

THE CANADIAN TEMPORARY FOREIGN WORKER PROGRAM: REGULATIONS, PRACTICES AND PROTECTION GAPSⁱ

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Abstract: *In recent years, the number of temporary foreign workers (TFWs) admitted to Canada has more than doubled. In this book chapter, Delphine Nakache examines the Temporary Foreign Worker Program (TFWP), in order to evaluate the Canadian approach to integrating and protecting these migrants. She considers three possible policy perspectives on the legal status of temporary foreign workers, according to whether the country of employment (1) sees temporary labour migration as an opportunity to integrate the workers; (2) is indifferent to their future position in society; or (3) tries to prevent their integration. In order to determine into which policy perspective Canada fits, the author analyzes one important integration mechanism - the employment related rights of TFWS - and briefly discusses the most prominent issues surrounding family accompaniment and access to permanent residency from within for these workers.*

INTRODUCTION

The number of persons entering Canada on a temporary basis is on the rise. Indeed, in 2007, for the first time in its history, and again in 2008, Canada welcomed more temporary than permanent residents. While the number of international students who initially entered the country in 2008 represented a 20 percent increase over 2004 (in part because Canada's post-secondary educational institutions are making a concerted effort to attract them), the highest increase was in the number of temporary foreign workers (TFWs). Between 2002 and 2008, the number of TFWs present in Canada (on December 1) rose by 148 percent, from 101,259 to 251,235, while total entries of these workers — that is, the sum of initial entries and re-entries — rose by 73 percent, from 110,915 to 192,519 (CIC, 2009b, 62-64).ⁱⁱⁱ While the two flagships of Canada's temporary labor migration programs, namely the Seasonal Agricultural Worker Program (SAWP) and the Live-in Caregiver Program (LICP), have remained relatively stable over the years, the Temporary Foreign Worker Program (TFWP) has undergone seismic changes in its purpose, size and target populations. And yet, until now, the TFWP has operated largely below the radar of public debate.

The TFWP came into existence in January 1973 (Department of Manpower and Immigration Canada 1975, vol. 2, 186). It was initially targeted at specific groups of people with highly

specialized skills, including academics, business executives and engineers. However, employer demand for workers to perform jobs requiring lower skill levels prompted the federal government to introduce in July 2002 the Pilot Project for Hiring Foreign Workers in Occupations that Require Lower Levels of Formal Training (herein referred to as the Low-Skill Pilot Project). A higher proportion of low-skilled workers have entered Canada since the inception of this pilot project. This is demonstrated by the fact that in 2002, only 26.3 percent of all TFWs were in low-skilled occupations (National Occupational Classification (NOC) C and D Occupations), whereas in 2008, the proportion had shifted to 34.2 percent (CIC 2009b, 66). By far, the largest increase was in NOC D occupations, which accounted for only 1 percent of the workforce in 2002 but 8.8 percent in 2008 (CIC 2009b, 66; Nakache and Kinoshita 2010, 4-5).^{iv}

Despite official claims that the TFWP is temporary, research has shown that TFWs have indeed become a pervasive feature of the Canadian labour market (Sharma 2006; Preibisch 2007). Low-skilled workers, particularly, «have become extremely experienced and valuable employees,” and are increasingly used by employers to fill permanent vacancies (Canadian Bar Association 2006, 9; Alboim 2009, 39). This phenomenon raises the following question: if the number of TFWs is increasing year after year, how “temporary” are these workers? Given that this “temporary” status is becoming increasingly permanent, it is important to examine the rules of the programs, both on paper and how they are applied in practice, in order to analyze the legal status of such workers and to examine how differential inclusion is structured for skilled workers (who are welcome to settle permanently) versus low-skilled workers (who are expected to leave when their work permits expire). The main objective of this chapter, therefore, is to establish whether the rules relating to the legal status of TFWs admitted for employment in Canada are structured in such a way as to assist eventual integration in the country of employment, or whether they discourage, or even prevent such integration. It is not taken for granted that all TFWs want to immigrate to Canada, but this chapter is focused on assessing the real opportunities for integration in Canada for those who commit to this country for several years and who may legitimately wish to settle here permanently.

According to Cholewinski, there are three different policy perspectives on the legal status of TFWs: (1) the temporary migrant is offered the opportunity to remain and integrate in the

country of employment; (2) the official scheme is indifferent to the temporary migrant's future position in society; it is left to the worker or the employer whether or not to encourage integration or participation in the social or political life of the country; and (3) the aim of the official rules is to prevent the integration of the temporary migrant, who is admitted for employment in the country only for a designated period of time (2004, 6). One major aspect of integration, which will be the main focus of this book chapter, concerns the employment-related rights for TFWs. The research questions addressed in this study with respect to the employment-related rights of TFWs can be summarized as follows: First, what rights do workers have to change their job, employer or employment sector? Secondly, do TFWs have a right to claim unemployment benefits and, if so, under what conditions? Is there a period for which unemployment benefits will be paid, and is there a period of unemployment after which TFWs may face expulsion from the country? Thirdly, what protections do TFWs have at work in terms of the enforcement of employment standards and the ability to claim workers' compensation? In addition, issues surrounding family accompaniment and access to permanent residency from within Canada are briefly discussed, with the objective of knowing, first, if family members of low-skilled TFWs are permitted to join them, and secondly, if and how such workers can acquire permanent residency after a few years.

This chapter is based on the results of documentary analysis, as well as a series of 11 interviews conducted in spring 2009 with individuals involved in the TFWP. These interviews were necessary in order to clarify and confirm the research findings, but most importantly to learn more about the growing disconnect between what is stated in law and what happens in practice. Clearly, the main difficulty that was encountered during the research process was in gaining an understanding of TFWs' rights in both law and practice. There are three major reasons for this.

To begin, the administration of the TFWP is complex and confusing. According to the *Constitution Act, 1867*, immigration is a matter of shared federal-provincial jurisdiction. In short, the Parliament of Canada may make laws with respect to "aliens," "unemployment insurance" and "criminal law," whereas "civil rights" are under the authority of provincial legislatures — meaning that provinces govern, for example, employment rights, health care, education and housing.^v Thus, while the federal government regulates the entry and stay of TFWs, many of

their protections, with the exception of employment insurance (EI), are covered by provincial laws. Given the shared federal-provincial jurisdiction of the TFWP, each of these players is somewhat restricted in its ability to resolve various challenges within the program.

Secondly, even if there is no apparent distinction on paper between, for instance, the employment rights of TFWs and those of Canadian citizens or permanent residents, these rights do not always transfer well into practice. TFWs may experience additional hurdles: inexperience with the Canadian legal and social systems, limited opportunities for permanent immigration, language barriers, misleading employer-provided information, and self-censorship to protect their jobs and threats of deportation, to name a few. Furthermore, the rights held out as protection for all may be of little value to TFWs due to their unique employment status, as well as restrictions placed on their work permits.

Thirdly, a number of policy changes to the TFWP have been implemented recently and this makes an up-to-date analysis of the relevant law and policy extremely difficult. For example, there is some discrepancy amongst legislation, jurisprudence and internal, unpublished policy regarding EI for TFWs, as is shown in this chapter.

This chapter begins with a description of the administration of the TFWP including restrictions imposed on TFWs by their work permits, as well as issues related to protection for TFWs during periods of unemployment. The second section deals with the rights of TFWs in the workplace and analyses the multiple barriers faced by low-skilled workers in attaining permanent residency from within Canada.

PROTECTION GAPS WITHIN THE ADMINISTRATION OF THE TEMPORARY FOREIGN WORKER PROGRAM

An understanding of the legal regime that regulates the entry and stay of temporary foreign workers admitted into Canada is essential in order to evaluate the TFWP. The variety of players and policies involved in the program has the potential to create communication and protection gaps within the day-to-day administration of the program. Another administrative element that is a major area of concern is the restrictive nature of the work permit, which limits workers' ability

to change employers or to receive benefits such as the federal employment insurance (EI).

Overlapping jurisdictions and policies in administering the TFWP

Under the legal framework of the *Immigration and Refugee Protection Act (IRPA)* and the *Immigration and Refugee Protection Regulations (IRPR)*^{vi}, three federal departments administer the TFWP. Human Resources and Skills Development Canada (HRSDC) administers the “employment validation” (also referred to as “employment confirmation” or “Labour Market Opinion” (LMO)) and deals exclusively with employers; Citizenship and Immigration Canada (CIC) deals with the workers’ immigration documents and matters pertaining to admissibility requirements; and the Canada Border Services Agency (CBSA) is responsible for immigration processing at the port of entry and has the final say on whether a worker can enter Canada.

To better illustrate the interaction among these three chief players, let’s turn to the extensive process by which a TFW enters Canada. *First*, an employer must apply to HRSDC to get an LMO regarding the impact the entry of a TFW will have on the Canadian labour market. HRSDC considers the terms and conditions of the recruitment (such as the wages and working conditions offered), and ensures that the TFW will not be taking a job that a Canadian could perform (HRSDC 2009c; *IRPR*, section 203).^{vii} HRSDC also requires that all applications under the Low-Skill Pilot Project have a specific contract, signed by both the employer and prospective TFW, that outlines the employer’s obligations toward the worker, including wages, working conditions, roundtrip transportation costs, medical coverage, assistance in finding suitable accommodation and payment of all costs related to hiring the worker (HRSDC 2009d; CIC 2010b, 34). LMOs for high-skilled occupations are valid for up to three years, while LMOs for NOC C and D occupations are valid for up to two years. *Secondly*, once the employer obtains a positive LMO from HRSDC, the prospective employee must then apply to CIC for a work permit. Applications for work permits are generally made outside Canada; however, there are situations where a work permit may be obtained at the port of entry or within Canada. The immigration officer will not issue a work permit unless satisfied that the applicant is able to perform the work sought (this may include the ability to communicate in English or French) and will leave Canada at the end of the authorized period.^{viii} When assessing work permit applications, CIC immigration officers are expected to exercise their discretionary “judgement in

making well-informed decisions” (CIC 2010b, 35). The decision to issue a work permit, therefore, is made on a case-by-case basis. *Finally*, the CBSA officer at the port of entry has the final say on whether an individual can enter Canada, and the prospective worker must also satisfy the officer that he or she has the ability and willingness to leave. Thus, a positive LMO and permission to work in Canada are not determinative of admission, since the CBSA officer still has to review all immigration, identity and work-related documents before printing off the actual work permit and letting the person enter the country.

In a recent publication, CIC admits that some cases may fall into an “apparent grey area”, and recommends better communication between HRSDC and CIC/CBSA:

Officers are encouraged to contact HRSDC in cases where, for example, a bit more detail regarding the job offer would assist the decision, and likewise are encouraged to respond to HRSDC queries in a timely manner. Ultimately, closer communication will result in quicker, more efficient service which benefits the clients (Canadian employers and the foreign workers) and the two departments (CIC 2010b, 36).

Certainly, communication between HRSDC and CIC/CBSA is critical for clarifying some of the grey areas unique to the TFWP. It is particularly important in an immigration law context, where wide discretionary powers are granted to CIC and CBSA officers and, therefore, the risks of making mistakes are not minimal, and mistakes may lead to detrimental consequences for the prospective worker. Interestingly, several interviewees indicated that communication between CIC and HRSDC has increased over the years. They also noted, however, that there are still significant communication gaps between CIC and CBSA, as officers of the two agencies have very different perspectives and approaches to their immigration work.

The restrictive nature of the work permit

Work permits issued under the TFWP tie each TFW to a single employer. However, individual conditions imposed on the work permit — for instance, the location where the applicant can work, the particular occupation and the duration — vary. The restrictive nature of the work, which is employer specific, limits the rights that workers might otherwise exercise to change employers. TFWs also might be ineligible for EI just because they are legally restricted from taking new employment (although physically able to be employed).

Impediments to foreign workers' ability to change their employment

Temporary foreign workers who wish to renew their work permit before it expires or to change any of its conditions must apply to CIC.^{ix} TFWs with an expired work permit may apply from Canada to restore their status within 90 days of the expiration of the permit, but there is no guarantee that CIC will restore their status.^x Since November 2008, there have been two application streams from within: one for renewal of a work permit with the same employer (the current processing time is 80 days) and one for changing conditions to a new employer (the current processing time is 25 days) (CIC 2008b). Workers who have applied to extend a work permit with the same employer before the expiry of their existing permit have implied status from the date on which the application is received and can continue to work at their existing place of employment as long as their application is in process and they remain in Canada (CIC 2009d). However, workers who have applied for a work permit with a new employer are not authorized to work for the new employer until they receive the permit.^{xi}

Although the processing time for getting a new work permit with a new employer has been reduced significantly since November 2008, the overall waiting time for finding a new job, obtaining a new LMO and getting a new work permit takes at least 4 to 6 months (Nakache and Kinoshita 2010, 17-18). Certainly, HRSDC's job banks are available to TFWs who are looking for a new job, but no special initiative has emanated from either the federal or the provincial governments to match such workers with employers who already have an approved LMO, or to assist them in finding a new job if they become unemployed or discover that there is no job waiting for them upon arrival in Canada. Legally, TFWs who have been laid off are allowed to stay in Canada for the duration of their work permit, but those who are not self-supporting are expected to return home, even if their permit has not expired, so as not to be in violation of their visa.^{xii} In reality, TFWs often face financial difficulty during their sometimes lengthy period of unemployment, especially if they cannot access government benefits. In response, they might resort to unauthorized employment and be at risk of exploitation by unscrupulous employers (House of Commons Canada 2009, 25).

Confusion about the right of temporary foreign workers to receive employment insurance

The federal EI program temporarily compensates workers who have become unemployed through no fault of their own and who are making an effort to get back into the workforce. Along with the regular benefits program, EI also includes sickness, compassionate care and maternity/parental benefits. TFWs and their employers make payments into EI just like Canadian workers. According to some recent estimates, TFWs and their employers contributed as much as \$303 million over 12 months in employment insurance premiums in 2008 alone (McLaren and Lapointe, 2010). However, the unemployed are not entitled to benefits merely because they have paid into the plan. Rather, a claimant must have worked a certain number of hours within the last 52 weeks or since the last EI claim. This is the “qualifying period”; the number of hours depends on the regional rate of unemployment. In addition, a claimant must prove that he or she is “capable of and available for work and unable to obtain suitable employment.”^{xiii}

There are several problems with TFWs trying to access EI. The first is obvious: unless the worker has been employed for the qualifying period, he or she is not entitled to benefits. Secondly, TFWs may not be entitled to receive EI because their “employer-specific” work permit restricts them from being “available for work” for other employers. This latter problem is the focus of this section.

Within the jurisprudence, being “available for work” is interpreted in terms of both a claimant’s self-imposed restrictions and state-imposed restrictions (such as the restrictions on a work permit). In relation to this point, Justice Linden of the Federal Court of Appeal wrote, “Availability for work is a statutory requirement and cannot be ignored by Umpires, whatever the extenuating circumstances may be.”^{xiv} Thus, according to case law, TFWs with restricted work permits are not “available for work.” The consequence of this interpretation of the statute is illustrated by the following example.

In 1997, Josephine Simmons, a foreign national from Ghana on a restricted work permit, was laid off from her job because of a shortage of work. She applied for EI but was denied. The umpire, Justice Jerome, affirmed the decision of the board, writing:

The Board recognizes that to satisfy the requirement of availability under the Act a person has to be available for work without restrictions. Although we sympathize with the claimant, here we find according to the evidence she is restricted involuntarily because of Employment Authorization which limits her to be employed by one employer only. As a result, when the employer laid off the claimant, she was restricted from finding other employment. Accordingly, she was not available for other work. The fact that the employer supports the claimant with a letter stating he will hire her back in April 1997 is irrelevant to this issue.^{xv}

The subsequent jurisprudence gives a fairly clear message: TFWs with restricted work permits are not “available for work” as defined by the Act.^{xvi} This message puts TFWs in a legal and financial bind: on the one hand, they cannot get EI because they are not legally available for work; on the other, once they are legally available for work — having found new employment and having applied for changes to their work permit — they are no longer eligible for EI. Thus, according to the jurisprudence, TFWs are entitled to the benefits, but only when they no longer need them (Nakache and Kinoshita 2010, 19-20).^{xvii}

In contrast, the HRSDC website indicates that TFWs are, in fact, eligible for EI: “Temporary foreign workers are eligible to receive regular and sickness Employment Insurance benefits if they are unemployed, have a valid work permit and meet eligibility criteria, including having worked a sufficient number of hours” (HRSDC 2009b). However, the department’s EI policy manual, *Digest of Benefit Entitlement Principles* (HRSDC 2009a) is confusing and engages in doublespeak as it grapples with the issue of the TFW. The guide states that a person whose work permit expires or limits the worker to one employer cannot demonstrate availability, even if the worker is willing to seek work. However, it also states that the referee must consider the specific facts of the case, asking such questions as: “Is the individual permitted to seek work with other Canadian employers? Is their work permit renewable? Has the work permit expired permanently?” Then the guide goes on to say that a claimant who does not currently have a work permit is not necessarily barred from working, since the claimant may be able to secure a work permit as soon as employment is secured because of the type of work he or she performs. Although this section is indicated as “currently under review,” the contradictory information provided is problematic because it is impossible to know clearly whether and under which conditions TFWs are eligible for EI.

In some provinces, reports from lawyers and nongovernmental workers tell a different story than the jurisprudence. In Alberta, for instance, applications for EI are usually accepted initially, so that no appeal is necessary.^{xviii} The change is good news for TFWs in Alberta, since there is a growing recognition that they are eligible for EI benefits while their permits are still valid and they are actively looking for work.^{xix} Yet, EI officers in other provinces are still routinely refusing benefits to foreign workers in the belief that such workers simply cannot receive them. As a result, unions representing TFWs assert that less than 1 percent of TFWs are actually able to claim regular EI benefits in Canada (McLaren and Lapointe, 2010).

Given the troubling discrepancies among legislation; jurisprudence; and internal, unpublished policies, it has become crucial that HRSDC communicate its EI policy in a more coherent manner and that it ensure consistency between the official position and the decisions rendered on specific cases.

In conclusion, the overall administration of the TFWP involves a number of key players who do not always take full responsibility for the protection and well-being of TFWs. In addition, the restrictive nature of the work permit is a contentious matter. Strict conditions on work permits dissuade TFWs from changing employers and lead them to believe, mistakenly, that EI benefits are not available to them. Thus, TFWs who are laid off, and cannot find alternative employment, cannot access EI, and cannot otherwise afford to stay, are expected to go home. As will be shown, their ability to access the full employment-related rights package also depends on the kind of work permit that was first issued to them.

THE CHALLENGE OF PROVIDING THE SAME EMPLOYMENT RIGHTS TO TEMPORARY FOREIGN WORKERS

Even though the federal government has jurisdiction over “aliens,” the protection of workplace rights for TFWs is the jurisdiction of the provinces. In theory, TFWs are afforded as many legal protections in the workplace environment as are other workers in any province, but those rights, which are complaint-driven, do not transfer well into practice. To better illustrate this point, the following section examines the legal situation of TFWs in Alberta. This section explores how the protections provided by the employment contract, the Alberta *Employment Standards Code*

and Alberta's workers' compensation can be limited for TFWs in this province given the uniqueness of their situation.

The employment contract

A key requirement under the TFWP is that the employer must sign an employment contract before initiating the HRSDC LMO process, and HRSDC must approve the contract before it will issue an LMO. The contract is a detailed job description that stipulates the terms and conditions of employment, including the minimum and maximum number of hours of work per week and the rate of pay. The employer must forward to the employee a signed copy of the contract, which the employee must then sign and present, with other required documents, at the mission abroad or at a port of entry (HRSDC 2009e). On paper, these layers of protection may appear satisfactory; in practice, however, protection gaps exist for the TFW. The best example of a protection gap is the worker's right to return airfare under the low-skill pilot project. As explained earlier, employers of TFWs in NOC C and D occupations are required, under the low-skill pilot project, to have a specific contract, signed by both the employer and the employee that outlines the employer's obligation toward the foreign worker (HRSDC 2009d; CIC 2010b, 34). Among the specific contract provisions, employers are required to pay for an employee's flight to and from Canada. If a worker has had more than one employer throughout the duration of his or her work permit, it is the final employer who is responsible for paying for the airfare.

What remedies are available to a worker whose employer refuses to pay for the flight home?

Although the employment contract contains mandatory provisions, the federal government cannot use it to enforce the employment rights of TFWs:

The Government of Canada is not a party to the contract. [HRSDC] has no authority to intervene in the employer/employee relationship or to enforce the terms and conditions of employment. It is the responsibility of each party to the contract to know the laws that apply to them and to look after their own interests (HRSDC 2009e).

Thus, even if HRSDC officers use the contract to assist them in formulating their LMO, the department has no regulatory authority to monitor employer compliance with the employment contract (Fudge and MacPhail 2009, 18). This is so precisely because TFWs' employment rights

fall under provincial jurisdiction.

Similarly, in Alberta, the authority of the *Employment Standards Code* to address contractual violations is limited. An Employment Standards officer can intervene only when an employer has violated the code — thus, for example, an employee may launch a complaint when the employer has not paid “earnings” to which the employee is entitled. But he or she cannot enforce the contractual right to return airfare because “... this is considered an expense, required under Service Canada’s Labour Market Opinion but which is outside of the scope of Employment Standards...”.^{xx} Representatives of Service Canada in Alberta recently confirmed that they would not enforce remuneration for airfare in the province.^{xxi}

Certainly, a TFW might find redress by confronting a contractual violation (such as return airfare) through court proceedings, but the time constraints on a work visa might present a practical barrier to successful litigation. It takes 9 to 12 months for a case to be heard at provincial court, and it is reasonable to assume that a worker who has been denied return airfare is nearing the expiration date of his or her work permit. Moreover, litigating from abroad is an onerous proposition for a worker in the low-skill pilot project.

What other options are available? A worker might pay for the flight out of his or her own pocket. A worker who cannot afford a ticket home could report to the Canadian Border Service Agency for a removal order, but the enforcement of a removal order, in most circumstances, will bar the worker from returning to Canada (*IRPA*, sections 47, 48, 52). Or a worker, out of necessity, might remain in Canada illegally.

The result, especially for the low-skilled worker, is that although protection exists, it might be inaccessible. Both levels of government offer protections to TFWs, but each is limited in its ability to enforce these rights, which is all the more troubling since this measure was taken precisely to mitigate the “risks of similar abuse and poor working conditions” occurring with the expected growth of the TFWP (Office of the Auditor General of Canada 2009, 33).

Practical and legal hurdles for temporary foreign workers: a complaint driven process

Another barrier to the protection of TFWs in the workplace is the fact that a complaint driven process is regularly used to address violations of TFWs' employment rights. If a worker faces a violation of his or her employment rights, the onus is placed on that worker to initiate a complaint against the employer. Initiating a complaint against one's employer can be both difficult and intimidating, and can often lead to "self-censorship" as TFWs may fear losing their job if they file a complaint. The province of Alberta is useful in analyzing the complaint driven process and its effectiveness in protecting the employment rights of TFWs in practice.

In Alberta, a worker whose employment rights have been breached under the *Employment Standards Code* can launch a complaint through the province's Employment Standards office. Although the complaint process is free, TFWs find it intimidating. In a 2007 newspaper report, a spokeswoman for the then Ministry of Employment, Immigration and Industry recognized that there was a "real disincentive" for TFWs to lodge complaints, and noted that only 18 out of the 4,000 complaints being investigated came from people who self-identified as TFWs (Harding and Walton 2007). Moreover, the bureaucratic nature of the complaint process might seem overwhelming to a TFW. Before making a complaint to an Employment Standards officer, the worker must fill out and submit a "self-help kit" to the employer as a first attempt to resolve the situation. This step is not a formal requirement of the code, but an officer has authority to refuse to accept or investigate a claim if the worker has not first explored other means of resolving the dispute (Alberta 2009; *Employment Standards Code*, section 83(3)). Also, a foreign worker's entitlements under provincial legislation are not easy to determine. While Alberta Employment and Immigration makes documents available that inform workers of their rights, these documents are in English only, as are the complaint forms and the instructions that accompany it. Thus, the complaint process itself could prove a barrier to TFWs who may struggle to fill out the forms, adequately explain the breach, and calculate the compensation due them.

Not only is the complaint process challenging for the TFW, the protections the *Employment Standards Code* offers the worker may not be worth the risks, since the code was not designed in consideration of the peculiarities of the situation of such workers. For example, termination pay is an important aspect of the code, as a provision to bridge the financial gap between prior and new employment, but no termination pay is required if an employee has worked less than three

months, and only one week of termination pay is required if the employee has worked less than two years.^{xxii} Since the work permit of a TFW is typically no longer than two years, this minimal institutional protection may be of little value to these workers. The length of time it takes for an employer to get an LMO and for the restrictions on a work permit to be changed means that a single week of termination pay or notice is insufficient to fill the gap between old and new jobs for most TFWs. Furthermore, termination pay is not required for certain occupations and in certain situations. While these exceptions are not unique to TFWs, only those workers are legally barred from finding immediate alternate employment.

In sum, because of their unique immigration status and particular vulnerability, TFWs are less likely than other workers to file a complaint against their employers under the complaint-driven system of Alberta's *Employment Standards Code*. Furthermore, some of the code's protections are of little value to such workers, who are restricted from finding immediate alternative employment or whose time in Canada is limited.

Workers' compensation

Temporary foreign workers are also protected under workers' compensation legislation, but few injured workers report claims to Alberta's Workers' Compensation Board (WCB), and those who do report a claim may find that the protection offered them, although "the same" as that offered every other Albertan, looks quite different because of work permit restrictions and their temporary status.

A central goal of the WCB is to bring a worker back to a state of "pre-accident employability" (Workers' Compensation Board-Alberta 2004a, 2). Thus, entitlement to compensation lasts until the worker is physically fit to work in a job of at least equivalent pay. Ideally, after recovery, the employee returns to the same job with the same employer for the same pay. If this is not possible, and the worker is physically capable of working in a different occupation, the WCB will provide wage-loss supplement benefits, in other words, it will "top up" the wages of the worker to match what he or she was making before the injury or illness.^{xxiii}

Clearly, the WCB is concerned only with “physical impediments to work,” not with legal impediments such as restrictions on the work permit. Therefore, if the WCB considers that the worker is physically fit to work but in a different occupation, it will ignore the work permit restrictions and treat the worker as employable. This means the WCB will consider which job in Alberta the worker might be suited for and calculate wage-loss supplement benefits accordingly (Workers’ Compensation Board-Alberta 2008). This policy is extremely unfair to TFWs, since those who are physically able to work in a different job for comparable pay, but legally barred from doing so because of the restrictions on their work permit, are no longer entitled to compensation under the Workers’ Compensation Act.^{xxiv}

In sum, TFWs are potentially in a more vulnerable position than other workers in reporting workplace injuries. The numerous hurdles they face in accessing their rights and the lack of effective mechanisms to protect their rights at work are subjects of concern and, as such, undermine the legitimacy of the TFWP as a whole.

To conclude, TFWs are a vulnerable employment group, as a result of the legislation under which they fall. These workers lack employment mobility and are less likely to report abusive employer practices or to benefit from the protections that exist for all workers. If TFWs, regardless of their skill levels, could migrate permanently, this would be an important step in giving them a more secure status at work, as is discussed in the next section.

BARRIERS IN TRANSITIONING TO PERMANENT RESIDENCY FOR TEMPORARY FOREIGN WORKERS

One of the reasons that the annual number of temporary migrants arriving in Canada has increased is that temporary migrants have discovered that it is “administratively simpler” to apply for and obtain permanent residence if they have already been admitted as a “temporary” skilled worker than to do so from abroad (Papademetriou and O’Neil 2004, 8). However, the potential impact on the rights of all TFWs and on their prospects for full integration is considerable. For example, the risk of being exploited through inferior wages or working conditions “can be quite substantial in the case of temporary admissions, where the [m]igrants may have to leave the country if they lose their job” (Papademetriou and O’Neil 2004, 11), but

for immigrants who are granted permanent work and residency rights from the beginning, that risk decreases significantly because they are free to change jobs. Moreover, “Those who ultimately achieve permanent residence may not make a successful transition because they did not have access to settlement or language services when they arrived...Because two-step immigration extends the amount of time people must live in Canada before being eligible for permanent residence and then citizenship, it will also have implications on their long-term relationship to Canada” (Alboim 2009, 49, 52). An additional problem with the transition-to-permanence admission is that it is mainly directed at educated and skilled-workers, offering little hope of permanent settlement and little opportunity for lower- skilled TFWs.

Legally, all TFWs, except seasonal workers admitted under the Seasonal Agricultural Worker Program (SAWP),^{xxv} may apply for permanent residence. While TFWs are expected to leave Canada after their authorized period of stay, intent to become a permanent resident does not preclude them from being admitted temporarily, as long as the immigration officer “is satisfied that they will leave Canada by the end of the period authorized for their stay.”^{xxvi} This is the “dual intent” provision, which states that temporary residents “who have, or may have, a dual intent to seek status as a worker and then eventually as a permanent resident, must satisfy the officer that they have the ability and willingness to leave Canada at the end of the temporary period authorized” (CIC 2010b, 46).

Foreign workers have four ways to transition from temporary to permanent resident status from within Canada: 1) the Live in Caregiver Program (LICP), 2) the Federal Skilled Worker Program (FSWP), 3) the Canadian Experience Class (CEC) and 4) Provincial and Territorial Nominee Programs (PTNPs). All these programs are subcategories of the economic class, which also includes Quebec-Selected Skilled Workers and Business Immigrants. Among the existing temporary work programs, the LICP has a unique provision that makes it possible for live-in caregivers to apply for permanent residency after having completed two years of authorized full-time employment within three years of their entry into Canada under the program.^{xxvii}

The LICP applies only to live-in caregivers, but the FSWP and CEC are the almost exclusive preserve of skilled TFWs, while PTNPs apply to both skilled and low-skilled workers. In order

to understand what this difference in treatment of skilled and low-skilled TFWs entails, the following section begins with an elaboration of how existing federal programs for permanent residence actually prevent low-skilled workers from shifting from temporary to permanent resident status. This is followed by a discussion on how conditions relating to family accompaniment act as a barrier for the low-skilled in attaining permanent residency. Finally, the potential of PTNPs to allow access to permanent residency for low-skilled workers is assessed. It is shown that if PTNPs are low-skilled TFWs' best bet to obtain permanent resident status, they also come with their own sets of limitations, which should not be underestimated.

Barriers to permanent residency for low-skilled temporary foreign workers

Both the FSWP and the CEC exclude low-skilled TFWs as potential applicants for permanent residence.

For a significant period of time, the FSWP allowed for admission of workers in all skilled occupations. Applications were assessed on the basis of “available funds” and the amassing of sufficient points in six selection factors to meet the pass mark (education, language ability, work experience (type of occupation and years worked), age, arrangements for employment in Canada and adaptability — that is, previous study or work in Canada, the ability of the applicant's spouse or common-law partner to integrate successfully into Canadian society and the presence of relatives in Canada).^{xxviii} This approach, however, had long been criticized as insufficiently responsive to short-term labour market demands (Nakache and Kinoshita, 2010). The new eligibility rules introduced in 2008 and amended in 2010 (Government of Canada, 2008) seek to remedy this weakness. Currently, the eligibility under the skilled worker class is limited to: (1) applicants with an offer of arranged employment or (2) applicants with one year of full-time work experience in one of 29 listed occupations. For the latter category, there is an annual 20,000 cap on applications; a maximum of 1,000 applications can be considered in each occupation. Applications that do not fall within one of the two categories are not put into processing.^{xxix} What's more, occupations within the two categories are skilled only (i.e., Skill Type 0 (managerial occupations), Skill Level A (professional occupations) or B (technical occupations and skilled trades) on the Canadian National Occupational Classification list). Therefore, unless low-skilled workers already in Canada have an offer of arranged employment

within one skilled occupation, or can display one year of full-time skilled work experience within one of the 29 listed occupations, they will be unable to earn admission into Canada through the FSWP.

The CEC was implemented in September 2008; its stated objective was “to make the immigration system more attractive and accessible to individuals with diverse skills from around the world and more responsive to Canada’s labour market needs” (CIC 2008a). Accordingly, the program allows skilled TFWs with at least two years of full-time skilled work experience in Canada, and foreign graduates from a Canadian post-secondary institution with at least one year of full-time skilled work experience in Canada, to apply for permanent residence from within the country. Applicants under this category must also demonstrate their proficiency in either English or French and their intention to reside in any part of Canada other than Quebec.^{xxx} While this new immigration stream permits skilled workers under the TFWP to apply for permanent residency from within Canada, those in NOC C and D occupations are not eligible.

Another impediment to the transition to permanent residency for the low-skilled are the conditions related to family accompaniment for TFWs. There is no regulatory bar to having family members accompany TFWs to Canada, but low-skilled workers are less likely than skilled workers to bring their families with them. The onus is on potential employees to demonstrate to the immigration officer that they are capable of supporting their dependents while in Canada. A key point that is considered when processing such applications is the employment situation of the applicant’s spouse. While the spouse of a skilled worker is entitled to enter Canada with an open work permit — one with no restrictions on the employer — the spouse of a worker hired under the low-skill pilot project is not eligible for an open work permit and requires an LMO if applying for a work permit. This, combined with the fact that workers with lower levels of formal training generally earn less (House of Commons Canada 2009, 14), raises, according to CIC, “very legitimate concerns regarding the applicant’s bona fides and ability to support their dependents while in Canada.”^{xxxi}

Furthermore, applicants must demonstrate that they are financially capable of meeting the expenses associated with a relocation to Canada, which could include “...the cost of travel to

Canada, health coverage and family accommodations...” (CIC 2010b). Since applicants have to demonstrate to the officer that they are capable of meeting these types of expenses, low-skilled TFWs “are less likely to be able to demonstrate adequate financial support and therefore less likely to be accompanied by family members” (House of Commons Canada 2009, 14).^{xxxii}

In summary, while skilled TFWs may have access to permanent residency through the FSWP or CEC, these options are not available to low-skilled foreign workers, who face practical or legal barriers in using these immigration programs. This situation reflects a clear policy goal: Canada wants low-skilled workers to leave the country after a certain period of time and skilled workers to settle permanently. Family unit rules are also a good illustration of this policy objective: the low-skilled are less likely to be able to demonstrate that they can support their dependents while in Canada because — unlike the spouses of skilled workers, who may obtain an open work permit — their spouses’ work opportunities in Canada are limited.

PTNPs: An interesting avenue to permanent residency for low-skilled temporary foreign workers?^{xxxiii}

For most low-skilled workers, the only viable option for accessing permanent residency is through a PTNP. A PTNP is a federal-provincial/territorial agreement under which a province or territory determines its own criteria for the selection of potential immigrants, based on its demographic and labour market needs and priorities. Once selected by a province or territory, applicants are granted permanent residency if they meet federal health and security requirements.^{xxxiv} Provincial and territorial nominees are not subject to the requirements of the points system applicable to the FSWP, nor does CIC impose a minimum selection threshold for these candidates. To date, all provinces (with the exception of Quebec) and territories (with the exception of Nunavut) have negotiated PTNP agreements with the federal government. Although they are a relatively new phenomenon (the first PTNP was introduced in 1998 in Manitoba), admissions under PTPNs have grown quickly, from approximately 500 in 1999 to 22,000 in 2008. To accommodate continuing growth of these programs, CIC anticipates admitting up to 40,000 provincial and territorial nominees annually between 2010 and 2012 (CIC 2009a, 9-10 & 15; CIC 2009 d, 10; Office of the Auditor General of Canada. 2009, 12).

The widespread use of PTNPs across Canada represents a promising development for low-skilled TFWs, as many Canadian nominee programs outline specific categories for recruiting low-skilled (NOC C and D) workers. . However, while PTNPs offer low-skilled TFWs unique opportunities to access permanent residency, they too have their drawbacks. To begin, not all low-skilled TFWs can access permanent residence from within Canada through a PTNP. They often have to fit within narrow categories that are employer-driven, and in many provinces, occupation-specific. What's more, because the PTNPs are designed to fill labour market shortages unique to each province, the categories under which low-skilled TFWs are eligible to apply vary considerably across Canada. This means concretely that “two temporary foreign workers with the same profile could have different opportunities to settle permanently based on the province or territory of their original work permit” (House of Commons Canada 2009, 10). In addition, if TFWs become unemployed, the whole application process can be cancelled in some provinces. Finally, many of the nominee streams geared towards attracting low-skilled TFWs are of limited duration. All this makes it hard for a potential candidate to navigate through the appropriate channels most importantly, all this demonstrates that while opportunities do exist for low-skilled TFWs to access permanent residency through these territorial nominee programs, there is a clear attempt to limit the numbers of low-skilled workers entering these territories permanently. In other words, these categories are designed to attract the low-skilled for a limited time only, until labour shortages are filled. ^{xxxv}

In sum, low-skilled workers lack a pathway to settle permanently in the country, even though employers are using them to fill long-term and even permanent vacancies. With the objective of confirming the “temporary” nature of the TFWP, one of the main regulatory changes proposed by CIC in October 2009 was to introduce a maximum stay of four years for TFWs, followed by a period of six years during which they would not be allowed to work in Canada. (It should be noted that there is no limit to the number of renewals under the current legislation [*IRPR*, section 201]). The federal government explained that, “This provision would signal clearly to both workers and employers that the purpose of the TFWP is to address temporary labour shortages, as well as encourage the use of appropriate programs and pathways to permanent residency in order to respond to the long-term labour needs of employers” (Government of Canada 2009).

Given the limited opportunities for low-skilled workers to transfer from temporary to permanent resident status from within the country, this new approach would accentuate the two-tiered nature of the TFWP (Canadian Council for Refugees 2009) and reinforce the message that the skilled are welcome to settle here permanently, while the lower skilled are expected to leave when their temporary work permits expire.

CONCLUSION

The legal treatment TFWs may expect to receive in Canada and their chances of integration depend to a great extent on their employment-related rights and their concrete opportunities to achieve a more secure immigration status (through permanent residency). This chapter makes an important point regarding Canadian policy toward the treatment of TFWs: that Canada's rules on the legal status of migrants admitted for employment have been largely structured according to one policy model for low-skilled workers, to discourage their integration, and two simultaneous policy models for skilled workers, to both discourage and assist their eventual integration. Concretely, this means that all TFWs are limited in their ability to take advantage of full participation, full integration and full protection because of the practical and legal parameters placed around their employment-related rights. However, in contrast to low-skilled workers, skilled workers are offered opportunities to access permanent residency from within Canada. If the proposed introduction of a four-year limit on temporary work visas enters into force, this would represent a third policy model that would explicitly prevent the integration of low-skilled TFWs into Canadian society.

As was shown in this chapter, the significant increase in the number of TFWs has led to a growing concern about their employment-related rights. If, on paper, such workers have the same workplace rights as any other workers in Canada, this is not true in reality. One of the main weaknesses of the TFWP are the strict conditions that are imposed on work permits, which are employer specific and limit not only the rights a TFW might otherwise exercise, but also the ability of the federal and provincial governments to protect the worker from exploitation. TFWs might be ineligible for EI because they are legally restricted from new employment. They might

find workers' compensation to be insufficient if it is cut off merely because the worker is physically, but not legally, able to be employed. Since they lack employment mobility, they are more likely to suffer from abusive employer practices rather than risk being unemployed. In order to reduce the power imbalance that exists between employers and TFWs, and to enable greater labour mobility amongst TFWs, it is essential that the employer-tied work permit be replaced by a sector or province-specific work permit, a recommendation that has already been made by the Standing Committee on Citizenship and Immigration (House of Commons Canada 2009, 25).

Another problem is the lack of effective mechanisms to protect the rights of migrant workers at work. Reliance on a complaint-based mechanism to enforce basic provincial labour standards does little to address the unique vulnerabilities of TFWs. TFWs might call public attention to employment law issues, but they need to understand what their rights are, whom they should talk to and what steps they should take. Perhaps most important, they need to see that the benefits of speaking out outweigh the inherent risks.

Finally, despite official claims that the TFWP is temporary, employers are using both skilled and low-skilled TFWs to fill long-term and even permanent vacancies. This highlights the need to reconsider the increasingly short-term focus of Canada's labour migration policies, which is unrealistic and will not help Canada achieve its long-term goals of promoting population and labour force growth. Focusing on the short term is also unfair to the vast majority of TFWs, who are expected to spend years in Canada without contributing to our society in the long run. It sends a message that Canada wants low-skilled individuals only as workers but skilled individuals as future citizens.

The Employment and Immigration Minister for Alberta, Thomas Lukaszuk, recently spoke to some of the problems with the "temporary" nature of the TFWP. Lukaszuk made the following statements in July 2010 about the program in Alberta: "In my opinion, it was a program that had fulfilled its mandate, (by) suddenly providing a large number of workers to an economy that suddenly had a massive shortage of workers, ... It's not working well now. It's a temporary solution to a permanent problem" (in Audette 2010, par. 2-3). In addition, Lukaszuk maintained

that permanent solutions for the temporary foreign workforce should be taken into consideration (in Audette 2010, par. 12). The fundamental question, therefore, is whether it is really in Canada's best interest to have policies that do not support the low-skilled temporary foreign worker and that do not give such workers the option to become permanent residents. There is a need for a wider public debate on these federal policies, which are aimed at transforming the landscape for economic immigration to Canada for years to come.

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Notes

ⁱ This book chapter is a condensed version of a previous paper: Nakache , D. and P. Kinoshita. (2010). The Canadian Temporary Foreign Worker Program: Do Short-Term Economic Needs Prevail over Human Rights Concerns? *IRPP Study*, No. 5.

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ⁱⁱⁱ Preliminary tables for “Facts and Figures 2009” (CIC 2010c) indicate an increase in the number of temporary foreign workers present in Canada, from 250,492 in 2008 to 282,771 in 2009, and a decrease in the number of entries of temporary foreign workers to Canada, from 192,373 to 178,640. The decrease in entries of temporary foreign workers to Canada is due to the 2008/2009 economic downturn and the subsequent pressure from Human Resources and Skills Development Canada (HRSDC) on employers to hire Canadian workers (in response to rising unemployment). However, with the recent economic recovery and job creation, it is unsure whether this trend will continue in a near future

^{iv} The National Occupational Classification (NOC) is a standard made by Human Resources and Skills Development Canada (HRSDC) that classifies and describes all occupations in the Canadian labour market according to skill types O, A, B, C and D. Occupations coded “O” are senior and middle-management occupations; “A” are professional occupations; “B” are technical and skilled trade occupations; and “C” and “D” are occupations requiring lower levels of formal training. **Throughout this chapter, when referring to “low-skilled workers”, we are therefore referring to workers performing jobs in NOC C and D occupations.**

^v *The Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c. 3, sections 91, 92 and 95.

^{vi} *Immigration and Refugee Protection Regulations*, SOR/2002-227.

^{vii} Concerns have been raised about how the actual rates are set and about the process for setting them. The House of Commons Standing Committee on Citizenship and Immigration has called for more transparency and stakeholder input in calculating prevailing wage rates (House of Commons Canada 2009, 24; see also Fudge and MacPhail 2009, 6-7). In response to these criticisms, HRSDC has issued revised instructions aimed at providing clearer and more consistent evaluation criteria. Acknowledging the progress that has already been made, the Auditor General has recommended that HRSDC also provide clear directives, tools and training to officers engaged in issuing LMOs, and implement a framework to ensure the quality and consistency of opinions across Canada (Office of the Auditor General of Canada 2009, 31).

^{viii} *IRPR*, sections 179, 200. A TFW may intend eventually to apply for permanent residence or may have an application in process, but the officer must be satisfied that the applicant will leave Canada at the end of the temporary period authorized, regardless of a future decision with respect to permanent status (*IRPA*, section 22(2); *IRPR*, section 183; CIC 2009c, 5-7).

^{ix} *IRPR*, section 201.1. TFWs are allowed to apply to change or extend their work permit from within Canada before it expires by mailing their application to the Vegreville, Alberta, Case Processing Centre (*IRPR*, section 201.1). Although a workers can submit his or her application on the last day of the work permit (section 201(1)), a CIC form stipulates: “If your current temporary resident status is still valid you can apply for an extension of your stay providing you apply at least 30 days before the expiry date of your current status” (CIC 2010a, 3). In practice, however, a TFW can mail his or her application (with a tracking number) on the last date of expiry to Vegreville (Susan Wood, Edmonton Community Legal Centre. Edmonton, Alberta, February 5, 2010, e-mail communication).

^x *IRPR*, section 182

^{xi} *IRPR*, section 186(u); section 124(1)(b) and (c).

^{xii} Interview with officials from Alberta Employment and Immigration, Edmonton, June 12, 2009; interview with Randy Gurlock, Citizenship and Immigration Canada, Ottawa, June 8, 2009.

^{xiii} *Employment Insurance Act*, sections 7(1), (2), (3) and 18(a). Qualifying periods range from 420 hours if the rate of unemployment is more than 13 percent to 700 hours if the rate of unemployment is 6 percent or less. For a new entrant to the workforce, the number of qualifying hours is 910 hours (*Employment Insurance Act*, 1996, section 7(3)).

^{xiv} *The Attorney General of Canada v. Cornelissen-O'Neill*, (A-652- 93), Federal C.A. at para. 1.

^{xv} CUB 43501, Simmons (Jerome, J.), December 21, 1998.

^{xvi} For a complete list of all case law in that field, see Service Canada: “The Index of Jurisprudence A Supplement to the Digest of Benefit Entitlement Principles.” Accessed November 1, 2009. <http://srv130.services.gc.ca/indexjurisprudence>.

^{xvii} For additional examples related to EI, see: Nakache and Kinoshita (2010, 19-20).

^{xviii} Anonymous interview, Catholic Social Services, Edmonton, Alberta, June 12, 2009; interview with Susan Wood and Sarah Eadie, Edmonton Community Legal Centre. Edmonton, Alberta, June 9, 2009.

^{xix} For more details on the EI process in Alberta, see: Nakache and Kinoshita (2010, 21).

^{xx} A 2008 letter received from the Edmonton Community Legal Centre in response to a claim for unpaid airfare.

^{xxi} Susan Wood, Edmonton Community Legal Centre. Edmonton, Alberta, February 5, 2010, e-mail communication.

^{xxii} *Employment Standards Code*, section 56.

^{xxiii} *Workers' Compensation Act*, section 56(8) and (9); section 63; also Workers' Compensation Board-Alberta (2004b).

^{xxiv} Anonymous interview, Workers' Compensation Board, Edmonton, Alberta, June 4, 2009; interview with Douglas Sackney, Workers' Compensation Board, Edmonton, Alberta, June 8, 2009.

^{xxv} It is technically impossible for seasonal workers admitted to Canada under this program to access permanent residency from within Canada: the work permit is valid for one period of eight months, is nonrenewable and workers must leave the country after the expiration of this period.

^{xxvi} *IRPA*, section 22(2); *IRPR*, section 183.

^{xxvii} *IRPA*, sections 110 to 115.

^{xxviii} *IRPA*, section 12(2); *IRPR*, section 76(2).

^{xxix} In June 2010, Citizenship and Immigration Canada (CIC) published revised Ministerial Instructions which affect the Federal Skilled Worker Program.. For more on this topic, see: <http://www.cic.gc.ca/english/immigrate/skilled/apply-who-instructions.asp>

^{xxx} *IRPR*, section 87.1.

^{xxxi} Section 5.25 ("Work Permits requiring HRSDC confirmation R 203") of CIC 2010b was revised in July 2009, September 2009 and February 2010. I am quoting here from an earlier version (May 2009, 32, hard copy on file with author).

^{xxxii} It should be noted that spouses of work permit holders who have been nominated for permanent residence under a Provincial and Territorial Nominee Program (PTNP) are entitled to open work permits for the duration of the principal applicant's work permit, irrespective of the applicant's skill level (CIC 2010b, 67). For more details on PTPNs, please see: (Nakache and Kinoshita 2010, 33-34).

^{xxxiii} This section is based on the results of documentary analysis, as well as research questionnaires that were completed by key governmental actors in the administration of PTPNs in May-June 2010. For a more comprehensive analysis of PTPNs, please see: D. Nakache and S. D'Aoust, "Provincial and Territorial Nominee Programs: An Avenue to Permanent Residency for Low-Skilled Temporary Foreign Workers?" McGill/Queens University Press (forthcoming). See also: Nakache and Kinoshita (2010, 35-39).

^{xxxiv} *IRPR*, section 87

^{xxxv} Of the provinces and territories that offer opportunities for low-skilled workers to obtain nomination through their PTNPs (British Columbia, Alberta, Saskatchewan, Manitoba, the Yukon and the Northwest Territories), only the Yukon and Manitoba do not restrict low-skilled applicants to specific occupations. For more on this topic, see: D. Nakache and S. D'Aoust, "Provincial and Territorial Nominee Programs: An Avenue to Permanent Residency for Low-Skilled Temporary Foreign Workers?" McGill/Queens University Press (forthcoming).