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METROPOLIS BRITISH COLUMBIA

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1.0 Introduction

Precarious work has proliferated to such an extent that it threatens to displace the standard employment relationship as the prevailing employment norm even in high-income countries (Kallenberg 2009; Vosko, MacDonald and Campbell 2009). Most accounts of the change in employment norms have tended to emphasize the role of demand (the restructuring and relocation of firms) and to neglect the role of mass migration, especially across national borders, as a key dimension of globalization (Bauder 2006; McDowell, Batnitzky and Dyer 2009, 5-7). There is, however, a growing literature that emphasizes the role of international migration "as a regulatory labour market tool" (Bauder 2006, 21). Sociologists have developed the concept of unfree labour to describe migrant workers who are not free to circulate in the labour markets of the host countries in which they are working (Miles 1987; Satzewich 1991; Basok 2002). Some, like Nandita Sharma, consider these unfree migrant workers who cross national boundaries in order to work as the exemplary post-Fordist workforce. Even more significantly, these workers "facilitate the reduction of overall wage levels, help to lower labour standards, and assist in introducing more flexible employment practices" (Bauder 2006; Sharma 2006; Anderson 2010). According to Bridget Anderson (2010, 301),

> through the creation of categories of entrant, the imposition of employment relations and the construction of institutionalized uncertainty, immigration controls work to form types of labour with particular relations to employers and to labour markets. They combine with less formalized migratory processes to help produce "precarious workers" that cluster in particular jobs and segments of the labour market.

The insight from this literature is that the state, through immigration law, creates a variety of different migration statuses, some of which are highly precarious, that in turn produce a differentiated supply of labour that produces precarious workers and precarious employment norms. Identifying the constitutive role of immigration law in institutionalizing precarious employment norms for migrant workers enables us to better assess the adequacy of international human rights instruments that are designed to protect migrant workers (Preibisch 2010, 406).[1] On their face, international human rights norms offer a more promising avenue for protecting migrant workers from precarious employment than do claims based upon citizenship, a formal legal status that migrant workers do not enjoy in the state in which they are working (Basok, Inclán and Noonan 2006, 267-268). Human rights, by contrast, are invoked and applied on the basis of humanity and personhood, a much broader status that does not depend upon political membership in the host state. The United Nations and the ILO advocate a rights-based approach to managing temporary migration programs, the key elements of which include

> the observance of international human rights norms, including equality of treatment and non-discrimination, standard setting and accountability, the recognition of migrants as subjects and holders of rights, the participation of communities and the integration of gender, child's rights and ethnic perspective (Grant 2005, 26, quoted in Ruhs and Martin 2008).

The question addressed in this paper is whether international human rights instruments specifically designed to protect migrant workers' rights have the

1 The term "migrant worker" is used throughout this paper instead of the official term used by the federal government, which is "temporary foreign worker". I am adopting Kerry Preibisch's (2010) use of the term "migrant workers", which refers to "those people employed in Canada under temporary visas who do not hold Canadian citizenship or permanent residency (landed immigrant status)". Although in this paper I use migrant worker to refer to workers on a temporary residency visa, I appreciate Anderson's (2010, 301) point that the distinction between settled "immigrants" and temporary "migrant" is difficult to maintain in practice (especially as migrant workers pass through different statuses).

potential to challenge the role of immigration law in producing precarious employment.

The paper is divided into three parts. The first, which provides the conceptual framework, begins by explaining how precarious employment is conceptualized. Building on a multidimensional approach to precarious employment that locates it in the social processes of supply and demand (Fudge 2011a),[2] this part then explores the idea of precarious migration status and the role of the state in creating precarious migrants. It concludes by elaborating a taxonomy that is designed to map the link between migrant status and precarious employment. The next part explores the nexus between precarious migrant status and precarious employment by using the taxonomy outlined in the first part to analyze the three "low-skill" streams – the Seasonal Agricultural Workers Program, the Live-in-Caregiver Program, and the Pilot Project for Occupations Requiring Lower Levels of Formal Training (NOC C and D) – in the Canadian Temporary Foreign Worker Program. The goal of this case study is to see whether migrant statuses are used to institutionalize precarious employment norms. The capacity of international human rights instruments that are specifically designed for migrant workers to protect them from precarious employment is the subject of the final part. This part begins with a discussion of the three international human and labour rights conventions specifically designed to protect migrant workers. It then assesses their capacity to address the nexus between precarious migrant status and precarious employment identified in the case study. The paper concludes with a brief reflection on the paradox of international human rights for precarious migrant workers.

2 The processes of supply and demand are understood as institutionalized processes and not simply transactions or exchanges (Fudge 2011a).

2.0 The Nexus of Precarious Migrant Status and Precarious Employment

2.1 Precarious Employment

Employment norms reflect the "interplay between social customs and conventions and governance mechanisms that link work organization with market supply" (Vosko 2010, 3, referring to Deakin 2002). After World War II, standard employment, which is a full-time and year-round employment relationship for an indefinite duration with a single employer, was the platform for a range of private and public entitlements, such as pensions and unemployment insurance. Although the precise form of the standard employment relationship took different shapes, and the extent to, and ways in which, it was institutionalized differed in specifi

recognized as “the dominant feature of the social relations between employers and workers in the contemporary world” (Kallenberg 2009, 17; McDowell and Christopherson 2009).

Precariousness is a complex notion, and its use has differed from country to country (Vosko, MacDonald, and Campbell 2009, 5-6). What the concept attempts to capture is the insecurity and instability associated with contemporary employment relationships (Anderson 2010, 303; McDowell and Christopherson 2009, 338).[3] While emploerntry 31teri43ent h.82419Tc.26; Mdeploymen9

social relations of demand and supply into the equation. Vosko (2010, 102) defines precarious employment

> as work for remuneration characterized by uncertainty, low income, and limited social benefits and statutory entitlements. Precarious employment is shaped by the relationship between employment status (i.e. self-employed or paid employment), form of employment (e.g. temporary or permanent, part-time or full-time), and dimensions of labour market insecurity, as well as social context (e.g. occupation, industry, and geography) and social location (or the interaction of social relations, such as gender, and legal and political categories, such as citizenship).

2.2 Precarious Migrant Status

Social location, which includes citizenship status and entitlements, provides an important empirical and conceptual bridge to understanding how migration status contributes to precarious employment. Using citizenship as a lens, Vosko (2010, 11) highlights the role of the nation state in immigration law and policy in differentiating immigrants and creating a distinct component of labour supply that was excluded from the standard employment relationship. She employs the term “partial citizenship” to capture the nation state’s gradual and selective extension of civil, political, and social citizenship rights to migrants (Vosko 2010, 10).

The idea of partial citizenship bridges both the nation state’s power to exclude migrants from its territory and the entitlements that accrue to migrants once they are working in the territory of the host state. This bifocal conception of citizenship is simultaneously very narrow and very broad. As a legal status, citizenship is the formal status of membership in the state, or nationality as understood in international law, and typically encompasses the right to enter and to remain in the territory, access to assistance and diplomatic

protection, and the franchise (Macklin 2007). It is a narrow legal category, and it sits atop the hierarchy of migrant statuses. Partial citizenship, in this external sense, would mean migrant statuses that enjoy the rights of full legal citizens. However, citizenship also refers to a social status that encompasses a broader package of rights and entitlements that is often linked, but not exclusively identified, with legal citizenship. These entitlements are dependent upon membership in a national community, and they contemplate a range of degrees of belonging and a spectrum of entitlements.

The problem with using citizenship to capture the nation state's power to allow migrants to enter their territory is that it tends to minimize the extent to which migration law does what Catherine Dauvergne (2007, 495) calls the "dirty work" of citizenship. Immigration law is not only about "who gets in and who stays out"; it is "just as much about structuring the vulnerability of those who enter by assigning them to various categories of precariousness, ranging from illegality though permanent temporariness, transitional temporariness, and permanent residence to citizenship" (Macklin 2010, 332). Migrant status is a more precise concept for capturing the state's power to control entry into its territory, and the conditions it imposes.

Luin Goldring, Carolina Berinstein, and Judith K. Bernhard (2009) have developed an approach to precarious migration status in Canada that specifically draws upon the multidimensional conception of precarious employment. Recognizing the inadequacy of a dichotomous approach to understanding illegality and legality, they call for "a more robust way of defining and conceptualizing illegality and its production" (Goldring, Berinstein and Bernhard 2009, 240). They develop the concept of "'precarious legal status'" to describe "multiple and potentially variable forms of non-citizen and non-resident status"

(Goldring, Berinstein and Bernhard 2009, 245). They define precarious status as

> marked by the absence of any of the elements normally associated with

particular types of relations to employers and to labour markets" (Anderson 2010, 306).

2.3 A Taxonomy

In her discussion of how legal status is produced, Anderson (2010, 307-312) emphasizes the extent to which immigration laws, policies, and practices create categories of entrants, influence employment relations, and institutionalize uncertainty. This taxonomy allows her to explore the nexus between precarious migrant status and precarious employment. Each of her dimensions of migrant status – entrant category, employment relations, and institutionalized insecurity – encompasses a number of indicators such as demographics of the migrant worker population, the occupations and sectors to which they are recruited, the duration of their visas, and dependence on employers to maintain their legal migrant status. These indicators can be supplemented by drawing upon Goldring, Berinstein, and Bernhard's definition of precarious migrant status and Vosko's definition of precarious employment in order to capture more completely the dimensions of employment relations and institutional security. The dimension of institutionalized insecurity can be made more precise by looking at indicators such as entitlement to the benefits of social citizenship and pathways to more secure migrant statuses. A preliminary at-

Employment relations

- Labour market mobility: dependence on an employer
- Duration of employment relationship

  Terms and conditions of employment: wages, hours, health and

and guidelines, administered by several federal government departments and agencies (Hennebry 2010, 67). Generally, there is a two-step process for employing migrant workers.[6] First, the employer must obtain an employment authorization, known as a Labour Market Opinion (LMO), from Human Resources and Skills Development Canada/Service Canada (HRSDC). Typically, an employer must demonstrate that it has met the requirements to advertise for workers from within Canada, will pay the advertised job the prevailing wage rate, and has complied with the conditions of the work authorization and provincial employment standards legislation in cases in which the employer has employed migrant workers in the past.[7] Thus, the LMO fulfills a dual function. On the one hand, it ensures that migrant workers do not take jobs seen as belonging to Canadians or undercut Canadian terms and conditions of employment, while on the other, it ensures that employers who have exploited migrant workers in the past do not continue to do so. The second step is for the migrant worker to obtain a visa and a work permit. At this stage, the focus is on the suitability of the migrant worker, and officials with Citizenship and Immigration Canada (CIC) and Canada Border Services Agency (CBSA) decide whether or not to admit the applicant at the Canadian border.

The TFWP provides for a number of entrant categories, each composed of different requirements for employers and migrant workers and different rights and entitlements. These programs fall into two broad types that are distin-

6 There are two major exceptions to this general process, both of which make it easier for high-skilled migrants to work in Canada. First, some migrant workers can work in Canada without obtaining a work permit. The single largest exception to the general requirement to obtain a work permit is for business visitors who are foreign nationals engaged in international business and who are employed by a foreign employer. Second, a series of bilateral and multilateral agreements, negotiated as part of trade agreements (such as the North American Free Trade Agreement), relieve the employers of qualifying workers from having to obtain an employment authorization, although the workers are still required to fulfill the second step of the general process and obtain a work permit (Fudge and MacPhail 2009, 9-11 and 13-15).

7 *Immigration and Refugee Protection Regulations* , S.O.R./2002-227; *Regulations Amending the Immigration and Refugee Act Protection Regulations*, S.O.R./2010-172, s. 2 amending *IRPR* 2002, s 200(1)(2)(ii) and (iii).

guished by skill level. In general, high-skill workers obtain access to Canada through migrant categories that impose fewer requirements on employers and fewer restrictions on migrant workers than migrant categories that admit low-skill workers. Typically, high-skilled migrants are entitled to be accompanied by family members, while low-skilled workers are not. Moreover, high-skill migrant worker categories tend to provide an easier and more certain path to permanent residence than do low-skill entrant categories (Fudge and MacPhail 2009, 14-15).

Jurisdiction over migrant workers in Canada is divided between two levels of government, which creates an additional level of complexity (Hennebry 2010; Fudge 2011b). While the federal government has primary jurisdiction over immigration, the provinces and territories have responsibility of employment and labour law and policy.

3.1 Canada's Live-in Caregiver Program

Canada has historically recruited women migrants to work as domestic workers. In the 1960s, women from the Caribbean were targeted; however, the dominant source country has shifted to the Philippines. In 1981, the foreign domestic workers program was revised to provide domestic workers with a process for transferring from temporary to permanent migration status without having to leave Canada. In 1992, the program was overhauled and renamed the Live-In-Caregiver Program (LCP) (Fudge 2011b).

3.1.1 Conditions of Entry

The LCP is designed to fill a specific labour shortage in the country – the lack of people willing to reside in private households and provide care to members of those households. Like the other low-skill streams of the TFWP, the LCP is employer driven, and it ties the migrant worker's entitlement to work in Canada to an ongoing employment relationship with a specific employer.

they are only eligible to sponsor family members when they have obtained permanent residence status (CIC 2011a).

The LCP is a small program. Although it has gradually been growing, it is sensitive to downturns in the economy. While LMO applications by employers exceeded 33,000 in both 2007 and 2008, after the recession in 2009 the number of applications dropped to just under 21,000 (HRSDC 2010, Table 7).

3.1.2 Employment Relations

Live-in caregivers' work permits are linked to specified employers and their labour 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, a process that takes at least a month, during which time they cannot earn an income.

Historically, domestic work has been excluded from statutory employment standards such as overtime and statutory holidays. However, this pattern of exclusion is changing, and domestic workers, who include live-in caregivers, are now covered by most employment standards legislation (Fudge 1997). Some Canadian jurisdictions, such as Ontario, continue to exclude domestic workers from collective bargaining and occupational health and safety legislation.[12] Moreover, even when migrant domestic workers admitted under the LCP are formally included within the scope of protective labour legislation, the location of their work and residence - the homes of their employers - and their dependence on their employer to maintain or change their migration status undermines their ability to enforce employment-related rights (Zaman, Diocson

12 *Labour Relations Act*, S.O. 1995, c. 1, Sch. A, s. 3(a); *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, s. 3(1).

and Scott 2007). There is also evidence that employment agencies and immigrant consultants exploit migrant domestic workers (Standing Committee on Citizenship and Immigration 2009; Auditor General 2009, 33-34). Although Manitoba has taken steps to eradicate unscrupulous employment agencies, and Ontario has followed in the same direction, most jurisdictions have not developed strategies to deal with the problem (Fudge 2011b, 260-263).[13]

Live-in caregivers earn very low wages. The occupational classification that these workers fall under has the lowest average earnings per week. Moreover, very few Canadian-born or permanent resident workers are willing to live-in their employers homes.[14] The prevailing wages for live-in caregivers hover at the level of the provincial minimum wage, which ranges from $8 an hour in British Columbia to $11 an hour in Nunavut (HRSDC 2011a).[15]

3.1.3 Institutional Insecurity

Employers are required to provide live-in caregivers with health insurance at no cost until they are entitled to provincial health insurance. However, like most migrant workers, live-in caregivers have a difficult time accessing benefits available to Canadian permanent residents and citizens who are unemployed. Although they are required to pay into the unemployment insurance plan, they often do not meet eligibility requirements, such as being available for work, because they are restricted from working for another employer until

entitlement of migrant workers to unemployment insurance benefits mixed, different federal and provincial governments give contradictory advice to migrant workers about their eligibility (Nakache and Kinoshita 2010).

Unlike the other low-skill migrant worker programs in Canada, the LCP gives the migrant workers who enter Canada through it direct access to transferring to permanent resident (landed migrant) status. After having worked as a live-in caregiver for a cumulative period of at least two years during the four years following arrival in Canada, a live-in caregiver may apply for permanent residence without having to leave the country or meet the skills-based criteria that the majority of applicants who apply for permanent residence are required to meet.[16]

Once a migrant domestic worker achieves permanent status, she is no longer required either to live in the home of her employer or to engage exclusively in caregiving activities for a single employer (Langevin 2000, 42).[17] She can also sponsor family members as permanent residents. Over 90 percent of the foreign nationals who enter Canada under the LCP apply for permanent residence status, and 98 percent of them are successful (Department of Citizenship and Immigration 2009, 3781). While the vast majority of caregivers no longer live in their employers' homes after they obtain permanent resident status, the majority continue to face huge barriers to obtaining better jobs (Zaman 2006; Santos 2005, 91-134).

16 The recently introduced Canadian Experience Class mechanism and the longer-established Provincial Nominee Program are a move away from a pure skills-based point system (Alboim 2009). The regulations lengthening the period for determining whether the worker admitted under the LCP has achieved the minimum duration of employment came into effect in April 2010. See *Regulations Amending the Immigration and Refugee Protection Regulations,* S.O.R./2010-78, s. 2.

17 However, the transition from temporary migrant to permanent status is not immediate. It typically takes between twelve and eighteen months for a live-in caregiver who has fulfilled all of the conditions of the LCP to receive permanent resident status (Langevin 2000, 42).

3.2 Seasonal Agricultural Workers Program

Seasonal agricultural workers programs in Canada date back to the 1960s. Like the original migrant domestic workers program, the SAWP recruited workers from a select group of Caribbean countries, beginning with Jamaica. In 1973, the program was extended to include Mexico, and now seasonal migrant workers are a large and increasingly entrenched component of the supply of agricultural labour across Canada (Satzewich 1991; Basok 2002). However, unlike the LCP, which provides a process for transferring from temporary to permanent resident (landed migrant) status, the seasonal agricultural workers program remains a rotational migration program and there is no route for these workers to improve their migrant status.

There are several distinctive features of the Seasonal Agricultural Workers Program (SAWP), starting with its governance structure. Operating within the broad framework of the Immigration and Refugee Protection Act, the SAWP is a bilateral government-managed migration program involving both public and private actors in Canada and the labour supply countries. The agreements between Canada and the labour source countries are formalized in a Memoranda of Understanding (MOU) (Verma 2007, 7)[18] and appended to each MOU is a series of operational guidelines that include an employment contract (Verma 2007, 8).[19]

18 The legal status of the MOU between Canada and each of the sending countries is an "intergovernmental administrative arrangement" and it does not constitute an international treaty (Verma 2007, 7).

19 The MOU states that any disputes that arise under the MOU respecting the interpretation or application of the MOU or its attachments (i.e. the Operational Guidelines or the Employment Agreement) will be resolved through consultation between both parties. However, the MOU is silent on what process would be undertaken if no resolution is achieved through consultations.

3.2.1 Conditions of Entry

Canada has bilateral agreements establishing SAWPs with Mexico, Jamaica, Trinidad and Tobago, Barbados, and the Organization of Eastern Caribbean States, which includes nine countries. While the first foreign workers under the SAWP were employed in the harvesting of tender fruit and tobacco, as of August 2011 the types of operations that could avail themselves of migrant agricultural workers included those involved in apples, canning/food processing, flowers, fruit, greenhouse, nursery, tobacco, vegetables, ginseng, apiary products, Christmas trees, pedigreed canola seed, sod, bovine, dairy, duck, horse, mink, poultry, and sheep.

Almost all of the migrant workers admitted under the SAWP are men; only three per cent of those admitted under it are women (Preibisch 2010, 417), and only unaccompanied workers are admitted. Migrant workers employed in agriculture reside in housing provided by the employer, and they are often dependent upon employers for any form of transportation off the employer's property (Preibisch 2010, 415).[20] The SAWP is the only seasonal low-skill program; the duration of the work permit is for a maximum of eight months. It is also a rotational program; growers can name specific workers to return, and one study of operations in Ontario found that most of the workers admitted on the SAWP had been in the program for between seven and nine years (Hennebry 2010, 64). Although the SAWP began in Ontario and Quebec, it has expanded to nine provinces; however, it remains quite small, with about 25,000 to 28,000 workers entering each year (Hennebry 2010, 64; Preibisch 2010, 411).

The SAWP is characterized by a high level of state involvement in regulating the program, even though some elements have been privatized. The federal government (through HRSDC) is responsible for the SAWP; however, day-to-day administration is carried out by a private sector non-profit organization in the provinces.[21] Governments of labour supply countries shoulder a significant share of the administrative burden and contribute in key ways to the effective functioning of the program, including managing the recruitment of all workers. Labour supply countries also have offices in Canada where officials – liaison officers in the case of the Caribbean or consular staff in the case of Mexico – act as worker representatives. These government agents help to select workers, provide worker orientation, inspect workers' accommodation, and investigate conflicts and resolve disputes between workers and employers

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Workers under SAWP who violate the terms of their work authorization can be removed from Canada under the Immigration and Refugee Protection Act procedures. However, the SAWP also provides a distinctive process, called repatriation, which allows employers to have workers returned to the sending

their migrant status, have been excluded from the most significant types of workers protection legislation, including workers compensation, employment standards such as minimum wage and maximum hours of work, occupational health and safety, and collective bargaining. The claim underlying this exclusion was that legislation designed for industrial workers was not appropriate for workers employed in agriculture.

While the wholesale exclusion of agricultural employees from all employment and labour legislation began to change in the 1970s, the coverage of agricultural workers in different employment-protection regimes has been gradual and incomplete, varying across the country. Ontario, the province with the largest agricultural sector in Canada, excludes agricultural employees from collective bargaining legislation and, instead, provides a weak form of employee representation without legally enforceable collective agreements or a dispute resolution mechanism to resolve bargaining impasses.[24] A constitutional challenge to the exclusion of agricultural workers from that province's occupational health and safety legislation on the basis that it violated their right to equality under the law was rendered moot when a new government brought agricultural workers under the legislation (Tucker 2006, 274).

24 A constitutional challenge to this legislation as violating agricultural workers' freedom of association was unsuccessful as the Supreme Court of Canada read in a very mild duty to bargain in good faith (essentially the right of employees to make collective representations and a duty on employers to consider these representations): *Ontario (Attorney General) v. Fraser*, 2011 SCC 20 [*Fraser*]. Collective bargaining legislation in Quebec that excludes workers who are employed on farms with fewer than three-year round workers was challenged successfully on the ground that it violated freedom of association under *The Charter* Section 2(b): *Travailleurs et travailleuses unis de l'alimentation et du commerce, Section locale 501 c. Johanne L'Écuyer & Pierre Locas*, 2010 QCCRT 0191. However, in light of the *Fraser* decision it is unclear what the Quebec Court of Appeal will do on the appeal of this decision. In British Columbia, the Labour Relations Board dismissed a challenge brought by an employer to application of the provincial collective bargaining statute to migrant agricultural workers on the ground that provincial legislation did not apply to foreign nationals: *Greenway Farms Ltd. v. Commercial Workers International Local 1518*, (June 29 2009), BCLRB No. B135/2009. Similarly, the Manitoba Labour Relations Board rejected an employer's argument that foreign workers are not employees under the provincial collective bargaining legislation and certified a bargaining unit of migrant workers; see *UFCW Local 832 v. Mayfair Farms*, (June 26 2007), MLB, No. 595/06/LRA.

3.2.3 Institutional Insecurity[26]

Employers are required to provide workers admitted under the SAWP with a health insurance plan. SAWP workers like other migrant workers who have employment authorizations that specify a particular employer, have difficulty in collecting unemployment insurance benefits that are available to similarly situated workers who have landed migrant status. They may, however, be eligible to receive sickness benefits as long as they are residing in Canada. In contrast, it is not necessary for a migrant worker to be in Canada in order to receive maternity or parental leave benefits, and many Mexican workers have applied for these benefits.[27]

It is technically impossible for workers admitted under the SAWP to apply for permanent status (Nakache and Kinoshita 2010, 31). The program is characterized by a high degree of circularity; the same workers return over many years (Priebisch 2010, 409; Hennebry 2010, 6). The migrant status of these workers is very precarious.

3.3 Low Skill Pilot Project

Employer demand for workers to perform jobs requiring low levels of skills in the oil and gas (especially the Tar Sands Project in northern Alberta) and construction sectors (especially in the residential sector in Toronto) resulted in the introduction of the Low-Skilled Pilot Project (LSPP) in 2002 (Fudge and MacPhail 2009, 2-27).[28] This new initiative did not replace the live-in-caregiver or seasonal agricultural workers programs, but operated along-

26 This paper does not address the entitlement of temporary migrant workers to certain types of contribution-based security benefits that are governed by bilateral agreements.

27 The child must be born while the claimant is working in Canada, although it is not necessary for the child to be born in Canada.

side them. Increasingly, it is being used as the entrant category for workers in the agricultural sector, and the source countries for agricultural workers have expanded (Preibisch 2010, 410). In Quebec, for example, workers from Guatemala recruited under this program are replacing Mexican workers under

sued dropped to 30,488 in 2009, just under where it was in 2007. Much of the demand for migrant workers is for sales and services occupations, especially in accommodation and food services (HRSDC 2010, Table 4). The demand for low-skill workers is also high in trades and transport. Women tend to be employed in hospitality and food service, whereas men are employed in occupations in transport and construction.[32]

The source countries for high-skill and low-skill workers tend to be different. In 2005, more than two-thirds of migrant workers in the managerial, professional, and skilled categories originated from Europe and the United States, whereas 59 per cent of the workers from Asia and the Pacific and 85 per cent from the Americas (with the exception of the U.S.) have positions that are classified as low skilled (Fudge and MacPhail 2009, 21).

Although workers who enter through the low-skilled stream are not barred from having their spouses and children accompany them, in practice it is almost impossible for migrant workers in the program to bring their families with them to Canada. Low-skilled workers must cover the travel costs of their spouse and children, and they must demonstrate to the immigration officer that they are capable of meeting the expenses of supporting their family (Fudge and MacPhail 2009, 22). Furthermore, unlike high-skilled workers, their spouses are not given unrestricted work permits (Fudge and MacPhail 2009, 23). The duration of the work period is two years, and it can be renewed for a further two years, after which the migrant workers will have to leave Canada for four years.[33] This strict limit on the length of time a migrant worker admitted under the LSPP can reside in Canada was introduced in 2011

32 Data about the gendered nature of LSPP was obtained from Citizenship and Immigration Canada and is available from the author.

33 *Regulations Amending the Immigration and Refugee Act Protection Regulations*, S.O.R./2010-172, s. 1 amending IRPR, s. 183(1) and s. 2(1) amending IRPR, .s. 203(3) by adding (g)(i).

by the federal government in order to emphasize the temporary nature of the residence of the workers admitted under the program.

There is only minimal public regulation of the recruitment of migrant workers under the LSPP, despite the fact that the use of employment agencies to supply low skill workers across national borders has been found to be associated with an array of abusive practices (ILO 1997, Annex II, Article 3; ILO 2004, 6th item on the Agenda at 28-60; Fudge and MacPhail 2009, 33-38). Although the employment authorization contract stipulates that no recruitment fees are to be imposed on the workers and laws in most provinces prohibit employment agencies from charging fees, only Manitoba has implemented a regulatory regime with sufficient resources to drive exploitative recruiters out of business (Fudge 2011b, 261-263).[34]

3.3.2 Employment Relations

In order to obtain an LMO an employer must enter into a contract of employment with the migrant worker and submit it to HRSDC. The federal government sets out an extensive and detailed list of mandatory provisions that must be incorporated into the employment contract. Employers are prohibited from recouping the costs of a third-party recruiter, and they are required to pay two-way transportation between the employee's country of residence and place of work (Fudge and MacPhail 2009, 29-33).

The federal government does not directly enforce the employment contract on the grounds that it does not have jurisdiction to do so since employment matters fall under provincial power. What it does instead is make compliance with the contract and provincial law a condition for obtaining an LMO.

34 Nova Scotia recently enacted legislation, modeled on that introduced in Manitoba, to regulate agencies that recruit "foreign workers", An Act to Amend the Labour Standards Code, Respecting Worker Recruitment and Protection, S.N.S. 2011, c. 19.

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only applies to high-skilled workers, does not tie a temporary foreign worker's change of immigration status to that of permanent resident to a job with, and nomination from, a specific employer.

3.4 The Legal Production of Precarious Employment Norms

Low-skill migrant workers are heavily recruited into jobs in hospitality, construction, agriculture, and private household sectors that are known for the precarious nature and low pay of the employment they generate (Anderson 2010, 300). The unionization rates in these sectors, with the exception of construction outside the residential subsector, are very low. Moreover, some of the sectors, such as domestic work and agriculture, are exempted from basic labour standards and rights. Four of the top ten occupations in which migrant workers were employed in 2006 were in the bottom 5 per cent of occupations in terms of average remuneration (Thomas 2010, 9). Even within occupational groupings, as Derrick Thomas (2010, 9-10) notes, migrant workers "typically earn less than the Canadian-born and established immigrant workers." The cost of migrant workers may not be their only attraction (Macklin 2010, 340);[40] they also provide a stable workforce for precarious jobs. Unlike resident workers, workers admitted to Canada under these migrant categories cannot simply quit and find another job; they need official permission to circulate in the labour market. Many of them are also required to live on property under their employers' control.

The low-skill streams of the TFWP serve to differentiate migrant from resident workers. The migrant workers admitted under the LCP, SAWP, and

40 "The problem is not simply that employers are able to hire foreign workers at a lower cost than native workers …. The concern is that what makes the foreign workers cheaper is their precarious immigration status, which is as much a public distortion of private market force as a publically mandated preference for local labour. The difference is that it is a distortion that some employers find efficient" (Macklin 2010, 340).

LSPP form a different category within the Canadian labour supply because they are more precarious than resident workers, either because they are assigned fewer rights or because the rights that they are entitled to are not effective. Their precarious migrant status is used to assign them to jobs that are precarious, and it limits their ability to improve their terms and conditions of employment. The precarious migrant worker programs permit employers to establish conditions of employment in the sector that resident workers do not tolerate (Preibisch 2010, 406). By creating precarious migrant statuses, high-income countries like Canada are helping to institutionalize precarious employment norms (Sharma 2006, 137).

4.0 Human Rights and Precarious Migrant Workers

Multiple international legal regimes – trade law, refugee law, human rights law, labour law, and criminal law – govern migrant workers (Thomas 2011). There are, however, some international instruments that are specifically designed to protect their rights. These emanate from the International Labour Organization and the United Nations, and they are designed to ensure that migrant workers are treated the same as workers who have the right to reside permanently in the territory. Can these international migrant workers' rights instruments be used to challenge the state's involvement in channeling precarious migrant workers into precarious employment? In order to answer this question, it is necessary to determine how these instruments treat migrant workers who are only permitted to work in the host country for a specified employer and for a limited duration since these migrant workers are the most likely to have precarious employment.[41]

41 This paper does not consider workers who have an irregular or illegal migrant status.

4.1 International Norms and Instruments to Protect Migrant Workers: The ILO and UN

Since its founding in 1919, the ILO has been concerned about the protection of workers outside of their home country (Leary 2003, 231).[42] During World War II, the problems of migrant workers were also given special mention in the Philadelphia Declaration (Pécoud 2009, 335-338). The ILO has adopted two conventions specifically for migrant workers, which embrace the principle of equal treatment between migrant and national workers, and so too, has the United Nations. However, these conventions do not address the problems specific to workers on time-limited residence permits and restricted work authorizations. In fact, as we shall see, migrant workers' rights instruments "do not provide absolute rights for migrant workers. There are restrictions on job mobility, social security, and family unification rights depending on the length of employment and residence" (Wickramasekara 2008, 1258). These restrictions on migrant workers' rights are permitted because both the ILO and UN accept the principle of national sovereignty over immigration. Thus, the immigrant rights instruments are compatible with, rather than prevent, precarious migrant statuses; what they do is limit the length of time, and the extent, of the restrictions placed on migrant workers' rights.

ILO Convention 97 (C 97), *Migration for Employment (Revised)*, 1949, was adopted to deal with labour migration in post-war Europe, whereas Convention 143 (C 143), *Migrant Workers (Supplementary Provisions),* 1975, was designed for the construction boom that occurred in the Middle East as money and migrants flowed to that region after the 1973 oil-price hikes (ILO 2010,

42 Referring to the ILO constitution. For a brief history of the ILO and UN conventions on migrant workers see Pécoud (2009, 335-338).

128-129). Convention 97, and its accompanying Recommendation,[43] aims to regulate the entire process of migration from entry to return. It spells out procedures for private and public recruitment, and it encourages countries to sign bilateral agreements governing labour migration. It also established the principle of equal treatment with national workers for migrant workers (C 97, Article 6). Convention 143 was designed to address the growing problem of undocumented or illegal migration, as well as to provide equal treatment of migrant workers.[44] Neither was designed to address the problems specific to temporary migration programs that impose time limits on the duration of the workers' residence in the host country.

Both conventions adopt a broad definition of migrant worker. A "migrant worker" means "a person who migrates or who has migrated from one country to another with a view to being employed other than on his own account."[45] Convention 97 "requires that migrant workers be treated no less favourably than nationals in areas including pay, working hours, holidays with pay, apprenticeship and training, trade union membership and collective bargaining, and, with some limitations, social security" (ILO 2010, 128-129). Similarly, Convention 143 requires states to promote "equality of opportunity and treatment in respect of employment and occupation, of social security, of trade union and cultural rights and of individual and collective freedoms" for migrant workers and their families (C 143, Article 10).

However, there are some exceptions to the equality of treatment principle.

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43 *Migration for Employment Recommendation (Revised) No. 86.* 1949. Geneva: International Labour Organization

44 Convention 143 is divided into two parts, which can be ratified separately. Article 10, in Part II, provides for equal treatment of migrant workers.

45 See Article 11 in each convention. Note that this definition excludes the self-employed from the scope of the migrant workers conventions. However, some self-employed will be covered by ILO conventions that apply to workers, which is a broader legal category than employee.

Both Convention 97 and Convention 143 exclude members of the liberal professions and artists who are given permission to enter for an undefined short period.[46] In addition, Convention 143 excludes persons who enter specifically for purposes of training or education from the equal rights provided in Part II, although such workers are covered by other ILO conventions once they take up an employment relationship (C 143, Article 11[2][d]; Cholewinski 2008, 202, citing Böhning 2003). Significantly, Convention 143 (Article 11[2][e]) excludes migrant workers with special qualifications who go to a country to carry out specific short-term technical assignments (Cholewinski 2008, 3; Cholewinski 1997, 102). Moreover, Convention 143 permits member states to restrict free choice of employment for lawfully resident migrant workers to a maximum of two years (Article 14[a]).

The ILO migrant worker conventions were the catalyst and model for the UN *Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* (ICRMW).[47] Rather than establish new rights, it offers a more precise interpretation of human rights in the case of migrants (Pécoud and Guchteneire 2006, 246). However, the shift from the tripartite institution of the ILO to the UN, which is controlled exclusively by states, explains the "more state-centered ethos" of the UN convention (Cholewinski 2006, 415 and 414). For example, Article 79 provides "nothing in the present Convention shall affect the right of each State Party to establish the criteria governing admissions of migrant workers and members of their families" (ICRMW 1990).

The major employment-related protections of the ICRMW are in Part III, particularly Articles 25-27, which prescribe equality in wages and working

46 See Article 11(2) (b) in both conventions.

47 The Convention came into effect on 1 July 2003. It took 13 years to receive the twenty ratifications required to bring the Convention into force.

conditions for authorized and unauthorized migrant and national workers, allow migrants to join unions, and call for migrant workers to receive benefits under social security systems to which they contribute, or to receive contributions upon departure. Authorized immigrants are covered by additional rights in Part IV, which include the right to information about jobs abroad as well as a list of "equal treatment" goals, including freedom of movement in the host country, and equal access to employment services, public housing, and educational institutions.

However, Part IV also provides for a number of restrictions on the rights of a range of migrant workers with limited residence and work authorizations. Like Convention 143, it permits member states to restrict free choice of employment for lawfully resident migrant workers to a maximum of two years (ICRMW 1990, Article 52). Moreover, the rights of certain specific categories of temporary migrants, such as seasonal workers, project-tied workers or specified employment workers, are curtailed explicitly in Part V of the ICRMW or remain entirely unprotected. Seasonal workers are limited to the rights provided under Part IV "that can be applied to them by reason of their presence and work in the territory of the State of employment and that are compatible with their status in the State as seasonal workers, taking into account the fact that they are present in the State for only part of the year" (ICRMW 1990, Article 59[1]). Project-tied and specified-employment migrant workers are excluded from a range of rights in Part IV of the ICRMW, including free choice of employment (ICRMW 1990, Articles 61 and 62). Project-tied workers are also excluded from the rights in Articles 53-55 concerning equal treatment with national workers with respect to protection against dismissal and access to alternative employment in the event of loss or termination of work (ICRMW 1990, Article 61[1]). Ryszard Cholewinski (2006, 42) suggests that

the greater restrictions on the rights of specific categories of workers provided in the ICRMW may not be "compatible entirely with the general standards existing elsewhere in both UN human rights and ILO instruments."

Few countries have ratified the ILO or the UN's migrant workers conventions (Cholewinski 2006, 413). The major obstacles to migrant-receiving countries ratifying these conventions are the complexity and dynamism of a country's immigration legislation and practice, the reluctance to enter into multilateral commitments in the area of policy regarding foreigners, the fear that the ICRMW would require the admission of migrant workers' family members, and the perception that the conventions are no longer appropriate given the characteristics of contemporary migration (Cholewinski 2006, 413; Pécoud and Guchteneire 2006, 252; Cholewinski 2005). Moreover, despite the formal commitments made to protect migrant workers at the ILO, its constituents – governments and labour and employer organizations – have not "been as active as they could have been in terms of promoting equality of opportunity and treatment of non-nationals in the workforce" (Leary 2003, 232, quoting ILO 1999, para. 80).

However, the shift in global migration from migration for permanent settlement to temporary migration as a source of cheap and unskilled labour in the early 1990s prompted the ILO to focus on these temporary migrant workers. In its general survey on Convention 97 and Convention 143 in 1999, the ILO Committee of Experts confirmed that these instruments did not address the problems associated with temporary labour migration (ILO 1999, paras. 666-667). However, it was not until 2004 that the Conference decided to tackle the challenge of protecting temporary migrant workers' rights, and it did so by adopting a "soft-law" approach (ILO 2010, 168). At the 92nd Session, the Conference adopted a resolution on a "Fair Deal for Migrant Workers in the

Global Economy," which noted the need for "a rights-based international regime for managing migration" that rests "on a framework of principles of good governance developed and implemented by the international community" (ILO 2004, 139). The goal was to develop a non-binding multilateral framework for a rights-based approach to labour migration that takes account of national labour market needs. In 2005, the ILO Tripartite Meeting of Experts adopted the *ILO Multilateral Framework on Labour Migration: Nonbinding principles and guidelines for a rights-based approach to migration*, which was authorized by the ILO's Governing Body in 2006 (ILO 2006, 61).[48]

The Multilateral Framework on Migration recommends the adoption of policies to encourage circular and return – including temporary – labour migration. While the principles and guidelines it endorses pursue non-discrimination and human rights more forcefully than pre-existing international regulations, like the ILO and UN conventions, it still preserves national sovereignty (Vosko 2011, 376; ILO 2006, preamble at para. 8). However, it places a great deal of emphasis on its Decent Work Agenda in promoting a rights-based approach to managing temporary migration (ILO 2006).[49] Moreover, the Multilateral

international standards pertaining to the protection of migrant workers at the national level (ILO 2006, 61).[51] According to the ILO,

> [g]enerally, all authorized migrant workers are entitled to the same coverage under Canadian law as nationals. Canada has entered into bilateral agreements on social security with other countries. Workers are permitted to change employers, and temporary workers who lose their job through no fault of their own may remain to seek other employment (ILO 2006, 61).

Committee of Freedom of Association recently concluded that the exclusion of agricultural workers in Ontario from collective bargaining legislation violated the workers' freedom of association, even more recently, the Supreme Court of Canada ignored the decision of the ILO's supervisory institution and refused to provide agricultural workers in Ontario with the same collective bargaining rights available to other workers in the private sector.[52] Thus, there may be some potential for migrant workers' rights instruments, when combined with such core ILO's conventions as the freedom of association, to bring pressure to bear against states like Canada that violate migrant workers' fundamental labour rights.

However, neither the ILO and UN conventions, nor the Multilateral Framework on Labour Migration, prohibit states from tying a migrant worker's immigration status to a specific employer; instead, they impose a two-year limitation on any restrictions on the migrant worker's ability to "make the free choice of employment" (C 143, Article 14[a]; ICRMW 1990, Article 52). Although the ILO has concluded that Canada ensures "that restrictions on the rights of temporary migrant workers do not exceed relevant international standards" (ILO 2006, Guidelines 9.7, 18 and 61), the actual situation is not so clear. Each of the three groups of migrant workers discussed in the case

two years. Unlike national workers, migrant workers are not free to circulate in the labour market without the permission of a state official.

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46 MBC:

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