, selection, transport, placement into employment, and return to Mexico. It has limited application, however, in regard to unregistered intermediaries who carry out the bulk of recruitment to North America, and who are often involved with unethical and abusive practices. A senior official told us that this "legal gap" has a real-world impact on the ability of STPS (the labour ministry) to tackle such practices. Workers who migrate through the SAWP with Canada are recruited by the government rather than private agencies, with the bilateral MOU and associated SAWP contract providing the framework for this more tightly regulated recruitment.

Canada's legal and regulatory framework applying to migrant workers and labour recruitment cuts across its federalised governance structures, with the federal government taking primary responsibility for immigration, and provincial authorities responsible for labour protections, including the regulation of labour recruitment. The core federal framework is the Immigration and Refugee Protection Act (IRPA), which underwent significant amendments in 2014-2015. Along with its accompanying regulations (IRPR), it outlines the conditions that employers must meet in order to hire migrant workers, which include a number of fair recruitment measures. Immigration consultants are also regulated nationally, with a 2019 act establishing a self-regulatory body with expanded authorities, subject to what the government told us will be "significant oversight", to replace the previous self-regulating body. Provincial legislation varies in scope and content: some provinces have additional employment protections for migrant workers and specific licensing requirements for labour recruiters of migrant workers, while others cover migrant workers under standard employment standards and labour recruitment provisions. The variance in treatment depending on the province of destination, and the interplay between federal and provincial legislation, creates a high degree of regulatory complexity, while provinces where regulations and monitoring are weakest are attractive jurisdictions for exploitative recruiters and employers. In agriculture, a major sector for low-wage migrant workers, workers in many provinces face exclusion from key employment protections on working hours, wages and holiday, as well as bars on unionisation, which have been upheld by the Supreme Court and led to stern ILO criticism. Civil society organisations, labour unions and employers actively participate in government consultations and discussions, as well as in parliamentary reviews in recent years on the TFWP, immigration consultants, and trafficking.

Recommendations to the Mexican government:

- Ratify the ILO Private Employment Agencies Convention, 1997 (No. 181)

- Revise the Federal Labour Law and the RACT:
  - To provide the STPS with explicit authorities to investigate and penalize unlicensed labour recruiters and intermediaries.
  - to stipulate that labour recruitment fraud is a violation that can be investigated by the STPS regardless of whether it is performed by licensed and unlicensed recruiters or intermediaries.
  - to ensure that authorities can require recruiters to provide workers with financial compensation beyond repatriation costs.

Recommendations to the Canadian federal government

- Give increased political importance to federal/provincial/territorial working groups, with a view to coordinating legislation related to worker protections, labour recruitment, and immigration consulting; consider options to develop agreed inter-provincial minimum standards regarding the rights and protections of migrant workers.

- Where inconsistencies in provincial application of employment standards may be undermining Canada's efforts to meet its commitments to international treaties, review the possibility of using Constitutional authorities for the Parliament to legislate in areas related to employment "declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces" (s. 92.10.(c)). Areas where there could be advantages from federal legislation in employment could include, for example:
  - The ability for migrant workers to form and join unions in all industry sectors, noting that this would be consistent with Canada's international commitments under the ILO conventions 87 and 98 on the freedom of association and the right to collective bargaining.
  - Strengthen the legislative authorities for the federal government to require employers to compensate migrant workers, including ensuring that migrant workers are considered as a party in employer-worker disputes and inspections.
  - Develop a national framework for regulating, licensing, and penalizing labour recruiters involved in international recruitment of migrant workers, noting that the federal government already regulates licensed immigration consultants who are often involved in labour recruitment processes.
  - Ratify the ILO Private Employment Agencies Convention, 1997 (No. 181) and work with provinces and territories to ensure its implementation.

Recommendations to Canada's provinces and territories:

- Remove restrictions on freedom of association that prevent migrants or other workers from exercising their legitimate right to form or join trade unions.

- Remove blanket exemptions from employment standards legislation that leave migrants or other workers without basic legal protections, with respect to their working conditions, for example working hours, breaks, and wages.

2.1 Has the government ratified core international human rights and core/relevant labour conventions and enshrined them in domestic law? Does it meaningfully engage with UN and ILO oversight bodies?

Mexico

In Mexico international treaties signed by the government are automatically incorporated into the domestic legal framework after Congress approves them.[277] The

227. ILO, "Ratifications for Mexico"

Constitution stipulates that "all individuals shall be entitled to the human rights granted by this Constitution and the international treaties the Mexican State is part of, as well as to the guarantees for the protection of these rights" and guarantees that "such human rights shall not be restricted or suspended, except for the cases and under the conditions established by this Constitution itself".[228] Mexico has ratified all core UN human rights treaties, including the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, and most optional protocols.[229] Mexico has also ratified the American Convention on Human Rights,[230] and 78 Conventions adopted by the ILO, including the core 8 ILO Conventions and the Domestic Workers Convention, but not the Private Employment Agencies convention.[231] In 2018 the Senate approved ILO Convention 98 on the Right to Organise and Collective Bargaining, following campaigning by national and international trade unions.[232]

Mexico engages closely with international bodies including around human rights and migration, given its role as an origin, transit and destination state. The majority of its engagement with UN bodies such as the Committee for the Protection of the Rights All Migrant Workers and Members of their Families, and the Special Rapporteur on the Human Rights of Migrant Workers has related to the situation of migrants within Mexico rather than to the recruitment of Mexican workers for jobs abroad, though both entities have made recommendations relating to Mexico's consular protection for migrant workers in the United and States and beyond.[233]

2020 saw the ratification of the Canada-US-Mexico Agreement (CUSMA), formerly known as the North American Free Trade Agreement (NAFTA), which introduced a new binding labour chapter.[234] The labour chapter includes commitments for all three governments to maintain statutes and regulations consistent with the ILO Declaration of Rights at Work, including on freedom of association, with specific requirements for Mexico to revise its domestic legislation on worker representation in collective bargaining.[235] The CUSMA also requires each government to protect migrant workers under its respective labour laws, and introduced a rapid-response labour mechanism for parties to address complaints.[236]

Canada

Canada has ratified 7 of 9 core UN Human Rights Treaties.[237] It has not ratified the UN's International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, and in 2019 made clear at the UN Universal Periodic Review that it had no plans to do so.[238] Canada has also ratified 37 ILO Conventions and 1 Protocol, including the core 8 ILO Conventions. It has not ratified the Convention 181 on private employment agencies or 189 related to domestic workers. Canada is not a party to the American Convention on Human Rights, though as a signatory to the Charter of the OAS since 1990 it is committed to the right to collective bargaining, workers' right to strike and the principle of non-discrimination on the basis of race, sex and nationality among other characteristics.[239]

International treaties must be incorporated into Canadian domestic law through legislation in order to have direct legal effect, a position confirmed by the Supreme Court.[240] Because Canadian domestic law is applied at both federal and provincial level, "provinces, when affected, should be consulted on those provisions of the treaty that may impact upon their constitutional jurisdiction".[241] In engaging international partners

228. Government of Mexico, "Constitución Política de los Estados Unidos Mexicanos", Article 1, 5 February 1917.
229. United Nations Human Rights Treaty Bodies, "Ratification Status for Mexico"
230. OAS, American Convention on Human Rights "Pact of San José, Costa Rica"(B-32), 22 November 1969.
231. ILO, "Convenios Ratificados por Mexico"
232. ITUC, "Major win for Mexican workers as senate approves ILO organising and collective bargaining treaty", (21 September 2019).
233. UN Human Rights Council, "Report of the Special Rapporteur on the human rights of migrants", A/HRC/11/7/Add.2(24 March 2009); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families "Concluding observations on the third periodic report of Mexico", CMW/C/MEX/CO/3, (27 September 2017).
234. Government of Canada, "Temporary entry chapter summary", (29 November 2018); Government of Canada, "Labour chapter summary", (20 January 2020).
235. Government of Canada, "Canada-United States-Mexico Agreement (CUSMA) - Chapter 23 - Labor", Article 23.3 and Annex 23-A, (31 July 2021).
236. Government of Canada, "Canada-United States-Mexico Agreement (CUSMA) - Chapter 23 - Labor", Article 23.8, (31 July 2021). Government of Canada, "Labour chapter summary", (20 January 2020).
237. United Nations Human Rights Treaty Bodies, "Ratification Status for Mexico"
238. Government of Canada, "Information related to Canada's response to recommendations, Third Universal Periodic Review", (2019): 2.
239. OAS, Charter of the Organization of American States (A-41), Chapter IV, (27 February 1967).
240. Supreme Court of Canada, Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817, (09 July 1999).
241. Government of Canada, "Policy on Tabling of Treaties in Parliament"

around the Global Compact on Migration, a Canadian briefing document instructed the Canadian delegation "to avoid text that falls within the jurisdiction of Canada's provinces and territories."[242] A 2001 Senate committee noted with concern that "the vast majority of Canada's international human rights treaty obligations have not been the subject of implementing legislation. This means that Canadians cannot, through their courts, compel government respect for their international human rights as such."[243] The *Immigration and Refugee Protection Act (IRPA)* simply states that "this Act is to be construed and applied in a manner that (f) complies with international human rights instruments to which Canada is signatory", without elaborating on which human rights may be relevant in the context.[244]

This "implementation gap" has continued to be a source of friction between Canada and international bodies. A 2017 Amnesty International report, which called on federal, provincial and territorial leaders to develop an international effective human rights implementation agenda, highlighted what it called the "impatience" of 7 UN bodies on this matter:

> *"Implementation is where Canada falls short. This shortcoming arises as a concern virtually every time Canada's record is reviewed internationally. Findings are made, conclusions reached and suggestions for reform formulated; but in the face of the challenges of federalism, a lack of clear political responsibility and accountability, and a system shrouded in a lack of transparency, those expert international-level recommendations languish more often than not."*[245]

A 2017 intergovernmental meeting of federal, provincial and territorial representatives agreed to develop a protocol for following up on the recommendations that Canada receives from international human rights bodies.[246] This protocol was endorsed by the group's next meeting in 2020, though it was unclear what effect it was having in practice.[247]

Canada has clashed with the ILO over the right to freedom of association. In Ontario, the prohibition in the Agricultural Employees Protection Act (AEPA) on the right of agriculture workers to unionize and bargain collectively was challenged by the United Food and Commercial Workers (UFCW). Based on the UFCW's submission, the ILO Committee of Experts found in 2010 that the AEPA violated ILO Conventions 87 and 98.[248] However, the Supreme Court of Canada ruled in *Ontario (Attorney General) v. Fraser* that "the Ontario legislature is not required to provide a particular form of collective bargaining rights to agricultural workers, in order to secure the effective exercise of their associational rights."[249] In response the ILO Committee noted that "it continues to consider that the absence of any machinery for the promotion of collective bargaining of agricultural workers constitutes an impediment to one of the principal objectives of the guarantee of freedom of association: the forming of independent organizations capable of concluding collective agreements."[250]

The Supreme Court has meanwhile relied on ILO supervisory bodies as important sources in other cases on labour, including *Saskatchewan Federation of Labour v. Saskatchewan* (2015), in which the court referred to the fact that "the ILO supervisory bodies, including the Committee on Freedom of Association and the Committee of Experts on the Application of Conventions and Recommendations, have recognized the right to strike as an indissociable corollary of the right of trade union association" under ILO Convention 87.[251]

2.2 Are there national fair recruitment laws and policies? Does legislation address the entire spectrum of the recruitment process, including in relation to advertisements, information dissemination, selection, transport, placement into employment and return to the country of origin. Is legislation reviewed and evaluated?

242. Global Affairs Canada, "Instructions for CanDel - Outcome document of the Sept. 19 HLM - 20 July 2016", (19 July 2016):287, obtained through Access to Information (ATI) request to ESDC A-2017-00599, instructions for Canadian Delegation for negotiations related to the Global Compact on Migration
243. "Report of the Standing Senate Committee on Human Rights", 2b, (December 2001).
244. Immigration and Refugee Protection Act (S.C. 2001, c. 27)", section 3, (2001).
245. Amnesty International, "From Promise to Reality: Amnesty International's Recommendations for the 2017 Federal/Provincial/Territorial Human Rights Meeting", (2017).
246. "Federal, Provincial and Territorial Ministers from across the country gather to discuss Human Rights", *Canadian Intergovernmental Conference Secretariat*, (12 December 2017).
247. "Federal-Provincial-Territorial Videoconference of Ministers Responsible for Human Rights", *Canadian Intergovernmental Conference Secretariat*, (10 November 2020).
248. "Canada and Ontario violating farm workers' rights", *National Union of Public and General Employees*, (19 November 2010).
249. "Supreme Court Decision on Rights of Agricultural Workers Unworkable", *National Union of Public and General Employees*, (29 April 2011).
250. ILO, "Interim Report - Report No 358, November 2010 Case No 2704 (Canada)"
251. Supreme Court of Canada, "Saskatchewan Federation of Labour v. Saskatchewan", (30 January 2015).

Mexico

Largely due to Mexico's long history of emigration for work, the 1917 Mexican Constitution itself includes specific provisions relating to fair recruitment. It requires employment placement services to be free, whether delivered by the state or private sector, requires contracts with foreign employers to be notarised by a government entity as well as a consulate of the destination state, and specifies that foreign employers must cover the cost of workers' repatriation.[252]

The 1970 Federal Labor Law regulates labour and recruitment in more detail, and article 28 includes provisions relating to living and working conditions, healthcare, and consular support.[253] In 2012, the law was reformed and included new recruitment regulations that, according to a 2015 Solidarity Centre study brought "significant positive changes to the law governing recruitment", including the requirement for recruitment agencies to register with the STPS and that recruiters may not charge migrants for their services, whether directly or through arrangements with employers to make deductions from workers' pay.[254]

The 2006 Regulation of Worker Placement Agencies (RACT) - amended in 2014 - establishes the overall framework for recruitment agents, and requires that when "the possible commission of a crime is detected, the labor authorities will file a report of the facts before the competent Public Ministry".[255] However a senior STPS official told us the RACT was "very permissive" and "needs teeth" to be able to be stricter and more effectively enforced, and said the government was considering amendments to the legal framework to be more specific about types of fraudulent practices and increase sanctions on both licensed and unlicensed labour recruiters. Specifically, he told us there is a "legal gap", as the RACT "does not mention or classify offences committed by unregistered agencies", which are often responsible for exploitation of migrant workers. "It is also necessary to regulate not only legal entities but also the intermediaries, that is, the natural persons who play the role of a recruitment agency," he said.[256]

Advertisements: The Regulations for Employment Agencies (RACT) prohibit the dissemination of false or misleading job vacancies, working conditions, or any information provided by a labour recruiter that deceives a migrant worker (Article 10.III). The penalty for violating this prohibition is a fine between 50 to 5000 times the minimum wage, or the equivalent of between US$340 to US$34,000 (Article 33.I.1(c)).

Information dissemination: The RACT expects the STPS to design and implement permanent campaigns to provide information about rights and obligations related to the employment placement agencies (Article 18).

Selection: The RACT allows labour recruiters to request and collect information from migrant workers on their skills and knowledge in order to select and recruit the workers, and to advertise information to match the employer supply and the worker's demand for a job (Article 11). It prohibits labour recruiters from establishing requirements that may discriminate against worker applicants on the basis of ethnic or national origin, gender, age, disabilities, social and health conditions, pregnancy, religion, migratory status, sexual preferences, civil status, or any other factors for discrimination (Article 6). The penalty for violating this prohibition is a fine between 50 to 5000 times the minimum wage, or the equivalent of between US$340 to US$34,000 (Article 33.I.1(c)).

Placement into Employment: The RACT requires that labour recruiters make efforts to verify the genuineness of the employer, the job offer, general working conditions, and conditions related to housing, Social Welfare, and the repatriation of workers, and that worker applicants have applied through the necessary legal processes related to migration and the issuance of visas and work permits (Article 9 Bis). The Federal Labour Law requires that employers and migrant workers enter into an employment contract in the context of the migration process, and requires that information be provided to migrant workers in writing related to the employer and the job offer (Article 28 I and IV). Information must also be provided to workers clarifying that costs associated with the repatriation of workers are the responsibility

252. Government of Mexico, Constitución Política de los Estados Unidos Mexicanos, Article 123 19. X-Z, (5 February 1917).
253. Government of Mexico, Ley Federal del Trabajo, Article 28, (1 April 1970) (amended on 12 June 2015).
254. Gordon, Jennifer, "Roles for Workers and Unions in Regulating Labor Recruitment in Mexico", *Solidarity Center*, (January 2015): 3.
255. Secretaría del Trabajo y Previsión Social, Reglamento de Agencias de Colocación de Trabajadores, Article 30 bis, (21 May 2014).
256. Director, Ministry of Labour and Social Welfare, interview, Mexico City, 10 March 2020.

of the employer, as well as information on housing arrangements and health coverage in the country of destination (Article 25 and 28 I). The Federal Labour Law (Article 28) and the RACT (Article 9 IV) also require labour recruiters to provide contact information to migrant workers for consular services and relevant authorities from other governments that are available to assist the workers in relation to their rights in the country of destination.

Transport and Return to the Country of Origin: The Federal Labour Law specifies - in line with the Constitution - that costs associated with the repatriation of workers are the responsibility of the employer (Article 28 I a)), while the RACT further clarifies that labour recruiters also must take steps to ensure that transport be provided free of charge to workers employed more than 100km away from their homes (Article 9, VI). In the event that an employer has not complied with the terms of the contract, the law makes the labour recruiter responsible for the costs associated with the repatriation of the migrant worker (Article 9 Bis, V).

Canada

Under Canada's *Constitution Act*, the federal government is responsible for regulating the entry of foreign nationals into Canada, while provincial/territorial governments are responsible for the regulation of employment (including labour recruitment), labour relations (including the rights to form and join unions), education, housing, and health care.[257]

At the federal level, the 2001 *Immigration and Refugee Protection Act (IRPA)*, and 2002 Immigration and Refugee Protection Regulations (IRPR) - both amended several times since their introduction - outline the conditions that employers must meet in order to hire migrant workers, including requirements related to employment contracts, employers covering the transportation of migrant workers, and registration of workers in workplace compensation plans, amongst others. They authorize the federal government to inspect the employer's compliance with these conditions.[258]

At the provincial level, while specific legislation varies for the regulation of employment standards and labour recruitment, provincial policies can be broadly grouped into 3 models:

- provinces with additional employment standards protections for migrant workers and licensing requirements specific to labour recruiters of migrant workers (British Columbia,[259] Alberta,[260] Saskatchewan,[261] Manitoba,[262] Quebec,[263] and Nova Scotia [264]);
- provinces that have additional employment standards protections related to migrant workers, but no specific licensing requirements for labour recruiters of migrant workers (Ontario[265] and New Brunswick[266]); and
- provinces/territories that cover migrant workers under the same employment standards and labour recruitment provisions as residents of Canada (Newfoundland and Labrador, Prince Edward Island, Northwest Territories, Yukon, and Nunavut).

A 2020 research study by IRCC on regulatory approaches to international labour recruitment finds that "in general, the provinces prohibit either individuals or relevant entities involved in recruitment activities from charging either (1) any fees or (2) fees for strictly recruitment and/or employment-related services". This distinction alludes to the fact that in Canada licensed immigration consultants are permitted to charge prospective migrants for services exclusively related to immigration processes, which Canada treats as separate from recruitment costs. The 2020 IRCC study notes that "fees for immigration services and how they are regulated alongside more traditional recruitment services are a curious consideration in the Canadian immigration context".[267] This issue is discussed in more detail in section 6.

257. Sandra Elgersma, "Temporary Foreign Workers", *Library of Parliament*, (1 December 2014).
258. Government of Canada, "Temporary Foreign Worker Program Compliance", (29 March 2021).
259. Temporary Foreign Worker Protection Act [SBC 2018], Chapter 45, (8 November 2018).
260. Government of Alberta, "Resources for Temporary Foreign Workers"(2021).
261. Government of Saskatchewan, "Immigration Consultant and Foreign Worker Recruiter Licensing and Responsibilities"
262. Government of Manitoba, "Employment Standards", (14 April 2020).
263. Government of Quebec, "Placement of Personnel and Recruitment of Temporary Foreign Workers"
264. Government of Nova Scotia, "Foreign Workers"
265. Government of Ontario, "Employment Protection for Foreign Nationals", (25 June 2020).
266. Leanne Dixon-Perera, "Regulatory approaches to international labour recruitment in Canada", (June 2020): 13.
267. Leanne Dixon-Perera, "Regulatory approaches to international labour recruitment in Canada", (June 2020): 28.

Federal and provincial legislation contains specific provisions relating to the different stages of recruitment. There are variations between provinces, some of which are minor and some of which are more substantive.

Advertisements: At the provincial level, practices vary. British Columbia's *Temporary Foreign Worker Protection Act (TFWPA)* prohibits anyone from "provid[ing] recruitment services or act[ing] as or purport[ing] to be a foreign worker recruiter unless the person holds a licence".[268] This extends to advertisement, and individuals who operate without a license can be fined.[269] Labour recruiters in British Columbia are also prohibited from producing or distributing false or misleading information relating to recruitment services, immigration, immigration services, employment, housing for foreign workers, provincial and federal laws, and/or misrepresenting employment opportunities.[270] Ontario, meanwhile, has no stipulations regarding advertisements in the recruitment process in the 2009 *Employment Protection for Foreign Nationals Act (EPFNA).* At the federal level, there is a requirement to advertise TFWP jobs initially to Canadian residents, as part of the process of obtaining a LMIA.[271] IRPA also prohibits anyone who is not a member of a provincial or territorial law society, a notary in the province of Quebec, or a member of the ICCRC to advertise offering to provide immigration advice - an offence punishable by fines, imprisonment or both.[272]

Information dissemination: At the provincial level practices vary. British Columbia's *Temporary Foreign Worker Protection Act (TFWPA)* requires licensed labour recruiters to provide a services contract to the migrant worker outlining the services provided, and the fees that a recruiter is charging the migrant worker if it is providing immigration consulting services.[273] The licensed labour recruiter must also disclose in writing to the migrant worker the referral fee that it is receiving from the employer, and to disclose if it is providing recruitment services to the employer and immigration services to the migrant worker, and obtain consent from both the employer and the migrant worker.[274] In Ontario, a person who employs a foreign national is required to give the worker (in a language they understand) a copy of the most recent documents published by the Director of Employment Standards about the protection of migrant workers in the province.[275]

Selection: Canadian provinces generally prohibit discrimination in the hiring process. For example, the Ontario Human Rights Code prohibits discrimination by employment agencies "against a person because of a prohibited ground of discrimination in receiving, classifying, disposing of or otherwise acting upon applications for its services or in referring an applicant or applicants to an employer or agent of an employer".[276] British Columbia's Human Rights Code contains a similar provision.[277] The *Immigration and Refugee Protection Regulations (IRPR)* nevertheless requires that employers make reasonable efforts to hire Canadians or permanent residents first before being authorized to hire a migrant worker (unless an exemption from the LMIA process applies under the regulations).[278] Where employers have gained a positive LMIA and are able to recruit internationally, migrant workers must meet the regulatory requirements to obtain a work permit, including demonstrating to the immigration officer that they are able to perform the work that is being offered.[279]

Placement into Employment: at the federal level, the *IRPR* requires that employers provide documentation to the authorities to demonstrate the genuineness of the employer and of the job offer at the time of application (for example provide tax and employment payroll records).[280] For the TFWP, employers of migrant workers in low-wage occupations must provide or ensure that suitable and affordable housing is available for workers, and ensure they are covered by appropriate healthcare from the point that they arrive in Canada. Wages offered to migrant workers "should be similar to wages paid to Canadian and permanent resident employees hired for

268. Temporary Foreign Workers Act [SBC 2018] chapter 45, section 3, (2018).
269. Government of British Columbia, "Apply for a foreign worker recruiter's licence"
270. Government of British Columbia, "Recruiter Partner Agent Affiliate Obligation Factsheet"
271. Government of Canada, "Program requirements for low-wage positions"
272. Immigration and Refugee Protection Act (S.C. 2001, c. 27), part 1, (2001).
273. Temporary Foreign Worker Protection Act [SBC 2018] Chapter 45, section 27, (2018).
274. Ibid, section 23.
275. Employment Protection for Foreign Nationals Act, 2009, S.O. 2009, chapter 32, section 10, (2009).
276. Human Rights Code, R.S.O. 1990, c. H.19, (1990).
277. Human Rights Code [RSBC 1996] Chapter 210, section 13, (1996).
278. Immigration and Refugee Protection Regulations (SOR/2002-227), section 203(3)(e), (2002)
279. Ibid, section 200(3)(a)
280. Government of Canada, "Business legitimacy", (4 May 2021).

the same job and work location, and with similar skills and years of experience".[281] Provincial employment laws provide detailed provisions on working hours and wages.

Transport and Return to the Country of Origin: at the federal level, employers applying to hire migrant workers in low-wage occupations must pay for return transportation to the migrant workers' country of origin, and may not recover any of these costs directly or indirectly from the workers.[282] At the provincial level practices vary, but as an example, the province of British Columbia prohibits a labour recruiter from taking or keeping a migrant worker's passport or official documents; from threatening to send a worker back to their country or threaten other action for which there is no legal basis; and/or from taking action against or threatening to take action against someone for participating in a legal investigation or proceeding or for making a complaint or inquiry.[283] Ontario also bans employers and recruiters from holding worker's passports or work permits and from issuing threats against workers who complain to the authorities, without specifying types of possible threats that would constitute a violation of the law.[284]

2.3 Are all workers (formal, informal, regardless of category) covered by relevant legislation?

Mexico

Protections included in the Federal Labour Law and the Regulation of Worker Placement Agencies (RACT) appear to apply to all Mexican migrant workers and job seekers, and there is no reference to any exceptions.[285] Mexico has previously attempted to defend the rights of undocumented Mexican workers overseas, particularly in the United States - in 2002 requesting the Inter-American Court of Human Rights to give an opinion in relation to what it termed "the negation of labor rights based on discriminatory criteria derived from the migratory status of undocumented workers" in certain states in the region. This negation, the Mexican government suggested, "could encourage employers to use those laws or interpretations to justify a progressive loss of other labor rights; for example: payment of overtime, seniority, outstanding wages and maternity leave, thus abusing the vulnerable status of undocumented migrant workers."[286]

Canada

ESDC states that "Canadian law protects all workers in Canada, including temporary foreign workers. The exploitation of temporary foreign workers is considered a violation of Canadian laws and human rights."[287] Nevertheless, there is significant variation in precise legal protections afforded to migrant workers across Canada, depending on their occupation, the immigration program they entered Canada on, their legal status and the province they are employed in. This creates differences that can be meaningful in terms of rights protections.

As noted in sections 1.6 and 1.7, the ability of foreign workers to move jobs within Canada and to gain permanent residence differs significantly depending on their immigration program and occupation. Careworkers, for example, have a highly distinct immigration status as compared to agricultural workers. Even within each of these sectors, there are multiple programmes that have differing entry requirements and offer different possibilities of progressing to residence.

Additionally, workers in agriculture - a sector where migrant workers play a critical role - are exempted from key worker protections in many parts of the country. In Ontario, they are not able to establish or join unions - under the terms of the *1995 Labour Relations Act and the 2002 Agriculture Employees Protection Act (AEPA)*, which stresses "the unique characteristics of agriculture".[288] This has been termed "farm worker exceptionalism".[289] As noted in 2.1 and in section 9, this

281. Government of Canada, "Job duties and working conditions", (29 April 2021).
282. Government of Canada, "Wages"
283. Government of British Columbia, "Obligations for Partners, Affiliates and Agents of Recruiters Licensed in B.C."
284. Employment Protection for Foreign Nationals Act, 2009, S.O. 2009, c. 32, section 9.(3), section 10, (2009).
285. Ley Federal del Trabajo, article 28, (1 April 1970).
286. Inter-American Court of Human Rights, Advisory Opinion OC-18/03 of September 17, 2003, requested by the United Mexican States
287. Government of Canada, "Wages"
288. Agricultural Employees Protection Act, 2002, S.O. 2002, c. 16, (2002); Labour Relations Act, 1995, S.O. 1995, c. 1, Sched. A (1995).
289. See for example, Vosko, Leah F.; Tucker, Eric & Casey, Rebecca. 'Enforcing Employment Standards for TemporaryMigrant Agricultural Workers in Ontario, Canada: Exposing Underexplored Layers of Vulnerability'. International Journal of Comparative Labour Law and Industrial Relations 35, no. 2 (2019): 227–254.

exclusion has been argued in the Supreme Court and has been a source of friction between Canada and the ILO. Agricultural workers are not only unable to unionise: Ontario Regulation 285/01 excludes various sectors of the economy from the protections of the Provincial Employment Standards Act.[290] This has the effect that no agricultural workers in Ontario are entitled to receive: daily and weekly limits on hours of work; daily rest periods; time off between shifts; weekly/bi-weekly rest periods; or overtime pay. Almost all agricultural workers are not entitled to eating periods, public holidays or public holiday pay. Fishers and most farm workers also have no right to the minimum wage, the "three hour rule", or vacation pay.[291]

Similarly, Alberta's Bill 26 of 2019, which the provincial government said would "restore balance, fairness and common sense regulations",[292] removed the right of agricultural workers to unionise (by no longer classifying them as "employees"), exempted any farm with 5 or fewer employees (who must have worked more than 6 months consecutively to be counted) from the requirement to carry workplace insurance and from the provisions of the Employment Standards Code. It also expanded the definition of agricultural worker, increasing the number of people excluded from these provisions. The Bill reversed Bill 6 of 2015 which had introduced workplace protections for agricultural workers.[293]

Agricultural organisations argue that, "most if not all of our worker protection legislation had their origins rooted in the industrial and manufacturing industries. The nature of work in the manufacturing setting is very different to the nature of work in farming".[294] The ILO has raised concerns about the persistent exemption of agricultural workers from labour laws, noting that it may contribute to such jobs being unpopular among citizens, and in the context of Covid-19 has highlighted the discrepancy between acknowledgement of the importance of agricultural workers for the food chain, and their lack of labour protection: "recognizing these workers as essential implies the need to address their exemption from labour laws."[295]

Undocumented or "non-status" workers in Canada - the number of whom is not accurately known - have a distinct experience from other temporary foreign workers, as a result of their irregular status. A foreign national in Canada is only considered "a member of the worker class" if they have been authorized to enter and remain in Canada as a worker.[296] Under the *IRPA*, employers who employ migrant workers "in a capacity in which the foreign national is not authorized under this Act to be employed" face a fine of up to CAD$50,000 (US$41,400) or up to two years in prison if indicted - or up to CAD$10,000 (US$8,200) or up to six months in prison on summary conviction.[297] Where the IRPA criminalizes the employer in such situations, the IRPR places responsibility on the foreign national: "a foreign national must not work in Canada unless authorized to do so by a work permit or these Regulations."[298] Foreign nationals cannot obtain a new work permit for six months after being found to have worked without authorization,[299] while those who cannot show they have the correct visa to match their purpose in Canada can be subject to an exclusion order barring them from the country for a year.[300]

As a result, undocumented workers are less likely to file complaints. As one worker organization puts its, "many of us who are undocumented fear deportation if we speak out when there are problems at work".[301] A study of employment standards in Ontario held that "workers with insecure immigration status who face substandard conditions of employment are rarely in a position to complain due to implicit or explicit threats that they will be penalized by the immigration system (e.g., with deportation)."[302] A 2012 Toronto

290. O. Reg. 285/01: when work deemed to be performed, exemptions and special rules, section 1.1, (2000).
291. Government of Ontario, "Agriculture, growing, breeding, keeping and fishing"
292. Government of Alberta, "Farm freedom and safety engagement"
293. Bob Barnetson, "Bill 26 strips farm workers' basic employment rights", Parkland Institute, 27 November 2019.
294. Canadian Agricultural Human Resource Council (CAHRC), "Agriculture Workplace Management: A Comparison of Labour Relations, Employment Standards including Regulated Agricultural Wage Rates, Occupational Health and Safety, Workers' Compensation", (June 2016).
295. "Seasonal Migrant Workers' Schemes: Rethinking Fundamental Principles and Mechanisms in light of COVID-19", *ILO*, May 2020.
296. Immigration and Refugee Protection Regulations (SOR/2002-227), (2002).
297. Immigration and Refugee Protection Act (S.C. 2001, c. 27), (2001).
298. Immigration and Refugee Protection Regulations (SOR/2002-227), (2002).
299. Ibid, section 200(3)(e)(i).
300. Ibid, section 228(1)(c)(iii).
301. "Undocumented", *Sudbury Workers' Centre*, (March 2015).
302. Leah F. Vosko , "Rights without Remedies": Enforcing Employment Standards in Ontario by Maximizing Voice among Workers in Precarious Jobs, *Osgoode Hall Law Journal* 50.4 (2013).

City Council report assessed undocumented migrant workers as "particularly susceptible to situations where they are required to work for low wages, under poor and unsafe work conditions, and where they have no protection against unfair dismissal, abuse and/or exploitation by their employers", noting the barriers undocumented workers face in accessing insurance and state services.[303] Temporary foreign workers lose their Social Insurance Number (SIN), which gives them access to many government programmes and benefits, with the expiry of their work permit.[304] During the Covid pandemic in 2020, when many temporary foreign workers lost their jobs at short notice, the Migrant Rights Network wrote to the federal government asking for the Canada Emergency Response Benefit (CERB) to be extended to people without valid SINs, pointing out that "as they have limited access to Social Welfare programs, they are not able to pay their rent, buy food and feed their families".[305] The government agreed to give access to workers without valid SINs, though it was unclear whether information about the legal status of those applying would be shared with immigration authorities.[306]

In 2019 the Federal government initiated a pilot project to address the situation of some undocumented workers, providing pathways to permanent residence for out of status construction workers in Toronto.[307]

2.4 Are workers' organizations able to contribute to the setting and review of legislation, regulations and policy relevant to fair recruitment?

Mexico

Since 2000 public consultation has been required on all legislation originating in the executive branch (as opposed to parliament), about a third of all primary laws in Mexico.[308] Trade unions have previously complained about the failure to meaningfully consult them on significant labour reforms, for example in 2011 when changes to the federal labour law raised concerns about the facilitation of outsourcing and precarious contracting, and the failure to address the issue of "protection contracts" (see section 9).[309]

Unions and worker organisations in Mexico are not, in comparison to some other origin states, heavily invested in fair recruitment issues. "Mexican trade unions have not taken up recruitment as an issue", as a 2015 Solidarity Center study puts it. Civil society organisations, including the Project for Economic, Social and Cultural Rights (ProDESC), Centro de los Derechos del Migrante, Global Workers and the Jornaleros-SAFE project haved led efforts to advocate for strong regulations and a more effective Mexican government response on recruitment issues.[310] An academic specialising in Mexican migrant workers told us that even so there are relatively few civil society organizations focusing on migration and recruitment, and there are currently no formal avenues for such groups to contribute to the setting of relevant legislation and policy. Recently, some small organisations have been established by former migrants, but these tend to have limited resources, making sustained engagement on legislation challenging.[311]

Canada

Worker organizations including labour unions contribute actively to discussions relating to migrant workers and fair recruitment, both at the federal and provincial level. Parliamentary reports into the Temporary Foreign Worker Program in 2016 and into the oversight of immigration consultants in 2017 included substantial input from worker organizations, for example.[312] Worker organizations have been active in calling for policy and

303. Staff report for action on Undocumented Workers in Toronto, (2013).
304. Government of Canada, 'Social Insurance Number that begins with a "9"'
305. Migrants Rights Network, "Re: Regulatory changes to ensure Canada Emergency Response Benefit is available to migrants and undocumented residents", (26 March 2020).
306. Migrants Rights Network, "Income Supports for Migrants in Canada", (15 May 2020).
307. Government of Canada, "Temporary public policy for out-of-status construction workers in the Greater Toronto Area"
308. OECD, "OECD regulatory policy outlook 2018", (2018): 214-215.
309. ITUC CSI, "Reforma de la legislación laboral en México", (5 April 2015).
310. Jennifer Gordon, "Roles for Workers and Unions in Regulating Labor Recruitment in Mexico", *Solidarity Center*, (January 2015): 4-5
311. Dr. Aaraón Díaz Mendiburo, Universidad Nacional Autónoma de México, remote interview, 27 June 2020.
312. House of Commons, "Report 4 - Temporary Foreign Worker Program", (19 September 2016); House of Commons, "Starting Again: Improving Government Oversight of Immigration Consultants", (June 2017): 43-49.

legal changes to support migrant workers during the COVID-19 pandemic.[313]

At the federal level there are examples where advocacy by worker organizations has resulted in changes to laws and policies affecting migrant workers. For example, civil society groups and unions made strong calls for more effective federal monitoring of employer compliance with the hiring of migrant workers that led to legislative changes and new funding for the introduction of federal inspections of employers of migrant workers. The 2017 and 2018 budgets saw additional funding for inspection and compliance programmes.[314] New policy requirements for all employers under the Seasonal Agricultural Worker Program to have housing inspected by provincial, municipal, or licensed housing inspectors on an annual basis also responded to civil society and union feedback as part of a primary agriculture review.[315] Worker organisations have also called for the strengthening of licensing and monitoring of immigration consultants,[316] and in 2019, the government passed legislation creating a new statutory framework to regulate immigration and citizenship consultants including "the establishment of a victims' compensation fund to support clients harmed by wrongful conduct by a consultant".[317] Worker organizations have also pushed for stronger employment standards and inspections at the provincial level, for example in Ontario and British Columbia.[318]

Migrant worker organisations supported proposals for the open work permit for migrant workers in situations of abuse, which the government introduced in 2019, but stressed that they saw this as an interim measure.[319] In this vein, the UFCW also supported a pilot project for permanent residence for agri-food migrant workers "as an important step in the right direction".[320] This reflects the position that migrant worker and union organisations have generally taken in favour of open work permits (either occupation specific or sector specific) and permanent residency for migrant workers, as expressed in submissions to the government's 2019 consultation on occupation-specific work permits.[321]

In 2018, the Government of Canada established the Migrant Support Network, with a pilot in British Columbia, "to enhance the protection of migrant workers by providing resources, to those who support them." Among the project's goals is the strengthening of "the relationships between federal/provincial/territorial and community organizations, employers and employer representatives, employees and employee representatives", giving worker organisations access to policymakers on a regular basis.[322] Some agricultural employers have expressed concern about the influence that worker organisations have gained through the network, referring to "the arbitrary funding of activist groups".[323] In its 2021 Budget, the federal government announced that it will provide $49.5 million over three years, to expand the Migrant Worker Support Network nationally, and "to support community-based organizations in the provision of migrant worker-centric programs and services, such as on-arrival orientation services and assistance in emergency and at-risk situations."[324]

2.5 Are employers' and recruiters' organizations able to contribute to the setting and review of legislation, regulations and policy relevant to fair recruitment?

313. "UFCW and allies secure pay protection, EI eligibility for migrant workers during COVID-19 pandemic", *United Food and Commercial Workers Union*, (6 April 2020); Government of British Columbia, "Licensing recruiters to protect foreign workers", (19 July 2019).
314. Canadian Council for Refugees, "Temporary Foreign Worker Program: A submission by the Canadian Council for Refugees to the Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities", (May 2016): 3; Alberta Civil Liberties Research Center, "Changes to the TFWP - 2018"
315. Government of Canada, "What we heard: Primary agriculture review"; Government of Canada, "Hire a temporary worker through the Seasonal Agricultural Worker Program: Program requirements"
316. House of Commons, "Starting Again: Improving Government Oversight of Immigration Consultants", (June 2017)
317. Government of Canada, "Government changes will strengthen the regulation of immigration and citizenship consultants"
318. "Budget 2019 strengthens employment standards and highlights path for good, green jobs", *BC Federation of Labour,* (19 February 2019); Michael Mitchell and John Murray, "The Changing Workplaces Review: An Agenda for Workplace Rights - Final Report", *Government of Ontario*, (May 2017); Government of Ontario, "The Changing Workplaces Review - Information from Public Consultations"
319. Migrant Workers Alliance for Change, "Expanding Worker Rights - Open Work Permit Program for Migrant Workers Facing Risk", (December 2017).
320. "Food workers' union welcomes Canadian Agri-food Pilot", *United Food and Commercial Workers Union*, (12 July 2019); "Canada's unions applaud pilot project offering greater protections to migrant workers", *Canadian Labour Congress,* (12 July 2019).
321. See for example: The United Food and Commercial Workers Union (UFCW Canada), The United Food and Commercial Workers Union (UFCW Canada) comments on introducing occupation-specific work permits under the temporary Foreign Worker Programme published in Canada Gazette, part I, Volume 153, Number 25: Government notices (June 22, 2019)", (19 July 2019).
322. Migrant worker hub, Migrant Worker Support Network
323. WALI, "Issues and Solutions: The Seasonal Agricultural Worker Program", (2 May 2018).
324. Government of Canada, "BUDGET 2021 A RECOVERY PLAN FOR JOBS, GROWTH, AND RESILIENCE", (19 April 2021):219.

Mexico

Registered recruitment agencies appear to play a relatively limited role in policymaking in Mexico. There are limited avenues for external stakeholders to contribute to the setting of legislation and policy relevant to overseas recruitment.[325] A 2018 ILO report says that "collaboration between the SNE and private employment agencies is conducted through mutually agreed joint coordination and cooperation mechanisms", with little further detail.[326] A representative of a Mexican recruitment agency told us that they had never been invited to provide input into proposed legislative or policy changes by the government.[327]

Canada

Employer, immigrant consultant and recruiter organizations are active in providing input to the setting and review of federal and provincial legislation, regulations and policy. For example, multiple employers and employer organisations took part in the House of Commons Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities review of the TFWP in 2016, including representatives from the seafood, agriculture, hotel and technology sectors.[328] As a general rule, employer organisations have supported the continuation - and even expansion - of temporary work permit programmes, arguing that they help address critical shortages in the Canadian labour market. However employer groups largely opposed the government's 2019 proposals to introduce an occupation specific work permit for temporary foreign workers, for example arguing that "employer-specific work permits provide employers with critical predictability in meeting critical labour needs, where employers have been unable to find available Canadians to fill these positions."[329]

In general, input from recruiter and immigration consultant organizations tends to support the tightening of licensing requirements and monitoring, to reduce the prevalence of unregistered immigration consultants and to increase the regulation of the sector, which has come under scrutiny after high-profile cases of exploitation by unscrupulous consultants, both registered and unregistered, of migrant workers.[330] There have been calls to end the industry's self-regulation and to bring regulation of the sector under the aegis of the federal government.[331] In responding to such suggestions, industry bodies have generally argued instead that the regulatory body should be strengthened to improve its enforcement. Ahead of the introduction of the *College of Immigration and Citizenship Consultants of Canada Act* in 2019, industry submissions supported legislative amendments to penalize unauthorized consultants outside of Canada, and the need to improve enforcement of the Act and conduct additional investigations of regulated immigration consultants.[332]

325. Dr. Aaraón Díaz Mendiburo, Universidad Nacional Autónoma de México, remote interview, 27 June 2020.
326. ILO, "Public Employment Services in Latin America and the Caribbean: Mexico", (2018): 23.
327. Representative of recruitment agency, remote interview, February 2020.
328. House of Commons, Temporary Foreign Worker Program: Report of the Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities", Appendix A, (September 2016): 41-43.
329. Ontario Federation of Agriculture, "RE: Canada Gazette, Part I, Volume 153, Number 25, June 22, 2019. Introducing Occupation-Specific Work Permits (OSWP) Under the Temporary Foreign Worker Program", (19 July 2019).
330. Kathy Thomlison, "False promises: Foreign workers are falling prey to a sprawling web of labour trafficking in Canada", *the Globe and Mail,* (5 April 2019).
331. See for example: House of Commons, '"Starting again: improving government oversight of immigration consultants, Report of the Standing Committee on Citizenship and Immigration', (June 2017).
332. Canadian Association of Professional Immigration Consultants, "Review of Bill C-97's College of Immigration and Citizenship Consultants Act", (3 May 2019); Gerd Damitz, "Submission for Standing Committee on Citizenship and Immigration, studying Division 15 of the Bill C-97"; Jacobus Kriek, (Regulated Canadian Immigration Consultant and Policy Analyst, Matrixvisa Inc.), "Evidence - Standing Committee on Citizenship and Immigration", (1 May 2017).

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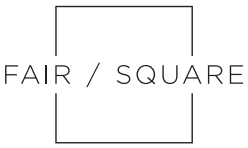

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