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Global Care Chains, Employment Agencies, and the Conundrum of Jurisdiction: Decent Work for Domestic Workers in Canada

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Les travailleuses domestiques migrantes transfrontalières qui résident et travaillent dans des foyers canadiens traversent de nombreux champs de compétence—entre les différents pays, les différents domaines de droit et les différents paliers de gouvernement dans un pays. À cause de cette « transgression », il est difficile de régir ces travailleuses de façon à leur procurer du travail décent. L'objectif du présent article est double : d'abord, il explique comment la circulation des travailleuses migrantes transfrontalières dans des champs de compétence superposés les rend vulnérables à l'exploitation et ensuite, en mettant en évidence le rôle de l'intermédiaire transfrontalier—the courtier ou l'agence d'emploi qui fait traverser les frontières aux travailleuses pour qu'elles vivent et travaillent dans des familles canadiennes—it démontre comment il est possible de régler certains de ces problèmes liés aux champs de compétence. L'article commence par une discussion des concepts clés—réseau mondial de soins et compétence—qui servent à analyser le Programme canadien d'aides familiaux résidants et la réglementation des agences de placement en Colombie-Britannique, pour illustrer comment les dilemmes liés aux domaines de compétence rendent difficile l'accès au travail décent pour les travailleuses domestiques. L'article suggère à la fin certaines façons de régler ces dilemmes et, en s'inspirant de modèles canadiens, ébauche des techniques pour réglementer les agences en essayant de promouvoir le travail décent pour les travailleuses domestiques migrantes.

Transnational migrant domestic workers who perform work on a live-in basis in Canadian homes cross a number of jurisdictional boundaries—between different nation states, different areas of law, and different levels of government within a nation. This “transgression” makes it difficult to govern these workers in a

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manner that provides decent work. The goal of this article is twofold: first, to explain how the movement of transnational migrant workers across a number of nested jurisdictional boundaries makes them susceptible to being exploited and, second, by focusing on the role of the transnational intermediary—the broker or employment agency that places domestic workers across national boundaries to live and work in the homes of Canadian families—to show how it is possible to overcome some of these jurisdictional conundrums. The article begins with a discussion of the key concepts—global care chain and jurisdiction—that are used to examine Canada's Live-in Caregiver Program and the regulation of employment agencies in British Columbia in order to illustrate how the jurisdictional conundrum creates problems for achieving decent work for domestic workers. It concludes by suggesting some ways to resolve the jurisdictional conundrum and, drawing upon existing Canadian models, sketches some techniques to regulate employment agencies with the goal of promoting decent work for migrant domestic workers.

Introduction

In 2009, Prince George Nannies and Caregivers Limited, a provincially registered employment agency in British Columbia, was ordered to repay fourteen Filipino live-in caregivers the placement fees (a total of just under \$25,000) that the agency had charged in violation of the *Employment Standards Act* (ESA).¹ This agency is just one of many employment agencies in British Columbia and Canada that recruit thousands of live-in caregivers from overseas, primarily from the Philippines, each year to live and to work in the homes of Canadian families caring for children and elderly and disabled people. This instance of illegally charging fees to live-in caregivers is not isolated—it is part of a widespread practice that is just one of a number of abuses of migrant domestic workers by employment agencies that were exposed in a series of newspaper articles published in 2009² and condemned in a report issued by the House of Commons Standing Committee on Citizenship and Immigration the same year.³

1. Prince George Nannies and Caregivers Ltd. (2 June 2009), BC EST no. D055/09, BC Employment Standards Tribunal, <http://www.bcest.bc.ca/leading/d055_09.pdf> [Prince George Nannies]. This case is discussed later in this article. *Employment Standards Act*, R.S.B.C. 1996, c. 113.
2. Nicholas Keung, "Juana Tejada, 39: Nanny Inspired Reforms for Caregivers," *Toronto Star* (11 March 2009) at GT5; Dale Brazao and Robert Cribb, "Nannies Trapped in Bogus Jobs," *Toronto Star* (14 March 2009) at A1; Robert Cribb and Dale Brazao, "Federal Agencies Fail to Protect Migrant Nannies," *Toronto Star* (15 March 2009) at A1; Robert Cribb and Dale Brazao, "Critics Want Crackdown as Nannies Exploited," *Toronto Star* (17 March 2009) at A1; Editorial, "Stop the Nanny Abuses," *Toronto Star* (18 March 2009) at A18.
3. Standing Committee on Citizenship and Immigration, *Temporary Foreign Workers and Non-Status Workers*, Report of the Standing Committee on Citizenship and Immigration (Ottawa: May 2009) at 30-6.

These agencies, which recruit and place domestic workers across national boundaries, are crucial actors in the construction, maintenance, and reproduction of global care chains, in which women from the South migrate to the North in order to provide domestic work.⁴ The International Labour Organization (ILO) has identified a wide range of abusive practices committed by private employment agencies against migrant workers, which include: advertising and soliciting for positions that do not exist; "providing false information to the worker on the nature and terms and conditions of employment"; "charging workers fees for recruitment services"; "forcing the migrant worker, upon arrival in the receiving country, to accept a contract of employment with conditions inferior to those contained in the contract [that was] signed prior to departure"; "withholding or confiscating passports or travel documents"; and "stipulating in the employment contract provisions that deny fundamental rights, in particular freedom of association."⁵

Despite a raft of legal instruments, such as international conventions, bilateral agreements, national and sub-national laws and regulations, non-binding multilateral instruments, and industry codes of conduct, which are designed to stop employment agencies from abusing migrant domestic workers, abusive practices by employment agencies continue. Why do these practices continue and how can they be stopped? These are the questions that animate this article, and in addressing them I both draw and build upon the ILO's pathbreaking 2009 report *Decent Work for Domestic Workers*,⁶ which is attentive to the transnational dimension of domestic work and the role of employment agencies in global care chains.⁷

Transnational migrant domestic workers who perform work on a live-in basis in Canadian homes cross a number of jurisdictional boundaries—between different nation states, different areas of law, and different levels of government within a nation. Governments and regulatory agencies claim that this "transgression" makes it difficult to govern these workers in a manner that enhances their

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4. At the theoretical and empirical level, it is possible to distinguish between reproductive labour, which includes all the impersonal activities in the management of the household, such as cleaning and meal preparation and which can be purchased in the market, and the nurturance or care of children, elderly, or ill people, which because of its interpersonal and emotional nature is more difficult to transfer to others and to purchase in the market. Mignon Duffy, "Reproducing Labor Inequalities: Challenges for Feminists Conceptualizing Care at the Intersections of Gender, Race, and Class" (2005) 19 *Gender and Society* 66 at 67. However, throughout this article, I will use domestic worker and caregiver interchangeably. When I refer to live-in caregivers, I am referring to migrant domestic workers who have been admitted under the special immigration program described later in this article.
 5. International Labour Organization (ILO), *Report of the Tripartite Meeting of Experts on Future ILO Activities in the Field of Migration* (Geneva: ILO, 21-5 April 1997) at Annex II, Article 3.1. See also ILO, *Towards a Fair Deal for Migrant Workers in the Global Economy*, Report no. IV at the International Labour Conference, 92nd Session, 2004, 6th Item on the Agenda (Geneva: ILO, 2004) at 58-60.
 6. ILO, *Decent Work for Domestic Workers*, Report no. IV(1) at the International Labour Conference, 99th Session, 2010, Fourth Item on the Agenda (Geneva: ILO, 2010) at 9.
 7. *Ibid.* at 69.

capabilities and provides decent work.⁸ By contrast, I will argue that it is possible and desirable to harness multiple jurisdictions in order to provide decent work for migrant domestic workers. The article begins with a discussion of the key concepts—global care chain and jurisdiction—used to examine the role of employment agencies in placing migrant domestic workers under Canada's Live-in Caregiver Program. I will sketch the basic governance of the program and identify the main criticisms leveled against it.⁹ My focus is on one element of the jurisdictional conundrum—the regulation of employment agencies in British Columbia—which creates problems for achieving decent work for domestic workers, and I will suggest some means for resolving it.

Global Care Chains: Transnational Migrant Domestic Workers

Female migration to take up domestic employment abroad creates “transnational” households, which form a global care chain between workers with family responsibilities in the North, who require household service, and temporary migrants from the South, who can provide for them—albeit at the cost of leaving

8. Judy Fudge, “Gender, Equality and Capabilities: The Role and Relevance of Anti-discrimination Law,” in Tonia Novitz, ed., *The Role of Labour Standards in Sustainable Development: Theory in Practice* (London: British Academy, 2011) [forthcoming].
9. Much has been written about the history of this program and its operation, which I will not repeat. Abigail B. Bakan and Daiva Stasiulis, eds., *Not One of the Family: Foreign Domestic Workers in Canada* (Toronto: University of Toronto Press, 1997); Daiva K. Stasiulis and Abigail B. Bakan, *Negotiating Citizenship: Migrant Women in Canada and the Global System* (Toronto: University of Toronto Press, 2005); Audrey Macklin, “Foreign Domestic Worker: Surrogate Housewife or Mail Order Servant?” (1991-2) 37 McGill Law Journal 681; Audrey Macklin, “Public Entrance/Private Member,” in Brenda Cossman and Judy Fudge, eds., *Privatization, Law and the Challenge to Feminism* (Toronto: University of Toronto Press, 2002) 218; Wenona Giles and Sedef Arat-Koc, eds., *Maid in the Market: Women’s Paid Domestic Labour* (Halifax: Fernwood, 1994); Sedef Arat-Koc, “In the Privacy of Our Own Home: Foreign Domestic Workers as Solution to the Crisis in the Domestic Sphere in Canada” (1989) 28 Studies in Political Economy 33; Patricia Daenzer, *Regulating Class Privilege: Immigrant Servants in Canada, 1940s-1990s* (Toronto: Canadian Scholars’ Press, 1993); Sabaa A. Khan, “From Labour of Love to Decent Work: Protecting the Human Rights of Migrant Caregivers in Canada” (2009) 24 Canadian Journal of Law and Society 23; Habiba Zaman, *Breaking the Iron Wall: Decommodification and Immigrant Women’s Labor in Canada* (Lanham, MD: Lexington Books, 2006); Maria Deanna Santos, *Human Rights and Migrant Domestic Work: A Comparative Analysis of the Socio-Legal Status of Filipina Migrant Domestic Workers in Canada and Hong Kong* (Leiden: Martinus Nijhoff, 2005); Annelies Moors, “Unskilled Labour: Canada’s Live-in Caregiver Program” (2003) 45 Comparative Studies in Society and History 386; Louise Langevin and Marie-Claire Belleau, *Trafficking in Women in Canada: A Critical Analysis of the Legal Framework Governing Immigrant Live-in Caregivers and Mail-Order Brides* (Ottawa: Status of Women, 2000); Austina Reed, “Canada’s Experience with Managed Migration: The Strategic Use of Temporary Foreign Worker Programs” (2008) 63 International Journal 469; Joseph H. Carens, “Live-in Domestics, Seasonal Workers, and Others Hard to Locate on the Map of Democracy” (2008) 16 Journal of Political Philosophy 419; Tanya Scheeter, *Race, Class, Women and the State: The Case of Domestic Labour* (Montreal: Black Rose Books, 1998).

their own families behind.¹⁰ Feminist scholars have emphasized the need to attend to the gendered nature of the contemporary processes of globalization, arguing that “gender inequalities are constitutive of contemporary patterns of intensified globalization . . . and that gender differences in migration flows often reflect the way in which gender divisions of labour are incorporated into uneven economic development processes.”¹¹ The connection between migrant domestic work, globalization, and the privatization of social reproduction has been variously designated the “new world domestic order,”¹² the “new international division of labour,”¹³ or the “trans-national economy of domestic labour.”¹⁴

On the demand side, the feminization of migration is fueled by the increase in women’s labour force participation, falling fertility rates, increasing life expectancy, changes in family structure, shortage of public care, and the increasing marketization of care in the North.¹⁵ On the supply side, economic trends such as “growing inequalities between high- and low-income countries,” and “insecurity, vulnerability, and instability” due to economic crises combine with gender-related factors such as abuse, family conflict, and discrimination to increase the numbers of women who migrate in order to obtain paid work.¹⁶ Remittances are key for the survival of household, community, and country in a number of developing countries. Exporting workers is one means by which governments cope with unemployment and foreign debt. Migrant women have become crucial agents in “global survival circuits.”¹⁷

Historically, “across a diverse range of countries, both developed and developing, women from disadvantaged racial and ethnic groups have tended to provide care [and household] services to meet the needs of the more powerful social groups, while their own needs for care have been downplayed and neglected.”¹⁸

10. ILO, *Decent Work for Domestic Workers*, *supra* note 6 at 9.
11. Gioconda Herren, “States, Work and Social Reproduction through the Lens of Migrant Experience: Ecuadorian Domestic Workers in Madrid,” in Isabella Bakker and Rachel Silvey, eds., *Beyond States and Markets: The Challenges of Social Reproduction* (Abingdon, Oxon: Routledge, 2008) 93 at 94.
12. Pierrette Hondagneu-Sotelo, *Domestica: Immigrant Workers Cleaning and Caring in the Shadows of Affluence* (Berkeley: University of California Press, 2001) at xix.
13. Rhacel Salazar Parreñas, “Migrant Filipina Domestic Workers and the International Division of Reproductive Labour” (2000) 14 Gender and Society 560 at 565.
14. Brigitte Young, “Financial Crises and Social Reproduction: Asia, Argentina and Brazil,” in Isabella Bakker and Stephen Gill, eds., *Power, Production and Social Reproduction* (Basingstoke: Palgrave Macmillan, 2003) 103 at 117.
15. Nicola Yeates, *Global Care Chains: A Critical Introduction*, Global Migration Perspectives no. 44 (Geneva: Global Commission on International Migration, 2005) at 4; Nicola Yeates, *Globalizing Care Economies: Explorations in Global Care Chains* (Hounds mills: Palgrave Macmillan, 2009).
16. Lourdes Beneria, “The Crisis of Care, International Migration, and Public Policy” (2008) 14(3) Feminist Economics 1 at 9.
17. Saskia Sassen, “Global Cities and Survival Circuits,” in Barbara Ehrenreich and Arlie Russell Hochschild, eds., *Global Woman: Nannies, Maids and Sex Workers in the New Economy* (New York: Henry Holt, 2002) 254 at 255.
18. Shahra Razavi, *The Political and Social Economy of Care in a Development Context: Conceptual Issues, Research Questions and Policy Options*, United Nations Research Institute for Social

Nowhere is this process of racialization and subordination more evident than when it comes to the globalization of care and social reproduction.¹⁹ Many of the women who leave the South to work in the North are temporary migrant workers who do not enjoy either the right to become permanent residents in their host country or the right to circulate without restriction in the labour market: "[G]iven the basic gender division of labour in destination countries women migrants are often restricted to traditionally female occupations—such as domestic work, care work ... work in the domestic services, and sex work—[that are] frequently unstable jobs marked by low wages, the absence of social services, and poor working conditions."²⁰

The term "global care chain" was first used by Arlie Hochschild to refer to "a series of personal links between people across the globe based on the paid or unpaid work of caring."²¹ Global care chains are transnational networks that are formed for the purpose of maintaining daily life. These networks comprise households that transfer their caregiving tasks across borders on the basis of power axes as well as employment agencies, governments and their departments, and other agents, institutions and organizations.²² The concept of a global care chain helps to illuminate the broader social processes that create the transnational transfer of domestic labour and assists in the conceptualization of the distributive features of this transfer. "These processes embody major social divisions and inequalities" such as race, class, and gender.²³ The concept also captures household internationalization strategies, and it can integrate non-material factors, such as identity formation. Moreover, the concept can be used to go beyond the simple push (poverty and unemployment) and pull (employment opportunities and improved wages) explanations of migration since the literature on global care chains "emphasises the macro context of trade" and uneven development.²⁴ These global care chains, which not only link countries of the North and South but also contiguous countries in the South, are created in the confluence of two related phenomena—structural adjustment policies and neo-liberal reforms.

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- Development (UNRISD), *Gender and Development Programme Paper no. 3* (Geneva: UNRISD, 2007) at 2.
19. Rhacel Salazar Parreñas, "Gender Inequalities in the New Global Economy," in Antoinette Fauve-Chamoux, ed., *Domestic Service and the Formation of European Identity: Understanding the Globalization of Domestic Work, 16-21st Centuries* (Bern: Peter Lang, 2005) 369.
 20. Rania Antonopoulos, *The Unpaid Care Work-Paid Work Connection*, Levy Economics Institute of Bard College Working Paper no. 541 (Geneva: ILO, 2008) at 38.
 21. Arlie Russell Hochschild, "Global Care Chains and Emotional Surplus Value," in Will Hutton and Anthony Giddens, eds., *On the Edge: Living with Global Capitalism* (London: Jonathon Cape, 2000) 130 at 131.
 22. Amaia Pérez Orozco, *Global Care Chains*, Gender, Migration and Development Series, Working Paper no. 2 (Santo Domingo, Dominican Republic: United Nations International Research and Training Institute for the Advancement of Women, 2009).
 23. Yeates, *supra* note 15 at 3.
 24. *Ibid.* at 5.

Elaborating on the concept of global care chains, Nicola Yeates emphasizes the great diversity of agents involved in the provision of care services, which "include recruitment and placement agencies, overseas job promoters and job brokers provided by commercial and non-commercial, governmental and non-governmental bodies."²⁵ These agents operate in different contexts and according to different logics; they are governed internally by "[r]elations of power and authority" that operate within the chain and externally by immigration and labour regulation.²⁶

Global care chain analysis has tended to focus on domestic migrant workers, and the Philippines, as the world's largest labour exporter of care workers, has received a great deal of attention.²⁷ As Daiva Stasiulis and Abigail Bakan recount, a number of structural factors linked to underdevelopment have triggered the large volume of labour flows from this country. These include the increasing scarcity of land, urban growth without sufficient expansion in urban employment to meet the supply of dislocated and landless agricultural workers, massive overseas indebtedness, and the general poor performance of a predominantly foreign-owned economy.²⁸

In 1982, President Ferdinand Marcos established the Philippines Overseas Employment Administration (POEA), which has the mandate of promoting and developing the overseas employment program and protecting the rights of migrant workers.²⁹ Since that time, there has been an unprecedented rise in female migration out of the Philippines. According to Stasiulis and Bakan, "by the mid-1990s, domestic workers counted for nearly 45 per cent of the overall number of newly hired overseas female contract workers registered with the Philippines government."³⁰ Receiving countries for migrant Filipino domestic workers include Middle Eastern, Asian, and European nations as well as Canada and the United States.³¹ Most of these countries admit these workers on a temporary basis, although a few, such as Canada, provide a route for permanent residency. Rhacel Parreñas explains that "the guest worker status, legal dependency to the 'native' employer, ineligibility for family reunification, and the labor market

25. *Ibid.* at 9.

26. *Ibid.*

27. See, for example, Parreñas, *supra* note 19. However, Yeates discusses the need to, and suggests ways of, broadening the focus of care chain analysis beyond domestic workers to include a range of other care providers such as nurses. Yeates, *supra* note 15 at 10-12. For an assessment of the role of the Philippine state as a transnational labour broker, see Robyn Magalit Rodriguez, *Migrants for Export: How the Philippine State Brokers Labor to the World* (Minneapolis: University of Minnesota Press, 2010).

28. Stasiulis and Bakan, *supra* note 9 at 56-7.

29. Executive Order no. 797, *Reorganizing the Ministry of Labor and Employment, Creating the Philippine Overseas Employment Administration and for Other Purposes*, Philippines Overseas Employment Administration (POEA), <<http://www.poea.gov.ph/rules/eo797.pdf>>. According to the ILO, *Decent Work for Domestic Workers*, *supra* note 6 at 76, the Philippines has established a legal fund under its *Migrant Workers Act* of 1995 to be used to provide legal services to Filipino migrant workers.

30. Stasiulis and Bakan, *supra* note 9 at 56. By 2003, "approximately two-thirds of Filipina migrant women [were] employed as domestic workers." Parreñas, *supra* note 19 at 370.

31. Stasiulis and Bakan, *supra* note 9 at 56.

segmentation of foreign women to domestic work guarantee host societies a source of secure and affordable pool of care workers at the same time that they maximize the labor provided by these workers.”³²

Two sets of agents are crucial for the maintenance and reproduction of this global care chain: the POEA and the employment agencies that operate in the sending and receiving countries. One of the POEA’s core functions is to issue licenses to private recruitment agencies that “engage in overseas recruitment and manning.”³³ In the Philippines, private fee-charging recruitment or employment agencies, which are subject to a range of regulations, “serve to ‘match’ employers’ demands for private in-home care from among the available applicants” and navigate the POEA’s requirements for deploying Filipino workers overseas.³⁴ Private employment agencies also assist employers in receiving countries in navigating the complex immigration rules and policies. Immigration consultants, who not infrequently operate employment agencies, also often help migrant workers through the immigration process, and they are frequently the first contacts that migrant domestic workers have in Canada. The effective regulation of private employment agencies that place domestic workers across national boundaries is a key challenge for policy makers at the international and national levels.

The Jurisdictional Conundrum

Paid domestic work transgresses a number of boundaries that law both defines and reflects, and it is this transgression, historically, that has made protecting this important activity difficult. Domestic work includes the activities of caring for other, often dependent, people and the tasks of housework that have traditionally been performed by women, especially mothers, primarily for affective reasons and as part of deeply rooted social and cultural roles. Domestic work takes place in the home—the private domain of the family. The boundaries between home/market and private/public are deeply inscribed in contemporary legal doctrines, discourses, and institutions. When performed for wages in the household, domestic work troubles boundaries that distinguish different spheres of social activity, which are associated with specific discourses and technologies of governance.³⁵

32. Parreñas, *supra* note 19 at 377.

33. Department of Labor and Employment, Republic of the Philippines, POEA, <<http://www.poea.gov.ph/html/aboutus.html>>.

34. Stasiulis and Bakan, *supra* note 9 at 70. Stasiulis and Bakan also discovered that agencies use racialized and ethnic markers in making the match. See also ILO, Bureau for Workers’ Activities, *Private Employment Agencies Send Millions Overseas to Work*, Doc. ILO/97/9 (18 April 1997). Actrav Turin, <<http://actrav.itcilo.org/actrav-english/telearn/global/ilo/secur/ilomigr.htm>>. For a critical assessment of the POEA’s role in protecting the rights of migrant workers from the Philippines, see Rodriguez, *supra* note 27 at 116–40, chapter 6.

35. See, for example, Judy Fudge, “Little Victories and Big Defeats: The Rise and Fall of Collective Bargaining Rights for Domestic Workers in Ontario,” in Bakan and Stasiulis, *supra* note 9, 119 at 121–3.

By crossing national boundaries, migrant domestic workers raise questions of citizenship and belonging that are the purview of immigration law. Admitted as temporary workers, they are also brought within the gaze of employment and labour law. Adelle Blackett explains how, by crossing different boundaries, domestic workers attract a plurality of legal responses:

The law at once jealously guards the public borders of the state through immigration laws, while reifying the private borders of the home despite the public activity that proliferates behind its doors. Restrictive regulation of the immigration dimensions of the trans-national “maid trade” stands in stark contrast to the abject neglect of the employment and labour law dimensions of domestics’ workforce participation.³⁶

In a legal system, these boundaries are institutionalized as “jurisdiction,” which Mariana Valverde describes as the “governance of legal governance.”³⁷ While jurisdiction is typically identified with the “where” (territory) and the “who” (authority) of governance, Valverde explains that “jurisdiction also differentiates and organizes the ‘what’ of governance—and most importantly because of its relative invisibility, the ‘how’ of governance.”³⁸ The objects of governance—what is to be regulated—for example, whether domestic work is a matter of family law or employment law or whether migrant workers fall within immigration or labour law—are associated with governance technologies (how the object should be governed), which, in turn, can be understood in terms of institutional capacities and rationalities.³⁹ According to Valverde, “jurisdiction sorts the where, the who, the what, and the how of governance through a kind of chain reaction, whereby if one question (where, who) is decided, then the answers to the other questions seem to follow automatically.”⁴⁰ She claims that these jurisdictional assemblages have a profound path dependency and that direct challenges tend to be confined to questions of who has the authority to govern, which, in turn, rest upon tacit or express assumptions about the objectives and techniques of governance.

The benefits of Valverde’s conception of jurisdiction is that it takes legal “technicalities” seriously and, unlike an exclusively spatial or scalar lens, adds a temporal dimension to the analysis of governance.⁴¹ However, jurisdiction only operates as a chain reaction flowing from the territory (where) and authority (who) of governance

36. Adelle Blackett, “Promoting Domestic Workers’ Human Dignity through Specific Regulation,” in Fauve-Chamoux, *supra* note 19, 247 at 247–8.

37. Mariana Valverde, “Jurisdiction and Scale: Legal ‘Technicalities’ as Resources for Theory” (2009) 18(2) Social and Legal Studies 140 at 145.

38. *Ibid.* at 144.

39. *Ibid.*

40. *Ibid.*

41. *Ibid.* at 153–5.

to its objectives (what) and techniques (how) after a legal regime has achieved a resolution, which may be temporary, to the specific forms of social conflict. Legal claims are often framed with the "how" in mind—that is, with the goal of obtaining the jurisdiction of a specific institution and its particular technologies (and remedies) over the activity in question. In such cases, legal disputes are framed in terms of the "what" or objectives of governance. These "technicalities" are crucial and distinctive technologies of law.⁴² Moreover, an activity can cross established legal categories and jurisdictional boundaries.

Any attempt to govern transnational domestic workers in Canada must navigate a jurisdictional conundrum. Adding complexity to the different territorial scales (international, transnational, national, federal, provincial, and industry) involved in regulating migrant domestic workers is the plurality of legal institutions, objectives, and techniques of the overlapping and competing jurisdictions. At the international level are the binding and non-binding instruments of the ILO and the United Nations that are designed to protect migrant workers.⁴³ Bilateral agreements and memoranda of understanding between nations create a terrain of transnational governance that specifically addresses to domestic workers.⁴⁴ The employment agencies that recruit and place these workers operate simultaneously in a transnational space—creating networks between states—and within two national spaces—the sending and receiving countries. Some sending countries, such as the Philippines, have a regulatory regime that is designed both to protect migrant workers and to facilitate their export. The national boundaries of receiving countries, such as Canada, are policed by the hard law of immigration, the purpose of which is to admit only those foreign nationals deserving of entry. However, with the profound shift to temporary migration programs, the objectives of immigration law have been stretched to include facilitating the efficient functioning of the labour market in the receiving country.⁴⁵ In Canada, the terms and conditions of domestic workers' employment fall within the authority of the provinces and territories, some of which require employment agencies to be licensed, although the details of the licensing regimes differ across the country. Moreover, the fact that live-in caregivers are required to reside in the residences of their employers creates problems for the enforcement of labour standards legislation. Adding to the regulatory complexity are the associations that represent employment agencies and immigration consultants, which impose membership requirements and generate industry-specific codes of conduct.

42. *Ibid.* at 145.

43. Kahn, *supra* note 9.

44. Naj Ghosheh, "Protecting the Housekeeper: Legal Agreements Applicable to International Migrant Domestic Workers" (2009) 25 *International Journal of Comparative Labour Law and Industrial Relations* 301.

45. Martin Ruhs and Philip Martin, "Numbers versus Rights: Trade-Offs and Guest Worker Programs" (2008) 42 *International Migration Review* 249.

Canada's Live-in Caregiver Program

Established in 1992, the Live-In Caregiver Program (LCP) is a special stream of the general Temporary Foreign Workers Program (TFWP), which is designed to fill a specific labour shortage in the country—the lack of people willing to reside in private households and provide care to members of those households. Like the majority of the streams of the TFWP, it is employer driven, and it ties the migrant worker's entitlement to work in Canada to an ongoing employment relationship with a specific employer.⁴⁶ However, what distinguishes the LCP from other streams of the TFWP is that it requires the migrant worker to live in the private household of the person for whom the worker provides care. The *quid pro quo* is that it provides a unique pathway to permanent residency.

The LCP built upon, and formalized aspects of, its immediate precursor, the Foreign Domestic Worker Movement (FDM), which was established in 1981.⁴⁷ The change in nomenclature from domestic to caregiver signalled a shift in focus in the type of work to be performed by the migrant worker from a broader set of household tasks to caregiving exclusively. However, unlike its predecessor, instead of being targeted to meet the childcare needs of families who can afford to hire "private" employees, "the LCP is also being deployed to supply qualified Filipino nurses as live-in home support workers for elderly and disabled people."⁴⁸ According to Audrey Macklin, through the LCP, the "[p]rivatization of health care has replicated the logic of childcare in the domain of 'home care.'"⁴⁹

At the federal level, the governance of the LCP comprises legislation, regulations, manuals, and guidelines. Like the general TFWP, the LCP raises immigration and labour market issues, and three federal government departments are involved in its administration: Citizenship and Immigration (CIC), the officials of which issue work permits from Canada and temporary resident visas at offshore offices; Human Resources and Skills Development Canada/Service Canada (HRSDC), which is responsible for issuing labour market opinions regarding potential employers' job offers to live-in caregivers; and Canada Border Services Agency (CBSA), whose officers have the final decision about whether or not to admit the applicant at the Canadian border.

46. Judy Fudge and Fiona MacPhail, "The Temporary Foreign Worker Program in Canada: Low-Skilled Workers as an Extreme Form of Flexible Labor" (2009) 31 *Comparative Labor Law and Policy Journal* 5.

47. The Live-In Caregiver Program (LCP) departs from the Foreign Domestic Worker Movement (FDM) in that the LCP is embodied in regulations (not policies), imposes education, training, and language requirements on the person seeking entry under the program, and does not require the migrant worker to demonstrate skills upgrading and public service as a condition of obtaining permanent resident status. *Immigration Refugee and Protection Act*, S.C. 2001, c. 27 [IRPA]; *Immigration Refugee and Protection Regulation*, S.O.R./2003-227 [IRPR].

48. Macklin, *supra* note 9 at 228.

49. *Ibid.*

Prospective employers must obtain a labour market opinion (LMO) from the HRSDC, which assesses the impact that hiring a foreign worker would have on Canada's labour market. In order to obtain a favourable LMO, employers (or their representatives) must detail their recruitment efforts, meet minimum advertising requirements, and, depending upon the province or territory in which the employer resides, apply for a Québec acceptance certificate, register with the BC Ministry of Labour and Citizens' services, or obtain a certificate of registration from the Manitoba Employment Standards Division.⁵⁰ If the HRSDC approves the employer's application, the employer must prepare and sign an employment contract, a sample of which is available on the Internet, and send a copy of the favourable LMO and signed employment contract to the live-in caregiver. At that stage, the live-in caregiver applies to the CIC for a work permit and includes a copy of the LMO and the employment contract, which she or he must also sign.⁵¹

Prospective employers must "have sufficient income to pay a live-in caregiver," "provide acceptable accommodation in [their] home" (a private, furnished room), and "make a job offer that has primary caregiving duties for a child or an elderly or disabled person."⁵² They must also pay for all services, fees, and costs of a recruitment agency and for all travel costs of the caregiver to and from Canada. Live-in caregivers cannot "work for more than one employer at a time . . . a health agency or labour contractor, or in a day care or foster care,"⁵³ and they must meet the eligibility requirements of the LCP.⁵⁴ These prerequisites are verified at an interview with a visa officer at the Canadian diplomatic mission in the country where the worker is living. If the live-in caregiver meets the medical, criminal, and security clearances, the CBSA issues a work permit at the border.⁵⁵

The live-in caregiver's work permit is linked to a specified employer. If she resigns or is dismissed, she must find another employer, with an offer of employment validated by the HRSDC and the CIC and then obtain a new federal work permit, which may take up to a month, during which time she is not permitted to work. After having worked as a live-in caregiver for a cumulative period of at least two years during the four years following her arrival in Canada, the live-in caregiver may apply for permanent residence without having to leave the country

- 50. Human Resources and Skills Development Canada (HRSDC), "Live-in Caregiver Program (continued)," <http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/lcpdir/lcpthree.shtml>.
- 51. *Ibid.*
- 52. Citizenship and Immigration Canada, "Hiring a Live-in Caregiver – Who Can Apply," <<http://www.cic.gc.ca/english/work/apply-who-caregiver.asp>>.
- 53. Human Resources and Skills Development Canada (HRSDC), "Temporary Foreign Worker Program: Live-in Caregiver Program," <http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/lcpdir/lcpone.shtml>.
- 54. The eligibility requirements include education, training or experience, and the ability to understand English or French so that they can function on their own in an unsupervised setting. *IRPR*, *supra* note 47, sections 112-13.
- 55. Citizenship and Immigration Canada, *supra* note 52.

or to meet the skills-based criteria that the majority of applicants who apply for permanent residence are required to meet.⁵⁶

Once a migrant domestic worker achieves permanent status, she is no longer required either to live in the home of her employer or to engage exclusively in caring activities for a single employer. She can also sponsor family members as permanent residents. However, the transition from temporary migrant to permanent status is not immediate. It typically takes between twelve and eighteen months for a live-in caregiver who has fulfilled all of the conditions of the LCP to receive permanent resident status.⁵⁷ Over 90 percent of the foreign nationals who enter Canada under the LCP apply for permanent residence status, and 98 percent of them are successful.⁵⁸ While the vast majority of caregivers no longer live in their employers' homes after they obtain permanent resident status, the majority face huge barriers to obtaining better jobs.⁵⁹ The Philippines supplies about 95 percent of the migrant workers admitted under the LCP.⁶⁰ The program is highly gendered. In 2005, only 5 percent of the workers admitted under the LCP permit were men.⁶¹ Recruitment into the LCP is typically through family networks and private employment agencies.⁶²

The LCP is an important mechanism for addressing the care needs of Canadian families. As Table 1 indicates, the numbers of LMOs issued under the LCP program has risen dramatically over the past few years, from 23,480 in 2005 to 35,090 in 2008.⁶³ Moreover, these figures simply capture the flow of migrant caregivers entering Canada each year—the stock is much higher since a typical work permit is valid for three years.

Despite the LCP's popularity among Canadian families and migrant domestic workers and its characterization by the ILO as a "best practice" program, since it

- 56. The recently introduced Canadian Experience Class mechanism and the longer-established Provincial Nominee Program are a move away from a pure skills-based point system. Naomi Alboim, *Adjusting the Balance: Fixing Canada's Economic Immigration Policies* (Toronto: Maytree Foundation, 2009), <<http://www.maytree.com/wp-content/uploads/2009/07/adjustingthebalance-final.pdf>>. The regulations lengthening the period for determining whether the worker admitted under the LCP has achieved the minimum duration of employment came into effect in April 2010. See *Regulations Amending the Immigration and Refugee Protection Regulations*, SOR/2010-78, section 2 [*Regulations Amending the IRPA*].
- 57. Langevin and Belleau, *supra* note 9 at 42.
- 58. Department of Citizenship and Immigration, "Regulations Amending the Immigration and Refugee Protection Regulations" 143(5) Canada Gazette (19 December 2009) 3781 at 3781.
- 59. Zaman, *supra* note 9 at 91-134.
- 60. Reed, *supra* note 9 at 474.
- 61. Sandra Elgersma, *Temporary Foreign Workers* (Ottawa: Parliamentary Information and Research Service, 2007) at 4.
- 62. Reed, *supra* note 9 at 474.
- 63. While the number of labour market opinions (LMOs) authorized in a year does not necessarily correspond to the number of domestic workers who are admitted into Canada under the program (since the worker may bow out of the program, not be able to obtain a work permit, or be refused entry at the border, and the LMO may relate to a renewal), there is a high correlation between the number of LMOs issued and the number of live-in caregivers who enter Canada. After the global financial crisis in 2008, the number of employer applications for LMO's plummeted to 20,861 (see Table 1).

Table 1
Number of temporary foreign worker positions on labour market opinion confirmations issued under the Live-in Caregiver Program (by province/territory)

Province	2006	2007	2008	2009
Newfoundland and Labrador	—	21	24	43
Prince Edward Island	—	—	—	—
Nova Scotia	72	97	85	80
New Brunswick	43	63	72	66
Québec	2,063	2,151	1,702	1,174
Ontario	13,025	18,498	18,987	11,211
Manitoba	210	200	223	136
Saskatchewan	193	236	254	197
Alberta	3,758	5,096	5,894	3,534
British Columbia	6,201	7,107	7,405	4,355
Yukon	14	15	14	22
Northwest Territories	36	32	55	27
Nunavut	—	—	—	—
Canada—Total	25,632	33,532	34,732	20,861

Source: Human Resources and Skills Development Canada, *Temporary Foreign Worker Program, Labour Market Opinion Statistics, Annual Statistics 2006-2009*, <http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/stats/annual/table7a.shtml>.

provides a unique path to permanent residency,⁶⁴ the program has received a great deal of criticism.⁶⁵ Some of this criticism also pertains to the TFWP in general—for example, the link between the migrant workers' visa and an employment relationship with a specified employer, abuse of migrant workers by employment agencies and immigrant consultants, and the failure of the federal and provincial governments to monitor the program in order to ensure that employers are abiding by the terms of LMOs and employment contracts.⁶⁶ Changes to the regulations governing the LCP that came into effect on 1 April 2010 addressed some of the specific criticisms of the program. However, the largest complaint—the requirement that caregivers live in the employer's residence—remains.⁶⁷

The majority of the general and specific criticisms of the LCP focus on the features of the program that increase the dependency of the live-in caregiver on the

64. ILO, *ILO Multilateral Framework on Labour Migration: Non-Binding Principles and Guidelines for a Rights-Based Approach to Labour Migration* (Geneva: ILO, 2006) at 74 [MFLM].

65. See the references in note 9 in this article.

66. Standing Committee on Citizenship and Immigration, *supra* note 3 at 30-40; Auditor General, "Chapter 2: Selecting Foreign Workers under the Immigration Program," in *Report of the Auditor General of Canada to the House of Commons* (Ottawa: Fall, 2009) at 33-4, <http://www.oag-bvg.gc.ca/internet/docs/parl_oag_200911_02_e.pdf>.

67. Standing Committee on Citizenship and Immigration, *supra* note 3 at 11-12. See *Regulations Amending the IRPA*, *supra* note 56 at section 2.

employer and, thus, increase the possibility of abuse by employers, employment agencies, and immigration consultants. In response to the criticisms leveled by the House of Commons Standing Committee on Citizenship and Immigration and the federal Auditor-General in 2009, the federal government published a number of draft amendments to the regulations governing the TFWP in general and the LCP in particular.⁶⁸ In the following section, I will refer to the criticisms, recommendations, and draft regulations that pertain to employment agencies that recruit and place migrant domestic workers in Canadian homes.

Governing Employment Agencies in Global Care Chains: The Case of Live-in Caregivers in British Columbia

International Norms

Two ILO conventions specifically address migrant workers: *Convention on Migration for Employment* (No. 97),⁶⁹ and *Convention on Migrant Workers* (No. 143).⁷⁰ *ILO Convention No. 97* and its accompanying recommendations aim to regulate the entire process of migration from entry to return.⁷¹ It also spells out procedures for private and public recruitment, and it encourages countries to sign bilateral agreements governing labour migration. It requires member states to undertake "to maintain . . . an adequate and free service to assist migrants for employment, and in particular to provide them with accurate information."⁷² *ILO Convention No. 143* is divided into two parts that can be ratified separately—one part endorses the equality of treatment of migrant and national workers, while the other part calls for sanctions on employers who hire unauthorized migrants and traffickers who smuggle migrants.

In its general survey on *ILO Convention No. 97* and *ILO Convention No. 143* in 1999, the ILO Committee of Experts found that these instruments did not address a number of developments in global migration, including the increasing role of private agents and intermediaries in managing international migration.⁷³ The rise

68. Department of Citizenship and Immigration, "Regulations Amending the Immigration and Refugee Protection Regulations (Temporary Foreign Workers)" 143(41) Canada Gazette (10 October 2009) 3051. The amendments were subsequently modified, in a manner that eased the requirements on employers to ensure that neither they nor employment agencies, exploited migrant workers. The regulations will come into effect on 1 April 2011. *Regulations Amending the Immigration and Refugee Protection Regulations (Temporary Foreign Workers)*, Doc. SOR/2010-172 (3 August 2010), Canada Gazette, Part II, Vol. 144, No. 17 (18 August 2010).

69. ILO *Migration for Employment Convention (Revised)*, 1949 (No. 97), [*ILO Convention No. 97*].
70. ILO *Migrant Workers (Supplementary Provisions) Convention*, 1975, (No. 143), [*ILO Convention No. 143*].

71. ILO *Migration for Employment (Revised) Recommendation*, 1949 (No. 86).

72. ILO *Convention No. 97*, *supra* note 69 at Article 2.

73. ILO, *Migrant Workers: General Survey on the Reports of the Migration for Employment Convention (Revised) (No. 97), and Recommendation (Revised) No. 86*, 1949, and the *Migrant Workers (Supplementary Provisions) Convention* (No. 143), and *Recommendation (No. 151)*.

in the migration of women to perform domestic or "sex" work was seen as a particular problem since these women are especially vulnerable to exploitation. Noting the low level of ratification of the migrant workers conventions by receiving countries, the Committee of Experts recommended two options: (1) promoting the existing standards and developing supplementary protocols to address their gaps and shortcomings; and (2) revising the two instruments into one convention.⁷⁴

The ILO selected the first option. In 2005, the ILO Tripartite Meeting of Experts adopted the *Multilateral Framework on Labour Migration (MFLM)*, which was approved by the ILO's Governing Body in 2006.⁷⁵ Voluntary guidelines set out in the *MFLM* address the problem of private recruitment agencies. In addition to endorsing bilateral and multilateral agreements to supervise migration processes and to control abuses in recruitment, placement, and employment, the guidelines urge member states to implement systems for licensing international recruitment agencies, which include the suspension of agents' licenses when they behave unethically or violate the law, and encourage self-regulation by private agents. They also prohibit recruitment agencies from charging fees to migrant workers and recommend that migrant workers be compensated for financial losses resulting from failures of recruitment or contracting agencies.⁷⁶

The growth in private fee-charging employment agencies that place workers across national borders coincided with a general decline in the role of public employment services and concerted efforts by private employment agencies to legitimate their role as labour market intermediaries. These efforts culminated in 1997 in the *Private Employment Agencies Convention, 1997* (No. 181),⁷⁷ which replaced *Fee-Charging Employment Agencies (Revised) Convention, 1946* (No. 96),⁷⁸ which advocated the abolition of private employment agencies. Article 7(1) of *ILO Convention No. 181* prohibits employment agencies from charging workers "directly or indirectly, in whole or in part, for any fees or costs to workers," although Article 7(2) allows some exceptions to be justified and notified to the ILO under Article 22 of the ILO Constitution.⁷⁹ In order to allay the concern that temporary migrant workers were being exploited by unscrupulous employment agencies, Article 8 urges member states to "provide adequate protection for and prevent abuses of migrant workers recruited or placed in [their] territory by private employment agencies" and to conclude "bilateral agreements to prevent abuses and fraudulent practices" that occur where workers are recruited in one

country to work in another.⁸⁰ Moreover, Article 9 of the *ILO Protection of Wages Convention, 1949* (No. 95) prohibits deductions from wages in order to secure employment through an intermediary.⁸¹ The ILO's 2007 *Guide to Private Employment Agencies* notes that the negative image of private employment agencies has led to their self-regulation.⁸² For example, the International Confederation of Private Employment Agencies has adopted a code of practice that, among other things, "expressly forbids the charging of fees to workers."⁸³ However, according to the ILO, self-regulation "cannot replace the role of national legislators and law enforcement agencies,"⁸⁴ and the guide provides an overview of a range of regulatory regimes for private employment agencies.

The Philippines has ratified all of the ILO conventions discussed earlier, with the exception of *ILO Convention No. 181*. Like many countries that have a significant number of overseas placement agencies, the POEA permits agencies to charge fees to employees in order to obtain a job, although it restricts the amount that can be charged.⁸⁵ By contrast, Canada has not ratified any of the ILO conventions that pertain to migrant workers, private employment agencies, or wage protection, although, as we shall see, there are some specific restrictions in some Canadian jurisdictions prohibiting employment agencies from charging fees to workers or prohibiting employers from deducting such fees from employees' wages.

Bilateral Agreements

As noted in the preceding section, the ILO considers bilateral agreements between receiving and sending countries to be the best way of managing temporary migration programs. The Philippines has concluded a number of bilateral agreements regarding the recruitment and treatment of domestic workers, although Canada is not among them.⁸⁶ Canada has entered into bilateral agreements with sending countries that participate in the Seasonal Agricultural Workers Program. Moreover, in 2008, the four western provinces entered into memoranda of understanding (MOU) with the Philippines government, which are designed to protect workers in the low-skill stream (now known as the Pilot Project for Occupations Requiring Low Levels of Formal Training).⁸⁷ These MOUs are intended to

80. *Ibid.*, section 8.

81. *ILO Protection of Wages Convention, 1949*, (No. 95), Article 9.

82. *ILO, Guide to Private Employment Agencies—Regulation, Monitoring and Enforcement* (Geneva: ILO, 2007) at 2

83. *Ibid.* at 29.

84. *Ibid.* at 2.

85. *Department of Labor and Employment, supra* note 33.

86. Ghoshch, *supra* note 44 at 314.

87. *Memorandum of Understanding between the Department of Labour and Employment of the Government of the Republic of the Philippines and the Ministry of Economic Development of the Government of British Columbia, Canada Concerning Co-operation in Human Resource Deployment and Development*, 29 January 2008 [MOU]. The MOU does not apply to workers

75. Report no. III (IB), International Labour Conference, 87th Session, Geneva, June 1999 (Geneva: ILO, 1999).

76. *Ibid.* at paras. 666-7.

77. *MFLM, supra* note 64 at 61; ILO Governing Body, *Minutes of the 295th Session* (Geneva, 28-30 March 2006) at para. 218.

78. *Ibid.* at 24-25.

79. *Private Employment Agencies Convention, 1997* (No. 181), [*ILO Convention No. 181*].

80. *Fee-Charging Employment Agencies (Revised) Convention, 1946* (No. 96).

81. *ILO Convention No. 181, supra* note 77, Articles 7(1) and 7(2).

ensure that temporary foreign workers recruited from the Philippines receive adequate protection from the time of recruiting by promoting "sound, ethical and equitable recruitment and employment practices."⁸⁸

The MOU between the Philippines and British Columbia obliges the Philippine government to send the British Columbia government a list of recruitment agencies that are licensed by it to recruit workers under the MOU. It also provides that employers shall pay the costs related to the hiring of workers and emphasizes that under the province's *Employment Standards Act (ESA)*, employers and sending agencies "must not request, charge or receive, directly or indirectly, any payment from a person seeking employment in British Columbia."⁸⁹ In addition to requiring sending agencies to provide workers with a contract or written offer of employment that sets out the minimum employment standards established under the MOU, the agencies are obliged to conduct mandatory orientation sessions regarding the contract for workers. Although the MOU "is not intended to be legally binding," the Philippines Overseas Office is allowed "to monitor Workers recruited under this MOU with the view to ensuring the protection and welfare of Workers under applicable Canadian and British Columbia laws."⁹⁰

The problem is that the MOU between the Philippines and British Columbia specifically excludes "Filipino nationals seeking to work in British Columbia as live-in caregivers."⁹¹ At the same time as the bilateral MOUs were being negotiated, the POEA promulgated a circular called *Guidelines of the Recruitment and Deployment of Filipino Workers to Canada*, which informs Canadian employment agencies of how to register with Filipino employment agencies and the POEA, stipulates the documents that must be submitted by agencies in order to recruit Filipino workers, and identifies which party is responsible for the various costs involved when workers migrate from the Philippines to Canada.⁹² Not only does the circular specifically apply to caregivers, it also requires the Canadian employer to "shoulder" all of the costs of recruitment, including visa fees and airfare.⁹³ Moreover, it notes that employment agencies are specifically prohibited from charging workers recruitment and placement fees in the four western provinces. However, the guidelines are only effective until province-specific guidelines relating to the MOUs are issued. It is extremely difficult for domestic workers to

who are entering by way of the live-in caregiver stream, but it appears to be designed for the low-skill stream. See Article 1(a).

88. *Ibid.*, Article 3(b) (iii).

89. *Ibid.*, Article 6.

90. *Ibid.*, Article 2(c) and Article 8. In 2008, a labour attaché was assigned to the Philippines consulate in Vancouver.

91. *Ibid.*, Article 1.

92. POEA, *Guidelines of the Recruitment and Deployment of Filipino Workers to Canada*, Memorandum Circular no. 06 (22 August 2008), <<http://www.poea.gov.ph/MCs/MC%206-08.pdf>>.

93. The employer is also responsible for a range of other costs, but the employee is responsible for passport fees, medical examination, and health insurance. *MOU*, *supra* note 87, Article 5.

determine their rights in light of overlapping and inconsistent treatment of live-in caregivers in the MOU and guidelines. It is precisely these inconsistencies and gaps that unscrupulous employment agencies can exploit and that create challenges for employment agencies that attempt to abide by the law.

Regulating Employment Agencies in the Philippines

The POEA represents the apex of the governance of out-migration in the Philippines, and its goal is to "promote and develop the overseas employment program" and "protect the rights of [Filipino] migrant workers."⁹⁴ The POEA is a client agency of the Department of Labour, and its governing body includes the secretary of labour and the representatives of recruitment and placement agencies as well as women's organizations. Among other things, the POEA issues licenses to engage in overseas recruitment and "manning" to private recruitment agencies, and it hears and arbitrates complaints and cases (with the exception of those concerning money, which are dealt with by the National Labour Relations Commission) against recruitment and manning agencies, foreign principals and employers, and overseas workers for reported violation of POEA rules and regulations.

Private recruitment agencies that operate in the Philippines are subject to detailed regulation. The *Migrant Workers and Overseas Filipinos Act of 1995* explicitly adopts a workers' rights-based approach to the regulation of recruitment agencies. Detailed regulations require agencies that recruit Filipino workers to work overseas to be owned and controlled by Filipino citizens as well as to meet a minimum capitalization and to place at least 1,000 workers within the first year of obtaining a license.⁹⁵ The regulations prohibit travel agencies from operating as recruitment agencies and require agencies to assume joint and several liability with employers for all of the workers' claims relating to wages. The regulations stipulate that the employer (or principal) is responsible for the cost of the worker's visa and airfare, and they limit the amount of the fee that a recruitment agency can charge the worker to a maximum of one month's salary unless such fees are prohibited in the host country. Since only employment agencies that are licensed by the POEA can submit the necessary documents for a Filipino migrant worker to be deployed in another country, it is necessary for a Canadian employer or Canadian employment agency to work with a Filipino agency.

94. POEA, "About POEA," <<http://www.poea.gov.ph/html/aboutus.html>>.

95. *Migrant Workers and Overseas Filipinos Act of 1995*, Republic Act no. 8042, Philippines, <http://www.poea.gov.ph/rules/ra_8042.pdf>.

96. POEA, *POEA Rules and Regulations Governing the Recruitment and Employment of Land-based Overseas Workers* (2002), <<http://www.poea.gov.ph/rules/POEA%20Rules.pdf>> [POEA Rules and Regulations]. For discussion of the POEA's employment-protection practices, see Rodrigues, *supra* note 27 at 120-2.

However, it is possible to avoid registering with the POEA and still recruit Filipino domestic workers by recruiting them in Hong Kong and Taiwan. In this way, it is possible to sidestep the Philippine's licensing scheme and still specialize in recruiting Filipino domestic workers to Canada.⁹⁷

Federal Legislation, Regulations, and Policies

Under the *Immigration and Refugee Protection Act (IRPA)*, regulations, and guidelines, it is lawful for employers to use a representative (for example, lawyers, immigration consultants, or hiring agencies) when seeking to obtain an LMO for a migrant worker.⁹⁸ Beginning on 1 April 2010, the federal government brought the LCP in line with the program for workers without formal qualifications, requiring employers of live-in caregivers to cover all of the costs of recruitment (such as those charged by employment agencies) and travel for caregivers and prohibiting them from recouping these costs from the workers.⁹⁹ While the federal government indicates that several provinces do not permit employment agencies to charge workers fees for job placements, it does not prohibit employment agencies from charging such fees to live-in caregivers. Instead of using its jurisdiction under immigration law to prohibit these practices, the federal government defers to the provinces and territories, which have the jurisdiction to regulate employment agencies. Moreover, the federal government does not enforce the employment contract that is a mandatory requirement of the immigration process, claiming that under the Canadian constitution, legal jurisdiction over employment relations is primarily a matter of provincial jurisdiction. Instead, the mandatory employment contract merely functions as a means for CIC officials to determine the legitimacy of the employer's job offer.

The federal government has responded to the findings of widespread abuse of migrant workers, including live-in caregivers, by introducing a voluntary monitoring program¹⁰⁰ and by introducing new regulations that would, among other things, make an employer ineligible to access the TFWP for a period of two years where the employer has been found to have provided significantly different wages, working conditions or tasks than that which was offered during the previous employment of a migrant worker.¹⁰¹ This assessment would take place at the

97. My thanks to Daniel Parrot for this observation.

98. Citizenship and Immigration Canada, "How to Hire a Temporary Foreign Worker: A Guidebook for Employers," <<http://www.cic.gc.ca/english/resources/publications/tfw-guide.asp>>. *IRPR*, *supra* note 47.

99. HRSDC, *supra* note 53. Prior to 1 April 2010, employers of live-in caregivers were not required to cover these costs.

100. HRSDC, "Temporary Foreign Worker Program: Monitoring Initiative Fact Sheet," <http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/ercompreview/factsheet.shtml>.

101. *Regulations Amending the Immigration and Refugee Protection Regulations (Temporary Foreign Workers)*, *supra* note 68 at 3782. Although some of the regulations pertaining to the LCP took effect in April 2010, the rest of the regulation will take effect on 1 April 2011. Unlike the draft

time of a new LMO request or work permit application, and it would consider the applicant's employment of migrant workers in the two years preceding the application. The federal government addressed concerns that recruiters are violating the law and abusing migrant workers by requiring the Department of Human Resources and Skills Development officials to consider the past compliance of employers, and any recruiters acting on their behalf, with federal and provincial laws that regulate the employment or the recruitment of employees in assessing LMO applications.¹⁰²

The problem with these proposals is that they fail to address directly the practices of recruiters, only addressing them indirectly through the prohibition of employers who have relied on a recruiter, which is typically an immigration consultant and/or an employment agency, from accessing additional migrant workers. While this step is an improvement over the federal government's current *laissez-faire* attitude to abusive recruiters, it does little to protect migrant workers who have been abused by recruitment agencies in the past. Moreover, it assumes that employers will be repeat users of migrant workers, an assumption that in the case of live-in caregivers is controversial since their employers are employing them to care for a family member and not to work in a commercial operation. Instead of allocating new funds to this endeavour, the federal government states that "necessary implementation measures . . . would be funded out of resources already allocated."¹⁰³

Some of the most egregious abuses of migrant workers by recruitment agencies could amount to human trafficking, which is a criminal offence under the *Criminal Code* and a prohibited practice under the *IRPA*. Under the *Criminal Code*, the offence does not require movement across an international border—any action in which a person is moved or concealed and is forced to provide or offer to provide labour is prohibited. Benefiting economically from trafficking is also prohibited, and it is an offence to withhold or to destroy identity, immigration, or travel documents to facilitate trafficking in persons. Such an offence carries a maximum penalty of five years' imprisonment.¹⁰⁴ Attention directed at human trafficking tends to focus on trafficking for the purposes of prostitution, although live-in caregivers have received some notice.¹⁰⁵

regulations, the regulations that were promulgated provide an opportunity to justify the discrepancies between the terms and conditions that the worker was offered and was actually given (see section 203(1.1)).

102. *Ibid.* at s. 203.

103. Department of Citizenship and Immigration, *supra* note 58 at 3785. According to the Auditor General, *supra* note 66 at 29, about 80 percent of the \$150 million in additional funding over five years provided in the 2007 federal budget went to the HRSDC for processing LMOs.

104. *Criminal Code*, R.S.C. 1985, c. C-46, ss. 279.01-279.04.

105. See, for example, Christine Bruckert and Colette Parent, *Organized Crime and Human Trafficking in Canada: Tracing Perceptions and Discourses* (Ottawa: RCMP Research and Evaluation Branch, 2004), <<http://dsp-psd.pwgsc.gc.ca/Collection/PS64-1-2004E.pdf>> (a focus on trafficking for the purposes of prostitution, with one mention of live-in caregivers at footnote 141); Langevin and Belleau, *supra* note 9 (focus on trafficking of live-in caregivers).

The *IRPA* targets cross-border trafficking in persons. Section 118 defines the offence of trafficking, which is to knowingly organize one or more persons to come into Canada "by means of abduction, fraud, deception, or the use of force or coercion."¹⁰⁶ Section 117 creates an offence, colloquially referred to as smuggling, of knowingly organizing, inducing, or assisting one or more persons to enter Canada without a valid travel document.¹⁰⁷ The federal government has widely publicized its prosecution, and the resulting conviction, of two labour brokers for unlawfully supplying foreign workers, and it has posted fraud warnings on the Internet.¹⁰⁸ However, prosecutions are the exception rather than the rule.

Employers are not the only ones entitled to use representatives to navigate the TFWP. Foreign nationals, including live-in caregivers, are also permitted to use these services when they are applying for temporary migrant worker status in Canada.¹⁰⁹ If the representative is charging a fee to the migrant worker for this service, the representative must be authorized, and the CIC only authorizes as representatives members in good standing of the Canadian Society of Immigration Consultants (CSIC)—lawyers who are members in good standing of a Canadian provincial or territorial law society or notaries recognized in Québec.¹¹⁰ Moreover, it is not unusual for employment agencies that specialize in placing migrant workers to be operated by immigration consultants who are members of the CSIC.¹¹¹ The CSIC was established in 2004, in the wake of reports of unethical and illegal practices by immigration consultants. It is "an independent, federally incorporated not-for-profit body," which is "responsible for regulating the activities of immigration consultants who are members and who provide immigration advice for a fee."¹¹²

Allegations of widespread fraud by immigration consultants have persisted despite the establishment of the CSIC. Membership in the CSIS is voluntary, and its only sanction is to suspend or revoke membership. There have been few successful prosecutions of "ghost" (fraudulent) immigration consultants, which is attributed to the dispersal of jurisdiction to investigate and to prosecute across a number of

106. *IRPR*, *supra* note 47, s. 118(1).

107. *Ibid.*, s. 117(1).

108. Citizenship and Immigration Canada, "Notice: Fraud Warning," <<http://www.cic.gc.ca/English/department/media/notices/notice-fraud.asp>>.

109. Citizenship and Immigration Canada, "Working in Canada: Applying for a Work Permit outside Canada," <<http://www.cic.gc.ca/english/pdf/kits/guides/5487E.PDF>> at 9.

110. *Ibid.* at 9-10.

111. It is possible to link immigration consultants to employment agencies by checking the IMMS476 form that a representative must submit along with a migrant workers visa application and cross-referencing the names against the lists of licensed employment agencies in various provinces. My thanks to Daniel Parrot for identifying the connection between immigration consultants and employment agencies.

112. Canadian Society of Immigration Consultants, "Mandate," <<https://www.csic-scci.ca/content/about>>.

federal jurisdictions.¹¹³ The federal minister of immigration and citizenship "vowed to crack down" on immigration consultants.¹¹⁴ Legislative amendments to the *IRPA* were quickly introduced and enacted. The amendments create a new offence by extending the prohibition against representing or advising persons for consideration in the immigration process to all third parties unless the third party fits into one of the exemptions, which essentially reflect CSIS membership.¹¹⁵ However, the problem with the "crack-down" is that its emphasis is on guarding Canadian borders from undesirable entrants at the expense of protecting migrant workers from abuse by unscrupulous consultants.

British Columbia

In Canada, several jurisdictions, including British Columbia, require employment agencies to be licensed and prohibit them from charging fees to place workers in employment. British Columbia also requires employers of domestic workers, which includes live-in caregivers, to register with the Employment Standards Branch. Under the licensing regime, which is provided in the *ESA* and its regulations, an agency must submit an application form, which contains a series of questions that tests the applicant's knowledge of the *ESA*, to the director of the Employment Standards Branch, along with a \$100.00 fee, and satisfy the director that the agency operates in the best interests of employers and persons seeking employment. Under the regulation, the director has the discretion to refuse to issue a license to an applicant who has had a previous license cancelled. The agency is required to keep information relating to all of its clients—both employers seeking employees and employees who are referred to employers—for two years. However, there is no requirement for the agency to post a bond. The director is authorized to cancel or suspend an employment agency's license if the agency makes a false or misleading statement in the application, contravenes the act or regulation, operates the agency "contrary to the best interests of employers or persons seeking employment," and, in "placing a domestic workers with an employer . . . does not inform the employer of the requirement to register the domestic worker with the Employment Standards Branch."¹¹⁶ The Employment Standards Branch publishes a list of registered employment agencies on its website.¹¹⁷

Although the *ESA* prohibits employment agencies from charging employees a fee for a job placement, agencies are permitted to charge people seeking

113. Colin Freeze and Joe Friesen, "RCMP Investigating Dozens of Immigration Firms," *Globe and Mail* (3 February 2010) at A1, A9.

114. *Ibid.*

115. *An Act to Amend the Immigration and Refugee Protection Act*, Third Session, Fortieth Parliament, 59 Elizabeth II, 2010, chapter 35.

116. *Employment Standards Act*, RSBC 1996, c. 113, ss. 1(1), 12 (*ESA*); *Employment Standards Regulation*, B.C. 396/95, s. 4.

117. Government of BC, Ministry of Labour, Employment Standard Branch, "Licensed Employment Agencies," <<http://www.labour.gov.bc.ca/esb/employment/>>.

employment for other services, such as advertising, resume writing, interview preparation, and immigration services.¹¹⁸ How an employment agency characterizes the fees that it charges to live-in caregivers is critical to the legality of the practice. In the case *Prince George Nannies and Caregivers Limited*, which is referred to in the introduction of this article, the principal of the employment agency (PG Nannies), Taiho Christopher Krahn, who was (and continues to be) a registered immigration consultant under the CSIC, appealed the order of the director's delegate to pay \$26,653.68 to fourteen Filipino live-in caregivers, arguing that the fees were permitted under the act.¹¹⁹ He claimed that the fees were for "advertising, resume preparation, image consulting, interview preparation, immigration settlement services and liaison services (between caregiver and employer)," and he relied on the BC Employment Standards Tribunal decision in *Re Serions* in support of his argument.¹²⁰ In *Re Serions*, there were two separate agreements between the employment agency and live-in caregiver, one for locating the employer and another for immigration services. While the tribunal upheld the director's determination that the agency had contravened section 11 (which prohibits employment agencies from paying any person for obtaining or assisting in obtaining employment for someone else), it asserted, in *obiter* and without any analysis, that immigration services were not caught within section 10.¹²¹

In *Prince George Nannies*, the Employment Standard Tribunal did not consider the *Re Serions* case to be of persuasive value since it involved two separate contracts, while, in the instant case, all of the services were bundled and there was only one fee.¹²² Thus, it upheld the delegate's determination that the fees that PG Nannies charged were prohibited under the *ESA*. The tribunal rejected the agency's assertion that the caregivers, by virtue of signing the contract, were placing an advertisement such that the fees were permitted. Moreover, it refused to apportion fee and to allow fees charged by PG Nannies for those services for which fees are permitted under the *ESA* on the ground that this would amount to an amendment of a contract found to be in violation of the *ESA*.¹²³ After PG Nannies's application for reconsideration was refused, the principal applied for judicial review, which was denied by the Supreme Court of British Columbia.¹²⁴

118. *ESA*, *supra* note 116, s. 10.

119. *Prince George Nannies*, *supra* note 1.

120. *Ibid.* at para. 11.

121. *Re Serions*, BC EST no. D378/01 (12 July 2001), BC Employment Standards Tribunal, <http://www.bcest.bc.ca/decisions/2001/d378_01.pdf> at 5. The claim was outside of the six-month statutory limitation period.

122. *Prince George Nannies*, *supra* note 1 at para. 62.

123. *Ibid.* at paras. 74-6.

124. *Prince George Nannies and Caregivers Ltd.*, BC EST no. RD106/09 (21 October 2009), BC Employment Standards Tribunal, <http://www.bcest.bc.ca/decisions/2009/rd106_09.pdf>; *Prince George Nannies and Caregivers Ltd. v. British Columbia (Employment Standards Tribunal)*, 2010 BCSC 883.

Despite the fact that the caregivers were successful in obtaining an order that the fees they paid to the employment agency should be repaid, the decision is troubling. The tribunal effectively provided a blueprint to employment agencies about how to charge live-in caregivers fees for services without contravening the *ESA*. According to the tribunal,

if PG Nannies, as in the *Re: Serions* case . . . had separated the agreement for advertising or other services it provides from the placement service and not bundled them in a single agreement and further allowed the Caregivers to decide what services they wanted to engage or not engage PG Nannies for and not make the placement of Caregivers contingent on paying a single fee whether or not the Caregivers use those services then I would be more inclined to find merit in the submissions of PG Nannies.¹²⁵

If employment agencies are permitted to charge employees fees for some services but not others, they have an incentive to characterize the fee for placement services as, for example, a fee for immigration services, the effect of which is to allow employers to shift the cost of recruitment to workers. In the *Prince George Nannies* case, employers who obtained live-in caregivers from the agency were each only charged \$600, while the live-in caregivers were each charged \$4,000.¹²⁶

In recognition of the specific vulnerability of domestic workers, who include live-in caregivers, anyone who employs a domestic worker is required to register under the *ESA* and to provide the domestic workers with a written contract that outlines the domestic workers' duties, hours of work, wages, and charges for room and board.¹²⁷ The registration form requires the employer to provide her or his name, address, contact information, and, if applicable, the name and e-mail address of the employment agency, whether the domestic worker was admitted under the LCP, and, if it is available, the name of the domestic worker.¹²⁸ However, the employer is not required to submit a copy of the employment contract. Thus, there is no way of verifying whether the contract that the CIC requires in order for the live-in caregiver to obtain a work permit corresponds to the contract required by British Columbia.¹²⁹

Since the BC government has moved almost exclusively to a complaint-based method of enforcing the *ESA*, it is unlikely that either the registry for domestic

125. *Prince George Nannies*, *supra* note 1 at para. 68.

126. *Ibid.* at para. 10.

127. *ESA*, *supra* note 116, ss. 14-5.

128. *Employment Standards Regulations*, *supra* note 115, s. 13; BC Ministry of Labour, Employment Standard Branch, "Domestic Worker On-Line Registration," <http://www.labour.gov.bc.ca/csb/forms/domestic_rcg.htm>.

129. The British Columbia Labour Relations Board characterized the legal status of the CIC employment contract as a job application and not an enforceable employment contract. *SELI Canada Inc. v. Construction and Specialized Workers' Union Local 1611* (3 April 2008), BCLRB no. B40/2008.

workers or the licensing requirements for employment agencies serve an enforcement function.¹³⁰ The live-in caregivers in *Prince George Nannies* had to submit a complaint in order to enforce the act. Moreover, despite having been found to have violated the *ESA*, PG Nannies continues to be listed as a licensed employment agency.¹³¹ In addition to the mandatory licensing requirement in British Columbia, employment agencies can also join the Association of Canadian Search, Employment and Staffing Services (ACSESS). ACSESS provides and administers a certification program, which, among other things, requires candidates to comply with its Code of Ethics, which states that all members will "make no direct or indirect charges to candidates or employees unless specified by a license."¹³² However, few agencies that specialize in the recruitment of live-in caregivers are members of ACSESS.¹³³

Recommendations for Governing Brokers in the Global Care Chain

It is possible to build a governance regime that would minimize the opportunities for employment agencies and recruiters to exploit live-in caregivers. Such a governance regime would have to operate across a range of different jurisdictional scales and a variety of legal categories and employ a variety of legal techniques. It would have to be animated by the goal of protecting migrant domestic workers from exploitation and involve the collaboration of a number of different federal and provincial agencies.

At the international level, Canada should ratify the relevant ILO conventions—the two dealing with migrant workers (*ILO Convention No. 97* and *ILO Convention No. 143*), the convention pertaining to private employment agencies (*ILO Convention No. 181*), and the wage protection convention (*ILO Convention No. 95*). Individually and combined, these conventions make it very clear that employment agencies should not be permitted to charge migrant workers fees for placing them in employment. At the transnational level, the MOU between British Columbia and the Philippines should be extended to include live-in caregivers.

130. David Fairey, *Eroding Worker Protections: British Columbia's New "Flexible" Employment Standards* (Vancouver: Canadian Centre for Policy Alternatives, 2005), <<http://www.policyalternatives.ca/publications/reports/eroding-worker-protections>>.

131. Prince George Nannies Limited was listed on the 3 February 2010 list of registered employment agencies, but not on the 21 January 2010 list. Government of British Columbia, Minister of Labour, Employment Standards Branch, Employment Standards Regulations, "Licensed Employment Agencies" at 5, <http://www.labour.gov.bc.ca/esb/employment/ea_name.pdf>.

132. Association of Canadian Search, Employment and Staffing Services, "ACSESS Code of Ethics and Standards," <<http://www.acsess.org/ABOUT/ethics.asp>>.

133. A search of the Internet revealed dozens of employment agencies in Canada who recruit and place domestic workers and the names of these agencies were cross-referenced against the membership of the Association of Canadian Search, Employment and Staffing Services in February 2010.

This extension would require employers to pay for all of the costs, including airfare, of recruiting live-in caregivers and provide each national government with a list of employment agencies operating in the other country.

At the federal level, on 1 April 2010, the government moved in the direction of protecting migrant domestic workers by requiring their employers to cover all recruitment and travel costs for live-in caregivers. To strengthen the protection of such workers, the federal government should prohibit the representative of a migrant worker in the immigration process from acting as a recruiter for that worker and introduce legislation to regulate immigration consultants.

At the provincial level, British Columbia should follow the example of Manitoba by implementing a comprehensive regime to govern recruiters that specialize in placing migrant workers, as described later in this article. In addition to prohibiting either employers or recruiters from charging fees to migrant workers, Manitoba provides a registration system that covers the employers of migrant workers and foreign recruiters. The goal would be to build upon British Columbia's registry for employers of domestic workers and its regime for regulating employment agencies.

Under Manitoba's *Worker Recruitment and Protection Act (WRPA)*, which came into effect on 1 April 2009, employers seeking to hire migrant workers must register with the provincial employment standards branch.¹³⁴ Failure to do so results in the CIC's refusal to process the employer's immigration application for a foreign worker. Moreover, a significant or material variance between the provincial certification of registration and the LMO, including discrepancies relating to third party recruiters, also results in a refusal of the HRSDC to process the LMO.¹³⁵ Thus, in addition to requiring the employer to provide information about itself and recruiters, information that is crucial for enforcing the *WRPA*, linking provincial registration to the federal immigration process bridges the jurisdiction gap between immigration and employment protection. The director of the Employment Standards Branch is authorized to refuse to register an employer for the purpose of hiring foreign workers for, among other things, providing inaccurate information and engaging a recruiter who does not hold a license to engage in recruiting foreign workers.¹³⁶

Under the *WRPA*, any person engaged in recruiting foreign workers must be licensed. In order to be licensed, an individual must provide an irrevocable letter of credit or cash in the amount of \$10,000 to be deposited with the director of employment standards.¹³⁷ Third parties must be members in good standing of a provincial or territorial bar association, the Chambres des notaires du Québec, or the

134. *Worker Recruitment and Protection Act*, S.M. 2008, c.23 [*WRPA*].

135. Human Resources and Skills Development Canada, "Temporary Foreign Worker Program, Manitoba's 'Worker Recruitment and Protection Act' and Changes to HRSDC/Service Canada's Labour Market Opinion Application Process," <http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/questions-answers/manitoba.shtml#Q04>.

136. *WRPA*, *supra* note 134, s.12.

137. *Ibid.*, ss. 2(4) and 5; and Human Resources and Skills Development Canada, *supra* note 135.

CSIS.¹³⁸ As a condition of obtaining a license, a foreign worker recruiter must consent to the director's obtaining information relevant to the license. Moreover, the director can refuse to issue a license to a recruiter for reasons ranging from violating the law to acting without honesty and integrity. The license is valid for one year from the date it is issued, and it can be cancelled or suspended for the same reasons that a license can be denied or if the recruiter violates the *WRPA*, refuses to provide information requested by the director, or contravenes a condition of the license.¹³⁹

The *WRPA* prohibits anyone engaged in recruiting foreign workers from charging or collecting fees from a foreign worker for finding or attempting to find that worker employment. The Manitoba Employment Standards Branch interprets this provision as placing an absolute ban on foreign worker recruiters from receiving "any money (directly or indirectly), or any other benefit, from a worker they assist with employment."¹⁴⁰ Moreover, it states that if a fee is charged for immigration services, those services "cannot be provided by a person that is linked (directly or indirectly) to the recruitment activity."¹⁴¹ These provisions should put an end to attempts by recruiters to characterize placement fees as fees for other services. The *WRPA* also prohibits employers of foreign workers from recovering any costs incurred in recruiting a foreign worker unless it pertains to the "reasonable monetary value of a good, service, or benefit" that was given to the worker for the worker's benefit and it was not required by the employer.¹⁴² Nor is the employer allowed to reduce the wages or benefits, nor alter the terms or conditions of employment of a foreign worker. However, "an employer may sue to recover the . . . reasonable costs of recruiting" if the foreign worker engages in serious employment-related misconduct or fails to complete substantially the term of employment.¹⁴³

The Manitoba Employment Standards Branch promises to go beyond the individual complaints-based mechanism to enforce the *WRPA* and "conduct inspections and investigations to ensure fees are not connected to [foreign workers] seeking or finding work."¹⁴⁴ In addition to having to repay any fees charged in contravention of the act, any person who recruits without a license is subject to fines as high as \$25,000 to \$50,000. A list of licensed foreign recruiters is published on the

138. Human Resources and Skills Development Canada, *supra* note 135.

139. *WRPA*, *supra* note 134, ss. 9 and 10.

140. Manitoba Employment Standards, "Foreign Worker Recruitment Licence Information," <http://www.gov.mb.ca/labour/standards/doc/wrpa-license_info,factsheet.html>.

141. *Ibid.*

142. *WRPA*, *supra* note 134, s. 16(1). In Ontario, recent legislation goes further than the Manitoba legislation with respect to fees since it prohibits the deduction of any fees unless specifically proscribed. *Employment Protection for Foreign Nationals Act (Live-in Caregivers and Others)*, S.O. 2009, c. 32, s. 7 [*Employment Protection for Foreign Nationals Act*].

143. *WRPA*, *supra* note 134, s. 16(2).

144. Manitoba Employment Standards, "Foreign Worker Recruitment, Fact Sheet, Summary of What's New in 2009," <http://www.gov.mb.ca/labour/standards/doc,2009_whats-new,factsheet.html>.

Employment Standards Branch website.¹⁴⁵ If an employer is involved in charging impermissible fees, the employer's recruitment registration will be revoked.

Not only should British Columbia adopt the Manitoba model for governing employers and recruiters who hire and place migrant workers, it should consider introducing a handful of other provisions that are designed to promote decent work for domestic workers. First, it could deem the mandatory employment contract required by the CIC for live-in caregivers to be the domestic worker's contract and make it enforceable under the *ESA*. This initiative would clear up any confusion about the status of the CIC employment contract. Second, following the example of Ontario's new legislation that is designed to protect live-in caregivers, it should require employers of live-in caregivers to provide the workers with information relating to domestic workers' employment standards entitlements.¹⁴⁶ There is also no reason why agencies that recruit migrant domestic workers should not be required to provide this information to them. Third, since the best practice of managed migration is to ensure that employers bear the costs of recruiting migrant workers, employers who use employment agencies should be made joint and severally liable for all fees charged by the agencies to migrant workers.¹⁴⁷ Not only are employers better placed than migrant domestic workers to evaluate the agency, joint and several liability would both create an incentive for employers to question low fees charged to them and help to drive unscrupulous employment agencies out of the market.

Conclusion

As a white settler country, Canada has a long history of employment agencies acting abroad to promote immigration, and their unethical and unscrupulous practices have prompted regulation at the municipal, provincial, and federal levels beginning at the turn of the twentieth century. Moreover, the economic crisis of the 1930s triggered action at an international level, and in 1933 the ILO adopted the *Fee-Charging Employment Agencies Convention, 1936* (No. 34), which prohibited fee-charging agencies and gave meaning to the maxim that "labour is not a commodity."¹⁴⁸ In the 1990s, after a decades long campaign, private employment agencies were able to persuade the international community that they were

145. Manitoba Employment Standards, "The Worker Recruitment and Protection Act Valid License Holders," <http://www.gov.mb.ca/labour/standards/asset_library/pdf/wrpa_valid_licensees.pdf>.

146. *Employment Protection for Foreign Nationals Act*, *supra* note 142, ss. 11 and 12. This legislation was introduced as a result of the abuses that were disclosed and publicized in the newspaper articles cited in note 2.

147. Joint and several liability is a feature of the Philippines's regulation regarding recruitment agencies, see POEA Rules and Regulations, *supra* note 96.

148. ILO *Fee-Charging Employment Agencies Convention, 1936* (No. 34) [ILO Convention No. 34].

legitimate labour market intermediaries.¹⁴⁹ However, the abusive practices of too many transnational labour brokers tarnishes their claim.¹⁵⁰ One of the lessons of the past is that private fee-charging agencies can, if they engage in abusive practices, threaten not only their own legitimacy but also their very existence.¹⁵¹

Jurisdiction has been used as an excuse by the federal and some provincial governments for their failure to ensure that migrant domestic workers are not exploited by employment agencies. However, as I have attempted to show in the preceding section, the division of jurisdiction between the two levels of government over immigration and employment matters could be used as a resource to prevent the abusive practices of employment agencies. Jurisdiction is not a legal problem that prevents the effective regulation of employment agencies that place workers across national boundaries. The problem of obtaining decent work for migrant domestic workers is political.

Not all employment agencies involved in global care chains engage in abusive practices. There is evidence that employment agencies can help to structure and formalize the migration process, weeding out unscrupulous players.¹⁵² However, this result is not inevitable, and employment agency self-regulation is not a solution to abusive practices. A multi-level governance structure is necessary both to cultivate legitimate employment agencies and to uproot the unscrupulous ones.¹⁵³ Complaints-based enforcement mechanisms that rely on migrant domestic workers to police renegade employment agencies simply place the onus on the particular actor in the global care chain who has the fewest resources and least power to do so. The current failure of the governance of employment agencies suggests that decent work is a privilege of citizenship that is denied to migrant domestic workers until they earn the entitlement to leave their employer's home.

149. Leah Vosko, *Temporary Work: The Gendered Rise of a Precarious Employment Relationship* (Toronto: University of Toronto Press, 2000) at 45-78. Canada never ratified ILO Convention No. 34.

150. Philip Martin, *Merchants of Labor: Agents of the Evolving Migration Infrastructure*, Decent Work Research Program, Discussion paper no. /158/2005 (Geneva: International Institute for Labour Studies, 2005) at 24.

151. In its recent report, the International Labour Conference's Committee on Domestic Workers proposed that the conference adopt a convention for domestic workers, a component of which targets abusive practices by employment agencies and recommends a multi-pronged approach that includes registration, enforcement, and a complaints mechanism. International Labour Conference, *Report of the Committee on Domestic Workers*, 4th Item on the Agenda, Provisional Record, 99th Session, Geneva, June 2010, Proposed Conclusion at para. 20(2).

152. ILO, *Decent Work for Domestic Workers*, *supra* note 6 at 69.

153. Unionization and collective bargaining by domestic workers, a topic beyond the scope of this article, could help to ensure that employment agencies do not exploit migrant domestic workers.