TEMPORARY WORKERS: PERMANENT RIGHTS?

ABSTRACT

Although Canada has long had programs designed to bring in migrant workers on a temporary basis, recruitment of temporary foreign workers has grown fast in the last decade. The Temporary Foreign Worker Program (TFWP), in particular, has been widely expanded to include a significant number of low-skilled workers. This article outlines the legal framework that regulates the entry and stay of temporary foreign workers into Canada. It examines the issues surrounding the legal status of temporary foreign workers admitted under the TFWP and identifies some major protection gaps within the administration of the program. This article was last revised in January 2009.

DELPHINE NAKACHE

Delphine Nakache is a professor of Law at the School of International Development and Global Studies (University of Ottawa) and an affiliated researcher with the Ontario Metropolis Centre. Her current research focuses on the legal status of both low-skilled and highly skilled temporary migrants admitted for employment in Canada under the general Temporary Foreign Worker Program. She also recently started a research project titled "Provincial Nominee Programs: Implications for Temporary Foreign Workers."

With falling fertility rates and the ageing of the baby boom generation, the supply of both high-skilled and low-skilled workers is in decline across Canada and around the developed world. While immigration is presented as a strategy for alleviating this shortage, Canada's immigration points system, which allows individuals to enter Canada as permanent residents (i.e., the Federal Skilled Worker Program), is criticized for not being sufficiently responsive to short-term labour market demands. These criticisms include, *inter alia*, the lack of credit given to those workers with skills or competencies that are in demand (the Federal Skilled Worker Program tends to admit skilled individuals only, regardless of need or demand for them), the large backlog of applicants seeking permanent residency as federal skilled workers, and the major challenges faced by many immigrants in gaining meaningful employment in jobs that match their education, skills and experience (Watt et al. 2008). Ministerial Instructions have recently addressed some of these criticisms.[2] However, given the disconnect between the short-term needs of employers and Canada's permanent immigration system, employers have turned to alternative means to address their immediate skill and labour shortages, such as Canada's temporary foreign worker programs (TFWPs).

Recruitment of temporary foreign workers (TFWs) is growing fast: in 2007, 115,470 TFWs arrived in Canada, a 47% increase since 1997 and a 21% increase in one year. By comparison, only 97,857 economic immigrants immigrated to Canada under the Federal Skilled Worker Program in 2007. Although the number of TFWs has grown substantially in all provinces (with significant numbers of foreign workers in Western Canada), this increase has been most pronounced in Alberta. In 2007, there were 37,257 temporary workers in the province, a 350% increase in four years. Permits issued to low-skilled workers account for the largest percentage of the increase in Alberta. Overall, it is estimated that 302,303 TFWs are currently living and working in Canada, a 100% increase over 1997 and a 22% increase over the previous year (CIC 2008c).

Canada has long had programs – general or sector-specific – designed to bring in migrant workers on a temporary basis. Canada's flagship temporary migration programs, namely the Seasonal Agricultural Worker Program (SAWP) and the Live-in Caregiver Program, have traditionally been the focus of particular attention within policy and academic circles: praised by some as an effective way of filling a shortage in the labour market with a low overstay rate, they have been denounced by others as placing too many restrictions on workers' mobility and all power in employers' hands, therefore increasing the vulnerability of the workers hired under these programs. Interestingly, a third program has been widely expanded in the last five years but has until now largely operated below the constitutional radar. This program, the Temporary Foreign Worker Program (TFWP), is the focus of our current research on the legal status of TFWs. But before addressing the issues surrounding the legal status of those TFWs, it is necessary to first explain the legal framework regulating the entry and stay of all TFWs into Canada.

According to section 95 of the *Constitution Act* (1867), immigration is a matter of shared federal-provincial jurisdiction: the Parliament of Canada may make laws in relation to immigration for Canada as a whole and provincial legislatures have powers to make laws with respect to immigration matters in the province, provided that these laws are not "repugnant to any Act of the Parliament of Canada" – i.e., the federal legislator (doctrine of paramountcy). However, measures and policies relating to the entry of non-citizens fall solely under federal jurisdiction (s. 91). Thus, the federal government regulates the admission and expulsion of TFWs but their protection is covered by provincial laws and standards. *The Immigration and Refugee Protection Act* (IRPA)[3] is a framework legislation that stipulates only the general principles, criteria, and powers of immigration/refugee decision-making. It must therefore be

complemented by a detailed outline of definitions, procedures and factors to be considered by decision-makers. Such details can be found in the *Immigration and Refugee Protection Regulations* (IRPR)[4] and in the administrative guidelines (which assist officers in interpreting the regulations and explaining the programs that fit under these regulations) (CIC 2008a).

The term "temporary foreign worker" refers to a foreign national engaged in a paid activity who is authorized to enter to Canada for a limited period of time (IRPR ss. 22, 29 and 47; IRPR ss. 2 and 200). While there are some types of work that a foreign national is authorized to do without having to obtain a work permit (IRPR ss. 186 and 187), the TFWP does not allow employers to hire TFWs without a work permit: once employers obtain a positive Labour Market Opinion (LMO) from Human Resources and Social Development Canada (HRSDC) – which requires, among other things, a demonstration that attempts were made to hire Canadians – the potential employee has then to apply for a work permit from Citizenship and Immigration Canada (CIC). Applications for a work permit are generally made outside Canada; however, ss. 198 and 199 of IRPR describe the situations whereby a work permit may be obtained at the Port of Entry (POE) or within Canada, respectively. CIC is primarily concerned with whether the TFW meets the job qualifications and if he or she will leave Canada after a temporary stay (IRPR ss. 200, 203 to 209). At that stage, a medical exam prior to undertaking work in Canada will be also be requested for TFWs who intend to work in a sector where the protection of public health is essential or who intend to be in Canada for more than six months and who have resided in a designated country for more than six months during the year preceding their arrival in Canada (IRPR, s. 70). It is the Canada Border Services Agency (CBSA) officer at the port of entry who has the final say on whether an individual can enter Canada. A positive Labour Market Opinion and permission to work in Canada are thus not determinant of admission, since the CBSA officer at the port of entry must still review all immigration, identity and work-related documents before printing off the actual work permit and allowing the person to enter the country.

Although work permits issued under the TFWP tie each TFW to a single employer, individual conditions imposed on the work permit – for instance, where and how long the applicant can work – vary from one person to the next (IRPR, s. 183 and 185). Temporary foreign workers in Canada with a valid work permit who wish to change any condition on their work permit or renew their work permit before its expiration are allowed to apply from within the country, by mailing their application to the Vegreville Case Processing Centre (IRPR, s. 199). TFWs with an expired work permit may apply from Canada to restore their status within 90 days of the expiration of their work permit, but there is no guarantee that CIC will restore their status (IRPR, s. 182). Since November 2008, there are two application streams from within – one for renewal of a work permit with the same employer (current processing time is 72 days) and another for changing conditions to a new employer (current processing time is 19 days) (CIC 2008b). TFWs who have applied to extend a work permit with the same employer prior to the expiry of their existing work permit acquire implied status as of the date the application is received, and can continue to work at their existing place of employment, as long as they remain in Canada (IRPR, s. 186(u)) (CIC 2009). However, workers who have applied for a work permit with a new employer are not authorized to work for the new employer until they receive their work permit (IRPR, s. 124(1) (b) and (c)). Although the processing time for the new employer stream has been significantly reduced since November 2008, the overall waiting time involved in finding a new job and a new LMO can be very long, especially since TFWs are not authorized to work and are therefore left without income for that time if they are no longer working for their previous employer. As a result, many TFWs leave the country with the intention of re-entering it immediately in order to have their application for a new work permit processed at a Canadian port of entry (this cannot be an airport since the workers have to physically be outside the country).[5] However, there is no guarantee that a worker with an LMO will again be authorized to re-enter Canada at a port of entry. Indeed, if the CBSA officer is not satisfied that the worker will leave the country upon expiration of the work permit, or that they do not, for example, possess the adequate English skills for the job, the officer might decide not allow the worker re-entry. What's more, the risk of deportation from the United States for some foreign workers who cross the U.S. border in order to seek to re-entry to Canada is very real. Last but not least, workers who applied for a restoration of status from within and who present themselves at the Canadian border with the intention of re-entering the country with a new work permit very often don't realize that leaving Canada means that they will be refused re-entry to the country, and that in addition, they will be subject to a removal order. On that point, CIC information provided in the document entitled "Applying to change conditions or extend your stay in Canada as a worker" (IMM 5553 E) is confusing: it does not clearly indicate

According to section 95 of the *Constitution Act* (1867), immigration is a matter of shared federal-provincial jurisdiction: the Parliament of Canada may make laws in relation to immigration for Canada as a whole and provincial legislatures have powers to make laws with respect to immigration matters in the province.

whether a TFW applying for restoration must leave Canada, nor does it indicate which status TFWs have while waiting for CIC to process their restoration applications. This document only indicates that the TFW has to wait for further instructions but does not provide details as to what those instructions may be. The IRPR also fail to elaborate on this point.

The TFWP, which came into existence in 1973, was initially designed for specific groups such as highly skilled academics, business executives, and engineers, to provide an efficient channel for professionals coming to Canada to work. In response to demands from provincial governments and employers, the federal government has progressively expanded the number of occupations under which workers could come to Canada, to include low-skilled and middle-skilled workers. It has also provided for an expedited LMO (e-LMO) process for "occupations under pressure" in certain provinces and oil sands construction workers in Alberta. A good example of this program extension is the Low Skill Pilot Project (formally known as the Pilot Project for Hiring Foreign Workers in Occupations Requiring Lower Levels of Formal Training NOC C and D), established in 2002 with the intention of meeting the labour market demand for low-skilled workers not eligible for the regular skilled worker LMO process. There are no quotas under the TFWP, and a significant number of low-skilled workers have entered Canada since the inception of this pilot project (Piché, Pelletier, and Epale 2006). This recent increase in the number of low-skilled workers has been accompanied by a growing concern surrounding their protection and eventual integration in the country of employment:

- First, under the Low Skill Pilot Project, employers have obligations towards workers that they do not have towards highly skilled TFWs. They must provide a written employment contract that clearly outlines remuneration, job duties, benefits, hours of work, and the rights and obligations of both parties. They must also pay return airfare to the employee, arrange for reasonable accommodation, and provide temporary medical insurance coverage and worker's safety insurance. However, as is shown below, the federal government has little to no ability to follow up on these conditions.

- Second, low-skilled workers hired under the Low Skill Pilot Project are encouraged to stay for a longer term than before. For example, work permits, initially valid for 12 months, were extended to 24 months in 2007. TFWs employed for 24 months are in theory required to return to their home country for at least 4 months before applying for another work permit under the Low Skill Pilot Project (24 months in, 4 months out; CIC Manual 2008: 28). Yet decisions on extensions have no regulatory authority and are made on a case-by-case basis. Therefore, if their employer still has a valid Labour Market Opinion, TFWs may be able to renew their work permit from within without having to leave the country for 4 months. In a context where there is no limit to the number of renewals (IRPR, s. 201), this creates a situation in which TFWs remain indefinitely in Canada. However, there is currently little hope of permanent settlement, little opportunity for a temporary resident to secure a permanent resident status from within the country. This is not because low-skilled TFWs are not allowed to do so: section 22 of IRPA somehow ambiguously states that an "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"). Yet low-skilled workers in occupations NOC C and D that are the subject of the Low Skill Pilot Project are unlikely to qualify for permanent residency under the Federal Skilled Worker Class (for the aforementioned reasons). They also are excluded from the Canadian Experience Class, which only targets skilled occupations (NOC 0, A, and B). Provincial Nominee Programs (PNPs) may be the most likely path to permanent residence for some participants in the Low Skill Project, but opportunities are limited here as well.[6] With the recent changes to the Low Skill Pilot Project, more applicants also want to have their family members accompany them to Canada. Again, although there is no regulatory bar to this situation, this is difficult in practice. The onus is on the potential employee to demonstrate to the immigration officer that they are capable of supporting their dependents while in Canada. One of the key points to consider when processing such applications is the spouse's working situation. While the spouse of a highly skilled worker is entitled to enter Canada with an open work permit (i.e., no restriction on employer), the spouse of a Low Skill Pilot worker is not eligible for an open work permit and requires a positive LMO if applying for a work permit. This creates, according to CIC, a "significant financial barrier to accompanying dependents which will be difficult to overcome" (Confirmation Exception Code (CEC) C41, CIC Manual 2008: 28 and 32-33). Interestingly, spouses of work permit holders who have been nominated for permanent residence by

Many TFWs leave the country with the intention of re-entering it immediately in order to have their application for a new work permit processed at a Canadian port of entry. However, there is no guarantee that a worker with an LMO will again be authorized to re-enter Canada.

a province under a provincial nominee program will be entitled to open work permits for the duration of the work permit of the provincial nominee principal applicant, *irrespective* of the skill level of the principal applicant's occupation. CIC writes: "While there is reluctance on the part of CIC and HRSDC to support work permits for lower-skilled workers because their skills profile would not normally qualify them for permanent immigration to Canada, concerns regarding these persons going out of status and remaining in Canada illegally are mitigated when the foreign national has been nominated for permanent residence. If a province feels a foreign national is sufficiently needed in its labour market to nominate that person, then having that job filled is clearly important, irrespective of where in the NOC that particular job is classified." (CIC Manual 2008: 58-59). This sentence illustrates the government's philosophy that low-skilled workers should not remain in Canada permanently.

Several other issues relating to the legal status of TFWs within the TFWP have already been identified as worthy of further investigation. Some of them are summarized below:

- The TFWP is composed of vague policies and guidelines and numerous changes in the administration of the TFWP are not accompanied by changes or clarifications in the legislation. In a context where wide discretionary powers are granted to CIC and CBSA officers, the risk of making mistakes is not minimal and this may lead to detrimental consequences for the TFW.
- There are overlapping policies involved in administering the TFWP. Splitting up the administration of the program between HRSDC, CIC and CBSA creates opportunities for miscommunication and confusion. In relation to this, the lack of an overall mechanism to oversee the TFWP is problematic: responsibility for ensuring that TFWs are treated fairly and not subjected to unreasonable processes is diffused and passed from one agency to another. As a result, it falls to employers to ensure that TFWs have access to the resources and information they need to settle into life in Canada. Many employers, however, simply do not have the time, resources, and knowledge to take on this responsibility and to help TFWs through their integration and settlement problems, nor is there any incentive for them to do so. For example, employers have no obligation to raise wages beyond what is stated in the LMO. Thus, while Canadian workers do receive pay wage increases, TFWs may receive the same wage for the two years they are eligible to work in Canada. There is also no mechanism in place to ensure that employers are honest when they apply for an LMO and no follow-up assessment of workplaces. For example, if employers fail to discharge their special obligations toward the low-skilled TFWs, the only course of action by HRDC is to refuse to renew a LMO. HRSDC and CIC have recently started a co-initiative aimed at developing monitoring and compliance mechanisms ("program integrity measures") and making associated regulatory changes. While this initiative is still at a very early stage of development, this is a positive change. CIC and HRSDC should also work together on providing ready access to independent legal information and advice to TFWs, for example with joint governmental information sessions for TFWs. Finally, CIC and HRDSC should also share their information about the location of TFWs with provincial governments so that provinces can increase worker protections through the enforcement of the requirements stipulated in the job contract or governed by the provincial legislation.
- TFWs are afforded as legal protections in the workplace environment as are other workers in the province, but those rights, which are complaint-driven, do not transfer well into practice: a lack of awareness of rights and available mechanisms for redressing rights violations, language barriers, misleading employer-provided information and threats of deportation are serious impediments in accessing those rights in the workplace.
- Although labour brokers can help match TFWs with employers, they often charge TFWs for work placement, which is illegal under several provincial laws but not prohibited within the country of origin of the TFW. Every province shall therefore introduce legislation similar to that introduced in spring 2008 in Manitoba, which requires foreign recruitment agencies to be registered in Canada and makes charging workers a fee for their own recruitment illegal. In addition, it is not uncommon to hear testimonies of foreign workers having been misinformed by some labour brokers who told them that temporary work permits were the first step toward permanent residency. Nor is it uncommon to hear of TFWs being charged exorbitant fees up front for immigration for permanent residency services before they leave their home country, which may be either paid beforehand or contracted for future payment – with little obligation on the part of the immigration service provider.

In sum, for temporary foreign workers to really benefit from the opportunity to live and work in Canada, it is necessary to identify protection gaps within the TFWP and to better address temporary workers' needs on a systemic level. This has implications for their understanding of workplace expectations and their rights and obligations in Canada, including access to permanent residency for those workers who may, in fact, remain indefinitely in Canada.

References

Watt, D., et al. 2008. *Renewing Immigration: Towards a Convergence and Consolidation of Canada's Immigration Policies and Systems*. Ottawa: The Conference Board of Canada, 12-15.

Canada. Citizenship and Immigration Canada (CIC). 2008a. *FW 1 Temporary Foreign Worker Guidelines*. Ottawa.

———. Citizenship and Immigration Canada (CIC). 2008b. *Operational Bulletin 087 – Separation of Processing Streams at CPC-V – New vs. Existing Employer Applications* (November 14). Ottawa.

———. Citizenship and Immigration Canada (CIC). 2008c. *Facts and Figures: Immigration Overview. Permanent and Temporary Residents* Ottawa.

———. Citizenship and Immigration Canada (CIC). 2009. *Operational Bulletin 092 – New Directives on Implied Status* (January 15).

———. Citizenship and Immigration Canada (CIC). N.d. *Applications Processed in Canada*. Ottawa. Accessed on January 26, 2009, at <www.cic.gc.ca/english/information/times/canada/process-in.asp>.

Piché, V., E. Pelletier, and D. Epale. 2006. "Identification of the Obstacles to the Ratification of the United Nations International Convention on the Protection of All Migrant Workers and their Members of their Families: The Canadian Case." UNESCO Series of Country Reports on the Ratification of the UN Convention on Migrant (August), 5.

Notes

[1] The author would like to thank Susan Wood whose comments were most helpful and Aleisha Bartier and Paula Kinoshita for their help as research assistants.

[2] In June 2008, in order to make the federal selection system more flexible, Parliament passed Bill C-50, which gives broad discretionary powers to the CIC Minister to issue instructions to immigration officers for the processing of applications of economic and family class immigrants. In November 2008, Ministerial Instructions were established, requesting priority processing of all economic class applications: "Ministerial Instructions," *Canada Gazette* 142, 48, November 29, 2008.

[3] SC 2001, c. 27 (enacted on June 28, 2002).

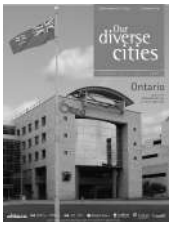
[4] SOR/2002-227.

[5] Informal conversation with Susan Wood, Temporary Foreign Worker Coordinator at the Edmonton Community Legal Centre (January 28, 2009).

[6] A PNP is based on a federal-provincial agreement (according to s. 8(1) of IRPA) under which a province obtains sole responsibility for the selection of a certain number of potential immigrants likely to be of significant benefit to the economic development of this province and for their nomination for immigration into that province. After federal security, criminality and health checks, CIC makes a final decision on the application and issues or refuses a permanent resident visa to the applicant. PNPs are open to only a select number of occupations and participation rates are still very low.

Our Diverse Cities

Our Diverse Cities / Nos diverses cités **is a special Metropolis series that examines issues related to diversity, integration and immigration in cities. It has also been assigned as course reading in university classes across the country.**



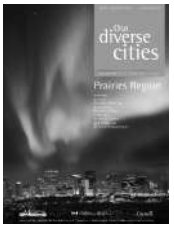
Volume 4, Fall 2007 – Ontario

- Margaret Walton-Roberts (Wilfrid Laurier University) "Immigration Regionalization in Ontario: Policies, Practices and Realities
- Brian K. Ray (University of Ottawa) and Jean Bergeron (Citizenship and Immigration Canada) "Geographies of Ethnocultural Diversity in a Second-tier City: Moving Beyond Where People Sleep"
- Sandeep Kumar Agrawal (Ryerson university), Mohammad Qadeer (Queen's University), and Arvin Prasad (Regional municipality of Peel) "Immigrants' Needs and Public Service Provisions in Peel Region"
- Myer Siemiatycki (Ryerson University) "Invisible City: Immigrants Without Voting Rights in Urban Ontario"



Volume 5, Spring 2008 – Atlantic Region

- Bridget Foster (Association for New Canadians, Newfoundland and Labrador) "Perspectives of an Atlantic Settlement Service Provider"
- Nicole Gallant (Université de Moncton, Institut national de la recherche scientifique) "How Social Networks Help to Attract, Integrate and Retain Immigrants: A Multidimensional Research Initiative"
- Alexandra Dobrowosky and Evangelia Tastsoglou (Saint Mary's University) "Women, Gender and Networks"
- Ather H. Akbari (Saint Mary's University) "The Role of Networks in Economic Integration of New Arrivals"



Volume 6, Spring 2009 – Prairies Region

- The Honourable Nancy Allan (Government of Manitoba) "Foreign Worker Recruitment and Protection: The Role of Manitoba's *Worker Recruitment and Protection Act*"
- Jim Frideres (University of Calgary) "The New Ethnic Identity? Young People on the Prairies
- Rick Enns (University of Calgary) and Tom Carter (University of Winnipeg) "Refugee Housing Trajectories in Edmonton"
- Joseph Garcea (University of Saskatchewan) and Smita Garg (City of Saskatoon) "Cultural Diversity, Race Relations, Immigration and Integration in Saskatoon: The Process of Developing Institutional Arrangements"
- Marc Arnal (University of Alberta, Campus Saint-Jean) "Rethinking Canada: Canadian Values as a New Framework for Development"

To obtain a copy, in English or French, please contact <canada@metropolis.net>