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**THE TEMPORARY FOREIGN WORKER
PROGRAM IN CANADA:
LOW-SKILLED WORKERS AS AN EXTREME
FORM OF FLEXIBLE LABOUR**

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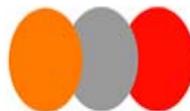
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The Temporary Foreign Worker Program in Canada: Low-Skilled Workers as an Extreme Form of Flexible Labour

Judy Fudge and Fiona MacPhail*

1. Introduction

The Canadian federal government is promoting temporary foreign migration for economic reasons and specifically to promote economic growth.¹ In *Budget 2007*, the federal government characterized the Temporary Foreign Worker Program (TFWP) as its “principal tool to help employers meet immediate skill requirements when qualified Canadian workers cannot be found.”² It also recognized the regional nature of the program; “in the Alberta oil sands and the construction sector in British Columbia, the program has become increasingly important for businesses in their efforts to remain competitive in Canada’s booming economy.”³ The federal government also promised improvements to the program that would make it easier for employers to access temporary migrant workers but that would also “not result in reduced employment opportunities for Canadians.”⁴

The federal government’s focus on the needs of employers in Canada and the Canadian labour market is reflected in Canada’s treatment of the international instruments regarding migrant workers. Like most receiving countries, Canada has not ratified the instruments that provide rights for migrants and that regulate labour market intermediaries.⁵ However, it has ratified those instruments that criminalize activities relating to human trafficking and human smuggling.⁶

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¹ Citizenship and Immigration Canada’s, 2006 *Annual Report to Parliament on Immigration* states “[i]n addition to selecting permanent residents, Canada’s Immigration program provides for the temporary entry of foreign workers and business people who are important to our economic growth.” *Annual Report to Parliament on Immigration* 2006, 22 at http://www.cic.gc.ca/EnGLIsh/pdf/pub/immigration2006_e.pdf

² *Department of Finance Canada, Budget 2007*, at 217;

<http://www.budget.gc.ca/2007/bp/bpc5de.html#immigrants>

³ *Ibid.*

⁴ *Ibid.*

⁵ Canada has not ratified either of the International Labour Organization’s migrant workers conventions: Convention 97, *Migration for Employment (Revised)*, 1949 and Convention 143, *Migrant Workers (Supplementary Provisions)*, 1975. Nor has it ratified the UN *Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* (ICRMW), which was adopted in 1990 and came into effect in 2001. The position of the federal government, which has jurisdiction to ratify treaties, is that it will not ratify ILO conventions to which the provinces, which have legislative jurisdiction over employment matters in Canada, do not conform. Yves Potsson and Allan Torobin, “The Right to Organize and Collective Bargaining: Canada and the International Labour Organization Convention 98,” (Summer 1999) 2:2 *Workplace Gazette* 86-90.

⁶ Canada has ratified both the *Convention against Transnational Organized Crime* and the two protocols that target specific aspects of trafficking. The federal government, which has legislative jurisdiction over criminal and immigration law, has outlawed trafficking in the criminal code and in the immigration legislation. The *Criminal Code*., S.C. 2005, c. 43, s. 279.01 prohibits trafficking in persons, which is defined as the recruitment, transport, transfer, receipt, concealment or harbouring of a person, or the

This article focuses on the legal regime that regulates the entry and exit of low-skilled temporary foreign and these workers' rights and terms and conditions of employment while in Canada. We have chosen to study this program because little has been written on it and it is an example of the international trend towards a proliferation of temporary migration programs for low-skilled workers.⁷ In this article, our primary concern is the employment-related rights of the temporary foreign workers who fill the jobs that employers in Canada cannot find Canadian citizens or permanent residents to take. We are also interested in beginning to explore the impact of this program in relation to the Canadian labour market. In order to understand the distinctive features and effects of the low-skilled temporary foreign workers program, we situate the low-skill TFWP in the context of the emergence and development of Canada's general TFWP.

We begin by tracing the changes in the TFWP from its birth in the 1970s, and the gradual shift from immigration for permanent settlement to a reliance on temporary workers to address labour market shortages. We show how changes introduced in the 1990s resulted in the polarization and proliferation of targeted temporary migrant worker programs with different restrictions and entitlements for different groups of workers. We present data to demonstrate the rise in the numbers of temporary foreign workers entering Canada associated with these Program changes. The data also foreshadows the changes to the low-skill TFWP, which we concentrate on in the second part of the article. In our discussion of the low-skill TFWP, first we analyze the changes that have made the program more "employer-friendly" and then we examine the mechanisms designed to protect temporary foreign workers. In the conclusion, we offer a preliminary (and tentative) assessment of the impact of the program on the Canadian labour market and evaluate whether or not the employment rights of the workers who are admitted under it are protected. We also indicate how the economic crisis has influenced the legitimacy of the low-skilled TFWP.

exercise of control, direction or influence over the movements of a person, for the purpose of exploitation. It is also an offence to withhold or to destroy identity, immigration, or make travel documents to facilitate trafficking in persons, and this offence carries a maximum penalty of five years' imprisonment. Unlike the *Criminal Code*, the immigration legislation specifically targets the illegal movement of people across national borders. Under the *Immigration and Refugee Protection Act*, (IRPA), S.C. 2001, c. 27, ss. 117 and 118, smuggling, ("knowingly organize, induce, aid or abet the coming into Canada of one or more persons who are not in possession of a visa, passport or other documentation required by the Act") and trafficking, ("knowingly organize the coming into Canada of one or more persons by means of abduction, fraud, deception or use of force or coercion") are prohibited. Notably absent in IRPA are provisions for the protection of victims. However, the Department of Citizenship and Immigration has introduced a policy that provides immigration officers with the discretion to issue temporary resident permits to trafficked persons for up to 180 days, see Laura Barnett, "Bill C-57: An Act to amend the Immigration and Refugee Protection Act," Prepared for Law and Government Division, 5 June 2007, Revised 24 July 2007 Legislative Summaries prepared for the Library of Parliament, http://www.parl.gc.ca/common/bills_ls.asp?lang=E&ls=c57&source=library_prb&Parl=39&Ses=1#a trafficking (accessed 18 August 2008).

⁷ V. Leary, "Labour Migration," in T.A. Alienikoff and V. Chetail eds. *Migration and International Legal Norms* (The Hague: C.T.M.C. Asser Press, 2003) 231-2; quoted in Ryszard Cholewinski, "International Labour Law and the Protection of Migrant Workers: Revitalizing the Agenda in an Era of Globalization," John D. Craig and Michael Lynk, eds., *Globalization and the Future of Labour Law* (Cambridge: Cambridge U.P. 2006) in 409, at 413.

2) The Temporary Foreign Worker Program

i) The Introduction of Temporary Foreign Worker Programs

The first general temporary foreign migrant worker program, called the Non-Immigrant Employment Authorization Program (NIEAP), was introduced on January 1, 1973, and while modified over time, such programs have become an established part of immigration and labour policy. The NIEAP placed restrictions on visitors who intended to work in Canada and workers admitted under it were only entitled legally to stay in Canada for the duration of authorized employment. Migrant workers were no longer allowed to apply for work permits from inside the country and they had to leave Canada in order to apply to change their immigration or employment status. Work permits assigned temporary foreign workers to a particular employer and stipulated their occupation, residence, and length and terms of employment.⁸ Not only was their access to Canada restricted, but once admitted, temporary foreign workers' labour mobility was restricted; these workers were required to obtain written permission from immigration officials to alter their conditions of work or to change employers. As soon as their employment authorization expired, which depended upon an on-going employment relationship with a specific employer, they were required to leave the country, and they could only apply for another work permit from abroad. Temporary foreign workers admitted under the NIEAP were not entitled to circulate freely within the labour market.

Essentially, the NIEAP was a rotation system of immigration and employment, the only temporary feature of which was the worker.⁹ In the majority of years after the introduction of the NIEAP in 1973, temporary migrant workers have outstripped immigrants who intend on settling permanently in Canada.¹⁰ The NIEAP signaled a shift in Canadian policy from immigration for permanent settlement to temporary foreign workers.¹¹ It also signaled the increased reliance by employers on unfree labour to perform work that was not attractive to workers who enjoyed freedom in the labour market.¹²

The basic elements of the NIEAP continue to provide the structure of Canada's temporary foreign workers program (TFWP). The TFWP is jointly administered by two federal departments; the labour department, now called Human Resources and Skills Development Canada (HRSDC), administers the employment authorization, and deals exclusively with employers, while the immigration department, now called Citizenship and Immigration Canada (CIC) deals with the workers and immigration matters pertaining to medical examinations, fees, and, if necessary, temporary residents visas. HRSDC is responsible for the program's impact on the Canadian labour market. The visa official, by contrast, is concerned with assessing the suitability of the migrant worker.

⁸ Only citizens and permanent residents are entitled to work in Canada without a special document. The term "work" is defined in the Regulation as an activity for which wages or commission is earned, or that competes directly with activities of Canadian citizens or permanent residents in the Canadian labour market, Immigration and Refugee Protection Regulation (IRPR), S.O.R. 2003-227 s.196.

⁹ NANDITA RANI SHARMA, *Home economics: nationalism and the making of 'migrant workers' in Canada* (University of Toronto Press. 2006), 105.

¹⁰ *Ibid.*, 117.

¹¹ *Ibid.*, 20.

¹² *Ibid.*.

The visa officer must be satisfied that the applicants will be genuine temporary residents and that they will respect the terms and conditions of the work permit.¹³ In assessing the “bona fides” of the application, the visa officer is required to consider a number of factors. The officer must consider any intention by the foreign national to become a permanent resident (which is known as “dual intent”), the applicant’s personal circumstances, and the context in the applicant’s home country.¹⁴

The TFWP is employer driven and is not governed by quotas. It is intended to ensure the recruitment of people from outside of Canada for jobs for which there are not sufficient Canadian citizens and permanent residents to perform. The first step is for the employer who seeks to recruit foreign nationals to work temporarily in Canada to obtain an employment authorization, known as a Labour Market Opinion (LMO). The employment authorization, which is issued by HRSDC, fulfills the dual function of ensuring that foreign workers do not take jobs seen as belonging to Canadians or undercut Canadian terms and conditions of employment.¹⁵ As part of the employment authorization, HRSDC is required to ensure that the employer has made reasonable efforts to recruit citizens and permanent residents and is paying the prevailing “Canadian” rate to foreign nationals. The requirement that employers obtain an employment authorization plays an important role not only in legitimating the use of temporary foreign workers, but also in influencing how the program impacts upon the Canadian labour market. Thus, it is important to examine more closely the process for obtaining an employment authorization and the authorization requirements.

One of the key components of the employment authorization is that employers pay the temporary foreign workers the prevailing wage rate for jobs of that type in the particular region. How the prevailing wage rate is set is both controversial and opaque. The employer is obliged to set out the wage rate for the job in her or his application for a temporary foreign worker, which is then reviewed by an HRSDC official. In determining the prevailing wage rate for a particular job, HRSDC and employers may consider general labour market and specific industry surveys, several of which are provided by the government and are available on the Internet.¹⁶ HRSDC officials rely on the National Occupational Classification (NOC), which is broken into five general skill categories, to classify the work the foreign national is expected to perform. This classification is

¹³ See: *HRSDC Assessment for Labour Market Opinion*, Human Resources and Skills Development Canada, at http://www.hrsdc.gc.ca/en/workplaceskills/foreign_workers/temp_assessment.shtml#wwc.

¹⁴ *IRPA*, s. 22(2). According to the legislation, dual intent does not preclude a migrant from being admitted temporarily if the immigration official is satisfied that she or he will leave Canada. The work permit is issued at the border, and the Canadian Border Service Agency has the final say on who is admitted to Canada.

¹⁵ When assessing an employer’s application for an employment authorization, HRSDC considers: 1) the occupation that the foreign worker will be employed in; 2) the wages and working conditions offered; 3) the employer’s advertisement and recruitment efforts; 4) the labour market benefits related to the entry of the foreign worker; 5) consultations, if any, with the appropriate union; and 6) whether the entry of the foreign worker is likely to affect the settlement of a labour dispute. See: *HRSDC Assessment for Labour Market Opinion*, Human Resources and Skills Development Canada, at http://www.hrsdc.gc.ca/en/workplaceskills/foreign_workers/temp_assessment.shtml#wwc). This last condition dates back to the *Alien Labour Act* 1897, 60-61 Victoria, c.11, which was introduced at the behest of the labour movement in order to prevent employers from recruiting strikebreakers from abroad.

¹⁶ Vance P. E. Langford, *Obtaining Labour Market Opinions (LMOs): Skilled Workers and Low-Skilled Workers*, The Canadian Institute, 2nd Annual Legal and Human Resource Guide to Employing Foreign Workers; *Filling the Skills Shortage in Alberta, British Columbia and Saskatchewan*, Calgary, Alberta, September 27-28, 2007; Service Canada, Job Bank, <http://www.jobbank.gc.ca?Intro=eng.aspx>

important because HRSDC uses it to identify the wages and labour market trends when assessing the employer's offer of employment to a temporary foreign worker.

Many employers are dissatisfied with how the government determines prevailing wage rates for specific occupations. The British Columbia Coalition for Businesses, for example, has written to the Minister responsible to the program to express its members' unhappiness with the prevailing wage rates, as they consider them to be "unfairly higher than average wages of BC employees for the same occupations."¹⁷ Other employers claim that the prevailing wage rates that employers are required to pay often exceed the industry average.¹⁸ However, there is also some evidence that some employers simply ignore the wage set out in the employment authorization contract and pay temporary workers less.¹⁹ Moreover, unions complain that in certain sectors, health care in particular, that the prevailing wage does not reflect the wages of unionized public sector workers who performed the work before it was contracted out to private for profit service providers.²⁰

The requirement that employers advertise positions before they are allowed to hire a temporary foreign worker is the second method for minimizing the possibility that the TFWP could lower the wages of workers who can circulate freely in the Canadian labour market. In order to receive a favourable assessment by HRSDC, the employer must advertise in a medium available across Canada, including the website provided by HRSDC, and keep and supply records of both advertisements and applicants.²¹ However, as we shall see, the government has a great deal of discretion to determine the rigour of the advertising requirements.

ii) The Polarization and Proliferation of Temporary Foreign Worker Programs in the 1990s

The NIEAP also signaled a shift from temporary programs that targeted specific sectors and occupations, such as seasonal agricultural workers and live-in domestic workers, to a general program that more efficiently recruited and monitored increasing numbers of foreign workers for a wide array of occupational "labour shortages" in Canada.²² During the 1990s the NIEAP began to be transformed into a bifurcated program

¹⁷ John Winter, Chair, Coalition of BC Businesses to Hon. Monte Solberg, Minister of Human Resources and Skills Development, RE: Labour Market Opinion and Expedited Labour Market Opinion Project, April 7, 2008. http://www.coalitionbcbusiness.ca/pdf/ELMOLtr_toHon_MonteSolberg.pdf (Accessed 25 February 2009).

¹⁸ Douglas Watt, Tim Krywulak, and Kurtis Kitagwa, *Renewing Immigration: Towards a Convergence and Consolidation of Canada's Immigration Policies and Systems* (Conference Board of Canada, 2008), 33. http://doc.cerium.ca/serv1/Renewingimmigration_08-10.pdf (accessed 25 February 2009).

¹⁹ C.S.W.U. Local 1611 v. SELI Canada and others (No.8) 2008 B.C.H.R.T. 436.

²⁰ National Union of Public and Government Employees, Canada: The Land of Opportunity? A review of Canada's Temporary Foreign Workers Program, April 2007, pp.9-10. <http://www.nupge.ca/publications/globalization> (Accessed 25 February 2009).

²¹ IRPR, s.205 (c)(ii).

²² For a discussion of the Seasonal Agricultural Workers program see: VIC SATZEWICH, *Racism and the incorporation of foreign labour : Farm labour migration to Canada since 1945* (Routledge. 1991); TANYA BASOK, *Tortillas and Tomatoes: Transmigrant Mexican Harvesters in Canada* (McGill-Queen's University Press. 2002); Veena Verma, *The Regulatory and Policy Framework of the Caribbean Seasonal Agricultural Workers Program*, May 2007 at <http://www.nsi-ins.ca/english/research/progress/45.asp>; Ann Weston, *Ann. The Changing Economic Context for Canada's Seasonal Agricultural Workers Program*, May 2007 at

that had two general streams, one that targeted highly skilled workers and the other that targeted low-skilled workers. Different, and unequal, obligations and entitlements attach to the different streams. The *Immigration and Refugee Protection Act* (IRPA), which came into effect in 2002, and the regulations issued pursuant to it,²³ reinforced and facilitated the polarization of temporary foreign worker programs in Canada because it provided for a wide array of different mechanisms for giving different categories of foreign workers access to Canada.

Currently, there is an extremely complex mosaic of different programs linked to specific occupations and sectors that authorize the entry of foreign temporary workers into Canada. See Figure 1, which summarizes these different categories. Some temporary foreign nationals can gain access to Canada in order to work without obtaining a work permit, and there are a wide array of situations in which it is possible for a foreign national to obtain a work permit without her or his employer having obtained an employment authorization and LMO. In fact, 45 per cent of the temporary foreign workers admitted into Canada in 2007 were admitted without a LMO.²⁴

The single largest exception to the general requirement to obtain a work permit is for business visitors, who are foreign nationals who do not intend to enter the Canadian labour market, who are engaged in international business, and who are employed by a foreign employer.²⁵ There are also twenty categories of foreign workers (including a visiting member of the armed forces or an officer of a foreign government, a guest artist performing a limited-time engagement and who does not have an employment relationship, employees of a foreign news company whose job is to report on Canada, and ministers of a congregation of a religious denomination) who do not require a work permit.²⁶ In addition, immigration officers have a residual discretion to issue work permits without HRSDC vetting the application for humanitarian reasons²⁷ or cases where the applicant has demonstrated that her or his employment will advance one of Canada's stated public policy objectives.²⁸

However, from an internal labour market perspective these discretionary programs are not nearly as significant as provisions in the IRPR that either complement

<http://www.nsi-ns.ca/english/research/progress/45.asp>: Kerry Prebisch, "Globalizing Work, Globalizing Citizenship: Community-Migrant Worker Alliances in Southwestern Ontario," in Luin Goldring and Sailaja Krishnamurti, eds., *Organizing the Transnational: Labour, Politics, and Social Change* (Vancouver: UBC Press, 2007), 97-114. For a discussion of the Live-in Caregiver Program see: ABIGAIL B. BAKAN & DAIVA K. STASIULIS, *Not one of the family: foreign domestic workers in Canada* (University of Toronto Press, 1997); DAIVA K. STASIULIS & ABIGAIL B. BAKAN, *Negotiating citizenship: migrant women in Canada and the global system* (University of Toronto Press, 2005); HABIBA ZAMAN, *Breaking the iron wall : de commodification and immigrant women's labor in Canada* (Lexington Books, 2006).

²³ *Immigration and Refugee Protection Act (IRPA)* S.C. 2001, c. 27 and the Immigration and Refugee Protection Regulations amend. (IRPR) S.O.R. 2002-227.

²⁴ *Annual Report to Parliament on Immigration, Citizenship and Immigration Canada.* (2008), at http://www.cic.gc.ca/english/resources/publications/annual-report2008/section3.asp#part3_3.

²⁵ IRPR, s.187. The typical situation involves a foreign company that contracts with a Canadian company and sends an employee to Canada to ensure that the Canadian company is meeting its contractual obligations. Such business visitors may be in Canada for up to two years.

²⁶ IRPR, s.186.

²⁷ IRPR, s. 208.

²⁸ Under IRPR, s.205, if applicant can demonstrate that her or his employment in Canada would create or maintain significant social, cultural, or economic benefits or opportunities for Canadian citizens or permanent residents she or he does not need an employment authorization from HRSDC.

Canada's international free trade agreements²⁹ or authorize the Minister of Citizenship and Immigration to designate work to be performed by a foreign national as necessary for the competitiveness of the Canadian economy.³⁰ The provisions that give the Minister broad power to establish temporary work programs have resulted in the proliferation of different streams, each of which impose different requirements on the employers and the foreign workers and provide different entitlements to the workers.³¹ In September 2008, the different streams were: 1) academics, 2) seasonal agricultural workers, 3) seasonal agriculture workers in British Columbia, 4) film and entertainment workers, 5) information technology workers, 6) live-in-caregivers, 7) live-in-caregivers for the province of British Columbia, 8) occupations requiring at most a high-school diploma or job-specific training, 9) oil sands construction project workers in Alberta, and 10) international students graduating from recognized post-secondary institutions

iii) Business Visitors and Highly Skilled Workers

Beginning in 1994, the movement of business visitors and highly skilled travelers across Canada's border in order to work temporarily has been facilitated by a series of bilateral and multilateral agreements that relieve qualifying workers from having to fulfill many of the obligations imposed under the general TFWP. These agreements essentially delegate authority from the state to the private sector to select temporary workers, and they have proven to be the thin-edge of the wedge for reducing the requirements imposed on highly skilled temporary workers, such as those in the software and information technology industry. Programs targeting highly skilled workers were justified as facilitating free trade and improving Canada's competitiveness in the global market.³²

Under s. 204 of the IRPR, work permits may be issued directly to foreign nationals who intend to perform work pursuant to an international agreement between Canada and one or more countries. NAFTA, GATS and Canada-Chile Free Trade Agreement are examples of wide-ranging agreements that have specific provisions relating to the movement of businesspersons and foreign workers into Canada.³³ These agreements complement Canada's immigration policy and they relieve high-skilled

²⁹ IRPR, s. 206.

³⁰ IRPR, s.205 (c) (ii).

³¹ *Occupations with Special Processes for Foreign Workers*, Human Resources and Skills Development Canada, at http://www.hrsdc.gc.ca/en/workplaceskills/foreign_workers/occspec.shtml.

³² Audrey Macklin, "Public Entrance/Private Member" in BRENDA COSSMAN & JUDY FUDGE, *Privatization, law, and the challenge to feminism* (Toronto 2002) 218 at 225.

³³ NAFTA chapter 16, which is called "Temporary Entry for Business Persons," permits the movement of highly skilled workers from one of the NAFTA signatories to another if they can establish citizenship, meet the immigration requirements, and qualify in one of the four categories (business visitors, professionals, intra-company transferees or traders and investors). *CIC: Foreign Worker Manual.*, Appendix G, 134-68. On December 15, 2008 The Minister of immigration and Citizenship announced that professionals seeking to work temporarily in Canada under the NAFTA can now receive a work permit for up to three years. Previously NAFTA worker were required to renew their permits every 12 months. Citizenship and Immigration Canada, News Release, Minister Kenney Announces 3-year renewable work permits for NAFTA professions, <http://www.cic.gc.ca/english/department/media/releases/2008/2008-12-15.asp> To facilitate the free flow of services, GATS (via Mode 4) permits the facilitated entry to member states of business visitors, intra-company transferees, and professionals, all of whom are defined in the agreement. GATS applies to very specific situations involving specified professionals and intra-company transferees who have been employed by an affiliated company for at least one year to the transfer and who are executives, managers, or employees having specialized knowledge. *CIC: Foreign Worker Manual.*, Appendix D, 117-21.

temporary foreign workers from the necessity of obtaining an HRSDC confirmation.³⁴ Thus, in facilitating transborder trade in goods and services, less emphasis is placed on ensuring that there are no disruptive consequences from temporary flows of migrant workers on the Canadian labour market. According to two government immigration analysts:

It is recognized that facilitated entry through trade agreements benefits businesses that operate around the globe with a high-skill workforce. This trend towards migration of high-skill workers is becoming an increasingly important ingredient for a firm's competitiveness ...[and] carries benefits such as job creation and skill transfer to Canadians.³⁵

In 1997, in response to employer demand to fill labour shortages in the software industry, three federal departments collaborated with the Software Human Resource Council to develop a separate stream within the TFWP that eases the processing requirements for certain occupations in the software industry. The LMO process was replaced by a national ("blanket") confirmation letter that recognizes that the seven designated software occupations cannot be filled by Canadian citizens or permanent residents. To qualify for expedited processing, the job offer must fit within one of the enumerated job descriptions for specific software editors, designers, and developers.³⁶ Provided the visa officer is satisfied that the foreign worker meets the minimum requirements for education, language, and work experience and the salary meets the minimum requirements for the occupation, then employers making job offers to foreign workers in these occupations are exempted from the entire LMO process and the foreign IT specialist can apply directly for a work permit at a visa office. This pilot project has effectively become a permanent program; the blanket confirmation for information technology specialists continues today and it is considered by many to be a good model for exempting other high demand occupations from the LMO process.³⁷

Canada has also introduced other programs in order to attract and to retain temporary highly skilled foreign workers. A program that allows spouses and common-law partner of a skilled worker to work without a confirmed job offer or LMO was introduced in 1998.³⁸ To qualify, the principal temporary foreign workers must be engaged in work at a high skill level (NOC levels O, A and B), which includes management and professional occupations as well as technical and skilled trades people.³⁹ In 2008, the federal government introduced a new "Canadian Experience Class" that will make it easier for skilled workers (those with NOC skill levels of O, A or B) with at least two years of recent Canadian work experience to change their immigration status from temporary to permanent.⁴⁰

³⁴ Moreover, some of these workers may obtain their work permits at a point of entry and a few are not even required to have a work permit.

³⁵ Macklin, *supra* note 32, 225 citing Bradley Pascoe and Beverly Davis, "Canada's Temporary Foreign Worker Program: A New Design," Washington; Fourth International Metropolis Conference: Trade Agreements and Migration, 8-11 December 1999, 6.

³⁶ Macklin, *supra* note 32, 225-6.

³⁷ *Ibid.*, 225.

³⁸ *Hiring Foreign Information Technology Specialists*, Human Resources and Skills Development Canada. at http://www.hrsdc.gc.ca/en/workplaceskills/foreign_workers/infotech.shtml. Macklin, *supra* note 32, 226

³⁹ IRPR, s.205 (c) (ii), *CIC: Foreign Worker Manual.*, 62-70.

⁴⁰ These workers will not to have leave the country in order to change their status. Steven Chase, "Ottawa to ease immigration for workers, student: Plan aims to retain skilled employees," *Globe and Mail*, 13 August 2008, A1.

iv) Increase in the Number of Temporary Foreign Workers in Canada

The shift in the federal government's immigration policy toward temporary migration has been effective in increasing the numbers of temporary foreign workers, a shift to temporary over permanent immigration, and shift to low skill over high skill (see Tables 1 through 3). The number of temporary foreign workers by year in Table 1 is the sum of the number of people entering for the first time, re-entering, and those still present in Canada on a work visa issued in a previous year. The first column indicates the dramatic increase in the number of temporary foreign workers from 97,500 to 302,300, between 1983 and 2007.⁴¹ Focusing upon the period since 2002 when many changes were made to the TFWP, the number of temporary foreign workers increased from 182,700 to 302,300. The number of temporary foreign workers in 2008 for a comparable category is not yet available from CIC. The CIC website has recently been updated and it now does provide the total entries (i.e. sum of initial entry and re-entry but does not include the numbers still present) of temporary foreign workers for each year 2004 through to 2008, and, thus, the number is not comparable those in Table 1. Using this data, however, reveals that total entries increased from 112,719 in 2004 to 165,215 in 2007, and to 193,061 in 2008.⁴² Thus, between 2007 and 2008 which corresponds to the time period when the expedited LMO was implemented, there were an additional 27,846 total entries of temporary workers.

Between 2002 and 2007, a period that saw a substantial easing of restrictions on temporary foreign workers, women's share of total number of temporary foreign workers increased from 33.0 to 40.5 percent (see Table 1), suggesting that the flow of temporary foreign workers is becoming feminized. This recent increase in the share of temporary foreign workers who are women reflects the shift to a low-skilled TFWP, as discussed further below.

The number of temporary foreign workers has not only increased but is greater than the number of permanent immigrants in the economic class for most years, as shown in Table 1. We compare the number of temporary foreign workers to the number of permanent immigrants in the economic class (rather than all categories of permanent immigrants which would include family members and refugees) because people in this class are selected for their skills and abilities to adapt and, thus, the motive underlying the choice and number of people admitted in the economic class is most similar to the temporary foreign workers. In the most recent years, temporary foreign workers as a percentage of permanent (economic class) immigrants has risen sharply, keeping in mind that the number of temporary foreign workers includes both the entries and those still present, whereas, the permanent (economic class) immigrants reflects the new entrants.

⁴¹ The years presented here are constrained by the data which are publicly available.

⁴² See Citizenship and Immigration Canada. Facts and Figures 2007 "Canada – Total entries of temporary foreign workers by province or territory and urban area, 2004-2008", Facts and figures 2008 – Immigration overview:

Permanent and temporary residents.

<http://www.cic.gc.ca/english/resources/statistics/facts2008/temporary/01.asp> . The data disaggregated by gender are not available.

The increased importance of temporary foreign workers is particularly noticeable in Alberta and British Columbia.⁴³ As shown in Table 2, in Alberta, the total entries of temporary foreign workers increased more than three times between 2004 and 2008, from 10,572 to 39,177; and notice that in 1998, the number of initial entries was only 7,341. During the same period in BC, the number of temporary foreign workers almost doubled from 24,222 to 46,955 between 2004 and 2008; notice that the number of initial entries of temporary foreign workers in BC in 1998 was only 12,065. In BC, between 2007 and 2008, there was a substantial increase of 10,444 total entries which is a slightly larger increase than in Alberta for the same period.

Finally, the expansion of the TFWP to make it easier to hire low-skilled temporary foreign workers is associated strongly with a shift in the skill composition of temporary migrants. The most striking observation is the increase in the number of workers in the lower skill levels (see Table 3). The number people entering with Skill Level C (intermediate and clerical) increased from 8,588 to 19,866 (combining males and females), between 1998 and 2007. The number of temporary foreign workers entering with the lowest skill level, skill level D, increased from 750 to 8,473 over this period tripled, although from relatively low numbers. The share of temporary foreign workers admitted in NOC level C and D as a percentage of total temporary foreign workers, rose from 14 to 30 percent for males and from 30 to 63 percent for females (calculated from the data in Table 3).⁴⁴

Researchers who have examined the limited data concerning the source countries for the TFWP have remarked upon the racialized nature of low-skilled part of the program. The proportion of temporary foreign workers from Asia and the Pacific has increased, while those from Europe and the U.S. have dropped. However, more than two-thirds of the temporary migrants in the managerial, professional, and skilled categories originated from Europe and the U.S. in 2005. By contrast, 59% of the workers from Asia and the Pacific and 85% from the Americas (with the exception of the U.S.) have low skills.⁴⁵

3. The Low-Skilled Temporary Foreign Workers Program

i) Expanding the Low-Skilled Temporary Migrant Workers Program in 2002

From its beginning in 1973, the first general temporary foreign worker program had low-skilled streams. It simply incorporated the Commonwealth Caribbean Agreement, which was a 1966 agreement between Canada and several Caribbean

⁴³ Note that the number of temporary foreign workers in Table 2 refers to total entries (initial entry and re-entry) for the period 2004 – 2008 and for initial entry for the year 1998 and hence, are lower than the numbers in Table 1, which captures total entries and those still present. While the inconsistency in reporting these numbers is undesirable, the tables are created in the best manner possible from the data which are publicly available.

⁴⁴ Given the large number of temporary foreign workers without a skill level stated in Table 3, in calculating the percentage of TFWs admitted under NOC C & D the number of temporary foreign workers in the skill unstated category are excluded from the total. Unfortunately, numbers of temporary foreign workers by skill level for the year 2008 are not available on the CIC website.

⁴⁵ Ricardo Trumper and Lloyd L. Wong, “Canada’s Guest Workers: Racialized, Gender, and Flexible,” in Sean P. Hier and B. Singh Bolaria, eds., *Race and Racism in 21st-Century Canada: Continuity, Complexity and Change* (Peterborough: Broadview, 2007), 151-170 at 155-7; Sharma, *supra* note 9, 129-30.

countries to establish and operate a migrant seasonal agricultural workers program.⁴⁶ In 1973, the program was extended to include Mexico, and now seasonal migrant workers are a large and increasingly entrenched component of the supply of agricultural labour across Canada.⁴⁷ The second low-skill stream that was incorporated into the general temporary foreign worker program was one that also initially targeted migrant workers from the Caribbean, but this time women who would work as live-in domestics.⁴⁸ Like its agricultural counterpart, this stream expanded to include other countries, especially the Philippines. However, unlike the seasonal agricultural workers program, which was specifically designed as a revolving migration program, in 1981 the foreign domestic workers program was revised to provide a process for transferring from temporary to permanent migration status. In 1992, the program was overhauled and renamed the Live-In-Care Giver Program.⁴⁹

Demand for a much broader range of low skill workers to fill jobs in a range of different sectors increased as Canada's economy grew in the early years of the twenty-first century. Employer demand for workers to perform jobs requiring low levels of skills in the oil and gas (especially the Tar Sands Project in northern Alberta)⁵⁰ and construction sectors (especially in the residential sector in Toronto)⁵¹ prompted the Liberal government to introduce the Low-Skill Pilot Project in 2002. This new initiative did not replace either the live-in-caregiver or seasonal agricultural workers programs, but operated along side them.⁵² In order to ensure that employers did not become dependent upon a cheap source of foreign workers who could be exploited and used to reduce wages and conditions of employment, the government imposed a number of requirements upon employers.

According to the government, “the Low-Skilled Pilot Project is a labour-market-driven risk-management strategy aimed at filling [a labour market] void by permitting the hiring of low-skilled workers from overseas.”⁵³ Low-skill jobs are those defined as requiring skills classified at the NOC C and D levels. The highest skill requirement for admission via this program is a high school (secondary school) diploma or two years of occupation-specific training (NOC C), although many of the temporary foreign workers admitted under it will simply be given a short work demonstration or on-the-job training (NOC D). Employment authorizations under this program initially had a maximum duration of one year, after which the workers were required to leave Canada in order to apply for another permit.

Although workers who enter through the low-skill stream are not barred from having their spouses and children accompany them, according to CIC, the government department responsible for administering the TFWP, this request raises “very legitimate concerns regarding the applicant’s bona fides and ability to support their dependents

⁴⁶ Satzewich, *supra* note 22.

⁴⁷ Basok, *supra* note 22.

⁴⁸ Bakan and Stasiulis, *supra* note 22; Zaman, *supra* note 22.

⁴⁹ *Ibid.*

⁵⁰ *Memorandum of Understanding for the Entry of Temporary Workers for Projects in the Alberta Tar Sands*, at http://www.hrsdc.gc.ca/en/workplaceskills/foreign_workers/forms/mouforOilAlberta.pdf

⁵¹ Zeina Bou-Zeid, “Unwelcome but Tolerated: Irregular Migrants in Canada,” Ph.D. Thesis, York University, Toronto, 2007 at 351-60.

⁵² Since the low-skill TFWP applies to agricultural workers, who can stay for two years without leaving Canada, it may, gradually, replace the SAWP, under which workers from Mexico and some Caribbean countries are only entitled to stay in Canada for eight months.

⁵³ *CIC, Foreign Worker Manual*, *supra* note 39, 29.

while in Canada.”⁵⁴ The low-skilled worker must cover the travel costs of the spouse and children, which, unlike their own travel costs, are borne by their employer. As temporary residents, their children may also be required to pay international student rates to attend school. Since the onus is on foreign workers to demonstrate that they are capable of meeting these expenses, these costs create a “significant financial barrier to accompanying dependents which will be difficult to overcome; however, it is not inconceivable that an applicant may be able to satisfy an officer that they possess the means and ability to meet the financial requirements.”⁵⁵ By contrast, the treatment of highly skilled workers in respect to their immediate families is very different. Through the provision of an open work permit that is issued without a LMO, the spouses of highly skilled temporary foreign workers are encouraged to accompany them to Canada.

The reason for this difference in treatment of highly skilled and low-skilled workers is that Canada wants to attract skilled foreign workers to settle permanently in the country and not simply to work for a temporary period. The Canadian Experience Class, which facilitates the shift from temporary to permanent status of highly skilled workers admitted under the TFWP, is the clearest example of this policy objective. Low-skilled workers are excluded from this program.

A low-skilled temporary foreign worker’s best bet of obtaining permanent resident status is through the Provincial Nominee Program (PNP). Introduced in 1996, it is a mechanism that allows a province to nominate prospective immigrants based upon specific economic and labour needs, rather than the federal government’s point system for determining whether candidates are qualified for Canadian immigration. PNPs are employer-driven programs; employers must nominate a foreign worker for permanent status. Although the restriction on the number of nominees had limited the PNP as route to permanent residency, the federal government has lifted its cap on the number of permanent residents accepted under it. However, each provincial program is unique, with varying eligibility requirements, which means that factors such as years of schooling, official language capability, and occupational classification are assigned different values in different provincial programs.⁵⁶

Recently, Alberta and British Columbia expanded the range of occupations from which workers may be nominated to include NOC categories C and D occupations.⁵⁷ Nominee applicants must have been employed for a specified period of time, which differs depending on the province and occupation, and the employer is required to submit the relevant LMO. Although the programs in Alberta and British Columbia differ in detail, both impose obligations on the employer that are designed to ensure both that the employer is not exploiting the worker and that the worker will be able to integrate into

⁵⁴ *Ibid.*, 32.

⁵⁵ *Ibid.*, 33.

⁵⁶ Report of the Standing Committee on Citizenship and Immigration, TEMPORARY FOREIGN WORKERS AND NONSTATUS WORKERS, Report of the Standing Committee on Citizenship and Immigration, 40th Parliament, 2nd Session, May 2009, at 10. Alberta recently changed the name of its PNP to the Alberta Immigrant Nominee Program.

⁵⁷ *Provincial Nominee Program: Strategic Occupations, Entry-Level and Semi-Skilled Pilot Project*, Ministry of Advanced Education and Labour Market Development, at <http://www.aved.gov.bc.ca/provincialnominee/strategicoccupations/entrylevel.htm> and *Semi-Skilled Workers*, Alberta Canada. Alberta’s official immigration website, at <http://www.albertacanada.com/immigration/immigrate/semiskilledworkers.html>.

the provincial labour market.⁵⁸ While there were only 981 nominees in Alberta in 2006-07 out of a pool of more than 20,000 temporary workers, the numbers were increased to 2500 in 2007-08 and are expected to rise to 8000 in 2009-10.⁵⁹ Despite the expansion of the PNP, critics have complained that the Canadian Experience Class, which does not tie a temporary foreign worker's change of immigration status to that of permanent resident to a job with a specific employer, is "elitist and unfair to unskilled and lower-skilled labourers who comprise the vast bulk on temporary work permits."⁶⁰

To meet the basic HRSDC requirements for the low-skill program, employers must:

- Demonstrate comprehensive and on-going efforts to recruit Canadian youth, Aboriginal peoples, recent immigrants and Canadians in areas of high unemployment;
- Show efforts to hire unemployed Canadians through HRSDC and provincial employment programs;
- Consult with the local union if the position is covered under a collective agreement;
- Sign an employer-employee contract outlining wages, duties, and conditions related to the transportation, accommodation, health and occupational safety of the foreign worker;
- Cover all recruitment costs related to the hiring of the foreign worker;
- Help the worker(s) find suitable, affordable accommodation;
- Pay full transportation costs for the foreign worker to and from his/her home country;
- Provide medical coverage until the worker is eligible for provincial health insurance coverage; and
- Register [the] worker under the appropriate provincial worker compensation/workplace safety insurance plans.⁶¹

The first two requirements are designed to ensure that foreign workers are only recruited when there is a labour shortage. The remaining requirements are intended to help protect temporary foreign workers.

What distinguishes the low-skill pilot from the general TFWP are the requirements that are designed to protect the foreign workers, as will be discussed in the following section. These obligations, the limited duration of the program, and the lengthy

⁵⁸ *Ibid.* In British Columbia, the employment offer must provide enhanced severance equal to one month's pay, which is not to be reduced by notice in lieu, and that the wage must be comparable to that for equivalent jobs in BC. In Alberta, the employer must sign an Employer Compliance Declaration Form attesting that they have not contravened the Employment Standards, Workers' Compensation, Occupational Health and Safety Act, the Public Health Act, or human rights legislation and standards within the twelve months prior to submitting an application.

⁵⁹ Emigrate, http://www.emigrate2.co.uk/visas_and_advice_detail-77.htm (Date accessed: August 26, 2008); Alberta Canada, Alberta Immigrant Nominee Program (AINP), <http://www.albertacanada.com/immigration/immigrate/ainp.html> (Date accessed: August 26, 2008).

⁶⁰ Chase, *supra* note 40, quoting New Democratic Party immigration critic Olivia Chow.

⁶¹ *Pilot Project for Occupations Requiring Lower Levels of Formal Training (NOC C AND D)*, Human Resources and Skills Development Canada. at http://www.hrsdc.gc.ca/en/workplaceskills/foreign_workers/lowskill.shtml.

and complex process to obtain an LMO, limited the attractiveness of the low-skill pilot to employers.⁶²

ii) Making the TFWP More Employer-Friendly

The 2006 election of the pro-business and Western-based Conservative party as the federal government fueled the lobbying efforts of business groups who wanted to see the TFWP made more user friendly for employers and the low-skill pilot expanded. Western-based construction and hospitality businesses were particularly vocal in their demand for quick and easy access to low-skilled temporary foreign workers, claiming that it was important to capitalize on the economic boom while it was underway and that training Canadians to do the jobs would simply take too long.⁶³

The government responded by making it easier for employers to navigate the TFWP process. In 2006, it established Temporary Foreign Worker Units in major cities in each region, which were dedicated to assisting employers in obtaining LMOs and employment authorizations.⁶⁴ It also announced the establishment of federal-provincial working groups on temporary workers in Alberta and British Columbia as part of the effort to meet employers' urgent and ongoing labour market needs.⁶⁵ These working groups compiled regional lists of occupations under pressure that reduced the obligations on employers to demonstrate efforts to recruit Canadian citizens and permanent residents. Employers who wish to hire temporary foreign workers in occupations appearing under a regional list are only required to conduct minimal advertising efforts rather than the more comprehensive efforts normally required.⁶⁶ By November 2006, the regional list for British Columbia contained over 230 occupations, ranging from senior managers and engineers, through dancers and actors, to light duty cleaners, babysitters, and taxi drivers.⁶⁷ The data provided in the last section of the first part of the article demonstrates a shift in the skill composition of the temporary foreign workers towards those with lower levels of skill, which indicates the success of the employer-friendly changes to the low-skill TFWP.

In 2007, the government announced a series of substantive changes to the Low-Skill Pilot and to the TFWP that made both programs, but especially the low-skill stream, more attractive to employers. The low-skilled pilot's name was changed to "Pilot Project for Occupations Requiring Lower Levels of Formal Training." This symbolic change was

⁶² National Citizenship and Immigration Law Section, Canadian Bar Association, "Low Skilled Workers Pilot Project," May 2006.

⁶³ Lyle Jenish, "Tourism industry seeks Filipino workers," *Globe and Mail*, April 5, 2007, S1-2.

⁶⁴ MONTE SOLBERG, *The Honorable Monte Solberg, Minister of Citizenship and Immigration, for enhancing the Temporary Foreign Workers Program*, Human Resources and Development Canada. (2006), at <http://www.cic.gc.ca/ENGLISH/departement/media/speeches/2006/enhancing-tfw.asp>.

⁶⁵ *Ibid.*

⁶⁶ They can satisfy their recruitment obligations if they advertise on the internet-based the National Job site or demonstrate that they have established and on-going recruitment mechanisms already in place (for example, using recognized job internet sites, unions, professional associations, corporate website, newspapers, and newsletters). For positions that fall into the low-skill classification employers must satisfy both conditions.

⁶⁷ *Regional Lists of Occupations Under Pressure*, Human Resources and Skills Development Canada, at http://www.hrsdc.gc.ca/en/workplaceskills/foreign_workers/occunderpres.shtml. Government of Canada, Regional Occupations under Pressure List, British Columbia, updated as of September 2007.

accompanied by the extension of the duration of the work permit from one to two years.⁶⁸ For offers of employment longer than twelve months, employers are required to review and, if necessary, to adjust the compensation to ensure it continues to meet the prevailing wage rate for the occupation and location of employment.⁶⁹ The requirement is supposed to ensure that it is not more attractive for an employer to hire a foreign national than a Canadian or a permanent resident; that the entry of foreign workers does not put downward pressure on wages paid to Canadians; and that foreign workers are compensated at the same prevailing wage rate as Canadians.⁷⁰

As part of the package of changes to the TFWP to make it more employer friendly, an expedited labour market opinion pilot was introduced, which allows eligible employers hiring temporary foreign workers in twelve occupations to obtain a LMO in three to five days.⁷¹ These occupations, which include low-skill positions in construction, hospitality, and tourism, accounted for 25 per cent of the combined volume of regular requests for LMOs in Alberta and British Columbia.⁷² In 2008, twenty-one additional occupations, including food and beverage services and residential cleaning and support workers, were added to the pilot, covering 50 per cent of the combined total of requests for LMOs from the two provinces. More than 230,000 requests for temporary foreign workers were received by HRSDC in 2007, up from 150,000 requests in 2006.⁷³ About 85 per cent of the applications for LMOs are granted.⁷⁴ The combination of the list of regional occupations under pressure, which substantially reduces the domestic recruitment obligations placed on employers, and the expedited LMO process, suggests that the requirement that foreign workers are only recruited when there is a labour shortage is formal rather than substantive.

Moreover, according to a recent report by the Conference Board of Canada, employers would like to see the process for obtaining LMOs made easier.⁷⁵ Some employers would like to see the length of the work permit extend beyond two years without the worker having to return from their source country.⁷⁶

iii) Protections for Temporary Foreign Workers

As the number of applications for TFWP jumped dramatically by 400 per cent in Alberta between May 2006 and May 2007, and the number of temporary foreign workers

⁶⁸ The Alberta Federation of Labour claims that the two-year limitation period for low-skilled workers was being eliminated through CIC's practice of issuing renewals without the worker having to leave Canada. Alberta Federation of Labour, *Entrenching*, the Second Report of the Alberta Federation of Labour, Temporary Foreign Workers Advocate, Edmonton, Alberta, April 2009.

⁶⁹ *Temporary Foreign Worker Program Improved for Employers in B.C. and Alberta*, Human Resources and Skills Development Canada at <http://news.gc.ca/web/article-eng.do?nid=350829&>.

⁷⁰ *Pilot Project for Occupations Requiring Lower Levels of Formal Training (NOC C AND D)*. Changes to the Pilot Project as of February 23, 2007.

⁷¹ For the requirements of this program, see *How to Qualify for the Expedited Labour Market Opinion Pilot Project*, Human Resources and Skills Development Canada, at http://www.hrsdc.gc.ca/en/workplaceskills/foreign_workers/elmopp/elmoppthree.shtml.

⁷² *Temporary Foreign Worker Program Improved for Employer in B.C. and Alberta*, supra note 67.

⁷³ Conference Board, supra note 18.

⁷⁴ "Canada's guest workers: Not such a warm welcome," *The Economist*, November 27, 2007, 40.

⁷⁵ *Ibid.*, 27-8. In particular, they would like to see the expansion of the expedited LMOS and an increase in regional and national LMOs, a switch to bulk LMOs for multiple positions without the need to submit an LMO for each position, and they would like to see the process for transferring work permits between employers accelerated.

⁷⁶ Conference Board, supra note 18, 28.

increased,⁷⁷ stories recounting the abuse of temporary foreign workers by recruitment agencies and employers appeared in the national and international media. Labour unions have been vocal in their criticism of the program. The Federal Labour Standard Review, led by Harry Arthurs, identified domestic and agricultural workers who are working in Canada as temporary migrants as the workers most in need of protection.⁷⁸

Provincial federations of workers have criticized the federal government for continuing to expand the TFWP without at the same time implementing monitors and controls to protect foreign workers.⁷⁹ In May 2007, the Alberta Federation of Labour established its own “Foreign Workers Advocate Office,” the goal of which is to help protect the basic human and workplace rights of vulnerable foreign workers in the province.⁸⁰ During the year that the office operated, it opened complaint files for 200 workers from Romania, Mexico, the Philippines, and Vancouver.⁸¹ At its 2008 Convention, the Canadian Labour Congress (Canada’s peak labour organization) called upon the federal government: to replace the TFWP with a comprehensive expanded program of permanent immigration; to end immediately the expedited labour market opinion process; to ban labour brokers and recruitment agencies; to revoke LMOs for employers found to be exploiting migrant workers; to establish effective labour standards enforcement mechanisms to stop the abuse and harassment of migrant workers by employers and brokers; and to abolish employer-specific work permits.⁸²

Initially, the federal government responded to criticisms that it failed adequately to protect foreign temporary workers by emphasizing that under the federal/provincial division of powers, the provinces, and not it, were responsible for enacting and enforcing labour standards. It also stressed the importance of ensuring compliance through soft methods such as education. However, in the fall of 2007, Monte Solberg, the Minister who was responsible for the TFWP at that time, acknowledged that, “of course, Canada’s New Government realizes that if we bring in temporary workers to alleviate our labour shortages, we know it is vital to protect the rights of these workers while they are here.”⁸³ He listed a series of initiatives to help to protect foreign workers. These included: developing memorandums of understanding with provincial governments to improve cooperation on matters concerning employment standards; amending the *IRPA* to prevent vulnerable foreign workers from being exploited or abused; and developing mechanisms

⁷⁷ The number of temporary foreign workers more than doubled between 2002 (182,000 temporary foreign workers), when the low-skill TFWP was introduced, and 2007 (302,300 workers). See Table 1.

⁷⁸ Harry Arthurs, *Labour Standards for the 21st Century*. Report of the Federal Labour Standards Review Commission, Ottawa, 2005, Chapter 10. <http://www.flr-ntf.gc.ca/en/fin-rpt-chp10.asp>

⁷⁹ *Use of 'disposable' foreign workers continues to spin out of control in Alberta*, Alberta Federation of Labour. (2008), at http://www.afl.org/news/default.cfm?newsld_529. *BC Fed condemns expansion of temporary worker program-government fails to address rights of vulnerable workers*, British Columbia Federation of Labour. (2008), at <http://www.bcfed.com/node/1214>. *Presentation to the Employment Services Act Review*, Manitoba Federation of Labour. (2008), at <http://www.mfl.mb.ca/pdfs/TFW-Brief.pdf>.

⁸⁰ *Alberta's disposable workforce; The Six-Month Report of the AFL's Temporary Foreign Worker Advocate*, Alberta Federation of Labour. (November, 2007). In the Spring of 2008 the AFL closed the Office and entered into an agreement with the Edmonton Community Legal Clinic to transfer the Advocates’s caseload to the Clinic. Alberta Federation of Labour, *supra* note 67 at 5-6.

⁸¹ Elise Stolte, “Abuse of Foreign workers unavoidable, Alta. Tories, Suggest,” *Edmonton Journal* June 18, 2008

⁸² SALIMAH VALIANI, *Analysis, Solidarity, Action - a Worker's Perspective on the Increasing Use of Migrant Labour in Canada* (2008).

⁸³ *Temporary Worker Program Improved for Employers in BC and Alberta*, *supra* note 67.

to monitor employer compliance with the terms and conditions of the TFWP as well as a formal process to address instances of non compliance.⁸⁴

A variety of mechanisms and regulations exist in the Temporary Foreign Worker Programs that are designed to protect temporary foreign workers and these have evolved over the past two years. They are: (a) the employment contract, (b) provincial employment standards, (c) restrictions on recruitment agencies, (d) unionization for some groups of temporary foreign workers, and (e) increased monitoring of the mechanisms. These mechanisms are described below and areas where the mechanism has, in practice, failed to protect temporary foreign workers are identified.

a) Soft Law: The Employment Contract

One of the key requirements under the TFWP is that the employer must sign a contract prior to initiating the HRSDC employment authorization process. The policy guidelines stipulate a number of terms that must be included in the contract, as well as provide a sample contract.⁸⁵

The sample contract contains provisions relating to the duration of the employment relationship, the job description, work schedule, wage deductions, wage review, travel expenses, accommodation, hospital and medical care insurance, registration for workers' compensation, and minimum notice (a week) for resignation or termination. It also specifies that employers are not entitled to recoup the following costs from employees: those relating to retaining or training the employee, including any amounts payable to a third-party recruiter; the cost of two-way transportation between the employee's country of residence and place of work; and the cost of health insurance until the employee is eligible for provincial health insurance. Moreover, the contract states that it is subject to provincial labour and employment standards and applicable collective agreements, and that the employer must abide by standards with respect to how wages are paid, how overtime is calculated, meal provisions, statutory holidays, annual leave, family leave, as well as benefits and recourse under relevant legislation or collective agreement. The guidelines also require the employer, and not a third party recruiter, to be a party to, and signatory of, the employment contract.

Despite the extensive and detailed mandatory provisions in the employment contract, it is not a mechanism that the federal government uses to enforce foreign temporary workers' employment rights. According to the instruction sheet that accompanies the sample contract:

The Government of Canada is not a party to the contract. Human Resources and Social Development Canada (HRSDC)/Service Canada (SC) 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.⁸⁶

Instead, HRSDC officers use the contract to assist them in forming their labour market opinion. The problem is that HRSDC has no regulatory authority to monitor employer compliance with the TFWP's requirements.

⁸⁴ *Ibid.*

⁸⁵ *CIC Foreign Worker Manual*, Instruction Sheet to Accompany Employment Contract, Annex 2. Moreover, any additional provisions in the employer's contract must not conflict with the provisions in the sample contract or policy guidelines.

⁸⁶ *Ibid.*

Moreover, it is questionable whether a migrant worker would be able to enforce this employment contract. In a case dealing with a union complaint of unfair labour practices involving temporary migrant workers, the B.C. Labour Relations Board characterized the employment authorization contract as an application form and not an enforceable contract.⁸⁷ The employment contract's function is mostly symbolic; it is a form of "soft" law.⁸⁸

b) Hard Law: Provincial Employment Standards

Federal websites are replete with information setting out temporary foreign workers' employment and housing rights.⁸⁹ The federal government also claims that most Canadian labour and employment laws, with the exception of employment insurance, which remains a contentious issue, protect even unauthorized workers.⁹⁰ However, it is careful to point out that for the vast majority of foreign temporary workers, most of their rights fall under provincial jurisdiction.⁹¹

Two of the provinces that receive the largest numbers of temporary foreign workers, Alberta and Ontario, exclude agricultural workers from collective bargaining rights, a point we return to below, while several provinces provide reduced employment-related entitlements (to overtime pay, maximum hours of work, and statutory holidays) for agricultural and domestic workers.⁹² Agricultural workers in Alberta are not covered by the provincial occupational health and safety legislation, and Ontario, which accepts by far the largest number of Seasonal Agricultural Workers, only recently brought agricultural workers under its health and safety legislation, and then only under the threat of litigation challenging the exclusion of these workers as unconstitutional.⁹³ Temporary workers are not entitled to provincial social assistance anywhere in Canada.

Foreign workers' advocates have criticized the federal government for simply passing the buck to the provinces when it comes to enforcing temporary foreign workers' employment rights. Provincial employment standards branches are understaffed and under resourced, and they rely on employees to initiate complaints in order to enforce basic labour standards.⁹⁴ A spokeswoman for Alberta Employment, Immigration and

⁸⁷ The instruction sheet that accompanies the contract states that "objective of setting out the relationship in a contract is to get the fairest working arrangement possible." *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ *Temporary foreign workers - your rights and the law*, Citizenship and Immigration Canada at <http://www.cic.gc.ca/EnGLIsh/work/tfw-rights.asp>. Foreign Worker's Guide to Labour and Employment Laws in Canada.

⁹⁰ *Ibid.*

⁹¹ While temporary foreign workers are entitled to pregnancy, parental, compassionate care, and sickness benefits regardless of whether they are inside or outside Canada, few would be entitled to regular employment benefits since employees must be actively seeking employment in Canada in order to be eligible.

⁹² *Alberta Labour Relations Act*, S.A., c.L-1, s. 4(1) (e); *Labour Relations Act*, 1995 S.O. 1995, Chapter 1, Schedule A, s. 3(b.1)

⁹³ Eric Tucker, "Will the Vicious Circle of Precariousness be Unbroken? The Exclusion of Ontario Farm Workers from the Occupational Health and Safety Act," in Leah Vosko, eds., *Precarious Employment: Understanding Labour Market Insecurity in Canada* (Kingston and Montreal: McGill-Queen's University Press, 2006) 256-76.

⁹⁴ Patrice Dutil and Ron Saunders, "New Approaches to Achieving Compliance with Statutory Employment Standards" (July 2005) *Vulnerable Workers Series – No. 6*, Work Network, Canadian Policy Research Networks and [David Fahey](#), [Christina Hanson](#), [Glen MacInnes](#), [Arlene Tigar McLaren](#), [Gerardo](#)

Industry stated that the Alberta provincial government does not monitor temporary foreign workers “because the bureaucracy on that one would be crazy.” However, she went on to admit that the government recognized that there is a “real disincentive “for temporary workers to lodge complaints. Of the more than 4,000 complaints received in Alberta in 2006, only eighteen were from people who identified themselves as temporary foreign workers.⁹⁵

To bolster the enforcement of provincial labour standards, in September 2007 the federal government announced that it would be entering into memoranda of understanding (MOU) with the provinces to strengthen protections for temporary workers.⁹⁶ Progress has been made in Alberta and Manitoba. In addition to hiring staff in the occupational health and safety, employment standards, labour mobility and foreign recognition areas, Alberta has set up a dedicated hot-line for foreign workers (which is available to employers and workers) and has opened two advisory offices to deal with foreign workers’ employment problems.⁹⁷ The hotline receives between 400 and 500 calls a month, which include, but are not limited to, employment-related complaints. Since they opened in December 1, 2007, the temporary foreign worker advisory offices in Calgary and Edmonton have received about 1,000 calls and 500 visits. Most significantly, the labour standards branch conducted 290 worksite visits between December 1, 2007 and August 31, 2008. During that period, the branch received 246 complaints from temporary foreign workers, the most common disputes involved wages, overtime, and general holiday pay.⁹⁸

Complaints only disclose the tip of the iceberg of violations. As a result of an investigation into the death of two Chinese temporary migrant workers on a construction project in the Alberta Tar Sands, officials in Alberta discovered that a Chinese employment agency failed to pay the wages of as many 132 Chinese workers between April and July 2007.⁹⁹ The Alberta government also laid 53 charges against three companies involved in the Horizons Oil Sands construction project in which the two workers died.¹⁰⁰ Responding to this discovery, Alberta’s Minister of Employment and Immigration, Hector Goudreau suggested that “some abuse of foreigners working temporarily in Alberta is unavoidable because of conditions in their home countries.”¹⁰¹

In Manitoba, the *Worker Recruitment and Protection Act*,¹⁰² which came into effect on April 1, 2009, provides for a registration system for employers who employ temporary foreign workers. Under the MOU between Manitoba and the federal government, employers who seek to obtain an LMO from HRSDC must show proof of

Otero, Kerry Preibisch and Mark Thompson, *Cultivating Farm Workers Rights* (Canadian Centre for Policy Alternatives, 2008).

⁹⁵ Katherine Harding and Dawn Walton, “Canada’s hottest new import? Employees,” *Globe and Mail*, February 24, 2007, A 14.

⁹⁶ *Temporary Worker Program Improved for Employers in BC and Alberta*.

⁹⁷ *Canada’s New Government announces development of Memorandum of Understanding with Province of Alberta on Temporary Foreign Workers*, Government of Canada, Canada News Centre. (July 9, 2007), at <http://news.gc.ca/web/view/en/index.jsp?articleid=335799>

⁹⁸ Telephone communication, Jennifer Raimundo, Alberta Employment and Immigration Branch, November 25, 2008.

⁹⁹ Stolte, *supra* note 80.

¹⁰⁰ Kelly Cryderman, “Companies charged in the death of two oilsands workers,” *Calgary Herald*, 22 April 2009.

¹⁰¹ Stolte, *supra* note 80.

¹⁰² S.M. 2008, c. 23.

registration.¹⁰³ Employers who submit a LMO application to the federal government without supplying a Certificate of Registration will be referred back to the Employment Standards for registration, and it is an offence, subject to fines as high of \$25,000 to \$50,000, to recruit foreign workers without registering. The registration requirement enables provincial employment standard officials to ensure that employers are providing temporary foreign workers with minimum standards under provincial legislation.

c) Restrictions on Recruitment Agencies

It is lawful for employers to use agencies to recruit foreign temporary workers into the low-skilled stream of the TFWP. However, they must pay any and all of the fees charged by such agencies. Other streams of the TFWP do not require employers to pay recruitment costs.¹⁰⁴ With the growth of the TFWP, especially the low-skill stream, Canadian employers are increasingly dependent upon the use of recruitment agencies, which are also known as labour brokers and employment agencies, which may be based in Canada or abroad, for obtaining temporary workers.

The problem is that the federal government does not enforce the employment contract. Thus, it falls either upon provincial governments to ban this practice or upon immigration officials to deal with the problem of recruitment fees when they are processing work permit applications.

Internationally, the use of recruitment agencies to supply low-skill labour across national border has been found to be associated with an array of abusive practices that run the gamut from charging workers exorbitant fees, misrepresenting the type and terms and conditions of employment to workers, with-holding passports and travel documents, to human trafficking.¹⁰⁵ There have been several recent examples of such practices in Canada, and the federal and provincial governments have responded with a variety of different legal and policy tools to remedy the problems associates with recruitment agencies.

All four western provinces prohibit employment agencies from charging workers fees for placement services. However, some provinces have no such prohibition; in fact, in 2001 Ontario repealed the legislation that required employment agencies to register and that prohibited them from charging fees to employees.¹⁰⁶ Some provinces, like

¹⁰³ Employers who want to recruit foreign workers must first register with the Employment Standards Branch, Business Registration Unit. To approve the application, the Branch must be satisfied that the applicant meets the requirements of the legislation and it will review the applicant's past conduct.

HRSDC, Temporary Foreign Worker Program, Manitoba's New Workers Recruitment and Protection Act, at http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/communications/whatsnewmanitoba.shtml

¹⁰⁴ Except for the low-skill and seasonal agricultural workers streams of the TFWP, in which the governments of Mexico and specified Caribbean countries are responsible for recruiting agricultural workers and in the other schemes there is not prohibition against brokers imposing fees on the workers. .

¹⁰⁵ Philip Martin, "Merchants of Labor: Agents of the Evolving Migration Infrastructure," in *Decent Work Research* (Geneva: International Institute of Labour Studies, 2005); Report of the Tripartite Meeting of Experts on Future ILO Activities in the Field of Migration, Geneva, 21-25 April 1997, Annex II, Guidelines on special protective measures for migrant workers recruited by private agents.

¹⁰⁶ The province has, however, recently introducing legislation to regulate temporary employment agencies, Bill 139, An Act to Amend the Employment Standards Act 2000 in relation to temporary help agencies and certain other matters, 1ST SESSION, 39TH LEGISLATURE, ONTARIO, 57 ELIZABETH II, 2008;

Ontario Ministry of Labour, Protecting Temporary Help Agency Employees, http://ogov.newswire.ca/ontario/GPOE/2008/12/09/c8262.html?lmatch=&lang=_e.html.

British Columbia,¹⁰⁷ prohibit this practice in the *Employment Standards Act*, while others, like Alberta,¹⁰⁸ have outlawed this practice under regulations made pursuant to the *Fair Trading Act*. British Columbia provides information in five languages to foreign workers that employment agencies and employers are prohibited from charging for recruiting and travel costs, and that only the government, and not employers, can deport temporary foreign workers.¹⁰⁹ Both British Columbia and Alberta also require employment agencies to be licensed. However, despite these prohibitions and the licensing requirement, the practice of charging substantial fees and misleading workers continues and some recruitment agencies simply do not bother to register.¹¹⁰ An Ontario-based recruitment agency that operated in Alberta without a license, charged up to \$18,000 for promised jobs, and misled the workers about the jobs and their wages, was ordered to stop operating in Alberta.¹¹¹

After a scandal at one of Manitoba's largest meat-packers, in which Chinese workers were each charged \$10,000 by a recruitment agency for a job,¹¹² the provincial government enacted legislation designed to provide greater protection for foreign workers from fee-charging recruitment agencies. The *Worker Recruitment and Protection Act* replaced provisions in the *Employment Standards Act* relating to employment agencies, and set up a licensing and registration system for businesses involved in foreign worker recruitment.¹¹³ The *Act* requires foreign recruiters to be licensed, which involves providing a letter of credit or cash, and to register, as well as prohibits agencies from charging fees to workers.¹¹⁴ In addition, it prohibits employers from recovering from foreign workers costs relating to recruiting them.¹¹⁵ The *Act* also gives the province the authority to revoke a license, to investigate, and to recoup money on behalf of workers from employers and recruiters.¹¹⁶ Manitoba has also promised to increase monitoring in order to give the proposed legislation bite.¹¹⁷ Prince Edward Island announced that it would follow the Manitoba model and enact legislation making it illegal for recruiters to charge foreign workers for the opportunity to work in the province.¹¹⁸

¹⁰⁷ R.S.B.C., c-113, ss.10-12.

¹⁰⁸ Alberta *Fair Trading Act*, S.A. c.F-2, s.103; Alberta Employment Agency Business Licensing Regulations, Alberta Regulation 189/99.

¹⁰⁹ *Ministry of Labour and Citizens' Services, Employment Standards For Foreign Workers*, at http://www.labour.gov.bc.ca/esb/facshts/foreign_workers.thm .

¹¹⁰ According to the Alberta Federation of Labour, supra note 67 at 13 , Service Alberta reports 277 current investigations into Broker activities, and since 2007 seven Orders were issued and one prosecution was launched.

¹¹¹ "Ontario firm ordered to stop operating in Alberta," *The Toronto Star* 16 January 2008.

¹¹² Joe Friesen, "Meat firm abandons China deal," *Globe and Mail*, January 8, 2007, A 4. Maple Leaf subsequently established its own recruitment office and it has partnered with the International Organization for Migration, which heels by recruiting and prescreening workers, Conference Board, supra note 18, at 31-32

¹¹³ S.M. 2008, c. 23.

¹¹⁴ *Ibid.*, ss.2 (2), 5, 15(4).

¹¹⁵ *Ibid.*, s. 16(1). However, s. 16(2) provides that employers can sue for recovery of such costs if the worker fails to report for work, engages in willful misconduct, or fails to complete substantially all of her or his terms of employment with the employer.

¹¹⁶ *Ibid.*, ss. 10, 20.

¹¹⁷ *The Worker Recruitment and Protection Act*, S.M. 2008, c. 23; *Province Introduces Proposed Worker Recruitment and Protection Act*, Province of Manitoba; News Release. (April 17, 2008), at <http://www.gov.mb.ca/chc/press/top/2008/04/2008-04-17-145000-3532.html>.

¹¹⁸ 'Double dipping' with foreign workers to be made illegal: minister, CBC News. (July 3, 2008), at <http://www.cbc.ca/canada/prince-edward-island/story/2008/07/03/foreign-brow.html>.

The four western provinces have followed the route recommended in ILO migrant worker conventions, that of bilateral agreements between receiving and sending countries to deal with the problem of recruitment agencies.¹¹⁹ Each of these provinces has recently entered into memoranda of understanding (MOU) with the Philippines government (one of the largest source countries for Canada's TFWP program), which is designed to protect workers in the low-skill stream.¹²⁰ These MOUs are intended to 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."¹²¹

The MOU between the Philippines and British Columbia obliges the Philippine government to send the British Columbia government a list of recruitment agencies (called sending agencies in the MOU) 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*, employers and sending agencies "must not request, charge or receive, directly or indirectly, any payment from a person seeking employment in British Columbia."¹²² 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 for workers regarding the contract. Although the MOU "is not intended to be legally binding," the Philippines Overseas Office in Toronto 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."¹²³ Thus, like the employment authorization contract, the MOUs are a form of soft law. Moreover, other major sending countries such as China are unlikely to enter into even such "soft" arrangements in order to protect the temporary migrant workers they send to Canada.

Recruitment fees are a contentious issue for immigration officials. The visa officer's job is to decide whether or not to issue a work permit to the foreign national under the low-skill stream of the TFWP. The CIC's Foreign Worker Manual acknowledges that although the requirements of the program are explicit that an employer is not permitted to recoup recruitment costs through payroll deductions or other withholding of wages, "nonetheless, recruiters and employers may still require such fees under another pretext."¹²⁴ According to the Manual, "the visa officer should consider how the payment of such fees impacts on the intent of the applicant."¹²⁵ In particular, visa officers are required to consider: how the payment of the fee will impact upon a

¹¹⁹ *The Private Employment Agencies Convention*, C181, 1997, Article 8. This is the model used in the SAWP.

¹²⁰ Ministry of Economic Development, B.C./Philippine Memorandum of Understanding, Backgrounder, January, 29, 2008; 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, January 29, 2008. The MOU does not apply workers who are entering as live-in caregiver stream, but appears to be designed for the low-skill stream. Article 1(a)

¹²¹ *Ibid.*, Article 3(b) (iii).

¹²² *Ibid.*, Article 6.

¹²³ *Ibid.*, Article 2(c), Article 8. In 2008, a labour attaché was assigned to the Philippines consulate in Vancouver.

¹²⁴ *CIC Foreign Worker Manual*, 32.

¹²⁵ *Ibid.*

worker's capacity to send money home while supporting herself or himself in Canada and whether there is a reasonable apprehension that the applicant is more likely than not to remain in Canada after the authorized period. Visa officers are allowed to consider previous experience with particular recruitment agencies in deciding whether or not to issue a work permit in an individual case, but this consideration cannot be the sole factor.

In 2008, eighty Mexicans seeking temporary work were detained at the Canadian border (at the Vancouver airport) and then turned to Mexico because the recruitment agency had not fulfilled the requirements of the TFWP.¹²⁶ The problem with the practice of refusing to issue a work permit to a foreign worker who is charged a recruitment fee is that it effectively punishes the weakest party and lets recruitment agencies and employers off the hook.

Recruitment agencies and labour brokers who seek to bring temporary workers into Canada without the appropriate documents are engaging in practices that are illegal under the IRPA. Two labour brokers in Ontario were found guilty of violating the human smuggling provision contained in s. 117 of the IRPA, which creates an offence of knowingly organizing, inducing, or assisting one or more persons to enter Canada without a valid travel document. They were sentenced to three months' house arrest and fined \$65,000.¹²⁷ The federal government has widely publicized this conviction and it has posted fraud warnings on the Internet.¹²⁸ It has also asserted that "there must be zero tolerance for abuse, mistreatment or wrongdoing by unscrupulous employers, unions or recruiters."¹²⁹

The line between labour brokers who simply import unauthorized workers and those who engage in fraud and coercive behaviour may be difficult to draw in practice.¹³⁰ Canada's reputation as a model of best practices for temporary foreign worker programs was tarnished when the *Economist* published a report in November 2007 recounting the plight of eleven Filipino workers who were lured to Canada with the promise of high paying jobs. After paying hefty fees (of at least \$10,000 Cdn each) to labour brokers, the migrant were "sold" to unscrupulous employers, kept in an isolated rural house, and forced to do menial jobs earning – if they were paid at all – a fraction of what they were promised."¹³¹ The police officer who chanced upon them, described the migrant workers as "economic slaves."¹³²

Practices such as these could amount to human trafficking, which is a criminal offence under the *Criminal Code* and a prohibited practice under the IRPA. However, attention directed at human trafficking tends to focus on trafficking for the purposes of

¹²⁶ *Mexicans denied entry at Vancouver airport, returned home*, CBC News. (June 25, 2008), at <http://www.cbc.ca/canada/british-columbia/story/2008/06/24/bc-migrants-turned-back.html>

¹²⁷ *Just the Facts*, Human Resources and Skills Development Canada, at <http://www.hrsdc.gc.ca/en/corporate/facts/index.shtml>.

¹²⁸ *Ibid.*; *Notice: Fraud Warning*, Citizenship and Immigration Canada, at <http://www.cic.gc.ca/EnGLIsh/departement/media/notices/notice-fraud.asp>.

¹²⁹ HRSDC, *Canada's New Government announces development of Memorandum of Understanding with Province of Alberta on Temporary Foreign Workers*, <http://news.gc.ca/web/article-eng.do?nid=335799&>.

¹³⁰ International Labour Organization, "Getting at the Roots: Stopping Exploitation of Migrant Workers by Organized Crime (International Symposium, The UN Convention Against Transnational Organized Crime: Requirements for Effective Implementation, Turin, Italy 22-23 February 2002), cited in Nandita Sharma, "Travel Agency: A Critique of Anti-Trafficking Campaigns," (2003) 21(3) *Refuge* 53 at 59-60.

¹³¹ "Canada's guest workers: Not such a warm welcome," *The Economist*, November 24, 2007, 40.

¹³² *Ibid.*

prostitution, although live-in caregivers (domestic workers) and exotic dancers have attracted more scrutiny.¹³³

In 2007, the Conservative government proposed to amend the *IRPA* to deal with the inability of immigration officers to exercise discretion to refuse a work permit to an individual who may fit the technical requirements of the *IRPA*, even though there are public policy reasons, such as human trafficking, to refuse admittance. Under the proposed amendments, even if a foreign national met all of the conditions for a work permit, if the immigration officer believed that public policy considerations specified in ministerial instructions, which would be published in the *Canada Gazette*, would justify refusing the work permit, the officer was obliged to refuse the permit.¹³⁴ According to the government, the ministerial instructions were aimed at “protecting” foreign nationals who are at risk of being subjected to humiliating and degrading treatment. However, during the parliamentary debate over Bill C-57 concerns were expressed that the proposed amendments penalized individuals who were in need of help by denying them entry to Canada, and that they would simply find other, illegal means, to come to Canada to work. The Bill was defeated as the minority government was not able to marshal enough support to ensure its passage through Parliament.¹³⁵

d) Union Representation

While some groups of temporary foreign workers are represented by unions, a series of recent cases before the Labour Relation Board and Human Rights Tribunal in British Columbia, which involved an Italian-Canadian joint venture and a general construction union over a bargaining unit of construction workers that contained about forty temporary migrant workers, reveals the weakness in the legal protection provided to these workers. A central theme throughout the extensive litigation was whether the temporary foreign workers from Latin America were being the same wages as the Canadian and European workers.¹³⁶ The decisions illustrate how difficult it is even for temporary workers who are unionized to obtain equal employment rights.

The joint venture, SELI Canada, won a two-year contract for tunneling operations involved in the construction of a rapid transit line into Vancouver in time for the 2010 Olympics. SELI international had operations in Europe and Latin America, and recruited workers from those regions to work along side Canadian workers. On June 30, 2006, the Construction and Specialized Workers Union was certified to represent a unit of approximately fifty construction workers employed by SELI. About forty of the employees in the unit were temporary foreign workers from various Latin American countries, while the remainder was Canadian residents or citizens. The union and SELI agreed to exclude the temporary migrant workers from Europe from the bargaining unit.

¹³³ CHRISTINE BRUCKERT & COLETTE PARENT, *Organized Crime and Human Trafficking in Canada: Tracing Perceptions and Discourses*, R.C.M.P. Research and Evaluation Branch. Catalogue No.: PS64-1/2004E-PDF (2004), at <http://dsp-psd.pwgsc.gc.ca/Collection/PS64-1-2004E.pdf>. LOUISE LANGEVIN & MARIE-CLAIRE BELLEAU, *Trafficking in Women in Canada: A Critical Analysis of the Legal Framework Governing Immigrant Live-in Caregivers and Mail Order Brides*, Status of Women Canada. (2000), at http://www.swc-cfc.gc.ca/pubs/pubspr/066231252X/200010_066231252X_1_e.html.

¹³⁴ The Bill also required that a second immigration officer confirmed all work permit refusals under the new provisions. *Ibid.*, 3-5.

¹³⁵ Barnett, *supra* note 6, 4-5.

¹³⁶ SELI Canada Inc. and SLCP-SELI Joint Venture and Construction and Specialized Workers' Union Local 1611, BCLRB No. B36/2007; BCLRB No. B40/2008.

In July 2006, the union complained to the labour relations board that the employer had committed unfair labour practices during collective bargaining negotiations by transferring some of the migrant workers to other countries, increasing the wages of others, and failing to pay the migrant workers from Latin America the same wages as their Canadian counterparts. There was a big discrepancy between what the temporary migrant workers from Latin America were promised and what they were paid, and as the union was making a foothold in the unit, the employer raised the migrant workers wages.¹³⁷ The British Columbia Labour Relations Board dismissed all of the union's allegations of unfair labour practices against the employer, including the claim that the employer paid the workers from Latin America less than their Canadian counterpart. After two years of litigation, more than a dozen appearances before the Labour Relations Board and repeated appearances at the Human Rights Tribunal, the union was decertified. Moreover, the union's presence did not stop the employer from retaliating against the workers who signed the human rights complaint.¹³⁸ However, the British Columbia Human Rights Tribunal held that the employer had violated the Human Rights Code prohibition against treating workers differently on the basis of their place of origin by paying the workers from Europe substantially (approximately 30%) more than their counterparts from Latin America, and by providing the former workers with substantially better housing, food, and reimbursement for expenses.¹³⁹

The SELI case demonstrates how difficult it is for a union to enforce temporary workers' rights. What is unusual about this group of migrant workers was that they were unionized. Large public and private construction projects, like those upon which the SELI workers were employed, are a heavily unionized sector in Canada. However, most migrant workers are employed in sectors such as agriculture, domestic service, hospitality, and food service that are barely unionized.

Since the mid-1980s, the United Food and Commercial Workers (U.F.C.W.) has led a campaign in several provinces to organize farm workers, including temporary migrant workers. In Ontario, the campaign has been stymied by the lack of legislation compelling an employer to engage in collective bargaining. The U.F.C.W. has brought a series of constitutional challenges to collective bargaining legislation that excludes agricultural workers from full collective bargaining rights. A recent decision of the Ontario Court of Appeal held that the Ontario government was required to extend collective bargaining rights to agricultural workers.¹⁴⁰ Almost immediately after the decision, Rol-land Farms, one of the mushroom farms that was involved in the litigation and Canada's largest mushroom producer, laid-off fifty temporary migrant workers and evicted them from the company-provided housing.

Rol-land Farms' action served to spotlight the vulnerability of temporary foreign workers to changes in the economy.¹⁴¹ The lay-off of 120 migrant workers from

¹³⁷ SELI Canada Inc. and SLCP-SELI Joint Venture and Construction and Specialized Workers' Union Local 1611, BCLRB No. B40/2008.

¹³⁸ C.S.W.U. Local 1611 v. SELI Canada and others (No.3), 2007 BCHRT 423.

¹³⁹ C.S.W.U. Local 1611 v. SELI Canada and others (No.8), 2008 BCHR 436. The Employer announced that it will be appealing the decision.

¹⁴⁰ *Fraser v. Ontario (Attorney General)*, 2008 ONCA 760. The Supreme Court of Canada granted the Attorney General's leave to appeal, April 2, 2009, (32968),

¹⁴¹ Lesley Ciarula Taylor, "Migrant workers stuck as jobs axed at mushroom site," *The Toronto Star*, 24 December 2008; the *Guelph Mercury*, "These Workers Need Special Protection," <http://news.guelphmercury.com/Opinions/article/420082>

Guatemala, Jamaica, and Mexico occurred just as the company requested creditor protection.¹⁴² Any downturn in the economy is likely to result in the termination of temporary foreign workers before they have completed the term of their work permit.¹⁴³ Their lack of immigration status renders temporary migrant workers very vulnerable.

In British Columbia, where agricultural workers are covered by collective bargaining legislation, the UFCW's unfair labour practice complaint that fourteen seasonal agricultural workers from Mexico were dismissed for joining and supporting one of its locals was dismissed by the Labour Relations Board on the ground that it was an economic, and not anti-union, decision.¹⁴⁴ Two organizations representing employers in the agricultural sector in British Columbia have filed a submission with the British Columbia Labour Board arguing that it has no jurisdiction over temporary migrant workers, who as a matter of the constitutional law fall under federal authority.¹⁴⁵ This submission challenges what has long been understood as provincial authority over temporary foreign workers employment rights. In Manitoba and Quebec, there are a few bargaining units of agricultural workers that include the seasonal migrant workers. However, overall, very few migrant workers are unionized, and most migrant workers have little power to enforce their labour rights.¹⁴⁶

e) Promoting Compliance

Despite the fact that the enforcement of labour standards falls outside the federal government's jurisdiction, there are a number of tools that it has to promote employer compliance with the requirements of the low-skill program. In 2007, the federal government announced that it would ensure that proper monitoring and compliance measures are in place to protect temporary foreign workers. As part of the new compliance strategy, employers are required to keep proof that they fulfilled the conditions of the low-skill worker program for a minimum of twenty-four months. Employers who are unable or unwilling to provide such proof may have their eligibility for the expedited labour market pilot project revoked.¹⁴⁷ Remarkably, however, failure to meet these requirements does not result in an employer being banned from the temporary foreign worker program itself.

4. Conclusion

The safeguards to ensure that employers in certain sectors do not become dependent on low-paid and subordinate temporary migrant are not secure. LMOs appear to be a formal rather than a substantive requirement, and employers are not happy with

¹⁴² Ibid.

¹⁴³ Canadian Press, "Temporary foreign workers first to suffer layoffs in economic downturn," 8 February 2009.

¹⁴⁴ Floria Plant Growers Ltd. and Untied Food and Commercial Workers International Union, Local 1518, BCLRB No. B157/2008 There was no evidence that the employer knew that the union had filed a certification to represent the seasonal migrant workers the day before the employer returned the workers to Mexico and there was evidence of a bad growing season.

¹⁴⁵ Brian Morton, "Employer want to curtail migrant workers rights, union says," 9 October 2008, <http://www.canada.com/components/print.aspx?id=e0dc9ac8-d88e-4175-8df5-2c96ce12273c&sonor=> (accessed: October 9, 2008)

¹⁴⁶ Jennifer Hill, "Binational Guestworkers Unions: Moving Guest workers into the House of Labor," (2008) 35 Fordham Urb. L.J. 307, 320.

¹⁴⁷ *Expedited Labour Market Opinion*, Human Resources and Skills Development Canada at http://www.hrsdc.gc.ca/en/workplaceskills/foreign_workers/elmopp/elmoppseven.shtml.

how the government calculates prevailing wage rates, believing that they are set too high.¹⁴⁸ The only premium that employers who hire migrant workers through the low-skilled program are required to pay the costs of return transportation to the sending country and medical insurance. These costs may not be enough to deter employers from becoming reliant on migrant labour. Moreover, given the record of problems with the program, it is not possible simply to assume either that employers are paying the prevailing rate or that they are not able to pass on the costs to workers.¹⁴⁹ The fact that the wages of most of the occupations under pressure in Alberta and British Columbia had not increased more than the wages in other occupations suggests that the low-skilled streams of the TFWP operate as a device to regulate the Canadian labour market by lowering wages and conditions of employment.¹⁵⁰ Unless there are mechanisms to ensure that prevailing wage rates are not undermined and that temporary migrant workers are able to enjoy the same employment and labour rights as Canadian citizens and resident workers, the effect of the low-skilled TFWP is to fragment and segment the labour market by providing a pool of unfree workers.¹⁵¹

The actual and potential exploitation of low-skilled temporary migrant workers undermines the legitimacy of the program both within and outside of Canada. The federal government has come to see protecting temporary workers as its responsibility. However, as we have seen, the mechanisms to protect the rights of migrant workers are neither well developed nor effectively enforced. The reliance on “soft law” has done little to protect low-skilled temporary foreign workers from exploitation by brokers or by employers. A May 2009 Report of the Standing Committee on Citizenship and Immigration recommended whole-sale revisions to the TFWP in general and the low-skilled component in particular. Specifically, the Committee urged the federal government, which enjoys only a minority status, to create a temporary foreign worker advisory board, provide sector (as opposed to employer) specific work permits, levy fees on employers to support temporary foreign workers who are unemployed, create a path to permanent residency for all temporary workers that simply depends upon the foreign worker meeting a minimum term of employment, and provide greater protection of temporary foreign workers.¹⁵² Currently, the low-skilled TFWP represents an extreme version of labour flexibility; it provides employers with a pool of unfree workers who are disposable at will and with, until very recently, little political cost to the federal or provincial governments.

¹⁴⁸ John Winter, Chair of the Coalition of BC Businesses to Minister Monte Solberg, *supra* note 17.

¹⁴⁹ Nor did the Board consider the policy behind the migration program, which is to require employers to pay a premium to access foreign workers on a temporary basis, in determining the temporary foreign workers' wages. SELI Canada Inc. and SLCP-SELI Joint Venture and Construction and Specialized Workers' Union Local 1611, BCLRB No. B40/2008.

¹⁵⁰ Based on a calculation of the increase in hourly wage rate of full-time/full-year workers from 1997 to 2007 in occupations under pressure, compared to hourly wage rate of full-time/full-year workers for all occupations together, using Statistics Canada CANSIM data. Cody Krause, “Occupations under Pressure: An Examination of the Temporary Foreign Worker Program in BC and Alberta,” University of Northern British Columbia, 2008, on file with the authors..

¹⁵¹ Harald Bauder, *Labour Movement: How Migration Regulates Labor Markets* (Oxford: Oxford University Press, 2006). The Report of the Standing Committee on Immigration and Citizenship on Temporary Foreign Workers and Non Status Workers, *supra* note 55 at 22-24, indicated problems with the transparency in determining the prevailing wage rate and urged the federal government to take steps to improve the transparency of the process and to allow stakeholders, including unions, to participate.

¹⁵² House of Commons Standing Committee on Immigration and Citizenship, *supra* note 55. However, the Conservative members of the Committee objected to these recommendations.

Perhaps the biggest challenge to the program for low-skilled workers is its declining popularity domestically. In April 2008, more than half of those polled were opposed to recruiting temporary workers from overseas to help ease Canada's labour shortage.¹⁵³ While support was still highest in the western provinces, ranging from 58 per cent in Alberta to 49 per cent in British Columbia, in central Canada, the first region to be pummeled by the economic downturn and job losses, only 39 per cent of people were in favour of the TFWP. As the recession has gripped Alberta, migrant workers have been the first to suffer lay-offs.¹⁵⁴ When asked in the provincial legislature about the plight of the temporary foreign workers who were laid-off and who do not qualify for unemployment insurance, Alberta's employment and immigration minister, Hector Goudreau, responded: "we need to recognize that the work temporary is exactly what it says and if it is impossible for them to move into other occupation, then there is an expectation that they should go home."¹⁵⁵ The support for the low-skilled TFWP is likely to decline as unemployment rises in the Western provinces, and calls for temporary foreign workers be laid off before nationals are increasing. The federal government has recently increased the advertising requirements for employers who seek to obtain low-skilled workers, including workers under the live-in caregiver and Seasonal Agricultural Workers Program.¹⁵⁶ In March 2009, HRSDC imposed a requirement on employers in Alberta and British Columbia who seek to access expedited LMO process to submit evidence of recruitment efforts undertaken, the results of such recruitment efforts, and the rationale for not hiring interested Canadians.¹⁵⁷ It appears that the recession has undermined the legitimacy of the low-skilled TFWP, and that the federal , as well as some provincial, governments are using the program as a shock absorber to deal with the economic crisis.

¹⁵³ Nicholas Keung, "Support for foreign worker program waning," Star, April 25, 2008. Nationally, only 44 per cent supported the temporary worker program.

¹⁵⁴ Canadian Press, "Temporary foreign workers first to suffer layoffs in economic downturn," 8 February 2009.

¹⁵⁵ Province of Alberta, The 27th Legislature, Second Session, Alberta Hansard, Monday, March 16, 2009, <http://www.assembly.ab.ca/Documents/isysquery/50fb4ac6-f856-4dfb-b74f-9fdd1d66ee68/1/doc/>

¹⁵⁶ HRSDC, Temporary Foreign Worker Program, Minimum Recruitment Efforts, http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/communicaitons/advertrecruitment.shtml;

HRSDC, Temporary Foreign Worker Program, Expedited Labour Market Opinion Pilot Project, http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/communicaitons/whatsnewelmopp.shtml

¹⁵⁷ HRSDC, Temporary Foreign Worker Program, Expedited Labour Market Opinion Pilot Project, http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/communications/elmoppchanges.shtml

Table 1: Number of Temporary Foreign Workers (initial entry, reentry, still present) and Permanent Residents (Economic class), 1983-2007

	Temporary			Permanent (Economic Class)			Temp/Permt %	FemTemp/TotTemp %
	Total	Males	Females	Total	Male	Female		
1983	97,500	69,700	27,800	24,200	11,900	12,300	402.9	28.5
1984	98,700	70,900	27,900	26,100	12,100	14,000	378.2	28.2
1985	106,000	76,000	30,000	26,100	12,500	13,600	406.1	28.3
1986	120,300	83,100	37,200	35,800	18,600	17,200	336.0	30.9
1987	132,600	89,700	42,900	74,100	39,900	34,200	178.9	32.4
1988	151,300	101,000	50,200	80,200	40,700	39,500	188.7	33.2
1989	158,600	100,200	58,300	90,100	45,700	44,400	176.0	36.8
1990	177,900	105,800	72,100	97,900	49,900	48,000	181.7	40.5
1991	184,900	107,300	77,600	86,500	43,100	43,400	213.8	42.0
1992	172,300	101,100	71,100	95,800	47,800	48,000	179.9	41.3
1993	157,100	95,700	61,300	105,700	51,000	54,600	148.6	39.0
1994	144,100	93,400	50,600	102,300	50,600	51,700	140.9	35.1
1995	141,900	94,800	47,000	106,600	53,700	52,900	133.1	33.1
1996	143,700	97,600	46,100	125,400	64,500	60,900	114.6	32.1
1997	148,300	102,500	45,700	128,400	66,800	61,500	115.5	30.8
1998	155,700	109,200	46,400	97,900	51,400	46,500	159.0	29.8
1999	165,800	116,200	49,500	109,300	57,800	51,400	151.7	29.9
2000	178,600	124,700	53,900	136,300	72,700	63,600	131.0	30.2
2001	187,600	129,900	57,600	155,700	82,500	73,200	120.5	30.7
2002	182,700	122,400	60,300	137,900	73,700	64,200	132.5	33.0
2003	180,900	114,400	66,500	121,000	63,900	57,100	149.5	36.8
2004	199,900	122,300	77,500	133,700	70,100	63,700	149.5	38.8
2005	225,500	136,200	89,300	156,300	80,900	75,400	144.3	39.6
2006	257,000	154,000	103,000	138,300	71,900	66,400	185.8	40.1
2007	302,300	179,900	122,400	131,200	67,900	63,400	230.4	40.5

Source: Compiled from Citizenship and Immigration Canada. Facts and Figures 2007. Immigration Overview. Permanent and Temporary Residents. Canada - Temporary residents by Yearly Status, 1983 to 2007
<http://www.cic.gc.ca/english/pdf/pub/facts2007.pdf>

Table 2: Total entries of Temporary Foreign Workers by Province, 2004 and 2008

Region or Province	Initial entry only ¹	Total entries (initial entry and re-entry) of temporary foreign workers ²				
	1998	2004	2005	2006	2007	2008
Newfoundland	530	1,361	1,298	971	1,248	1,309
PEI	82	105	177	210	220	445
Nova Scotia	1,615	1,709	1,505	1,712	1,673	2,137
New Brunswick	530	752	939	1,045	1,294	1,725
Quebec	10,941	17,726	19,162	20,262	22,515	24,171
Ontario	29,300	52,129	54,159	59,141	64,140	66,875
Manitoba	1,591	2,162	2,423	3,004	3,938	4,207
Saskatchewan	1,102	1,305	1,755	1,901	2,485	3,661
Alta	7,341	10,572	12,708	18,565	29,439	39,177
BC	12,065	24,222	27,964	31,095	36,511	46,955
Unstated or Territories		586	628	1,160	1,595	2,163
Canada	65,978	112,719	122,848	139,268	165,215	193,061

Source: 1. Facts and Figures 2007. Immigration Overview. Permanent and Temporary Residents.

Canada – Initial Entry of Foreign Workers by Province or Territory and Urban an Area.

<http://www.cic.gc.ca/english/pdf/pub/facts2007.pdf>

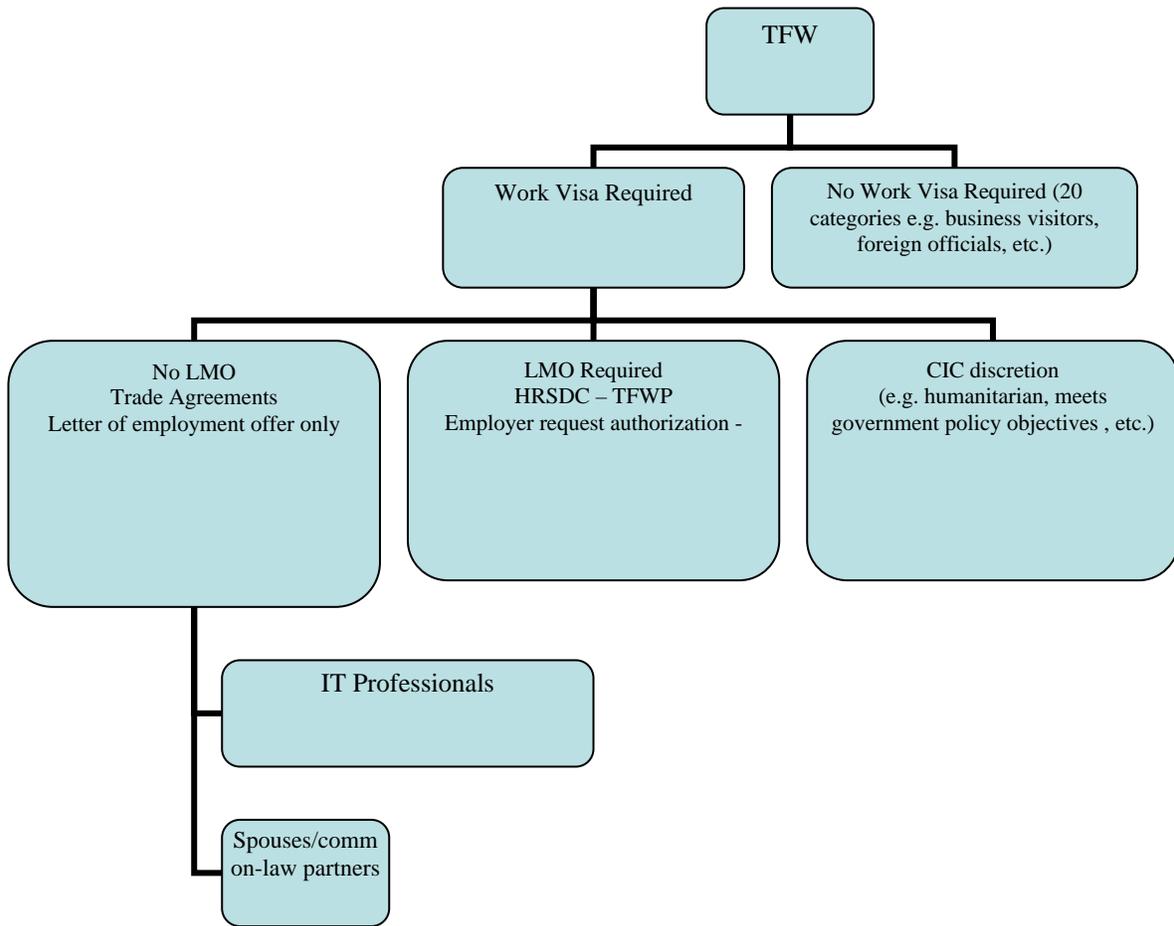
2. Citizenship and Immigration Canada. “Canada – Total entries of temporary foreign workers by province or territory and urban area, 2004-2008”, Facts and figures 2008 – Immigration overview: Permanent and temporary residents. <http://www.cic.gc.ca/english/resources/statistics/facts2008/temporary/01.asp>

Table 3: Temporary Foreign Workers (Initial entry) by Occupational Skill Level, Men and Women, 1998-2007

Skill level (NOC)	Male Temporary Foreign Workers by Occupational Skill Level										
	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	%Change
Skill level 0 managerial	2,470	2,467	2,721	2,764	2,604	2,509	2,814	2,923	3,307	3,529	42.9
Skill level A professionals	22,613	22,809	25,686	24,543	19,406	14,684	14,670	15,994	17,471	16,622	-26.5
Skill level B skilled and technical	9,894	11,524	12,645	12,036	10,242	8,389	8,765	10,324	12,471	15,623	57.9
Skill level C intermediate and clerical	5,170	8,219	12,891	7,729	7,445	6,500	6,171	7,229	7,491	9,845	90.4
Skill level D elemental and lab.	498	560	579	497	562	718	704	1,287	2,624	6,224	1149.8
Skill level not stated	6,403	6,743	7,407	7,871	7,858	8,785	11,605	12,238	14,384	18,064	182.1
Total	47,048	52,322	61,929	55,440	48,117	41,585	44,729	49,995	57,748	69,907	48.6
Skill Level (NOC)	Female Total Temporary Foreign Workers by Occupational Skill Level										
	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	%Change
Skill level 0 managerial	535	517	574	568	569	538	637	673	723	763	42.6
Skill level A professionals	6,344	6,648	7,793	7,768	6,383	5,225	5,261	5,499	5,977	5,676	-10.5
Skill level B skilled and technical	1,829	2,185	2,921	2,453	2,512	2,442	2,392	2,605	2,535	2,589	41.6
Skill level C intermediate and clerical	3,418	3,430	3,732	5,310	5,589	5,780	7,320	7,921	10,021	13,457	293.7
Skill level D elemental and lab.	252	271	224	296	274	255	236	368	829	2,249	792.5
Skill level not stated	6,535	7,529	7,700	8,106	9,503	10,946	13,571	14,794	16,760	20,826	218.7
Total	18,913	20,580	22,944	24,501	24,830	25,186	29,417	31,860	36,845	45,560	140.9

Source: Compiled from Citizenship and Immigration Canada. Facts and Figures 2007. Immigration Overview. Permanent and Temporary Residents. Canada – Initial Entry of Foreign Workers by Gender and Occupational Skills Level. <http://www.cic.gc.ca/english/pdf/pub/facts2007.pdf>

Figure 1: Categories of TFW by admission requirements



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