

UNIVERSITY OF ALBERTA

Rights of Temporary Foreign Workers in Canada

by

Lidia Macovei

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ABSTRACT

During the last decade, Canada experienced unequal economic growth. As result, the Canadian government expanded its Temporary Foreign Worker Program, which led to an essential change of its purpose, making it easier for employers to recruit temporary foreign workers for low-skilled jobs. In practice, TFWs are quite vulnerable without access to the same rights and privileges as Canadian citizens or permanent residents.

The purpose of this thesis is to analyze whether the Canadian government respects the rights of TFWs through its domestic regulations and if such laws protect the rights of TFWs in practice. The thesis goal is to determine if the economic interest of the Canadian government and employers can be matched with international migrant rights' standards. It investigates international standards related to the protection of human rights, including covenants, international treaties, and human rights committees. This thesis also discusses similar programs governing TFWs in America, Germany, and Australia.

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LIST OF ABBREVIATIONS

ACLRC	Alberta Civil and Liberties Research Centre
AEO	Arranged Employment Opinion
AFL	Alberta Federation of Labour
ASCO	Australian Standards Classification of Occupations
CCPR	<i>Covenant on Civil and Political Rights</i>
CCRF	<i>Canadian Charter of Rights and Freedoms</i>
CEDAW	<i>Convention on the Elimination of All Forms of Discrimination Against Women</i>
CESCR	<i>Covenant on Economic, Social and Cultural Rights</i>
CPRMW	<i>United Nations Convention on the Protection of Rights of All Migrant Workers and Members of their Families</i>
CBSA	Canada Border Services Agency
CEC	Canadian Experience Class
CIC	Citizenship and Immigration Canada
DIC	Australia Department of Immigration and Citizenship
DWER	Australian Department of Workplace and Employment Relations
GSMWP	German Seasonal Migrant Worker Program
HCHR	High Commissioner for Human Rights
HRSDC	Human Resources and Skills Development Canada
H-1B	Workers in Professional and Speciality Occupations
H-2A	Temporary Agricultural Workers
H-2B	Temporary Non-Agricultural Workers
IRPA	<i>Immigration and Refugee Protection Act</i>
IRPR	<i>Immigration and Refugee Protection Regulations</i>
LCP	Live-In Caregiver Program
LMO	Labour Market Opinion
LSWPP	Low-Skilled Worker Pilot Program
NOC	Canadian National Occupational Classification
OECD	Organisation for Economic Cooperation and Development
PNP	Provincial Nominee Program
PSWPS	Pacific Seasonal Worker Pilot Scheme
SAWP	Seasonal Agricultural Worker Program
TFWP	Temporary Foreign Worker Program
TFWs	Temporary Foreign Workers
UNDHR	United Nations Declaration of Human Rights
UFCW	United Food and Commercial Workers
WCP	Workers Compensation Program
WRAPA	Manitoba's Worker Recruitment and Protection Act
FSWP	Federal Skilled Worker Program

RIGHTS OF TEMPORARY FOREIGN WORKERS IN CANADA

INTRODUCTION

Temporary foreign workers (TFWs) play an important role in the Canadian economy. In recent years, the number of foreign workers admitted to work temporarily in Canada has increased significantly. The main driver of Canada's policy toward the acceptance of foreign workers into the country to work temporarily is related to addressing the workforce shortage. Many Canadian employers recruit foreign workers from different countries under the Canada's Temporary Foreign Worker Program (TFWP).

The TFWP was created to meet Canada's domestic needs to fill short-term gaps in the labour market. The program also addresses foreign nationals' interests in working in Canada and having reasonable opportunities to improve their lives. However, as a complex program that regulates recruiting and retaining temporary foreign workers, the TFWP has some strengths and weaknesses.

The intention of my thesis is to analyze the existing literature and legislation established in legal articles, books, legal reviews, and other scholars' publications relevant to regulations of TFWs. It seems important not only to explore the reasons why this program was created and recently expanded, but also to consider the impact that the expanded program had on TFWs and their families. Therefore, the main goal of my

research is to examine how effectively the program has met the needs of Canadian employers and TFWs. I will focus my analysis on some aspects and consequences of the TFWP in respect of the human rights of TFWs.

Chapter 1 will describe the historical development of migration in Canada and in particular, effects of the aging population and labour market shortages as the main drivers for labour migration policies. This chapter will also provide an overview of the TFWP, specifically, the reasons why this program exists, and why the Canadian government promotes it. This chapter will present different explanations as to why the Canadian government expanded the TFWP, including a perceived labour shortage, Canada's backlogged immigration program, and the apparent neoliberal restructuring of Canada's labour market and employers' desire for a flexible workforce. It will also examine the intended purpose of the TFWP both at the national and international level, and how it operates in practice. Further, this chapter will present an analysis of the background justification for regulating TFWs and the effectiveness of these regulations on foreign workers.

Once a brief background justification on TFWs' rights has been established, Chapter 2 will provide an analysis of international standards related to the protection of human rights, including international covenants, treaties, and human rights committees. It will also discuss Canadian domestic regulations governing migrant workers' rights, including the TFWP.

Chapter 3 will present the comparison between the Canadian TFWP and similar programs governing the status of TFWs in other countries, such as the United States, Germany, and

Australia. From that perspective, I will evaluate the strengths and weakness of these programs to then provide recommendations to the Canadian TFWP.

Finally, this thesis will present recommendations regarding protection of TFWs' rights in Canada, incorporating both domestic and international literature.

CHAPTER 1

An Overview of the Temporary Foreign Worker Program

1. Global Migration and Canadian Economy

Globalization has opened many possibilities for migrant workers seeking job opportunities and work in different countries. In the past, TFW programs have been used by countries that did not have immigration settlement policies and had acute shortages of labour, such as European countries like Austria, Germany, and Switzerland.

According to Karl Flecker, in 2006, approximately 2.5 million migrant workers entered the European countries belonging to the Organization for Economic Cooperation and Development (OECD).¹ Many OECD countries have established TFW programs to attract highly skilled TFWs such as professionals, engineers, managers, and other highly educated workers or skilled workers, such as information technologists (IT) and health workers. In the past decade, there has been a rise in demand for seasonal and lower-skilled workers in many countries, and Canada is one of these.²

Historically, labour migration was supposed to be a “temporary phenomenon and migrants were not expected to remain in the country of employment and eventually

¹ Karl Flecker, “Building a Disposable Workforce through Temporary Migration Policy” (2010) Metropolis, Canadian Issues, TFWs at 99.

² Dominique M Gross, “TFWs and Regional Labour Market Disparities in Canada” (2010) SPP Simon Fraser University at 7.

integrate and settle.”³ This approach, based on a temporary system of migration, which interdicted migrant labourers to integrate into the country, did not work because the total foreign population in western European countries increased. Many labourer migrants failed to return to their countries of origin and their families were able to join them in a new homeland.

Canada is considered to be one of many countries that have accepted immigrants to work temporarily or permanently in order to cover its labour force deficiency. For example, in 2008, “the number of TFWs admitted in Alberta and British Columbia exceeded the total of all categories of permanent resident newcomers combined.”⁴

Recently, guest worker programs were extended in many countries, including the United States, Germany, and Australia, where permanent immigration is considered a tool to encourage economic development. However, TFWs are viewed as a temporary solution to maintain economic growth due to delays or long periods in obtaining permanent residency.

For the first time in its history, Canada has experienced a demographic change in which the proportion of senior citizens, referred to as “Baby Boomers,” is higher than any other age group.⁵ As a result of the combination of an aging society and a decrease in the fertility rate, Canada is facing labour market shortages of both low-skilled and skilled

³ Delphine Nakache & Paula J Kinoshita, “The Canadian TFW Program: Do Short-Term Economic Needs Prevail Over Human Rights Concerns?” (2010) School of International Development and Global Studies and affiliation not provided to SSRN at 6.

⁴ Myer Syemiatyski, “Marginalizing Migrants: Canada’s Rising Reliance on TFWs” (2010) *Metropolis*, Canadian Issues, TFWs, at 61.

⁵ Delphine Nakache & Paula J Kinoshita, *supra* note 3 at 3.

workers. Delphine Nakache and Paula J. Kinoshita predict that Canada will experience a labour shortage of nearly one million people by 2020.⁶ As a result, recruitment of TFWs has grown rapidly in the past years, especially in 2007 – 2008, and the number of people entering Canada with a temporary status is continually on the rise.⁷

To overcome its workforce shortage, Canada has designed TFW programs and regulations that allow foreign nationals to enter the country to work on a temporary basis. From the beginning, the Canadian TFWP was designed to attract skilled TFWs. Later, this program was extended to easily accept low-skilled foreign workers.

Alberta Immigration defines the TFWP as follows: “The Temporary Foreign Worker Program is a federal program. It is designed to meet temporary labour needs [and] to fill short-term gaps in the labour force.”⁸ According to Government of Canada, “The Temporary Foreign Worker Program enables Canadian employers to hire foreign workers on a temporary basis to fill immediate skills and labour shortages when Canadians and permanent residents are not available.”⁹

Under the TFWP, Canadian employers may recruit workers from outside the country. Consequently, Canada’s labour force has been significantly impacted by this worldwide phenomenon; therefore, it cannot be disputed that in the present times TFWs represent an

⁶ *Ibid.*

⁷ *Ibid.*

⁸ Alberta Immigration, “Temporary Foreign Worker Program” (2011) online:
<<http://www.albertacanada.com/immigration/audience/employers-tfw-temporary-foreign-worker-program.aspx>>

⁹ Canada, HRSDC, “Temporary Foreign Worker Program” (2011) online:
<http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/pamphlet/ecr_pamphlet.shtml>

important demographic of the Canadian societal landscape.¹⁰ The significant increase of TFWs is due to the expansion of the federal government's TFWP.

1.1. Historical Development of Migration in Canada

Temporary labour migration is not a new phenomenon for Canadian society. An example of this is found in the railway industry, which, early in the country's history, adopted a temporary migration approach and used migrant labour from Asia to undertake the construction of one of Canada's most important transportation projects – the Canadian Pacific Railway. Although the Canadian Prime Minister of that time, John A. Macdonald, was opposed to the idea of giving foreign workers permanent residency, thus “preventing a permanent settlement in this country of Mongolian or Chinese immigrants”¹¹, the railway was ultimately a method used by many foreign workers to gain permanent status in Canada. Therefore, the movement of migrant workers became part of Canadian history. Some, but not all, people involved in this movement were admitted to Canada with permission to live here permanently. Free movement of TFWs in Canada has been a gradual process; it has existed throughout the history of Canada in various steps and increased considerably in recent years.

Due to this constant movement of migrant workers into its land, Canada, like the USA, has often been described as a nation of immigrants. For example, in December 1984, there were over 20,000 TFWs in Canada.¹² The number of TFWs coming to Canada had

¹⁰ Government of Canada. Parliamentary Report on Temporary Foreign Workers and Undocumented Workers, (June, 2009) House of Commons, Ottawa at 2.

¹¹ Myer Siemiatycki, *supra* note 4 at 60.

¹² Arthur Sweetman & Casey Warman, “Canada's TFW Programs” (2010) Metropolis, CI, TFW at 20.

never been so high. However, this migratory movement has not ceased and on the contrary, it has continued to grow. In 2007, the number of TFWs reached over 300,000. In provinces such as Alberta, these numbers have more than doubled in only a few years. According to Citizenship and Immigration Canada (CIC), there were 57,843 TFWs in 2007, compared with 13,236 in 2004.¹³

However, the necessity to allow TFWs to come and work in Canada has been considered as temporary, something that in some point of time will reach an end, particularly when the country's population grows and reaches a sufficient number such that it will not continue to be necessary to hire immigrants.¹⁴ Indeed, labour migration may be considered as a "temporary phenomenon" because it limits the stay period of the TFW in the employers' country, a characteristic that confirms the temporary nature of the TFWP. However, since Canada continues to need such workers, "not all who make their way to Canada on a temporary basis will leave the country as expected."¹⁵

On the other hand, not all TFWs want to immigrate to Canada and become permanent residents. One question is whether the policy should change for those who work in Canada for several years such that the law should give them increased opportunity to remain and legitimately settle permanently.

The question regarding granting permanent residency to TFWs is not without controversy; rather, it is a disputed issue in the existing literature. For instance, some

¹³ Government of Canada, Citizenship and Immigration Canada (CIC), Temporary residents by yearly status 1983 to 2007. Facts and Figures, (April 12, 2007) Ottawa.

¹⁴ Delphine Nakache & Paula J Kinoshita, *supra* note 3 at 7.

¹⁵ *Ibid.*

libertarians and neo-conservatives consider that the free movement of labour across international borders is a natural effect of free trade and investment.¹⁶

Gerry Angevine and Graham Thompson argue that the labour market functions, according to doctrine of the neo-classical economic theory, just as any other market, when the “demand for the product increases, the price adjusts upward, and vice versa ... like other markets, the supply of labour responds to change in wage rates.”¹⁷ According to this doctrine, flexibility is described as the adjustment of workers and employers to changes in the market. Angevine and Thompson show that there are many existing research studies that confirm the idea that flexible labour markets improve labour market performance, because flexible labour markets provide for new job creation, lower unemployment, and as result, lead to economic growth.¹⁸ To prove this, the authors give an example of an Organisation for Economic Cooperation and Development (OECD) study, which demonstrated that countries with more flexible labour markets experienced greater job creation and higher rates of economic growth.¹⁹ The study shows that the United States has the most flexible labour market in the world, while European countries with less flexible labour markets are slower to respond to newcomers.

Fraser Institute, a traditional pro-market research institute, advocates for the increased flexibility of Canada’s labour market, arguing that “flexibility is a key to an efficient

¹⁶ Martin Collacott, “Canada’s Immigration Policy: The Need for Major Reform” (2003) Fraser Institute at 25.

¹⁷ *Ibid* at 2.

¹⁸ *Ibid* at 4.

¹⁹ *Ibid* at 5.

labour market, characterized by job creation, low rates of unemployment and high productivity.”²⁰

1.2. Labour Market Shortages

As described previously in this chapter, TFWs have been an important resource to overcome skill-labour shortages in many sectors of the Canadian economy.²¹ The decision taken by the Canadian government to expand its TFWP responded to the labour shortage experienced by Canada in 2007 and 2008. Indeed, this phenomenon of increasing the influx of TFWs is demonstrated in 2008 when temporary work permits took only 32 days to be processed, compared to the 4-5 years processing time for permanent resident visa applications before that time.

This huge difference in the processing time is evidence of the government’s commitment to prefer the access of TFWs over permanent residents. As a result of the shifting of the immigration policy, more newcomers were admitted to Canada as TFWs than as permanent residents.²² However, Canada’s need for skilled workers has been gradually equalled by growing needs for low-skilled TFWs or those with limited skills who are accepted because they work in sectors or types of jobs in which Canadians will not.²³

²⁰ Gerry Angevine & Graham Thompson, “Eliminating Barriers to Worker Mobility: Increasing the Availability of Skilled Labor in Alberta’s Oil Sands Industry” (2008) Fraser Institute at 2.

²¹ Arthur Sweetman & Casey Warman, *supra* note 12 at 19.

²² Myer Syemiatycki, *supra* note 4 at 62.

²³ Martin Collacott, *supra* note 16 at 24.

Martin Collacott argues that “by 2020 the country’s economic development could be decreased by a shortage of as many as one million skilled workers.”²⁴ He associates this shortage of skilled workers with Canada’s aging population. Referring to this situation, Collacott mentions that “without any net immigration and with no change in the current fertility rate, our population will continue to grow for another dozen years and [then] begin to fall below the current level in the late 2020s.”²⁵

On the other hand, legal scholars such as Nakache and Kinoshita state that “the short-term focus of Canada’s temporary labour migration policy will not help the country realize its long-term labour market needs and is unfair to the vast majority of TFWs, who are expected to spend years in Canada without contributing to society in the long run.”²⁶ They argue that government should instead develop appropriate policies and regulations that will support TFWs to move from temporary status to permanent residency.

This labour gap was revealed by a parliamentary report on TFWs and non-status workers released in 2009, which states that there are insufficient workers in Canada to fill job vacancies in certain sectors.²⁷ The report continues to say that the government’s response to this situation is met by an increased number of TFWs and individuals who are currently in Canada without legal status.²⁸ However, the parliamentary committee which prepared this report recognizes that the situation of Canada’s labour shortage may be

²⁴ *Ibid* at 9.

²⁵ *Ibid* at 11.

²⁶ Delphine Nakache & Paula J Kinoshita, *supra* note 3 at 1.

²⁷ Government of Canada, Parliamentary Report (2009) *supra* note 10 at 2.

²⁸ *Ibid*.

more complex than this simple explanation. The government's solution and quick response to this labour market failure has continued to focus on accepting TFWs.

Dr. Roslyn Kunin, of the Canada West Foundation, has studied the Canadian labour shortage in order to develop strategies for overcoming it. Dr. Kunin argues that there is a new immigration and labour market reality in some regions of Canada:

It has reached a point and as an economist this is something I have never seen, and frankly, never expected to see. Businesses sometimes don't operate because they can't get money, and businesses sometimes don't operate because they can't get customers, and businesses sometimes don't operate because prices for their products aren't high enough for them to make a profit. But now, for the very first time, I am seeing businesses where all these conditions are met and they aren't operating because they can't get enough workers to do their particular business.²⁹

Other researchers have analyzed how the labour shortage has impacted local businesses, explaining how they are no longer able to run their business as they normally did. Consistent with this position, authors such as David George-Cosh argue that the impact of the labour shortage costs the Canadian economy a great deal.³⁰ Such observations have contributed to reinforce Canada's commitment to create a highly flexible workforce through the expansion of the TFWP.

Others raise the question of whether there is in fact a labour shortage at all. According to the Alberta Federation of Labour (AFL), the apparent labour shortage will only be felt in the short term, and that it was in any event generated by the government's neo-liberal approach of very little market intervention and regulation. The AFL report points out that if the government had intervened and slowed down the rate of growth and development

²⁹ Roslyn Kunin, "Western Canadians Understand Need for Long-Term Economic Planning" (2008) Canada West Foundation at 2.

³⁰ David George-Cosh, "Labour Shortage Could Cripple Canada's Tech Industry: Report" (2008) Financial Post, Canada.

by not simultaneously approving several million dollar infrastructure projects, the economic boom may have continued instead of generating a labour shortage due to an uncontrolled growth rate.³¹

On the other hand, Canadian employers can recruit TFWs under the TFWP only if they demonstrate that there are no available Canadian workers to fill the jobs, essentially by proving that there is in fact a labour shortage in a specific area, and that they have no other sources to recruit employees other than through the importation of TFWs.³² While the AFL contests that there has been a tight labour market, they do not believe it has been so extreme as to justify the use of TFWs or for that matter, the extensive use of the regulations on required skills, internship, and training as many employers have lobbied for the government to do.³³

In addition, the AFL has stated that with the current financial crisis and subsequent increased unemployment, the myth of a labour shortage is becoming less convincing to Canadians.³⁴ Even before the economic recession, there were thousands of skilled workers across Canada who were either unemployed or underemployed looking for work. Furthermore, the AFL argues that there should be no reason that justifies Canada

³¹ Alberta Federation of Labour, “Understanding the Need for Measured Reforms to Alberta’s System for Skills Training” (2009) [AFL] online: < <http://www.afl.org/index.php/View-document/15-Beyond-Chicken-Little.html>>.

³² Canada, “Government of Canada Response to the Report of the Standing Committee on Citizenship and Immigration: Temporary Foreign Workers and Non-Status Workers” (2009) online: <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4017803&Language=E&Mode=1&Parl=40&Ses=2>

³³ AFL, *supra* note 31 at 9.

³⁴ *Ibid* at 10.

spending time and money recruiting TFWs from around the world when there is a large, untapped source of skilled workers within its own borders.³⁵

In conclusion, the current economic crisis has questioned the credibility of the myths of the labour shortage and aggravated negative attitudes towards TFWs. As AFL points out, many TFWs that come to Canada through the TFWP have faced discrimination and racism.³⁶ This is in part due to the fact that while this foreign labour force continues to enter the Canadian workforce, in parallel there has been layoffs of Canadian workers, and the result is a misperception of immigrant workers stealing jobs from Canadians.

2. Canadian Temporary Foreign Worker Program

In order to better understand the TFWPs, I undertook a literature review analyzing these programs. In particular, my research focused on the TFWP, the purposes intended to be served by this program, and the way it operates. Throughout this literature review, I sought to comprehend the background justification of TFW programs, and the explanation behind the apparent positive correlation between the increase of these programs and the Canadian economy. For this purpose, I analysed and reviewed the academic and legal literature, government and trade union reports, and other scholars' publications that relate in general to the Canadian TFWP, and in particular, the working conditions of TFWs.

³⁵ *Ibid* at 14.

³⁶ *Ibid*.

2.1. The Origins and Development of the Temporary Foreign Worker Program

In 2002, the TFWP started as a pilot project to hire TFWs for job positions that required trained workers.³⁷ In 2005, the federal government recognized the need for unskilled labour and therefore lowered its original requirements for TFWs and temporarily accepted applicants with lower levels of formal training.³⁸ Consequently, the federal government changed its original requirements towards TFWs by expanding the scope of workers that may be admitted into Canada, recognizing the country's need for unskilled TFWs. Therefore, the government increased the number of applications for temporary work permits focusing on applicants with lower levels of skill and lack of formal training.³⁹

In 2007, the Low-skilled Worker Pilot Program was renamed "Pilot Project for Occupations Requiring Lower Levels of Formal Training."⁴⁰ According to the Parliamentary Report on TFWs and Undocumented Workers, the TFWP is a government initiative intended to bring unskilled foreign workers in Canada in order to supply a wide range of employers and sectors of the Canadian economy with a flexible workforce.⁴¹

After the program was expanded, Canadian employers increased their access to TFWs, hence making it easier for employers to recruit and hire TFWs. Under the rules of this

³⁷ Delphine Nakache & Paula J Kinoshita, *supra* note 3 at 5.

³⁸ Canada, Parliamentary Report, *supra* note 10 at 4.

³⁹ *Ibid.*

⁴⁰ Judy Fudge & Fiona MacPhail, "The Temporary Foreign Worker Program in Canada: Low-Skilled Workers as an Extreme Form of Flexible Labour" (2010) online <<http://ssrn.com/abstract=1552054>> at 26.

⁴¹ Canada, Parliamentary Report, *supra* note 10 at 2.

program, a job vacancy needed previous advertisement for a seven-day period prior to the effective signing date of the contract with a TFW.⁴² Due to modifications introduced in the immigration policy, farmers and employers no longer needed to demonstrate employment vacancies. It also must be noted that both high-skilled and low-skilled TFWs were eligible to apply to work in Canada under the expanded TFWP.

In June 2008, an amendment to the IRPA “quietly passed in through the Budget Implementation Bill (C-38), firmly sealed the employer-driven policy direction making the temporary migration of workers the principal path to permanent residence in Canada.”⁴³ These changes sealed the employer-driven policy direction, which had a particular impact on TFWs. Essentially, the amendment states that applications to permanent residency in Canada will be assessed and selected under the basis of a list of 38 occupations, a list which is similar to the employer-generated list of “occupations under pressure”.⁴⁴

In general, the changes introduced to the IRPA reinforced the employer-driven policy direction, and thus allowed TFWPs to move forward on a real path towards permanent residency in Canada.⁴⁵ The principal consequence of these changes was that the expanded TFWP permitted the Canadian government to give employers more easy and beneficial access to TFWs, allowing the recruitment and hiring of both high-skilled and low-skilled TFWs. In particular, the government waived the employer’s previous

⁴² Delphine Nakache & Paula J Kinoshita, *supra* note 3 at 9.

⁴³ Salimah Valiani, “The Shift in Canadian Immigration Policy and Unheeded Lessons of the Live-in Caregiver Program” Ottawa (2009) at 9.

⁴⁴ *Ibid* at 10.

⁴⁵ *Ibid* at 9.

responsibility to advertise a job vacancy for at least six weeks before obtaining permission to contract a TFW.⁴⁶ Consequently, the TFWP became “an employer-driven temporary migration program that ties a migrant workers’ employment authorization to a job with a particular employer”.⁴⁷ According to this disposition, a TFW is tied to his or her employer, in which situation exists the potential that employers may use, abuse, or threaten foreign employees with deportation. This provision also may affect TFWs by making them vulnerable to exploitation.

2.2. The Current Temporary Foreign Worker Program

In its early stages, the Canadian TFWP was intended mostly for skilled TFWs. Later, it was extended to all categories of occupations including low-skilled TFWs. The program includes three ways that permit low-skilled TFWs to become part of the Canadian workforce: (i) the Seasonal Agricultural Workers Program (SAWP); (ii) the Live-In Caregiver Program (LCP); and (iii) the Low-skilled Worker Pilot Program (LSWPP), renamed as the Pilot Project for Occupations Requiring Lower Levels of Formal Training that fall under the Canadian National Occupational Classification (NOC) categories C and D.⁴⁸

In 2008, the Canadian government launched a program for TFWs called the Canadian Experience Class (CEC), for which TFWs became eligible for permanent residency after a minimum of two years of full-time, skilled employment in Canada. Also eligible for

⁴⁶ Karl Flecker, *supra* note 1 at 6.

⁴⁷ Judy Fudge, “The Precarious Migrant Status and Precarious Employment: The paradox of International Rights for Migrant Workers” (2011) at 15.

⁴⁸ *Ibid* at 7.

this program were international students who graduated from a Canadian post-secondary institution with at least one year of full-time skilled work experience in Canada.

Thus, subject to the fulfilment of certain requirements, these programs gave the opportunity for skilled TFWs to change their status from temporary to permanent residents. Skilled TFWs have three ways to obtain permanent resident status in Canada: Canadian Experience Class (CEC), Federal Skilled Worker Program (FSWP), and Provincial Nominee Program (PNP) that falls under the category of economic class.⁴⁹

The LCP relates to low-skilled TFWs; the CEC and the FSWP relate to skilled TFWs; and the PNP relates to both skilled and low-skilled TFWs. Among these programs, the LCP provides the opportunity for live-in caregivers to apply for permanent residency after two years of full-time employment within a three-year window of them being in Canada under this program.⁵⁰ Both the LCP and the CEC program give TFWs the opportunity to gain permanent residency status if they prove that they have been employed for 12 months under the CEC program or for 24 months under the LCP.

To better understand the effect of the TFWP's expansion, it is crucial to understand the existing differences between skilled and low-skilled workers. In order to do so, I will briefly refer to the different labour categories of the NOC, which are the following: 0 (management); A (requires university education); B (requires college education or apprenticeship training); C (requires secondary school and/or occupation-specific

⁴⁹ Alberta Civil Liberties Research Centre, "Temporary Foreign Workers in Alberta. Human Rights Issues" (2010) [ACLRC] at 25.

⁵⁰ Delphine Nakache & Paula J Kinoshita, *supra* note 3 at 31.

training); and D (on-the-job training is provided).⁵¹ Categories 0, A, and B are considered skilled jobs. On the other hand, low-skill jobs fall under NOC categories C and D. The requirement for admission in these categories is a high school diploma or two years of specific training.

According to Dominique M. Gross, the goal of the Canadian government to introduce new reforms was to “eas[e] the labour market test for low-skill workers by decreasing the time needed to obtain an LMO.”⁵² Gross explains that “[under] the expedited LMO in the Pilot Project for Occupations Requiring Lower Levels of Formal Training (NOC C and D), the contract period was also extended from one to two years before the TFW must return home.”⁵³ The modification introduced to the federal government’s immigration policy towards TFWs had different effects such as increasing the numbers of TFWs, as well as introducing the possibility for immigrant workers to change their legal status from TFWs to permanent residents, and a change of preference by employers to hire low-skilled over skilled TFWs.⁵⁴

Most recently, however, these rules have received important modifications. Indeed, according to recent changes in the TFWs’ policy (April 1, 2011), the new regulation established a “cumulative duration of four years that a TFW can work in Canada, followed by a period of four years in which the worker would not be eligible to work in

⁵¹ *Ibid* at 5.

⁵² Dominique M Gross, *supra* note 2 at 10.

⁵³ *Ibid.*

⁵⁴ Judy Fudge & Fiona MacPhail, *supra* note 40 at 15.

Canada.”⁵⁵ In other words, low-skilled TFWs now have a limited time to work in Canada – a maximum of four years; after this period expires they must leave Canada and will not be able to enter the country again under the category of TFWs until a subsequent period of four years passes by.

The four-year limit is not applicable to skilled TFWs who work in managerial (NOC 0) or professional occupations (NOC A), including CEC, nor to low-skilled workers who applied for the PNP and the LCP.⁵⁶

After more recent modifications to the TFWP, the federal government included different treatment for skilled and low-skilled TFWs that “prevents lower-skilled workers from shifting from temporary to permanent resident status”.⁵⁷ As a result of the new changes introduced to the program, low-skilled TFWs only remaining path to become permanent residents is through the PNP – the conditions of which are subject to provincial government regulations. According to Nakache, “although PNPs are the most likely path to permanent residency for this group, they come with their own sets of limitations and selection criteria.”⁵⁸ This program is the only existing provincial program in which low-skilled TFWs can apply to receive permanent residency status in Canada. However, only a small number of TFWs gain access to permanent residency status through the PNP.

⁵⁵ CIC, “Information for foreign workers in Canada on the TFWP regulatory changes” (2011) online: <<http://www.cic.gc.ca/english/work/changes.asp>>.

⁵⁶ *Ibid* at 2.

⁵⁷ Delphine Nakache & Paula J Kinoshita, *supra* note 3 at 31.

⁵⁸ *Ibid*.

The explanation of the shifts and changes of policy towards TFWs is complex. Any attempt to make a cost-benefit analysis of the TFWP must consider the role these programs play in the Canadian economy. This situation must take into account that both the role of the program and their benefits may be changed during economic fluctuations.⁵⁹ Although the TFWPs differ in many aspects, they share as a common driver that they bring TFWs to Canada to fill labour shortages, and also share a main objective in that they allow the economy to operate more efficiently.

2.3. Government Management of the Temporary Foreign Worker Program

As was previously stated, the federal government allows eligible TFWs to work in Canada for an authorized period of time, under the TFWP, provided that employers first demonstrate they are unable to find suitable Canadians or permanent residents to fill the job positions and that the entry of these workers will not have a negative impact on the Canadian labour market. Accordingly, employers from all types of businesses can recruit foreign workers with a wide range of skills to meet temporary labour shortages.⁶⁰ Therefore, the government's role towards the TFWP has to do not only with filling the gap between supply and demand of labour but, most importantly, with the protection of Canadian workers and its labour market by maintaining a proper equilibrium between local and foreign workers and continuously monitoring the positive or negative effects temporary foreign labour may have in our economy.

⁵⁹ Arthur Sweetman & Casey Warman, *supra* note 12 at 21.

⁶⁰ Christopher Worswick, "Temporary Foreign Workers: An Introduction" (Spring 2010) *Metropolis* at 3.

The TFWP is a program managed by three federal government departments: Citizenship and Immigration Canada (CIC), Human Resources and Skills Development Canada (HRSDC), and the Canada Border Services Agency (CBSA).

The CIC department is responsible for managing access to Canada when applications for visa and work permits are made from abroad, and when applications for continued access to Canada are made from within Canada. One of its principal obligations is to protect the health, safety, and security of Canadian citizens. With that purpose, visa officers in Canada's missions overseas assess the admissibility of foreigners to ensure there are no issues concerning security, criminality, and communicable diseases. This department also evaluates factors such as the genuine nature of the job offer and the legitimacy of the applicant's intentions, and ensures that the workers have both the qualifications and ability to do the job to which they are destined.

The HRSDC department assesses the possible risks and benefits to the Canadian labour market when determining whether a TFW should be hired. In order for a TFW's application to be positively assessed, the HRSDC must conclude that there would be no negative impact on the Canadian job market.

Finally, CBSA is responsible for the admission of foreign workers as they enter Canada and for the enforcement of the Immigration and Refugee Protection Act when workers and employers do not respect the terms and conditions set forth by the government.⁶¹

⁶¹ HRSDC, "Temporary Foreign Worker Program" (October 6, 2011) online: <http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/index.shtml>.

The process to hire a TFW has to comply with different requirements and follow the steps set forth in the federal government regulations. In first place, the employer who seeks to recruit a foreign worker to work temporarily in Canada must obtain an employment authorization called Labour Market Opinion from the HRSDC.

The main conditions for obtaining a LMO are a genuine job offer; wages and working conditions comparable to those offered to Canadians in the same occupation; proof of reasonable efforts to hire or train Canadians for the job; and evidence that the hiring of a foreign worker will not affect the Canadian labour market.⁶² The TFWP requires employers to pay the same wages to TFWs as are paid in the domestic labour market.

According to the HRSDC, employers can be considered ineligible to recruit TFWs if, “during the two years preceding a LMO application, it is found that they have not provided wages, working conditions or an occupation to a TFW that were substantially the same as the terms and conditions of the job offer.”⁶³ If an employer violates these conditions, he or she can be refused to hire foreign workers for a period of two years.⁶⁴

The goal of the LMO is to ensure there is no adverse effect on the Canadian labour market. In that sense, as part of the employment authorization, the HRSDC is required to ensure that the employer has made reasonable efforts to recruit citizens and permanent residents, which means that TFWs are recruited only if employers demonstrate that they

⁶² Dominique M Gross, *supra* note 2 at 9.

⁶³ HRSDC, “Temporary Foreign Worker Program. Employer Compliance: Requirements for the Temporary Foreign Worker Program”, New rules effective April 1, 2011, online:
<http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/pamphlet/ecr_pamphlet.shtml>

⁶⁴ *Ibid.*

cannot find Canadian workers or permanent residents to fill job openings.⁶⁵ Once the Ministry has approved the job offer, the TFW gets a copy of the LMO and with that, she or he can apply to the CIC department for a work permit.

3. Regulations Governing Temporary Foreign Workers in Canada

In this section, I will provide a brief description of Canada's regulations governing the legal status of TFWs in Canada. Like many other matters in Canada, jurisdiction over TFWs is divided between two levels of government, a division which creates an additional level of complexity to the matter. Thus, the federal government regulates the admission and expulsion of foreign workers and has primary jurisdiction over immigration. However, the provinces and territories have primary responsibility over employment and the establishment of labour standards,⁶⁶ which means that the legal status of TFWs in Canada is regulated and protected by legislation, rules, and programs enacted by the provinces and territories.

3.1. The Constitution Act

Section 95 of the *Constitution Act*, 1867 reads:

In each Province the Legislature may make Laws in relation to Agriculture in the Province, and to Immigration into the Province; and it is hereby declared that the Parliament of Canada may from Time to Time Make Laws in relation to Agriculture in all or any of the Provinces, and to Immigration into all or any of the Provinces; and any Law of the Legislature of a Province relative to Agriculture or to Immigration shall have effect in and for the Province as long and as far as it is not repugnant to any Act of the Parliament of Canada.⁶⁷

⁶⁵ Judy Fudge & Fiona MacPhail, *supra* note 40 at 9.

⁶⁶ Judy Fudge, *supra* note 47 at 17.

⁶⁷ The Constitution Act, 1867 (UK), 30 & 31 Vict, C 3, online: <<http://canlii.ca/t/ldsw>>.

This means that the Parliament of Canada creates legislation related to immigration for Canada as a whole and provincial legislatures have the power to enact legislation related to immigration matters for each province. However, the concluding phrase in section 95 confirms the paramountcy of federal legislation.

3.2. Immigration and Refugee Protection Act

TFWs may come to Canada under the auspices of the *Immigration and Refugee Protection Act* (IRPA), which stipulates general principles, criteria, and powers with respect to immigration policy. The IRPA regulates temporary entry of TFWs and provides different mechanisms for giving foreign workers access to work in Canada.

One of the stated objectives of the IRPA is to allow Canada to exercise maximum economic benefit of immigration. Subsection 3(1) of IRPA refers to immigration as a means for Canada to “support the development of a strong and prosperous Canadian economy, in which the benefits of immigration are shared across all regions of Canada.”⁶⁸ Therefore, to support the Canadian economy, the government promotes temporary labourers.⁶⁹

According to sections 22 and 29 of the IRPA, TFWs are considered foreign nationals allowed to enter the country to work for remuneration for a limited period of time. The IRPA defines the foreign national as “a person who is not a Canadian citizen or permanent resident, and includes a stateless person.”⁷⁰ Section 47 stipulates that TFWs

⁶⁸ *Immigration and Refugee Protection Act*, S.C. 2001, C 27 at 2.

⁶⁹ Delphine Nakache & Paula J Kinoshita, *supra* note 3 at 3.

⁷⁰ *Ibid* at 1.

lose their “temporary resident status at the end of the period for which they are authorized to remain in Canada.”⁷¹

Regarding permanent settlement of TFWs in Canada, section 22 of IRPA explains that “[a]n intention by a foreign national to become a permanent resident does not preclude them from becoming a temporary resident if the officer is satisfied that they will leave Canada by the end of the period authorized for their stay.”⁷² Consequently, TFWs come to Canada to work temporarily under the regulations stipulated in IRPA that regulate their temporary entries.

According to Human Resources and Skills Development Canada (HRSDC), on June 30, 2011, an Act came into force in the form of Bill C-35 to amend some provisions of the IRPA regarding TFWs.⁷³ The amendment consisted of new rules regulating “the intervention of paid third party representatives in the Labour Market Opinion (LMO) and Arranged Employment Opinion (AEO) application process.”⁷⁴

This amendment to the IRPA requires that the paid third party representatives, such as recruitment companies, consultants, and lawyers, who provide services to TFWs, must have permission before providing these services. The federal government introduced these changes to protect TFWs from fraud and improper payments for these representatives, which reach up to tens of thousands of dollars.

⁷¹ *Ibid.*

⁷² Dominique M Gross, *supra* note 2 at 9.

⁷³ Government of Canada, HRSDC, “Operational Bulletin 317” (2011) online: <<http://www.cic.gc.ca/english/resources/manuals/bulletins/2011/ob317.asp>>.

⁷⁴ *Ibid.*

Another amendment to the IRPA imposed a limit on residency for low-skilled TFWs, which is “[a] maximum cumulative duration of four years, followed by a period of four years in which the worker would not be eligible to work in Canada”⁷⁵. This provision of the IRPA arguably discriminates between low-skilled and skilled TFWs, by means of forcing the low-skilled TFWs to leave Canada after a period of four years of working without being able to apply to obtain permanent residence status.

3.3. Immigration and Refugee Protection Regulations

Section 196 of the *Immigration and Refugee Protection Regulations* (IRP Regulations) states that the “foreign national must not work in Canada unless authorized to do so by a work permit.”⁷⁶ Therefore, the general rule is that a non-resident intending to work in Canada must first receive a job offer from a Canadian employer and then must apply for a work permit.

Sections 2 and 200 of the IRP Regulations set rules for the issuance of work permits to foreign citizens. Accordingly, pursuant to section 204 of the IRP Regulations, a work permit can be issued to foreign citizens who want to work in Canada temporarily, with the condition “to leave Canada by the end of the period authorized for their stay.”⁷⁷

According to section 110 of the IRP Regulations, the Live-in Caregivers Class is also defined as “a class of foreign nationals who may become permanent residents”.⁷⁸ In this

⁷⁵ HRSDC, *supra* note 63.

⁷⁶ Emily Carasco et al, *Immigration and Refugee Law, Cases, Materials, and Commentary* (Toronto: Emond Montgomery, 2007) at 236.

⁷⁷ *Ibid.*

⁷⁸ *Immigration and Refugee Protection Regulations* (SOR/2002-227) [IRP Regulations] at 68.

case, a foreign citizen who wants to come to Canada as a live-in caregiver first must obtain a work permit and after apply for a temporary resident visa.

On June 30, 2011, along with Bill C-35, the government also introduced amendments to the IRP Regulations⁷⁹. According to HRSDC, these modifications will help the TFWP to provide additional protection to temporary foreign workers. The amendments change the sections regarding the Labour Market Opinion and Live-in Caregiver Program. As the federal government states, “all LMO applications must be submitted using the new application forms, which are now specific to each program stream.”⁸⁰ In addition to old requirements, Bill C-35 gives more authority to the CIC and the HRSDC to verify the genuineness of any job offered to foreign workers.⁸¹ According to this stipulation, TFWs will receive more protection from the Canadian government.

3.4. Manitoba’s Worker Recruitment and Protection Act

A particular situation of cutting edge provincial regulation affecting TFWs is found in Manitoba, which has introduced new legislation that regulates TFWs’ legal status in that province, the *Worker Recruitment and Protection Act* (WRAPA). Its goal is to better protect the rights of TFWs inside the province. In addition to the protection from unsafe practices of employers and recruiters, the Manitoba government has developed a strategic action plan for economic growth that emphasizes and recognizes the importance of enhanced settlement services for newcomers, both immigrants and TFWs, which includes

⁷⁹ HRSDC, *supra* note 9.

⁸⁰ *Ibid.*

⁸¹ Certified Canadian Immigration Consultant, “Canada Immigration” [CCIC] online: <<http://marclaforceccic.com/pressreleases/?tag=immigration-documents>>.

provisions for language training, labour market integration strategies, and welcoming communities.⁸²

Manitoba passed the WRAPA in April 2009, in order to establish control on employers' recruiting activity of TFWs. Thus, "foreign worker recruitment activities place the provincial government at the front-end of foreign worker recruitment and reaffirm the province's commitment to ensuring that workers are not charged for finding employment."⁸³ The benefit of this Act is that it provides a framework for recruitment of foreign workers and responds to issues of TFWs' vulnerability. The WRAPA includes standards for the protection of foreign workers from recruiters. Indeed, under the WRAPA, all employers are obliged to register with the province before the recruitment process begins. Employers also must have authorization and are prohibited from charging any kind of commission for recruitment.⁸⁴ These stipulations provide protection for TFWs from undue payments of recruitment fees, which actually consisted of thousands of dollars.⁸⁵

It seems that the federal government took into consideration these principles when it adopted the amendments to IRPA in April 1, 2011. These new stipulations can be seen in the new changes with respect to the TFWP where government provides additional protection to the TFWs from payment of recruitment fees and introduces a rigid control

⁸² Nancy Allan, "Foreign Workers and Protection: The Role of Manitoba's Workers Recruitment and Protection Act" (2008) Winnipeg, Government of Manitoba at 30.

⁸³ *Ibid.*

⁸⁴ *Ibid* at 31.

⁸⁵ *Ibid.*

over Canadian employers, who must, according to the new regulations, demonstrate the genuineness of any job offered to TFWs.

4. The Long Term Purpose of the Temporary Foreign Worker Program

The primary justification of the federal government when promoting the entrance of TFWs to Canada was to help Canadian economic growth. The economic reasoning behind this is that labour migration is often characterized as a “principal tool to help employers meet immediate skill requirements when qualified Canadian workers cannot be found.”⁸⁶ To respond to the employers’ needs, government changed the TFWP and, as a result, employers were “able to hire TFWs more quickly and easily to meet immediate skills shortage and fast track international workers into in-demand jobs.”⁸⁷

In an interview with Minister of Citizenship, Immigration and Multiculturalism, Jason Kenney, published in *Metropolis*’ journal in 2010, he described the goal of this program by stating that it looks to “address labour shortages that are temporary, where neither Canadians nor permanent residents can be found to meet these needs. In general, the number of foreign workers that come to Canada depends on employer demand.”⁸⁸ At the provincial level, Alberta Immigration’s department considers the TFWP is designed to meet temporary labour needs and to “fill short-term gaps in the labour force.”⁸⁹

⁸⁶ *Ibid* at 5.

⁸⁷ Delphine Nakache & Paula J Kinoshita, *supra* note 3 at 3.

⁸⁸ *Metropolis*, “Interview with the Honorable Jason Kenney, Minister of Citizenship, Immigration and Multiculturalism” (Spring 2010) CI TFW at 10.

⁸⁹ CIC, “Temporary Foreign Worker Program” (June 5, 2011) online: <<http://www.albertacanada.com/immigration/audience/employers-tfw-temporary-foreign-worker-program.aspx>>.

From another perspective, legal academics such as Nakache and Kinoshita argue that the TFWP's purpose is to "address temporary labour shortages, as well as encourage the use of appropriate programs and pathways to permanent residency" for TFWs in order to respond to the long-term needs for the Canadian labour force deficiency.⁹⁰ The Canadian government uses temporary labour programs to give to TFWs the possibility to change their temporary status into permanent residency, and by those means respond to long-term economic needs.

The existing literature regarding the TFWP provides a general overview of the reasons behind the decision of both the federal and provincial governments to create TFWs programs, as well as the explanation of why employers promote them. Further, I intend to present some debates regarding TFWs that took place both in the academic community and the trade unions, and which also include some policy debates.

Regarding the academic debates, scholars such as Mark Thomas of York University provides an explanation as to why employers may be interested in promoting the TFWP. He argues that workers under this program are highly vulnerable to exploitation because it admits a flexible workforce. Due to this vulnerability, workers themselves are placed on the lower level of Canadian society.⁹¹ Thomas argues that from a governmental perspective, the TFWP do not include citizenship rights. Consequently, without such rights, the government may deny protection to workers under such a program. In addition, he maintains that the government uses TFWP to fix problems within its severely

⁹⁰ Delphine Nakache & Paula J Kinoshita, *supra* note 3 at 35.

⁹¹ Mark Thomas, "Migrant Labour, Citizens and Labor Rights in the new Economy", Conference Report – the 50th Annual Convention of the International Studies Association, New-York (2009) online: <<http://convention2.allacademic.com/one/isa/isa09/>>.

backlogged immigration system. In other words, in dealing with immigration issues such as black market and illegal workers, the federal government renamed these individuals as “temporary workers.”⁹² It follows that after their designation as temporary workers they will be no longer considered illegal immigrants and therefore will not continue to be seen as an immigration problem for the government.

Consequently, what appears to be a labour issue is in fact an immigration issue. According to Thomas, the TFWP excused the government for neglecting its duties regarding foreign workers. At the same time, when these programs appeared to be dealing with immigration problems, they really ended up challenging workers’ rights.⁹³

When addressing the same subject, Harald Bauder suggests that “the international migration of workers is necessary for the survival of industrialized economies.”⁹⁴ Bauder also explains the role that TFWs play and their relation to Canada’s economic development when he writes: “our economy is dependent on the labour of often ‘invisible’ international migrants.”⁹⁵

Harald Bauder states that “workers do not exist because there are arduous and badly paying jobs to be done, but rather arduous and badly paying jobs exist because immigrant workers are present or can be sent for to do these.”⁹⁶ This analysis helps to better understand the Canadian situation and explains the expansion of the TFWP due to the

⁹² *Ibid* at 5.

⁹³ *Ibid*.

⁹⁴ Harald Bauder, *Labour Movement: How Migration Regulates Labor Markets* (Oxford University Press, USA, 2006) at 2.

⁹⁵ *Ibid* at 4.

⁹⁶ *Ibid* at 5.

important role TFWs play in Canada by means of maintaining and strengthening the country's economy.

Indeed, without the presence of these TFWs, the Canadian economy would suffer, such as Bauder writes that “[t]he economies of the industrialized world today depend on migration. Without immigrant labor, the economies of North America and Europe would suffer or even collapse.”⁹⁷

In his book, Harald Bauder refers to this situation as the segmented labour market, where foreign workers, along with other marginalized workers in society, maintain the economic system by occupying jobs and positions what he calls “secondary labour market” such as low-paid or temporary jobs:

The immigrants are more vulnerable and can be paid lower wages, and they work longer and more flexible hours than domestic workers. More immigrants are hired for low-end occupations that non-immigrants don't want. Occupations in which immigrants are typically overrepresented include office cleaning, landscaping, food preparation services, and manual labor.⁹⁸

Additionally to this situation, Professor Bauder explains that foreign workers are a welcome labour force because they are cheap and flexible.

The trade unions stress the fact that the TFWP ensures employers' access to a highly flexible workforce. The AFL argues that the TFWP exists and has proliferated first and foremost due to this fact. In that sense, they refer to the recruitment of TFW as a

⁹⁷ *Ibid* at 4.

⁹⁸ *Ibid*.

“disposable workforce”, which the employer can simply disregard when the employee is no longer needed.⁹⁹

Other problems discussed over the TFWP are related to the maintenance of a functional labour market with a flexible workforce willing to work in the ‘secondary labour market’ for low wages and under poor working conditions. From the perspective of the supply of workers, the debates have focused on the discussion of whether the TFWP was expanded as a response to employers’ claim that there is a shortage of available workers. The prevailing view is that the TFWP was conceived to cover the existing labour gap and to supplement the available workforce.

Based on the literature search, I conclude that the Government of Canada decided to expand the TFWP for different reasons. First, the federal government elaborated TFW programs to respond to the labour deficiency in Canada. Second, government expanded its TFWP in order to respond to the demands of employers who were looking to recruit a temporary, flexible, and low wage workforce.

Third, the program also addresses foreign nationals’ interests in finding more job opportunities in Canada than in their countries of origin. Because of the overall purpose of the program, Canada owes a general obligation to treat TFWs fairly, to give them employment and other rights equal to that of Canadians, and to provide them with reasonable opportunities to improve their lives.

⁹⁹ Yessy Byl, “Temporary Foreign Workers in Canada: A Disposable Workforce” (2010) *Metropolis*, CI TFWs at 97.

However, even though the TFWP contains a number of legal protections intended both to protect the domestic labour market and to provide equal employment rights to TFWs, the Program is largely employer-driven and governed by contract. The expansion of the TFWP, developed with the best intentions of the government to meet the needs of employers and TFWs, created a particular vulnerability of TFWs to abuse and discrimination, to which I will return in Chapter 2.

CHAPTER 2

The Rights of Temporary Foreign Workers under International and Canadian Domestic Law

Globalization has increased the movement of migrant workers and created many opportunities to work outside their countries of origin. Canada is considered to be one of many countries that have accepted immigrants to work temporarily in order to cover its workforce deficiency. Because Canada is facing labour market shortages as a result of the aging population and a decrease of the overall fertility rate, the migrant contribution is important for Canadian economy.

Chapter One examined how the Canadian government has adopted regulations to facilitate entry of TFWs. The purpose of this Chapter is to analyze and clarify whether the Canadian government respects the rights of these workers through its domestic regulations and if such laws protect their rights in practice. My goal is to determine if the economic interest of our governments and employers can be matched with international migrant rights standards. To this purpose, I will analyze the International Human Rights Law correlated with the domestic law as it applies to TFWs' rights in Canada and establish if Canada's economic interest is consistent with the international protection of the rights of migrant workers.

In terms of international law, Canada is not party to the *Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*¹⁰⁰, which is the most comprehensive international instrument directly governing migrant workers. One of my goals is to analyze the Convention to determine both its strong and weak elements in order to bring some suggestions and recommendations to the Canadian law regarding TFWs' economic, social, and cultural rights. I will argue that Canada should become Party to the Convention in order to align with international standards on human rights.

Defining the term of “Temporary Foreign Workers”

Under the IRPA, TFWs are defined as “foreign nationals” who may work temporarily in Canada. Article 2 of IRPA defines a “foreign national” as a “person who is not a Canadian citizen or a permanent resident, and includes a stateless person”.

Shelly Gilbert defines “temporary foreign workers” as “non-citizen individuals admitted to work in Canada for time-limited periods through immigration permits issued under IRPA.”¹⁰¹ A Law Commission in Ontario writes that TFWs are “individuals admitted on a temporary basis to Canada in order to work”.¹⁰² They are also known as “guest workers

¹⁰⁰ *Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, (18 December 1990) [Convention on Migrant Workers], online: <<http://www2.ohchr.org/english/bodies/treaty/index.htm>>.

¹⁰¹ Shelley Gilbert, “Canada's Temporary Foreign Worker Program & Human Trafficking” (March, 2012) online: <www.uwindsor.ca/law/legalassistance/system/files/foreign-worker.ppt>.

¹⁰² Law Commission of Ontario, “Who are Temporary Foreign Workers?” (2012) online: <<http://www.lco-cdo.org/en/vulnerable-workers-baxter-sectionII>>.

or overseas contract workers who migrate for a limited period of time in order to take up employment.”¹⁰³

The *Convention on Migrant Workers* uses the term of “migrant workers” instead of “temporary foreign workers” as it is used by Canadian law or “guest workers” used by the U.S., Germany, and Australia guest worker programs. The Convention defines migrant worker as follows: “The term ‘migrant worker’ refers to a person who is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.”¹⁰⁴

On the contrary, Alberta Civil Liberties Research Centre (ACLRC) points out that Canada does not have a class of migrant workers. It mentions that in Canada are following categories of individuals: (i) citizens, (ii) permanent residents (including family, economic, and refugee class), (iii) temporary residents (visitors, workers, and students), and/or individuals without status (for example, individuals already in Canada who are waiting for a determination on their claim for refugee protection). Additionally, ACLRC argues that most people who come to Canada who would be considered as migrant workers under the *Convention on Migrant Workers* have been granted the status of permanent residents and they have the legal rights and social benefits of Canadian citizens.¹⁰⁵

¹⁰³ ACLRC, *supra* note 49 at 10.

¹⁰⁴ Convention on Migrant Workers, *supra* note 100 at Article 2(1).

¹⁰⁵ ACLRC, *supra* note 49 at 50.

In this thesis, I intended to use the term “temporary foreign workers”, except in section 2.4 of Chapter Two relating to the *U.N. Convention on Migrant Workers*, which expressly uses the term “migrant workers”, and Chapter Three relating to the U.S., Germany, and Australia guest worker programs that use the term “guest workers”.

1. Background Justification of Migrant Workers’ Rights

As a result of the expanding globalization, every year millions of men and women leave their country in search of better and security job in order to offer a better life for their families. According to the United Nation’s High Commissioner, 214 million people worldwide live outside their country of origin.¹⁰⁶ These people seek opportunities to find a better life, with better working conditions. It is notable that the number of workers admitted under temporary programs has increased significantly in traditional immigration countries such as the U.S., Canada, Germany, and Australia. For instance, in 2006, the US accepted more than 295,000 temporary workers, compared to 208,100 in 1997.¹⁰⁷

Canada has experienced an even greater proportional increase of migrant workers in the last decade. Notably, Citizenship and Immigration Canada shows that the number of temporary migrant workers in 2008 exceeded the number of permanent economic migrants. The federal government indicates that 251,235 TFWs were working in Canada on December 1, 2008, compared to 112,553 TFWs who entered Canada in 2004.¹⁰⁸

¹⁰⁶ UN High Commissioner for Human Rights, Migration and Human Rights (2012) [UNHCHR MHR], online: <<http://www.ohchr.org/EN/Issues/Migration/Pages/MigrationAndHumanRightsIndex.aspx>>.

¹⁰⁷ International Labour Migration, “A Rights-Based Approach” (2010) [ILM], online: <http://www.ilo.org/public/english/protection/migrant/download/rights_based_approach.pdf> at 29.

¹⁰⁸ CIC, “Facts and figures 2009: Permanent and temporary residents” [CIC, Facts 2009], online: <<http://www.cic.gc.ca/english/resources/statistics/facts2009/index.asp>>.

Those figures continue to climb. In 2011, CIC registered the number of TFWs as 300,111.¹⁰⁹

Without doubt, migrant workers contribute to economic growth and development of society in host countries. For example, Barbara MacLaren describes how temporary migrant workers “contributed as much as \$303 million over 12 months in employment insurance premiums in 2008 alone.”¹¹⁰

Sarah Marsden, in her recent article describing the regulation of TFWs in Canada, argues that “[w]ithin the socio-historical context of migrant labour regulation in Canada, political and regulatory developments function to further entrench segregation and exclusion of foreign workers by maintaining a subclass of flexible labour.”¹¹¹ Marsden further demonstrates that Canada’s current temporary migration regime reinforces its historical role as a “technocratic settler state in which the regulation of migrant workers creates inherent boundaries.”¹¹²

Migrant workers arriving in the employment country usually do not know the rights to which they are entitled.¹¹³ At the international level, Stefanie and Harrison Grant write that even though migrant workers contribute to the country’s economy, they face many

¹⁰⁹ CIC, “Temporary Foreign Workers Present on December 1, 2011” online: <<http://www.cic.gc.ca/english/resources/statistics/facts2011-preliminary/04.asp>>.

¹¹⁰ Barbara MacLaren & Luc Lapointe, “Employment Insurance: How Canada Can Remain Competitive and be Fair to Migrant Workers” (2010) online: <[PDF] from focal.ca> at 74.

¹¹¹ Sarah Marsden, “Assessing the Regulation of Temporary Foreign Workers in Canada” (2011) 49 Osgood Hall L.J 39 at 39.

¹¹² *Ibid.*

¹¹³ Stefanie Grant & Harrison Grant, “International migration and human rights: A paper prepared for the Policy Analysis and Research Programme of the Global Commission on IM” (2005) at 30.

barriers and lack protection because of undeveloped domestic legislation or because of employers' abuse. Referring to the human rights issues in the destination countries, the author points out that migrants' issues arise from discrimination, racism, employer abuse, and others concerns, such as inadequate integration and undeveloped cultural identity.¹¹⁴ Consequently, migrant workers are frequently subject to unequal treatment, unequal opportunities, and other discriminatory behaviour.

Further, they argue that discrimination and racism affect migrants themselves that may be identified in several different forms such as racial violence, limited access to citizenship, and limited access to the administration of justice.¹¹⁵ This demonstrates that migrant workers have unequal access to economic, social, and cultural rights, including emergency care, a reflection of policies that restrict and deter immigration. Temporary workers are subject to different treatment compared to citizens and even to other immigrants as permanent residents. For example, discrimination at work may be in the form of lower wages, which leads to other forms of discrimination and marginalization, such as discrimination in housing and education.¹¹⁶ Labour abuse is common among TFWs such as excessive overtime, improper wage payment and withholding of wages, poor health and safety condition, harassment (physical, verbal, and sexual), and limited freedom of movement. Grant highlights that the migrant women as domestic workers are most vulnerable, such as in the following:

Most move from poorer to richer countries for economic reasons, and most leave their children behind. Their working conditions vary enormously. While some are

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid* at 7.

¹¹⁶ ILM, A Rights-Based Approach, *supra* note 107 at 80.

subjected to conditions this may amount to virtual slavery and forced labour. Because of their subordinate status both as migrants and as women – sometimes characterised as ‘double marginalisation’ – female migrant workers are particularly vulnerable to exploitation and ill treatment. Distinctions between trafficked women and voluntary women migrants are difficult to make because both may end up in comparable situations of exploitation, violence and abuse.¹¹⁷

Stefanie Grant maintains that their vulnerability in the workplace and in the entire society is linked to a variety of different economic, cultural, and political factors, including lack of enforcement mechanisms. Most significantly, she explains that the distinctive vulnerability of TFWs results from the fact that they are not citizens of the country where they work.

1.1. Migrant Workers’ Rights Approach

In order to understand how legislation of the destination countries impact on TFWs’ rights, I will present a human rights approach to investigate the situation and to advocate for protection of workers’ rights. A human rights approach is defined as a “catalyst that can transform the practice of development from a focus on identifying and meeting needs to enabling people to recognize and claim rights that are enshrined in the United Nations Declaration of Human Rights (UNDHR).”¹¹⁸

This approach can be used in various contexts: for legal purposes, to provide an international framework, and to empower people in order to overcome obstacles towards the realization of social, economic, and political rights. Additionally, this approach has the potential to achieve a positive transformation in the power relations among various

¹¹⁷ Stefanie Grant & Harrison Grant, *supra* note 113 at 12.

¹¹⁸ Celestine Nyamu-Musembi and Andrea Cornwell, “What is the rights based approach all about? Perspectives from international development agencies” (2004) England: Institute of Development Studies at 45.

subjects. In the Canadian context, for example, there is a need for a better relationship between employers, government and TFWs. The present government policies favour a power position for employers. Using a human rights' based approach may help to examine this relationship and determine how to modify this power in order to enhance TFWs' ability to fight for their rights.

Juanita Elias explains how TFWs' rights are seen as human rights, and that their rights should be enforced and protected.¹¹⁹ An examination of the Canadian case demonstrates that the TFWs' rights are not protected as they should be. The importance of this approach is that it frames TFWs' rights as human rights in order to create political opportunities for this marginalized group of workers to gain recognition and to have their rights enforced.

Similarly, Susan Martin uses the rights based approach to protect and enforce TFWs' rights.¹²⁰ In her analysis, Martin emphasizes the role of the state and the international human rights instruments such as conventions developed by the United Nation (UN), including two major covenants and other treaties, all of which play an important role in guaranteeing that foreign workers' rights are recognized and enforced. It is important to find ways to ensure that the rights of foreign workers are protected and enforced, especially within immigrant receiving countries such as Canada.

¹¹⁹ Juanita Elias, "Putting the Rights Based Approach to Migration within Feminist Frames" (2008) online: <www.allacademic.com/meta/p252703_index.html>.

¹²⁰ Susan F Martin, "Migration and Development: Policy Coherence", Paper presented at the ISA's 50th Annual Convention "Exploring the Past, Anticipating the Future" New-York, USA (2009) online: <http://citation.allacademic.com/meta/p313983_index.html>.

Finally, it is important to take into consideration the point of view of Karen Dick: “[i]t’s easy to talk about rights, but much more difficult to get them enforced, or even to get people to assert their rights.”¹²¹ Indeed, when government invites foreign workers into the country, it should take into consideration that, as Max Frisch colorfully stated, “[w]e invited guest workers, and got human beings.”¹²²

2. International Standards Relating to the Protection of Migrant Workers’ Rights

Legal standards that protect TFWs’ rights are found in international conventions and treaties, international labour and migrant organizations, regional instruments, and customary international law. This section focuses on the protection of economic, social and residence rights of TFWs by international human rights instruments.

2.1. Covenant on Civil and Political Rights

This sub-section will refer to those provisions regarding the protection of human rights of the TFWs as non-nationals. *Covenant on Civil and Political Rights* (CCPR)¹²³ protects the right to freedom from forced labour (article 8), and the liberty and security of the person (article 9). In addition to these provisions, CCPR contains, in article 26, an equality clause, which guarantees that “[a]ll persons are equal before the law and are entitled without discrimination to the equal protection of the law,” provisions similar to

¹²¹ Karen Dick, “Voices from the front lines: Three sites of struggle against precarious labour in Canada” (2007) Briarpatch, Ottawa, online: <<http://briarpatchmagazine.com/articles/view/voices-from-the-front-lines-three-sites-of-struggle-against-precarious-labo>>.

¹²² Max Frisch, “Towards a Fair Deal for Migrant Workers in the Global Economy” (2004) International Labour Conference, 92nd Session, online: <<http://www.ilo.org/public/english/standards/relm/ilc/ilc92/pdf/rep-vi.pdf>> at 111.

¹²³ *Covenant on Civil and Political Rights*, (19 December 1966) [Linda Reif, IHRL: CCPR] at 26.

those of article 2(1), which states that “[e]ach State Party...undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, without distinction of any kind, such as race, colour, sex, language, religion, ...national or social origin”. Similar provisions are included in the *Canadian Charter of Rights and Freedoms* (CCRF), which states that “[e]very individual is equal before the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex [or] age”.¹²⁴

Provisions related to foreign workers as non-nationals include the right to freedom of association with others and the right to form and join trade unions. Accordingly, the CCPR recognizes the right of everyone to “freedom of association with others, including the right to form and join trade unions.”¹²⁵ The Covenant provides for limits on exercising these rights “which are prescribed by law...in the interests of national security of public safety [and] public order, the protection of public health or morals or the protection of the rights and freedoms of others.”¹²⁶ The rights to freedom of movement and to choice of residence are important for migrant workers, because their purpose for coming to a new country is to look for a better job and a better life for their families.

Moreover, the CCPR obligates the States to protect migrant workers’ rights as human rights. Thus, States have a legal obligation to assist individuals whose rights under the

¹²⁴ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act 1982*, section 15(1) “Equality Rights” RSC44.

¹²⁵ CCPR, *supra* note 123 at Article 22(1).

¹²⁶ *Ibid* at Article 22(2).

Covenant are violated.¹²⁷ Mark Gibney maintains: “The primary responsibility for protecting human rights lies with those states where these individuals who are being denied human rights protection live.”¹²⁸ It means that if migrant workers are not receiving protection against employers, this represents a human rights violation of the country members because governments have the primary responsibility for protecting all human rights, whether they are permanent residents or not.

2.2. Covenant on Economic, Social and Cultural Rights

The human rights protections are provided in the *Covenant on Economic, Social and Cultural Rights* (CESCR)¹²⁹ for all human beings without any kind of discrimination and without distinction between citizens and non-citizens. CESCR protects the economic and social rights that include the following: employment rights, trade union rights, right to social security, and family reunification. Regarding economic rights of migrant workers, the Covenant protects the right to work, including free choice of employment; the right to fair and satisfactory working conditions, including fair wages, safe and healthy working conditions; and the right to form and join trade unions.¹³⁰ In this context, article 6 describes the measures that States can take in order to maintain the right to work of individuals, including policies and techniques for stable economic, social and cultural development, and safe employment conditions.

¹²⁷ Mark Gibney, *International Human Rights Law: Returning to Universal Principles* (Toronto: Rowman & Littlefield Publishers, 2008) at 91.

¹²⁸ *Ibid* at 4.

¹²⁹ *Covenant on Economic, Social and Cultural Rights* (16 December 1966) [Linda Reif, IHRL: CESCR] at 69.

¹³⁰ *Ibid* at Articles 6, 7, and 8.

Article 7 establishes the right of everyone to enjoy just and favorable working conditions that are safe and healthy. Remuneration includes fair wages that could provide a decent living for workers and their families. Article 11 provides the right of everyone to an adequate standard of living for themselves and their families. It also provides the worker's right to rest, leisure, reasonable working hours, and paid holidays and vacations.

CESCR also guarantees the rights to form and join trade unions as an aspect of the rights to freedom of association, found in article 8. These rights can be restricted only for certain reasons such as protection of national security or public order. These rights should be guaranteed to foreign workers immediately after their entry into the country of employment.¹³¹

Furthermore, CESCR guarantees, in article 10(1), the right to family reunification that proclaims that the "protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children."¹³² Such provisions are included in article 23, in that "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State." This is one of the basic rights of migrant workers, to not be separated from their families for an unreasonable period of time.

The UN Committee on Economic, Social and Cultural Rights highlights that, in relation to migrant workers, the right to work must be applied without discrimination, which

¹³¹ Ryszard Cholewinski et al, *Migration and Human Rights: The United Nations Convention on Migrant Workers' Rights* (UNESCO Publishing, Cambridge University Press, 2009) at 211.

¹³² CESCR, *supra* note 129 at 69.

means that migrant workers have the same work rights as citizens and permanent residents. Specifically, the Committee ascribes that “the principle of non-discrimination as set out in article 2(2) of the Covenant should apply in relation to employment opportunities for migrant workers and their families.”¹³³

This Committee also points out that “States parties are under the obligation to respect the right to work by prohibiting forced or compulsory labour and refraining from denying or limiting equal access to decent work for all persons, especially disadvantaged and marginalized individuals and groups, including migrant workers.”¹³⁴ Furthermore, the Committee contends that States parties should take measures “to eliminate discrimination against non-citizens in relation to working conditions and work requirements, including employment rules and practices with discriminatory purposes or effects [and] to prevent and redress the serious problems commonly faced by non-citizen workers, including debt bondage, passport retention, illegal confinement, and physical assault”. Additionally, the Committee recognizes the freedom of assembly and association, “once an employment relationship has been initiated until it is terminated”.¹³⁵ However, receiving countries may have policies that restrict foreign workers access to their labour market.¹³⁶ In reality, if a country provides free access to the labour market, this freedom will apply to skilled rather than low-skilled TFWs.

¹³³ UN High Commissioner for Human Rights, “Economic and Social Council Report” (2010) E 89 [UNHCHR, Report] at 16.

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

¹³⁶ ACLRC, *supra* note 49 at 45.

2.3. U.N. Convention on the Elimination of All Forms of Discrimination

Against Women

Women foreign workers are especially vulnerable to discrimination and exploitation. Many scholars and women's rights advocates argue that migrant women face discrimination both as women and as non-nationals of the employment country.¹³⁷ Therefore, in this subsection I will analyse the *U.N. Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW)¹³⁸ regarding the State's obligation to respect, protect, and fulfill the human rights of women foreign workers. My goal, specifically, is to determine if the provisions of the convention adequately protect and support women working under the Canadian Live-in Caregiver Program. Canada, as Party of the convention, has an obligation to eliminate discrimination in private sectors, "[t]o take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise."¹³⁹ Canada also has the responsibility to use the concept of *due diligence* to prevent and punish violence against foreign worker women.

2.3.1. Violation of the Human Rights of Migrant Women

The CEDAW Convention requires the States Parties "to uphold the human rights and fundamental freedoms of all women, including migrant women, on a basis of equality with men."¹⁴⁰ In order to eliminate discrimination against women in the field of

¹³⁷ Jennifer S Hainsfurther, "A Rights-Based Approach: The Utilization of CEDAW to Protect the Human Rights of Migrant Workers" (2009) AUILR, Vol.24, Issue 5, 9 at 3.

¹³⁸ *Convention on the Elimination of all forms of Discrimination Against Women*, 18 December 1979, [Linda Reif, IHRL: CEDAW] at 80.

¹³⁹ *Ibid* at Article 2(e).

¹⁴⁰ ACLRC, *supra* note 49 at 46.

employment, CEDAW includes provisions addressing employment discrimination, such as equal employment opportunities, equal remuneration for the same job, a fair wage, and the rights to family benefits. The Convention intervenes where working women are discriminated because of their race, colour, and national or ethnic origin.¹⁴¹

In receiving states, foreign worker women often face discrimination and humiliation at the work place. The women rights' abuse may appear in both the State's legislation and among private employers.¹⁴² In some countries, including Canada, abuses of migrant women rights take place at the hands of employers or agencies rather than government's policies. Given that many violations of migrant women's rights take place at the hands of private employers, under article 2(e) of the CEDAW Convention demands the States to take all measures in order to eliminate discrimination against women by any person, including employers.¹⁴³ This provision empowers migrant women and human rights organisations to claim the State is responsible if it did not monitor properly the recruitment agencies and employers who practice abuse and violation on their migrant women workers.

According to Jennifer Hainsfurther, many States do not take into account domestic workers as "employees" under their labor codes; therefore, they are not receiving health insurance, social security, unemployment programs, and other government services.¹⁴⁴ Hainsfurther demonstrates that migrant women as domestic workers are vulnerable to

¹⁴¹ ILM, *supra* note 107 at 135.

¹⁴² Jennifer S Hainsfurther, *supra* note 137 at 3.

¹⁴³ CEDAW, *supra* note 138 at Article 2(e).

¹⁴⁴ Jennifer S Hainsfurther, *supra* note 137 at 7.

restrictions on their freedom of movement. There are cases, she writes, when employers keep the migrant worker locked in the house, or employers confiscate travel documents and women do not have any contact with the outside world. Such situations demonstrate that women working in the domestic sector are more vulnerable because they are isolated from society. Because many domestic laws provide the dependence of foreign workers on their employers, migrant women are often vulnerable to gender-based violence in the workplace, resulting in physical, psychological, or sexual abuse.¹⁴⁵

2.3.2. The Applicability of CEDAW to Migrant Women's Rights

CEDAW is one of the most ratified among international human rights treaties; therefore, it is considered a potential tool for protecting women foreign workers. The UN High Commissioner for Human Rights (UNHCHR) mentions that although violence against migrant women is not explicitly mentioned in the text of CEDAW, the Committee explains that according to article 1, gender-based violence is a form of discrimination against women.¹⁴⁶

To understand this further, the General Recommendation 19 on Violence Against Women maintains, “[g]ender-based violence is a form of discrimination that seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men.”¹⁴⁷ General Recommendation 19 states that the gender-based violence “includes acts that inflict physical, mental, or sexual harm or suffering, threats of such acts, coercion, and

¹⁴⁵ *Ibid* at 9.

¹⁴⁶ UNHCHR, “Treaty Bodies” (2012) online: <<http://www2.ohchr.org/english/bodies/treaty/index.htm>>.

¹⁴⁷ *General Recommendation 19: Violence Against Women*, CEDAW GR19 (1992) [Linda Reif, IHRL: CM] at 88.

other deprivations of liberty.”¹⁴⁸ The Committee recommends, “States parties should ensure that laws against family violence and abuse...and other gender-based violence give adequate protection to all women, and respect their integrity and dignity.”¹⁴⁹

The Committee mentions that “States parties should take appropriate and effective measures to overcome all forms of gender-based violence, whether by public or private act,”¹⁵⁰ which means that States have an obligation to take all measures to combat violence against all women. Although the Committee’s recommendations are not legally binding, under article 4 of CEDAW, states are required to take positive measures to eliminate all forms of violence against women in order to fulfill their obligations.¹⁵¹

The Committee additionally maintains that the State must act “with due diligence to prevent and respond to...violence against women” and to “provide victims of domestic violence with safe and prompt access to justice.”¹⁵² Furthermore, the Committee states that “[u]nder general international law and specific human rights covenants, States may also be responsible...if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.”¹⁵³ This constitutes an authorization of the concept of due diligence as applicable under CEDAW. The principle of due diligence plays an important role by providing a standard to measure

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid* at 89.

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

¹⁵² *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*, (22 December 2000) [Linda Reif, IHRL: CM] at 85.

¹⁵³ *General Recommendation 19*, *supra* note 147 at 88.

state responsibility on elimination of discrimination against all women. The State's obligation to act with due diligence to prevent violations of rights means that the State should take all measures to eliminate discrimination against women under the CEDAW provisions. Because the CEDAW Convention guarantees equality between women and men, states are obligated to take "all appropriate measures" to eliminate discrimination against women. States have an obligation to use the principle of due diligence to prevent and punish the violence against all women, including temporary foreign workers.

2.3.3. Canada's Human Rights Legislation and the Dualist System

Canada is a Party to the CCPR, the CESCRC, and the CEDAW Convention, all of which have direct implications for the rights of migrant workers as non-nationals. The dualist system followed by Canada means that treaties ratified by Canada are not automatically implemented. If the regulations of treaties are not incorporated into domestic law, they are not binding in Canadian courts. Even if these treaties' stipulations are not directly binding in Canadian courts, they can be applied in cases where similar provisions are found in the *Canadian Charter of Rights and Freedoms*.¹⁵⁴ The international human rights instruments remain an important tool to protect the rights of TFWs as non-nationals because of the familiarity that they have and the wide ratification by most states.

¹⁵⁴ Tanya Basok & Emily Carasco, "Advancing the Rights of Non-Citizens in Canada: A Human Rights Approach to Migrant Rights" (2010) 32 HR Q. 342 at 351.

2.4. U.N. Convention on the Protection of the Rights of Migrant Workers

Although Canada is not party to the *United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (CPRMW)¹⁵⁵, my goal in this sub-section is to examine why Canada did not ratify the convention, one of the most useful legal tools for protecting TFWs' economic, social, and cultural rights, such as employment rights, family reunification, and rights to remain and to naturalization. On the international level, the convention reflects significant progress for migrant workers with legal status, such as the right to unionize and the recognition of equal rights with permanent residents and citizens in terms of social security benefits.¹⁵⁶

2.4.1. Migrant Workers' Fundamental Rights

International instruments on human rights do not require nation state parties to employ migrant workers. But, if states accept them as economic participants in their society, migrant workers are supposed to have the same rights as nationals.

The principle of non-discrimination with respect to the rights of nationals and non-nationals found in the international human rights conventions is also included in *Convention on Migrant Workers*. Provisions of the Convention apply to all migrant workers and their family members.¹⁵⁷ Article 7 stipulates that migrant workers are eligible for the protection of their rights without distinction of any kind such as ethnic,

¹⁵⁵ *Convention on Migrant Workers*, *supra* note 100.

¹⁵⁶ Catherine Dauvergne & Sarah Marsden, "The Ideology of Temporary Labour Migration in the Post-Global Era" UBC (2011) online: <<http://ssrn.com/abstract=1768342>> at 21.

¹⁵⁷ UNHCHR, "Guide on Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families" (2009) online: <<http://www.unhcr.org/refworld/docid/4a09710a2.html>> at 17.

social origin, and nationality. These provisions guarantee the rights of migrant workers and their families without discrimination. Article 1(1) contains a general provision that underlines its applicability to all migrant workers “without distinction of any kind” and shows the prohibition of discrimination from employers.

According to Migrants Rights International, the *Convention on Migrant Workers* protects all migrant workers and members of their families, regardless of their legal status.¹⁵⁸ One of the main principles of the convention is the equal treatment between nationals and migrant workers hired in the same country, as stipulated in article 25. This means that migrant workers have rights to be treated equally with the nationals of the country of employment in respect of remuneration and conditions of work. Migrant workers, as well as nationals, have the right to join trade unions and associations, specified in article 26.¹⁵⁹ Article 54(1) guarantees equal treatment between non-nationals and nationals in respect to protection against dismissal and unemployment benefits. Articles 49 and 51 provide rights to equal access to public work schemes and to alternative employment in case of loss of work or termination.

The Convention protects employment rights such as the right to work; the right to free choice of employment; the right to just and favorable conditions of work; the right to equal pay for equal work without discrimination; the right to a fair remuneration allowing for a dignified standard of living, and the right to rest.

¹⁵⁸ Migrants Rights International, “The 1990 Convention: On the Protection of the Rights of All Migrant Workers and Members of their Families” (2007) online: <http://www.migrantwatch.org/about_the_convention/BasicRights.html>.

¹⁵⁹ UNHCHR, Guide, *supra* note 157 at 18.

The right to work applies to all migrant workers regardless of their status. Protection of migrant workers against exploitation and abuse is a core component of human rights, especially in vulnerable situations and unbalanced power between workers and employers.¹⁶⁰ Thus, the Convention provides in article 52(1) the right to free choice of employment, which stipulates that “migrant workers in the State of employment shall have the right freely to choose their remunerated activity.” Under article 52(2), a State may limit free access to employment “in accordance with its legislation concerning recognition of occupational qualifications acquired outside its territory.”¹⁶¹

Further restrictions are imposed on migrant workers with limited work permission. Article 52(3)(a) stipulates that the state of employment has “the right freely to choose their remunerated activities subject to the condition that the migrant worker has resided lawfully in its territory for the purpose of remunerated activity for a period of time prescribed in its national legislation that should not exceed two years.” These limitations do not apply to those workers who have “resided lawfully in its territory for the purpose of remunerated activity for a period of time prescribed in its national legislation that should not exceed five years,” provision found in article 52(3)(b).

Freedom of movement is guaranteed in article 39, which provides to migrant workers and members of their families the right to liberty of movement in the territory of the State of employment and the freedom to choose their residence.¹⁶² Article 40 of the Convention provides the right of migrant workers to join trade unions, including the right to form

¹⁶⁰ UNHCHR, Report, *supra* note 133 at 16.

¹⁶¹ *Ibid* at Article 52(2).

¹⁶² UNHCHR, Guide, *supra* note 157 at 20.

associations and trade unions for the protection of their economic, social, cultural, and other interests. Furthermore, these provisions are stipulated in the CCPR (article 22) and CESCR (article 8) regarding the protection of the trade union rights of migrant workers and their families. It follows that international human rights instruments grant migrant workers the right to form trade unions for the protection of their interests.

The Convention recognizes in article 38 the right to family reunification without detriment, which means that receiving countries are obligated to take into account the needs of migrant workers and members of their families to be together.¹⁶³ Regarding the right to family reunification, article 44(2) stipulates that States Parties are obligated to take appropriate measures to facilitate the reunification of migrant workers with their families. The right of migrant workers to reunite with their families is essential, not only for their family wellbeing, but also because the realization of this right contributes to social stability in both receiving and sending countries.¹⁶⁴

The Convention accords to migrant workers the right to remain in the country of employment while working, and in the case of immediately after termination of employment, protection against expulsion, and a right to naturalization.¹⁶⁵ Although migrant workers are invited for economic reasons, the States should protect them because

¹⁶³ Victor Piche, "Identification of the Obstacles to the Ratification of the *United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families: The Canadian Case*" (2006) online: <http://unesdoc.unesco.org/images/0014/001473/147310e.pdf>.

¹⁶⁴ Beth Lyon, "The Unsigned United Nations Migrant Worker Rights Convention: An Overlooked Opportunity to Change the Brown Collar Migration Paradigm" (2009) Villanova USL, PL & LT, WP 20 at 53.

¹⁶⁵ Cholewinski, *supra* note 131 at 105.

they are not only guests but also subjects and therefore they are ruled by the law.¹⁶⁶ Because of their economic contribution to, and social participation in the country of employment, it would be fair for migrant workers and their families (such as low-skilled foreign workers in Canada) to be allowed to stay and provide them with an opportunity to obtain citizenship status.

2.4.2. Canada's Position on the Ratification of the Convention on Migrant Workers

Although the *U.N. Convention on Migrant Workers* represents the most comprehensive treaty in the field of migration and human rights, the majority of receiving countries have not ratified it, including Canada.¹⁶⁷ In fact, only 39 countries in total have ratified this Convention. Some of the substantive objections of the receiving countries for non-ratification of the Convention are:

a concern with the breadth and complexity of the Convention; the technical and financial obligations it places on states which have ratified it; and the view that the Convention either conflicts or adds no value to national migration laws.¹⁶⁸

Vincent Chetail argues that “[e]ven though the CPRMW does not contain all the solutions, it can be considered a comprehensive and appropriate standard for dealing with various aspects of the migration phenomena, and ensuring a minimum of consistency in protection. Its very existence recalls that migrants’ rights are human rights.”¹⁶⁹

¹⁶⁶ *Ibid.*

¹⁶⁷ Laurie Berg, “At the Border and Between the Cracks: The Precarious Position of Irregular Migrant Workers under International Human Rights Law” (2007) 8 MJ of IL 1.

¹⁶⁸ ACLRC, *supra* note 49 at 50.

¹⁶⁹ Vincent Chetail, “Book Review: ‘Migration and Human Rights. The United Nations Convention on Migrant Workers’ Rights’, by R. Cholewinski, P. De Guchteneire and Pécoud” (2010) International Journal of Refugee Law, 22 4, at 682.

Countries of origin consider that the Convention can protect their migrants, while countries of destination do not consider ratifying the Convention is necessary to provide protection to migrant workers. Authors also maintain that their national system of migrant workers' protection is adequate, or superior to, the rules included in Convention.¹⁷⁰

Victor Piche identifies four following obstacles to the ratification of the Convention.¹⁷¹

The first obstacle is that the management of migration has to remain a national priority and “migration policies are exclusively national sovereignty issues and should not be determined by Conventions at multilateral or international levels.”¹⁷² His second argument is that the spirit of the Convention is far different from Canadian philosophy in terms of the selection of TFWs and “historically removed from Canadian culture and traditions.”¹⁷³ Further, the author argues that the federal government has neither interest nor power in “monitoring rights in regards to the contractual revoking of various fundamental rights by migrant workers” mainly because provincial jurisdictions control work-place health and security standards.¹⁷⁴ The last obstacle to the ratification of the Convention is the fact that Canada has already signed two international treaties: the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights, which incorporate the protection of human rights. According to Piche,

¹⁷⁰ Ryszard Cholewinski, *supra* note 131 at 59.

¹⁷¹ Victor Piche, *supra* note 163 at 5.

¹⁷² *Ibid* at 10.

¹⁷³ *Ibid*.

¹⁷⁴ *Ibid*.

“dealing with universal human rights protection is sufficient to guarantee the protection of the rights of migrants.”¹⁷⁵

Srdjan Vucetic points out that few states have signed the Convention. The sending countries see the Convention as a mechanism by which they can protect their citizens living and working abroad.¹⁷⁶ Theoretically, the Convention is intended to protect migrant workers’ rights if the state signed and ratified it; however, in practice it is different. He also explains how important it is that countries sign the Convention, since migrant workers constitute a vulnerable group of people that need protection and without any support of governments it is just a convention without any legal or political influence.¹⁷⁷ Specifically, Vucetic emphasizes that the political question ‘who has the right to have rights?’ needs to be answered at the level of the states’ domestic politics.¹⁷⁸

Ryszard Cholewinski underlines that in many countries the rights of migrant workers do not match the Convention’s standards. For instance, in Western countries with a traditional human rights law, the “gap between national laws and the Convention appear relatively minor.”¹⁷⁹ Most importantly, Cholewinski mentions that in Canada there is discrepancy between the TFWP and the Convention in respect of human rights of TFWs. Canada accepts a large number of TFWs, many of whom are low-skilled and who have rights’ issues, such as being tied to a specific employer, no right to family reunification,

¹⁷⁵ *Ibid* at 12.

¹⁷⁶ Srdjan Vucetic, “Democracies and International Human Rights: Why There is No Place for Migrant Workers?” (2007) online: < http://aix1.uottawa.ca/~svucetic/Vucetic_Istanbul.pdf> at 404.

¹⁷⁷ *Ibid* at 420.

¹⁷⁸ *Ibid* at 428.

¹⁷⁹ Ryszard Cholewinski, *supra* note 131 at 18.

and no right to unionize. This means that “[b]y tying the validity of a foreign worker’s visa to a specific employer, the Canadian government implicitly gives all employers the right to deport any migrant worker at will or prevent them from being re-hired by another Canadian employer.”¹⁸⁰

The ratification of the Convention will not preclude the Canada from maintaining its immigration policy, but it would help in minimizing the risks of abuse and violations of the migrant workers’ rights in Canada. This would eliminate the current situation regarding migrant workers’ rights, which is one of the major obstacles to ratifying the Convention.¹⁸¹ Therefore, the Convention ratification would grant additional rights to migrant workers and may be a specific instrument of protection for these vulnerable workers.

According to Raluca David, “[t]he main issues facing human rights of migrant workers today is the perceived threat to state sovereignty posed by the effects of implementing human rights for non-citizens.”¹⁸² On the contrary, the Convention recognizes state’s sovereignty over immigration control.¹⁸³ Article 79 declares, “[n]othing in the present Convention shall affect the rights of each State Party to establish the criteria governing admission of migrant workers and members of their families”.¹⁸⁴ Despite the

¹⁸⁰ Victor Piche, *supra* note 163 at 212.

¹⁸¹ *Ibid* at 208.

¹⁸² Raluca David, “Human Rights of Migrant Workers: The Vicious Cycle of Powerful State Sovereignty, Lack of Ratification and Weak Enforcement” (2010) online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1593693> at 3.

¹⁸³ Laurie Berg, *supra* note 167 at 7.

¹⁸⁴ *Convention on Migrant Workers*, *supra* note 100 at Article 79.

international recognition of migrant workers' rights, state sovereignty remains a supreme principle in the international system.¹⁸⁵

The Human Rights Committee mentions that the *Convention on Migrant Workers* is a tool that encourages States members to establish or improve national legislation according to international standards.¹⁸⁶ Article 79 of the Convention stipulates that States have the prerogative to determine who is admitted to their countries and their conditions of residency. The Convention's scope is to prevent and eliminate the exploitation of migrant workers and members of their families by domestic laws and practice.¹⁸⁷ Even though the Convention proclaims that each States has a sovereign right to decide who can enter its territory, for what purpose and under which conditions, the majority of migrant receiving states, such Canada and the U.S., still refuse to ratify it.

Although the countries of employment maintain the sovereign right to set their immigration policies, the Convention has established fundamental principles to protect the rights of TFWs: (i) non-discrimination applied to all workers, including TFWs; (ii) equality between TFWs and nationals in the field of employment and occupation; (iii) international labour standards that set minimum standards for treatment and conditions at work, such as minimum wages and maximum work hours that apply to all workers regardless of status.

¹⁸⁵ Raluca David , *supra* note 182 at 11.

¹⁸⁶ UNHCHR, Guide, *supra* note 157 at 6.

¹⁸⁷ *Ibid* at 16.

In conclusion, even if there are solid explanations for why Canada, along with some receiving countries, have refused to ratify the Convention, I argue that Canada, a liberal democratic country, should ratify the *U.N. Convention on Migrant Workers* to improve its domestic law related to the relationship between Canadian employers and TFWs, in which the TFWs are vulnerable to unlawful exploitative actions by employers, and also to align with international standards on human rights.

3. Domestic Regulations Governing Migrant Workers' Rights in Canada

In Canada, regulations that provide legal status of TFWs are divided between two levels of government. As it was mentioned in Chapter One, the federal government regulates the admission and expulsion of migrant workers and has primary jurisdiction over immigration, while the provinces and territories have primary responsibility over employment and the establishment of labour standards.¹⁸⁸ Federal government creates acts and regulations related to immigration as a whole and provincial legislatures establish acts and regulations related to immigration matters for each province.

The IRPA stipulates general principles, criteria, and powers with respect to immigration policy of migrant workers, regulates temporary entries of TFWs, and provides different mechanisms for giving foreign workers access to work in Canada. The IRP Regulations, however, contain specific provisions relating to different categories of migrant workers, including who may be issued a work permit and under what circumstances, and what restrictions will attach to the worker's permit.

¹⁸⁸ Judy Fudge, *supra* note 47 at 7.

3.1. Temporary Foreign Worker Program Relating to Migrant Workers' Rights

In this section, I will discuss human rights issues raised by the TFWP in relation to migrant workers, defined by the program as TFWs. Also, I will analyze and clarify whether the Canadian government respects the rights of TFWs according to its domestic regulations and if such laws protect these workers in practice, as well as to determine if the Canadian government and employers' economic interest can be matched with the rights of the TFWs as human beings. Moreover, I intend to focus on the protection of the Canadian legislation regarding TFWs' economic, political, and social rights, including employment rights, trade union rights, social security rights, family reunification, as well as residence rights that include the right to remain in the employment country, and the right to permanent residence and to naturalization. To this purpose, my analysis has focused on a review of academic and legal scholars' literature, government and trade union reports, and other scholars' publications regarding the TFWP in relating to working conditions of the TFWs.

Federal government expanded the TFWP to meet labour shortages that developed in Canada due to unprecedented economic robustness. Consequently, the number of TFWs has tripled over the past ten years, exceeding the number of economic class permanent residents entering Canada for the first time in 2006.¹⁸⁹ Dauvergne and Marsden maintain that the expanded TFWP provides to foreign workers fewer labour, association, and mobility rights than permanent migrants or citizens.¹⁹⁰ They argue that employment may be restricted to a particular employer indicated on their work permit, and that family

¹⁸⁹ Yessy Byl, *supra* note 99 at 96.

¹⁹⁰ Catherine Dauvergne & Sarah Marsden, *supra* note 156 at 8.

reunification may be restricted, such as the mandatory separation from family members for low-skilled TFWs.¹⁹¹

3.1.1. Unequal Rights between Temporary Foreign Workers and Citizens

TFWs come to Canada based on a work visa, which is issued for a limited period of time. This temporary status denies to foreign workers equal rights vis-à-vis other workers who are permanent residents or citizens. According to Dauvergne and Marsden, some TFWs have experienced abuse and exploitation in the workplace and “the conditions of inequality and exploitation are expanding rather than contracting as the expansion of borders has facilitated the expansion of exploitive labour practices.”¹⁹² Because of their temporary status, TFWs are more vulnerable than resident workers; they have fewer rights and the rights that they have are not effective, and they are less likely than other workers to complain against their employers despite the fact that migrant labourers are working in the sectors that resident workers refuse to do.¹⁹³ This situation places TFWs in a vulnerable position compared to citizens or permanent workers.

3.1.2. Discrimination between Skilled and Low-skilled Foreign Workers

As pointed out earlier, Canada is recruiting TFWs to fill its labour market demands.¹⁹⁴ There is a “difference in treatment of skilled and low-skilled foreign workers”¹⁹⁵, which

¹⁹¹ *Ibid* at 19.

¹⁹² *Ibid* at 26.

¹⁹³ Judy Fudge, *supra* note 47 at 35.

¹⁹⁴ Catherine Dauvergne & Sarah Marsden, *supra* note 156 at 20.

¹⁹⁵ Delphine Nakache & Paula J Kinoshita, *supra* note 3 at 31.

place low-skilled workers in an unequal position. This distinction between skilled and low-skilled is reflected in recent changes in Canadian regulations.¹⁹⁶

Therefore, in this sub-section, I will analyze specific policy issues existing with the federal TFWP regarding low-skilled workers. First, this program prevents low-skilled workers from shifting from temporary to permanent resident status. According to Nakache and Kinoshita, low-skilled workers have many barriers to obtaining permanent resident status. Authors maintain that through the existing federal programs “it is legally impossible for them to change their immigration status from temporary to permanent [residency].”¹⁹⁷ On the contrary, for skilled workers, it is simple to apply for and to obtain permanent residency if they have already been admitted in Canada based on a work visa. That means that the federal government encourages skilled foreign workers, offering them a ‘green path’ to settle permanently in Canada, while low-skilled workers are forced to leave the country when their work permits expire.

Under the new changes to the TFWP, the conditions regarding family reunification and work permit for family members of low-skilled workers are more severe than for those of skilled worker families, which mean that low-skilled workers are not allowed to bring their family members with them. This particular restriction is found in the IRP Regulations, which permit skilled workers to be accompanied by their family for the duration of their time in Canada based on an open work permit for the spouse. Low-skilled workers are excluded from this possibility.¹⁹⁸ Because of this restriction, low-

¹⁹⁶ IRPA, *supra* note 68 at 169.

¹⁹⁷ Delphine Nakache & Paula J Kinoshita, *supra* note 3 at 31.

¹⁹⁸ IRP Regulations, *supra* note 78 at Section 80(2).

skilled workers stay in Canada for years separated from their families, who remain in their country of origin. Dauvergne and Marsden criticize this situation, arguing that “[i]n Canada, family life is restricted, such as the mandatory separation from family members within Canada’s low-skilled migration scheme.”¹⁹⁹ This stipulation included in the TFWP where low-skilled foreign workers are separated from their family, has a negative impact on both the rights of low-skilled TFWs and subsequently, on the family integration.

Until recent changes in the legislation, low-skilled workers were able to stay in Canada and obtain new work permits as long as their employers were able and willing to obtain a labour market opinion for them.²⁰⁰ Effective April 1, 2011, low-skilled workers are now confined by restrictions that result in their inability to extend their work permits for more than a two-year period, while skilled workers have no restrictions to extend their status in Canada.²⁰¹ The duration of the work period allowed is two years, and can be renewed for two more years, after which time the low-skilled workers will have to leave Canada for four years.²⁰² This restriction was introduced by the federal government in order to emphasize “the temporary nature of the residence of the workers admitted under the program.”²⁰³

¹⁹⁹ Catherine Dauvergne & Sarah Marsden, *supra* note 156 at 19.

²⁰⁰ HRSDC, “Hiring Foreign Workers in Canada” (2009) online: <http://www.hrsdc.gc.ca/leng/workplace_skills/foreign-workers/pamphlet/tfwp-pamphlet.shtml>.

²⁰¹ HRSDC, TFWP, *supra* note 9.

²⁰² IRP Regulations, *supra* note 78 at sections 183(1) & 203(3).

²⁰³ Judy Fudge, *supra* note 47 at 30.

Eugenie Depatie-Pelletier highlights that TFWs admitted to Canada as low-skilled have many restrictions that “constitute obstacles to exercising rights and freedoms considered to be fundamental for all residents under the *Canadian Charter of Rights and Freedoms*...namely the right...to equal protection and benefit of the law without discrimination”.²⁰⁴ These restrictions are considered as a human rights abuse of the low-skilled TFWs that should give some consideration for policy-makers, because, as Delphine Nakache questions, “is it really in Canada’s best interest to have policies that do not support the lower-skilled temporary foreign workers and that do not give such workers the option to become permanent residents?”²⁰⁵ They are left then in a discriminatory situation.

3.1.3. Unequal Employment Rights to Temporary Foreign Workers

Canadian Trade Unions have issued various reports in recent years explaining how TFWs are being exploited and taken advantage of when they work in Canada. For instance, Yessy Byl argues that the TFWP is racist and that the rights of TFWs under this program are not respected or enforced, in the following: “if rights are not enforced, they really aren’t rights in the first place.”²⁰⁶

Similarly, a number of researchers have raised the issue of the employment insecurity and instability of family relationships associated with the international migration standards.

This point was raised by Nakache, who writes that “[i]n theory, TFWs have many legal

²⁰⁴ Eugenie Depatie-Pelletier, “Restriction on Rights and Freedom of Low-Skilled TFW” (2010) *Metropolis*, CI 45 at 64.

²⁰⁵ Delphine Nakache, “The Canadian Temporary Foreign Worker Program: Regulations, Practices and Protection Gaps” (2010) online: <<http://www.yorku.ca/rap/events/pdf/D.Nakache.pdf>> at 41.

²⁰⁶ Yessy Byl, *supra* note 99 at 56.

protections in the workplace environment, as do other workers in any province, but those rights, which are employer-driven, do not transfer well into practice.”²⁰⁷ This means that even if officially there is no distinction between the employment rights of TFWs and permanent residents or citizens, in reality TFWs do not have the same rights as other employees in the workplace. Because they are in a unique employment situation, all the more reason their rights need be protected.

According to Nakache, after the new changes to the TFWP, “employers are dependent on recruiting agencies to help match them with appropriate TFWs. Recruiters charge TFWs for work placement, which is illegal under provincial laws. For instance, in Alberta workers are charged recruitment fees up to \$20,000.”²⁰⁸

The author also explains that TFWs experience many other barriers, such as lack of experience regarding the Canadian legal system, and are often threatened with deportation. There is a significant gap in the literature with respect to this matter as I could find no evidence of any single court-case regarding TFWs as claimant. It seems that TFWs avoid this kind of situation, which could obviously jeopardize their work or even lead to deportation from Canada because the current legislation empowers the employer to decide their situation.

²⁰⁷ Delphine Nakache, *supra* note 205 at 10.

²⁰⁸ *Ibid* at 13.

3.1.4. Restrictions and Limitations for the Temporary Foreign Workers

As was mentioned above, in 2008 TFWs contributed over three hundred million dollars to the employment insurance (EI) program.²⁰⁹ An unemployed foreign worker, however, is not allowed to receive benefits even if he or she has paid into the plan because “an EI claimant must prove that he or she has worked a certain number of hours; they must prove that they are available for work and unable to obtain suitable employment.”²¹⁰ Under the Canadian legislation, TFWs must pay into the EI program, but they are not eligible for benefits because they are supposed to be working while they are in Canada.

Another limitation affecting TFWs is the restrictive nature of the work permit, which bounds their ability to change employers.²¹¹ The restrictive nature of the work permits and the temporary employment authorization limit foreign workers’ right to change their employers. The challenge is that TFWs might be ineligible for EI just because they are legally restricted from taking new employment.²¹²

Canadian government does not protect TFWs, this corroborating with the restrictive nature of the work permit that leads to a contentious matter. Consequently, TFWs who are laid off cannot find another employment, cannot access EI benefits, they cannot afford to stay, and finally, they are expected to return home.²¹³ All of these circumstances

²⁰⁹ Barbara MacLare & Luc Lapointe, *supra* note 110 at 5.

²¹⁰ Delphine Nakache, *supra* note 205 at 8.

²¹¹ *Ibid* at 4.

²¹² *Ibid*.

²¹³ *Ibid* at 10.

show that the rights of TFWs in Canada are not protected, which also affects the overall wellbeing of these workers and their families.

For instance, under Alberta's employment standards system, TFWs are limited in their ability to lodge a complaint against their employers because of their temporary status and particular vulnerability. Nakache states that, "[i]nitiating a complaint against one's employer can be both difficult and intimidating, and often leads to 'self-censorship' as TFWs may fear losing their job if they file a complaint."²¹⁴ This means that TFWs constitute a vulnerable group with lack of employment mobility and less likelihood to report employer abuses or to benefit from protections that exist for all workers.

According to the United Food and Commercial Workers (UFCW) Canada, "[w]hen migrant workers raise issues of concern to their employer, they do so knowing they face the very real risk of being sent home under the repatriation provisions. Workers can be sent home by their employer, often with just a day or two's notice, for any reason. This ability of employers to have workers repatriated for any reason is perhaps the most significant negative aspect of [the program]."²¹⁵ In practice, there are many cases when TFWs are sent home by their employer if they do not satisfy the employer's interests. Due to their precarious positions, they can easily become victim to all kinds of worker's rights violations, abuse, and mistreatment. Some of such injustices include being threatened by their employer with deportation, forced to work overtime without proper compensation, and/or forced to pay unrealistic prices for accommodation, and poor living conditions.

²¹⁴ *Ibid* at 13.

²¹⁵ United Food and Commercial Workers Canada, "The Status of Migrant Farm Workers in Canada", Report (2007) online: <<http://www.ufcw.ca/Theme/UFCW/files/PDF2007/StatusReportEN2007.pdf>> at 9.

The TFWP also restricts the foreign worker's right to mobility and permanent residence. Because TFWs cannot change employers without legal authorization, that restriction interdicts them from exercising the freedom to move within the Canadian labour market. Furthermore, their temporary status under the work permit system obligates them to return to their home country after their work contract expires; this restriction limits their right to apply for permanent residency.

3.1.5. Lack of Government Protection

One of the main requirements of the TFWP is that the employer must sign an employment contract with the TFW. That contract stipulates the terms and conditions of employment, such as maximum number of hours worked per week and the minimum wage. Although the employment contract contains mandatory provisions, the federal government cannot use it to enforce the employment rights of TFWs because the Government of Canada is not a party to the contract; it “has no authority to intervene in the employer/employee relationship or to enforce the terms and conditions of employment.”²¹⁶ Moreover, “[i]t is the responsibility of each party to the contract to know the laws that apply to them and to look after their own interests.”²¹⁷ Even though on paper it seems that TFWs rights’ are protected, in practice it is different. As Nakache mentions, “[b]oth federal and provincial levels offer protections to TFWs, but each is limited in its ability to enforce these rights.”²¹⁸ Because government is not party to the work contract, employers have rights over TFWs who are limited in defending

²¹⁶ Delphine Nakache, *supra* note 205 at 27.

²¹⁷ *Ibid* at 11.

²¹⁸ *Ibid* at 10.

themselves because of many circumstances, such as lack of knowledge about the legal system, lack of language, lack of communication with labour unions, and lack of government protection.

3.1.6. Women's Rights Abuse under the Live-in Caregiver Program

Some researchers, legal scholars, and trade union activists often mention that the TFWP is employer-driven because it restricts the rights of TFWs; in particular, women who are working under the LCP are stipulated to work for a 24 month period and to live in the private residence of the employer for whom the worker provides care.

Live-in caregivers' work permits are linked to specified employers and their labor mobility is severely restricted. They are only entitled to perform care work in a private home, and in order to change employers they must obtain the permission of two government departments, during which time they cannot earn an income.²¹⁹

If for any reason, one of those women wishes to leave her job, or if is fired, she has to return home because of the many formalities imposed by the program. Some employers exploit this provision to their favour and take advantage of live-in caregivers, who cannot stand up for themselves or complain because of the fear of being deported.

As it is mentioned above, there are several policy violations related to women's rights. Because their work permits are connected to a specified employer, their labour mobility is restricted. In order to change the employer, they must obtain the permission of two government departments, which takes time, and during that time frame women do not get any payment.

²¹⁹ Judy Fudge, *supra* note 47 at 18.

There are some cases that illustrate the situation regarding the abuse of TFWs and the lack of state mechanisms to protect them against employers.²²⁰ Work inside the home with the same employer and the poor wages and working conditions creates a situation that empower employers to use and abuse their live-in caregivers, as Valiani maintains in the following: “power [is] wielded by employers as a result of mobility restrictions on workers as well as the promise of eventual permanent residency.”²²¹ This demonstrates the restricted mobility provided by the Canadian law, which reflects a discriminatory attitude of some Canadian employers and the power they have through this policy to exercise against caregiver women.

Another violation is that “[l]ive-in caregivers cannot bring family members with them; they are only eligible to sponsor family members when they have obtained permanent residence status.”²²² Women left their family, including minor children, and often they lose their family entirely because of long-time family separation. The extent of family separation, according to Alberta Civil Liberties Research Centre, “caregivers under the LCP spend on average five years apart from their spouses and children.”²²³ That has a negative effect on TFW women and their families. As Judy Fudge argues, “[t]here is also evidence that employment agencies and immigrant consultants exploit migrant domestic workers.”²²⁴ Women in live-in caregiver program are working in “low-paying, vulnerable

²²⁰ Salimah Valiani, *supra* note 43 at 18.

²²¹ *Ibid* at 7.

²²² Judy Fudge, *supra* note 47 at 18.

²²³ ACLRC, *supra* note 49 at 72.

²²⁴ Judy Fudge, *supra* note 47 at 20.

sectors such as caregiving, domestic and hotel work, and hospitalities.”²²⁵ This situation creates a ‘gender stereotype’ regarding TFWs who came to the country through the LCP.

Furthermore, live-in caregivers do not have the right to unionize because provincial law does not recognize the domestic sphere as a workplace, as demonstrated, for example, in British Columbia, where live-in caregivers do not have right to unionization. That neither the federal nor provincial governments keep a registry of contact information of all live-in caregivers is another obstacle to organizing workers, and, according to the author, live-in caregivers have faced multiple abuses in relation to Canadian employers.²²⁶

To summarize, I would mention that for a democratic society like Canada, discrimination against women working as caregivers is intolerable given the declining birth rates and ageing population. Therefore, government should take action to protect foreign worker women by improving its legislation.

3.1.7. Negative Impact on the Migrant Workers’ Rights and Their Families

In addition to the lack of government support and the limited period of time to stay in Canada, TFWs have many other restrictions such as little job security, limited labour mobility, and employment in low-wage positions. Because of these limitations, TFWs have a higher risk of being exploited through an unfair wage in jobs that citizens or permanent residents refuse to do. Consequently, TFWs have to leave the country if they

²²⁵ Heather Gibb, “Missing from Temporary Foreign Worker Programs: Gender-Sensitive Approaches” (2010) *Metropolis*, CI 45 at 94.

²²⁶ Salimah Valiani, *supra* note 43 at 16.

lose their job without having rights to protect themselves.²²⁷ All of these restrictions and limitations negatively impact workers' lives and the wellbeing of their families.

According to ACLRC, "migrant workers and their families may face domestic strain and possible family breakdown owing to long periods of separation. Family reunification is a goal of many TFWs as they arrive in Canada; however, two years is a long time to be separated from one's family and this may negatively impact family members".²²⁸

Although the government has adopted appropriate regulations regarding TFWs rights, these rights are on paper, but in practice the situation of these vulnerable labourers is different. Therefore, I would conclude that the economic interest of the Canadian employers is not in the best interest of TFWs' human rights. Because of the 'temporary' nature of their status in Canada and the fact that TFWs are not generally viewed as having the right to become permanent residents, they are vulnerable to abuse and discrimination.

²²⁷ Judy Fudge, *supra* note 47 at 32.

²²⁸ ACLRC, *supra* note 49 at 53.

CHAPTER 3

Comparative Law: The Case of the United States, Germany and Australia Guest Worker Programs

In order to better understand the purpose of the Canadian TFWP legislation in the United States, Germany, and Australia. Through this comparison, my goal is to evaluate the effectiveness of the guest worker programs existing in these countries, which accept foreign labourers, and from that perspective, to evaluate the strengths and weakness of the Canadian TFWP and to bring some recommendations to the program.

1. The United States' Guest Worker Programs

Like Canada, the United States of America is known to be one of the traditional immigration countries. The history of guest worker programs in the U.S. began in the agricultural sector with the Bracero Program that admitted over 450,000 migrant workers annually from Mexico.²²⁹ This program is one of the most “important guest worker programs implemented in the U.S. to this day”, which started in 1942 to address the labour shortage after the U.S. entered into the Second World War.²³⁰

²²⁹ *Ibid* at 37.

²³⁰ Comparative Case Studies, “Guest Worker Programs in the US and Germany” (2010) online: <<http://orias.berkeley.edu/2010/GuestWorker.pdf>>.

American guest worker programs allowed foreign workers entry into the country on a temporary basis, considering them as non-immigrants.²³¹ According to Philip Martin, the U.S. guest worker programs were a “great exception, with unions and immigrant advocates [that were] generally opposed to ‘contract labour’ programs, whether they admitted immigrants who were bound to their first employer for several years, or non-immigrants, required to leave after a certain number of months or years.”²³² By contrast, in European countries, guest worker programs “admitted ‘probationary immigrants’” with rights to family reunification, to change employers, and to remain within the country depending on the employers’ request and on the work permits for residence card renewals. Therefore, most guest workers returned to their countries of origin; however, many of them settled in the European countries, thus forming significant minority communities.²³³

The U.S. Department of Labour introduced three major guest worker programs: (i) Workers in Professional and Speciality Occupations (H-1B Visa); (ii) Temporary Agricultural Workers (H-2A Visa); and (iii) Temporary Non-agricultural Workers (H-2B Visa). The U.S. government states that the purpose of its guest worker programs is to ensure that the admission of foreign workers on a temporary basis will not affect the job opportunities, working conditions, and wages of American workers.²³⁴

²³¹ Arin Greenwood, “The Case for Reforming U.S. Guest Worker Programs: Issue Analysis” (2008) CEI, online: <<http://cei.org/sites/default/files/Arin%20Greenwood%20-%20The%20Case%20for%20Reforming%20U.S.%20Guest%20Worker%20Programs.pdf>>.

²³² Philip L Martin, “Temporary Worker Programs: U.S. and Global Experiences” (2010) TFW Spring Metropolis, CI at 122.

²³³ *Ibid.*

²³⁴ United States Department of Labour, “Foreign Worker Programs”, online: <http://www.dol.gov/compliance/audience/foreign_workers.htm>.

1.1. Workers in Professional and Speciality Occupations (H-1B Program)

In 1990, the U.S. Congress created the H-1B temporary work visa to address the American business demands for a “brain gain” of skilled foreign workers.²³⁵ The H-1B visa is granted to those who have a bachelor’s degree with “distinguished merit and ability.”²³⁶ The H-1B program provides employers with easy access to foreign workers until sufficient U.S. science and engineering workers can be trained.

Several aspects distinguish the H-1B visa from other temporary visa programs. The H-1B visa is issued for three years and can be extended up to six years. Although the H-1B visa is issued for a temporary period of time, many TFWs with an H-1B visa have the option to obtain permanent residency and citizenship if a U.S. employer wants to sponsor the H-1B’s application. In this category, temporary workers holding a “portable visa” can change their employer if a new employer will submit an employment contract with work requirements to the U.S. Department of Labour. The H-1B program requires a short application form and does not require a labour market test. However, the H-2A and H-2B programs do not provide these options to those whose work is based on temporary seasonal agricultural or non-agricultural visas.²³⁷

According to Philip Martin, “[e]mployers may apply a maximum of six months before visas become available, and there are typically three times more (approved) employer requests than visas submitted on the first day visas become available, so that ‘winners’ of

²³⁵ Kati L Griffith, “U.S. Migrant Worker Law: The Interstices of Immigration Law and Labour and Employment Law” (2010) 31 Comp. Lab. L. & Pol’y J. at 131.

²³⁶ *Ibid.*

²³⁷ *Ibid.*

H-1B visas are selected by lottery.”²³⁸ Although H-1B workers have many work rights, there are also many barriers for them, which may make them “vulnerable to exploitation” because they trust their employer for the permanent residency applications and may wait long periods before receiving that status.²³⁹

1.2. Temporary Agricultural and Non-agricultural Workers (H-2A and H-2B)

The H-2A and H-2B programs allow American farmers to request certification from the U.S. Department of Labour to employ an unlimited number of foreign workers if farm workers are not available and if the foreign workers will not affect American farm workers.²⁴⁰

H-2 visas, or temporary worker visas, are visas that allow unskilled foreign workers to work in the U.S. on a temporary or seasonal basis. H-2A jobs are agricultural in nature while H-2B jobs are typically in such industries as landscaping, hospitality, construction, manufacturing, food packaging and processing, fisheries, retail and other industries. H-2 visas’ workers are in a disadvantaged position compared to those on H-1B visa. As Kati Griffith describes, the H-2 visa is issued for one year or less and it can be extended for a three-year period. The author mentions that the “H-2 visa holders do not have any opportunity to seek permanent residency or citizenship”, and they cannot change their employer.²⁴¹

²³⁸ Philip L Martin, *supra* note 232 at 123.

²³⁹ Kati L Griffith, *supra* note 235 at 134.

²⁴⁰ *Ibid.*

²⁴¹ *Ibid* at 135.

The U.S. guest worker programs have many policy issues. As Martin maintains, it is not clear if workers admitted under the American programs are considered temporary visitors or probationary immigrants.²⁴² Both trade unions and worker advocates criticize the U.S. guest worker programs, whether they admit temporary visitors or probationary immigrants, arguing that in both cases the migrants are captives of their employers, making their workplace rights more theoretical than real.²⁴³ For example, the H-1B program admits probationary immigrants and allows American employers to “sponsor” H-1B guest workers during a six-year period that they can work in the U.S.²⁴⁴

On the contrary, the H-2A and H-2B programs do not offer a clear path to permanent residency. These programs require certification, a process which involves employer recruitment supervised by local employment service agencies. These workers are vulnerable if they want to complain against employers because their legal status depends on their employer.²⁴⁵

The American Federation of Labour maintains that government should ensure appropriate legal pathways to permanent residence in order to address rising numbers of unauthorized workers.²⁴⁶ Establishing appropriate pathways for permanent residency of guest workers would reduce the number of black market and illegal workers, as well as addressing employment and human rights abuses.

²⁴² Philip L Martin, *supra* note 232 at 125.

²⁴³ American Federation of Labour, “Legislation Issues” (2012) New-York, online: < <http://nysaflcio.org/>>.

²⁴⁴ *Ibid.*

²⁴⁵ Kati L Griffith, *supra* note 235 at 138.

²⁴⁶ American Federation of Labour, *supra* note 243.

2. Germany Guest Worker Programs

Having reviewed the American case, I will briefly describe the case of Germany's guest worker programs. Germany is considered to be one of the first European countries that implemented guest worker programs to meet its labour shortage.

2.1. Germany's Gastarbeiter Program

The German guest worker program, named also the German Gastarbeiter Program, was created to admit guest workers based on temporary status. For different reasons, these 'guest workers' remained longer than intended, having no access to citizenship, nor the rights to apply for permanent residency. Despite the end to official recruitment, a considerable number of guest workers remain in Germany, working there permanently.²⁴⁷

According to the Alberta Civil Liberties Research Centre, "[u]ntil late 1998, Germany did not count third-generation immigrants as citizens until they had lived in the country for at least ten and in some cases fifteen years."²⁴⁸ The German labour market forced government to change its immigration policy toward foreign workers, which offered more opportunities for migrant workers to receive resident status.

In 2004, the German parliament introduced new reforms to their immigration and guest worker policies, which allowed guest workers to obtain German citizenship as a result of naturalization. Consequently, in Germany a class of immigrants was created separated from the class of permanent residents and citizens.²⁴⁹ As Max Friedrich Steinhardt

²⁴⁷ Delphine Nakache & Paula J. Kinoshina, *supra* note 3 at 6.

²⁴⁸ ACLRC, *supra* note 49 at 36.

²⁴⁹ *Ibid.*

mentions, the naturalization of guest workers in Germany has positive economic effects, which leads to increasing labour market opportunities and wage rates for these workers.²⁵⁰

To be eligible to apply for permanent residency, according to the guest worker program, foreign workers must have eight years of residency in Germany, must have adequate knowledge of the German language, must be independent without any welfare support, and must give up their previous citizenship.²⁵¹

Under the Gastarbeiter program, guest workers received the rights to work and live in Germany, but they had no rights to apply for citizenship or permanent residency. The Canadian government, by introducing the new changes to the TFWP – a four-year limit that a TFW can work in Canada followed by a period of four-year in which the worker is not eligible to work in Canada – intended to avoid creating, similar to the German case, a class of immigrant workers without the right to apply for permanent residence or citizenship.

2.2. Seasonal Migrant Worker Program in Germany

The German Seasonal Migrant Worker Program (GSMWP) functions under the “memoranda of understanding” signed by the German Labour Ministry and labour ministries of source countries.²⁵² According to this program, foreign workers are allowed to work from three to seven months if employers prove that there are no available local

²⁵⁰ *Ibid.*

²⁵¹ Max Friedrich Steinhardt, “Does citizens Matter? The Economic Impact of Naturalization in Germany,” (May 2010) European Center for Advanced Research in Economics and Statistics, online: <<http://econstor.eu/bitstream/10419/48189/1/664193455.pdf>> at 2.

²⁵² Philip L Martin, *supra* note 232 at 126.

workers to do jobs in agriculture, forestry, or hotel and domestic sectors. In order to hire seasonal foreign workers, German employers must submit a work contract to local labour offices, which provides information regarding the wage and working conditions as well as housing, meals, and travel expenses.²⁵³ The German Employment Service provides a labour market test to ensure that there are no local workers available, a similar procedure found in the Labour Market Opinion (LMO) under the Canadian TFW program.

In conclusion, Germany's guest worker program is well known and often cited for its frequent use. In Germany, as in many industrialized countries such as Canada, the U.S., and Australia, "the demand for high-tech labor has changed the impact of guest worker programs. In its desire to attract and retain highly skilled professionals, Germany has once again reformed its laws to accommodate an increasingly diverse set of workers, having to offer permanent or long-standing terms of stay."²⁵⁴ Giving the fact that birth rates in Germany have been on the decline, the German government needs to consider foreign labourers more seriously.²⁵⁵

3. Australia's Guest Worker Program

Australia has many similarities with Canada and its historical background, with a low population density and high levels of natural resources, high industrialization, and an aging population.

²⁵³ *Ibid.*

²⁵⁴ Fatma Demirelli, Zaman, "Germany's Quest for Integration: A Work in Progress" (2010) online: <<http://www.sundayszaman.com/sunday/detaylar.do?load=detay&link=200824>>.

²⁵⁵ *Ibid.*

In order to admit migrant workers to Australia, its government initiated, in 1996, the Temporary Business (Long Stay) Visa, called the 457 Visa.²⁵⁶ According to the Department of Immigration and Citizenship, Australian government introduced, in 2008, the Pacific Seasonal Worker Pilot Scheme (PSWPS), which will remain open until June 2012.²⁵⁷ Australia experiences many similar trends, challenges, and policy issues to Canada with respect to migrant workers. Barbara Deegan has pointed out several policy issues regarding migrant workers and the Australia 457 Visa, such as working longer hours or days without being paid overtime, limited access to EI in case of sickness or layoffs, and dismissal for taking leave to care for a sick family member.²⁵⁸

Similar to the Canadian TFWP, the Australian program makes a distinction between skilled and low-skilled TFWs through Australian Standards Classification of Occupations (ASCO), which is identified as follows: 1-3 represents higher-skilled professionals and 4-7 represents lower- and semi-skilled occupations.²⁵⁹ A review of the 457 class in 2008, found that there are “very few problems with program integrity and exploitation occurred for high-skilled workers and professionals, and ... the abuses against lower and semi-skilled workers could be addressed through a system of Labour Agreements.”²⁶⁰

²⁵⁶ ACLRC, *supra* note 49 at 39.

²⁵⁷ Australia’s Department of Immigration and Citizenship, “The Pacific Seasonal Worker Pilot Scheme” (August 2008) online: < http://www.immi.gov.au/skilled/pacific-seasonal-worker/_pdf/factsheet-pswps.pdf>.

²⁵⁸ Barbara Deegan, “Visa Subclass 457 – Integrity Review” Final Report, (October 2008) online: <<http://www.minister.immi.gov.au/media/media-releases/2008/457-integrity-review-report.pdf>>.

²⁵⁹ Australian Bureau of Statistics, “Australian Standard Classification of Occupations (ASCO)” 2nd Ed, Canberra (2006) online: < <http://www.oesr.qld.gov.au/about-statistics/statistical-standards/national/anzsco.php>>.

²⁶⁰ Barbara Deegan, *supra* note 258 at 39.

The Labour Agreement is a sponsorship contract made between Australian employers, the Department of Immigration and Citizenship (DIC), and the Department of Workplace and Employment Relations (DWER) that allows employers to sponsor migrant workers in different sectors such as construction, industry, business, and other sectors.

The Agreement allows Australian employers to hire TFWs for a temporary or permanent visa. The Australian program is an “employer-driven” program, which means that “employers of visa applicants at the lower end of the skills matrix prefer to retain those persons under temporary visas in order to increase the level of control over them.”²⁶¹ As a result of the employer-driven effect, many TFWs are afraid to complain against their employers or look for a new job because of fear of losing their ability to remain in Australia.²⁶²

Further, low-skilled workers in Australia, similar to low-skilled workers in Canada, face many barriers in order to qualify for permanent resident status. Often, recruitment agencies provide them with misleading information regarding job offers in Australia in order to extort money from these foreign workers, despite the fact that recruitment agencies in Australia are registered at the Office of the Migration Agents Registration Authority.²⁶³ This office does not provide assistance to migrant workers and does not have authority to refund workers monies from the sanctioned recruitment agent.²⁶⁴

²⁶¹ *Ibid* at 50

²⁶² *Ibid.*

²⁶³ Australian Government, “Office of the Migration Agents Registration Authority” (2012) online: <<https://www.mara.gov.au/>>.

²⁶⁴ Barbara Deegan, *supra* note 258 at 39.

To summarize, the Canadian TFWP has some provisions in common with the American, German, and Australian guest worker programs. As found in the case of American guest worker programs, some programs admit temporary workers to fill seasonal agricultural jobs; others admit temporary workers to fill year-round jobs; and some programs offer temporary foreign workers the possibility of obtaining immigration status, while others do not.

Similar to the German guest worker programs, Canada has immigrant programs, such as the Live-in Caregiver and Low-skilled Worker Pilot Programs. Furthermore, similar to German employers, the Canadian employers must provide a labour market test to ensure that there are no available local workers to fill vacant positions. The new German immigration reforms, similar to the Canadian and American programs, maintain that migrant workers are required to fulfill certain criteria in order to obtain citizenship.²⁶⁵

In conclusion, a common denominator of guest worker programs in the U.S., Germany, and Australia is to increase admission of low-skilled foreign workers; however, these programs limit the social and economic rights of these workers. Like the Canadian government, the American, German, and Australian governments have increased the number of low-skilled workers. I believe that in order to ensure equal treatment and protection of TFWs through guest worker programs, receiving countries should cooperate with each other and sign an international agreement such as the *UN Convention on Migrant Workers*, which provides protection for all migrant workers.

²⁶⁵ Fatma Demirelli, Zaman, *supra* note 254 at 9.

RECOMMENDATIONS

After a thorough analysis of the international and domestic literature, it becomes evident that there are several significant issues regarding the Canadian TFWP. After many extensions and modifications (the last version April, 2011), it is evident that this program still does not adequately protect TFWs' rights. It protects the rights of employers and gives them the power to use cheap and flexible labour, but it also exposes the workers to abuse of their rights. These issues need to be addressed in order to better protect the rights of the hundreds of thousands of TFWs who work in Canada. I would like to close this thesis with a few recommendations regarding TFW policy issues:

a) In order to protect the human rights of all foreign workers with a temporary status in Canada, government should consider the work permit valid for all employers authorized to hire TFWs in a specific occupation. Especially in regards to the Live-in Caregiver Program, there should be accommodations where the worker is not obliged to live with her/his employer. This will prevent and eliminate a significant form of discrimination that affects TFW women working in the domestic sector.

b) I also would recommend that trade unions work in solidarity with Non-Government Organizations (NGOs) and immigrant labour agencies in order to influence the policy makers, thereby improving the legislation with respect to TFWs' rights, with the overall aim of eliminating any kind of discrimination.

c) I would emphasize that the government should move toward increasing opportunities for low-skilled TFWs to become permanent residents. Even though the TFWP has changed the legal base for high-skilled workers to become permanent residents, there are

presently few avenues for low-skilled workers to do this. In order to move in this direction, it might be effective to give them more flexibility in changing employers and to consider the fact that they are already in Canada and familiar with the local job market and work conditions in general, which makes TFWs more employable compared with new permanent residents.

d) Finally, I would suggest that Canada, as a traditional country of immigration, should ratify the *U.N. Convention on Migrant Workers*, which is a valuable resource toward improving national legislation and practice concerning of the TFWs' rights. I believe that ratification of the Convention would improve legislation related to relationship between TFWs and Canadian employers, from which all parties will benefit. Government will benefit from economic growth, employers will cover their labour shortage using cheap and flexible labour, and TFWs will enjoy full rights in a liberal democratic state such as Canada. From an international perspective, it is necessary for Canada to align with international human rights standards and international treaty organizations. From the domestic perspective, the Convention ratification may contribute to solving the issue of the vulnerability of TFWs to abuse in employment and violations of their human rights.

CONCLUSION

My purpose in this thesis was to analyze, describe, and critically evaluate government reports, books, and articles published by legal scholars, academics, trade unions, and other scholars regarding the TFWP and how this program regulates TFWs' rights in Canada. In doing so, I established that the federal government promulgates regulations, rules, and programs such as IRPA, IRP Regulations, and TFWPs.

The TFWP is the most important venue to regulate the entrance of TFWs into Canada. The purpose of these regulations is to mediate the access of TFWs depending on the particular needs of the country in a particular period of time, depending on its economic situation. Through this study, I found that the TFWP is employer-driven, and relies mainly on the private contractual relationship between the employer and the TFW, a relationship in which the TFW is vulnerable to unlawful exploitive actions by employers. However, there are various programs and regulations, such as the case of Manitoba's Worker Recruitment and Protection Act, which may be used as a positive example of how governments should protect TFWs from employers' abuse.

The second finding of my research is that although the Canadian government has recognized the deficiency of the TFWP and has taken some measures to resolve this situation through recent reforms that changed the initial purpose of this program, it has failed to create increasing pathways to immigration or permanent residency for TFWs. For instance, in 2007, when Canada was experiencing an economic boom, the federal government expanded its TFWP to more easily accept TFWs in order to then assist Canadian employers who were dealing with labour shortages.

After the economic boom, North America went through an economic crisis that also affected the Canadian economy. Due to the global recession, and in order to regulate the influx of TFWs in Canada, the federal government changed its TFWP, which included fewer opportunities for low-skilled TFWs to obtain permanent residency. The only remaining path to permanent residency is the PNP that few provinces have initiated. According to the new changes, only skilled workers are available to apply for permanent residency in Canada.

The purpose of this thesis was also to describe and analyze the protection of TFWs' rights in Canada using both domestic and international literature, as previously itemized. This thesis analyzed international human rights instruments such as the CCPR, the CESCR, and the CEDAW Convention for provisions that protect TFWs' rights as non-nationals. Canada is not aligned with the Party of the *U.N. Convention on Migrant Workers*, which I believe is one of the most comprehensive international legal instruments to protect the rights of TFWs.

As mentioned above, the Convention's scope is to prevent and eliminate exploitation of migrant workers by domestic laws and practices. The main finding of my research is that TFWs have a particular vulnerability to abuse and discrimination because of their temporary status in Canada. However, my thesis does not provide strong evidence of widespread abuse of TFWs' rights, whether by employers or government.

Through my research, I have shown the importance of the TFWP for the government, employers, and foreign nationals seeking better opportunities in Canada. However, I believe that the short-term focus of Canada's TFW policy will not help the country

resolve its long-term labour market needs. To solve the country's economic needs and to address this labour shortage problem, the federal government should improve its immigration legislation regarding TFWs' rights. I believe that the Canadian government should develop further initiatives in order to take action and prevent violation of foreign workers' rights, especially TFW women working in the LCP. Policy makers should improve the legislation regarding TFWs' rights to eliminate any kind of discrimination.

Finally, after a brief comparative analysis of similar existing programs in the U.S., Germany, and Australia regarding the situation of guest workers, I conclude that the governments of these countries have increased the number of low-skilled TFWs, but limit their social and economic rights. To ensure equal treatment and protection of TFWs through the TFWP, I believe that the countries of employment such as Canada, the U.S., Germany, and Australia should ratify the *U.N. Convention on Migrant Workers* in order to improve their domestic laws related to relationship between TFWs and local employers, and also to align with international labour standards and international legal organizations on human rights. The Convention's ratification may contribute significantly toward solving domestic issues regarding TFWs' rights.

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