

Canada's Choice

JUNE 2016

Decent work or entrenched exploitation for
Canada's migrant workers?

by Fay Faraday



Metcalf Foundation

The Metcalf Foundation helps Canadians imagine and build a just, healthy, and creative society by supporting dynamic leaders who are strengthening their communities, nurturing innovative approaches to persistent problems, and encouraging dialogue and learning to inform action.

Metcalf Innovation Fellowship

The purpose of the Metcalf Innovation Fellowship is to give people of vision the opportunity to investigate ideas, models, and practices that have the potential to lead to transformational change.

Fay Faraday

Fay Faraday is a nationally recognized lawyer with expertise in labour, human rights, and constitutional law. She has been working with migrant workers since 1990 and consults nationally and internationally on migrant worker rights. Representing unions, civil society, and community coalitions, Fay has litigated many leading cases at the Supreme Court of Canada and Ontario Court of Appeal. Fay is also a Visiting Professor at Osgoode Hall Law School and holds the Packer Visiting Chair in Social Justice at York University. Fay's 2012 report for the Metcalf Foundation, *Made in Canada: How the Law Constructs Migrant Workers' Insecurity*, maps the complex legal landscape that regulates migrant workers and develops a framework for sustainable reform to strengthen migrant worker rights in Canada. Her 2014 report for the Metcalf Foundation, *Profiting from the Precarious: How recruitment practices exploit migrant workers* provides ground breaking research on exploitative practices of transnational labour recruitment that erode migrant worker rights in Canada and develops frameworks for reform.

CONTENTS

PART I

INTRODUCTION 5

Labour Migration Policy at the Crossroads 5

PART II

WHO ARE CANADA'S MIGRANT WORKERS? 10

Redefining the Scope of the Temporary Foreign Worker Program..... 10

1. Program Changes Complicate Comparisons Over Time..... 14

2. Vulnerable Workers are Present Under Both the TFWP and the IMP..... 15

3. Reliance on Temporary Migration is Expanding Under the IMP 15

PART III

RECONFIGURING THE TFWP..... 18

A. "Putting Canadians First": Reiterating a Legal Obligation that
Already Existed 19

B. Hiring Migrant Workers Through the TFWP 21

1. General LMIA Requirements 21

2. Scrutinizing the Impact on the Canadian Labour Market..... 22

3. Scrutinizing Compliance with LMIA Commitments 25

4. Public Transparency and Accountability 29

5. Exemptions From the Changes to the TFWP 30

C. Migrant Caregivers: Narrower and More Precarious Pathways to
Permanent Residence..... 34

1. Live-in Caregiver Program ("LCP") Has Been Replaced by the
New "Caregiver Program" 34

2. "Live-in" Requirement Removed..... 36

3. Increased Precarity for Migrant Caregivers 36

4. Heightened Precarity for Caregivers Still Under the LCP 39

5. Continuing Delays in Processing Caregivers' Applications
for Permanent Status..... 41

PART IV

DEEPENING INSECURITY THROUGHOUT THE LABOUR MIGRATION

CYCLE	42
1. Recruitment.....	43
2. Obtaining a Work Permit.....	47
3. Arrival in Ontario	49
4. Living and Working in Ontario	50
5. Expiry and Renewal of Work Permits.....	53
6. Repatriation or Routes to Permanent Residency?	54

PART V

CONCLUDING COMMENTS: CHOOSING DECENT WORK AND DECENT

LIVES OR ENTRENCHED EXPLOITATION?.....	56
Recommendations	60
Fundamental Principles for a Rights-Based Approach to Policy	60
Building Permanence, Building Security	60
Building Security to Pre-empt and Resist Worker Exploitation	60

APPENDIX A

THE NATIONAL OCCUPATIONAL CLASSIFICATION (NOC) SYSTEM.....

APPENDIX B

ROUTES TO PERMANENT RESIDENCE FOR ECONOMIC CLASS

IMMIGRANTS.....	65
Pathways Pre-November 2014.....	68
Pathways Post-November 2014.....	69

PART I

INTRODUCTION

Labour Migration Policy at the Crossroads

In 2000, 116,540 workers with temporary status entered Canada.¹ By 2014, a total of 567,977 individuals were working with temporary immigration status in Canada.² These workers arrived in Canada under a variety of labour migration programs that facilitate the movement of workers into occupations at all so-called “skill levels” — professional, managerial, skilled, semi-skilled, and low-skilled.³

The Metcalf Foundation published *Made in Canada: How the Law Constructs Migrant Workers’ Insecurity* in 2012.⁴ The report tracked this sea change in Canadian employers’ demand for transnational migrant workers who labour in Canada with precarious temporary immigration status.⁵ *Made in Canada* mapped how federal and provincial laws intersect to create a labour migration *system* to facilitate this flow of workers and it detailed how, through law, that *system* imposes conditions of deep insecurity that leave migrant workers vulnerable to widespread exploitation. The report documented how migrant workers in the low-wage streams of temporary migration share common experiences of exploitation, concluding that “[t]he exploitation is not isolated

Temporary Status Workers in Canada

2000: **116,540**

2014: **567,977**

¹ *Facts and Figures Immigration Overview Permanent and Temporary Residents 2009* (Ottawa: 2010) at p. 62.

² *Facts and Figures Immigration Overview Temporary Residents 2014* (Ottawa: 2015) at pp. 20-21. This 567,977 figure comprises 109,457 individuals under caregiver, agriculture, and low-wage streams of the Temporary Foreign Worker Program; 69,929 individuals under the high-wage stream of the Temporary Foreign Worker; and 390,273 individuals under the International Mobility Program streams. Beyond this, 484,871 international students were present and an additional 109,997 individuals held work permits granted for humanitarian and compassionate reasons (30,250), to permit international students to work off-campus or work post-graduation (49,418), and to enable applicants for permanent residence to work pending a decision on their PR application (30,329): *Facts and Figures Temporary Residents 2014* at pp. 28, 38. The comparable figures for 2015 are not available at the time of writing. None of the figures cited include the most precariously placed workers with undocumented status.

³ See Appendix A for an outline to the National Occupational Classification (NOC) system which establishes these “skill levels.”

⁴ Fay Faraday, *Made in Canada: How the Law Constructs Migrant Workers’ Insecurity* (Metcalf Foundation, 2012). The Full Report and the Summary Report of *Made in Canada* are both available online at www.metcalffoundation.com.

⁵ *Made in Canada (Full Report)*, above note 4 at pp. 10-11, and Tables 1, 2, 3 and 4.

and anecdotal. It is endemic. It is systemic. And the depths of the violations are degrading.”⁶

In June 2014 the federal government introduced a broad range of changes to the Temporary Foreign Worker Program.⁷ In October 2014 it introduced further changes to the Live-in Caregiver Program, which took effect in November 2014.⁸

Two key factors generated the public pressure that led to the 2014 policy revisions:

- (a) concerns about employers’ rapid shift towards reliance on a large workforce of migrant workers with temporary status; and
- (b) concerns about widespread and systemic exploitation of low-wage migrant workers.

Following the October 2015 federal election, which brought a change in government,⁹ policy choices remain a live issue as the Temporary Foreign Worker Program is again under active scrutiny in anticipation of further reforms. In February 2016, MaryAnn Mihychuk, Minister of Employment, Workforce Development and Labour, announced the federal government’s plan to undertake a “serious review” of the entire Temporary Foreign Worker Program and to ask a Parliamentary committee for proposals for reform.¹⁰ It is hoped that this new report — *Canada’s Choice* — will contribute to informing the current public discourse and policy choices.

As *Made in Canada* observed, the worker exploitation that the report documented was not inevitable:

Migrant workers’ insecurity is a product of choices that federal and provincial governments have made in developing the legal and policy systems that govern these workers’ labour migration journey. Their insecurity is an entirely foreseeable outcome of those choices.¹¹

With Canada’s labour migration policy at a crossroads, what future will we choose? What values will inform our choices?

⁶ *Made in Canada (Summary Report)*, above note 4 at p. 5.

⁷ Government of Canada, *Putting Canadians First: Overhauling the Temporary Foreign Worker Program* (June 2014).

⁸ The changes were announced on 31 October 2014 and took effect on 30 November 2014: Citizenship and Immigration Canada, “Improving Canada’s Caregiver Program,” news release and background.

⁹ With the October 2015 federal election, the Liberal Party formed the government after winning a majority of seats in Parliament. Over the preceding decade, the Conservative Party had led successive minority governments from 2006 to 2011, followed by a majority government from 2011 to 2015.

¹⁰ Minister of Employment, Workforce Development and Labour MaryAnn Mihychuk as quoted in Robert Fife, “Temporary foreign workers program faces federal review,” *The Globe and Mail* (17 February 2016), <http://www.theglobeandmail.com/news/politics/temporary-foreign-workers-program-faces-federal-review/article28792323/> (accessed 17 February 2016).

¹¹ *Made in Canada (Summary Report)*, above note 4 at p. 6.

This report takes stock of what has changed and what has not changed in Canada's labour migration policy. It also examines whether, and to what extent, recent policy shifts alleviated the burdens of insecurity that the law imposed on migrant workers. This insecurity arises at the macro level, in how the policies frame public discourse, and at the micro level, in how implementing the program structures and affects workers' lives.

Canada's Choice concludes that rather than alleviating the structural burdens that were identified in 2012, the revised laws and policies are intensifying insecurity for low-wage migrant workers. The exploitation remains a made-in-Canada problem that demands made-in-Canada solutions.

Recent reforms underscore the **three inconsistent narratives** that are shaping Canada's labour migration policy. These conflicting narratives create a double standard such that:

- some workers' labour in Canada is valued as demonstrating an economic contribution and social integration that merits **access to permanent residence**; others' is not;
- some migrants' need for **family unity** and **family reunification** is safeguarded; others' is not; and
- some forms of work attract a commitment to developing a **sustainable labour force** with secure status; other forms of work are treated as "**zones of exceptionality**." These zones foster an enduring and expanding reliance on low-wage labour with temporary status and conditions that "Canadians" are "unwilling to accept."

These conflicting narratives normalize a two-tier labour market with differential rights. On this double standard, the workers who lack access to permanent residence, who enter Canada under programs that are premised on prolonged family separation, and who work in sectors where temporary status is normalized, are disproportionately racialized migrant workers from the Global South who are employed in low-wage jobs.

At the implementation level, low-wage migrant workers are also facing broader and deeper forms of insecurity. Some changes announced in 2014 were oriented towards program enforcement through random employer audits and heightened fines for employer non-compliance. On the whole, though, the law continues to construct labour migration programs in ways that leave low-wage migrant workers in profoundly precarious positions:

- First, **the key structural elements that produce workers' precariousness remain in place.**
- Second, **new elements have been introduced that exacerbate that precariousness.**

Key Elements of the Legal Framework that Continue to Drive Workers' Precariousness

- Work permits that tie workers to a specific employer;
- 4-in/4-out rule that forces workers to leave Canada after four years of labour and prohibits them from returning for four years;
- Inadequate and uneven regulation of exploitative recruitment practices;
- Fragmented complaint-based mechanisms for enforcing workplace rights;
- Lack of protection for workers who raise complaints about rights violations; and
- A lack of access to permanent residence on arrival or pathways to permanent residence for most low-wage migrant workers.

New Elements of the Legal Framework that Exacerbate Workers' Precariousness

- Work permits that are shorter in duration;
- Higher application fees that are often passed on to workers;
- Hard and declining caps on the number of low-wage migrant workers permitted in each workplace;
- Hard cap on the number of caregivers who can apply for permanent residence each year with the result that caregivers no longer have a certain route to permanent residence; and
- Reconfiguration of the caregiving program so that it exists only through Ministerial Instructions, is subject to change without notice or Parliamentary debate, and will expire by 2019.

- Third, elements of the temporary labour migration system that create insecurity for migrant workers have been incorporated into the *permanent* immigration stream. This now gives employers and recruiters heightened **power to determine who will be invited to immigrate** to Canada.

All of these changes were introduced in the context of a **government discourse** that shifted the focus from migrant workers' contributions to the economy and the widely documented exploitation of migrant workers by employers, to a **reframing of migrant labour as a threat to Canadian workers**.

Overall, the 2014 policy choices focused on determining how many of which workers can enter Canada's labour force. But the terms shaping the conditions on which that labour is performed exacerbate workers' precariousness and workers' ability to access permanent residence has been constricted.

Emphasizing that temporary migration must not institutionalize a second-tier low-wage/low-rights labour force, *Made in Canada* mapped the robust rights-based framework by which to assess whether Canada's temporary labour migration programs comply with constitutional rights, human rights, and international standards for decent work and security.¹²

This framework can again be used to assess whether the recent legal and policy changes advance a real experience of **decent work and decent lives** for low-wage¹³ migrant workers in Canada, or whether the changes **entrench exploitation**. The rights-based framework is reviewed in Part IV.

Canada's Choice is structured as follows:

Part II addresses the question of who migrant workers are: Who is working in Canada with temporary status? The answer is not straightforward. The 2014 amendments relabelled key elements of Canada's labour migration programs in a way that is at odds with common public terminology; that makes pre- and post-2014 comparison more complicated; and that may obscure areas of temporary labour migration where precariousness is expanding and which, as a result, will be critical to future policy development.

Part III analyzes the general changes that have been made to the Temporary Foreign Worker Program, the numerous exclusions from those changes, and the targeted changes made to the Live-in Caregiver Program. It

¹² *Made in Canada (Full Report)*, above note 4 at pp. 47-57.

¹³ As is addressed in more detail in Part II, the federal government's 2014 revisions redefined the concept of "low-wage" in a way that is itself deeply contested. Unless referring specifically to the TFWP definition of "low-wage," when used in this report, the phrase low-wage refers to workers who are earning below, at, or near the minimum wage.

analyzes changes to Labour Market Impact Assessments, and changes that control workers' access to permanent status. It examines the political narrative of "putting Canadians first" which framed those changes and underscores that the 2014 policy revisions did not in fact alter the long-standing legal obligations to ensure priority to Canadian citizens and permanent residents.

Part IV examines the impact of the changes on migrant workers. It uses a rights-based framework to analyze how insecurity has been intensified throughout workers' labour migration cycle. Parts of the labour migration cycle are subject to provincial laws whose details vary across the country. The analysis in this report focuses on the interaction between federal laws and Ontario laws.

Part V offers concluding comments and recommendations for future reform.

PART II

WHO ARE CANADA'S MIGRANT WORKERS?

TEMPORARY FOREIGN WORKER PROGRAM

The TFWP encompasses labour migration under the following programs:

- Caregiver Program
- Seasonal Agricultural Worker Program
- Stream for Low-Wage Positions
- Stream for High-Wage Positions

Redefining the Scope of the Temporary Foreign Worker Program

In public discourse leading up to the 2014 program changes and continuing since, the phrase “temporary foreign worker” was, and is, widely used to refer to “migrant workers” regardless of their occupation or the program stream by which they entered Canada.¹⁴ Workers arriving under intra-company transfers,¹⁵ workers in skilled positions,¹⁶ farmworkers, caregivers, restaurant and fast food workers,¹⁷ and many others¹⁸ have equally been referred to as “temporary foreign workers.”

In June 2014, the federal government formally divided the labour migration programs into two distinct streams: the **International Mobility Program** and the **Temporary Foreign Worker Program**. This change gave the “Temporary Foreign Worker Program” a technical meaning that differs from common public usage. This redefinition has significant implications for how we think and talk about migrant labour because the factors that gave rise to concerns about the use and treatment of migrant workers no longer map neatly onto the newly reconfigured program streams.

¹⁴ As in *Made in Canada*, above note 4 (Full Report) at p. 16 and (Summary Report) at p. 6, this report deliberately uses the term “migrant worker” rather than “temporary foreign worker” because it better reflects the perspective of the workers themselves and is consistent with the framing in international law. It is also more conducive to critical thinking about the existing programs. As Kerry Preibisch has written: “Referring to migrants in TMPs [temporary migration programs] as temporary obscures their long-term, structural importance ... and the decade-long tenure of some migrants; indeed, only their visa is temporary. Further, labelling migrants as foreign is part of a nationalist discourse that contributes ideologically to their legal and social disentanglement within labour market and society”: Kerry Preibisch, “Development as Remittances or Development as Freedom? Exploring Canada’s Temporary Migration Programs from a Rights-Based Approach,” in *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case*, Fay Faraday, Judy Fudge and Eric Tucker, editors (Toronto: Irwin Law, 2012) at p. 86.

¹⁵ For example, the skilled workers brought to work at RBC through intracompany transfers.

¹⁶ For example, the Chinese miners recruited to work at HD Mining in 2012.

¹⁷ For example, the workers in restaurants and fast food chains such as McDonalds, Tim Hortons and Denny’s.

¹⁸ See, for example, Murray Brewster, “Seafarers’ union takes government to court over foreign sailors”, *CBC News* (8 September 2015), online at <http://www.cbc.ca/news/canada/british-columbia/seafarers-union-takes-government-to-court-over-foreign-sailors-1.3219066>

The **Temporary Foreign Worker Program** does not encompass all low-wage migrant workers with precarious temporary status. Meanwhile, entry under the **International Mobility Program** does not guarantee that a migrant worker is highly paid or secure, or that the employer's use of migrant labour is subject to close oversight for its impact on the Canadian labour market.

The **International Mobility Program** ("IMP"), managed by the Ministry of Immigration, Refugees and Citizenship Canada ("IRCC"), encompasses all the labour migration programs for which employers **do not need** approval through a **Labour Market Impact Assessment** ("LMIA") prior to hiring a foreign national.¹⁹ These programs largely, though not exclusively, facilitate migration of workers in higher skilled occupations. The IMP encompasses labour migration under:

- International trade agreements;²⁰ and
- Reciprocal employment arrangements²¹ such as International Exchange Canada which includes
 - working holidays,
 - international exchanges for young professionals, and
 - international internships.
- Religious and charitable workers;²²
- Positions deemed to create or maintain significant social, cultural, or economic benefits or opportunities for Canadian citizens or permanent residents²³ including
 - entrepreneurs
 - intra-company transfers
 - visiting academics, post-doctoral PhD fellows, award recipients, and medical residents and fellows; and
- Positions that support economic competitiveness or other policy objectives²⁴ including
 - spouses of skilled workers,
 - spouses of international students,

INTERNATIONAL MOBILITY PROGRAM

The IMP encompasses labour migration under:

- international trade agreements;
- reciprocal employment arrangements such as International Exchange Canada;
- religious and charitable workers; and
- positions deemed to create or maintain significant social, cultural or economic benefits or opportunities for Canadian citizens or permanent residents.

¹⁹ A table identifying the work permit categories that are LMIA-exempt is set out on the Immigration, Refugees and Citizenship Canada website: *International Mobility Program: Labour Market Impact Assessment exemption codes* (modified 2015-05-01) online at <http://www.cic.gc.ca/english/resources/tools/temp/work/opinion/codes.asp> (accessed 24 September 2015). There are also a range of occupations that do not require a work permit: Immigration, Refugees and Citizenship Canada, *Jobs that do not require a work permit* (modified 2015-02-09) online at <http://www.cic.gc.ca/english/work/apply-who-nopermit.asp> (accessed 24 September 2015).

²⁰ *Immigration and Refugee Protection Regulations* ("IRPR"), SOR/2002-227, s. 204

²¹ IRPR, s. 205(b)

²² IRPR, s. 205(d)

²³ IRPR, s. 205(a), (c)

²⁴ IRPR, s. 206-208

- individuals awaiting processing of permanent resident applications,
- refugees, and
- emergency situations where international students or temporary residents are destitute and have no other means of support.

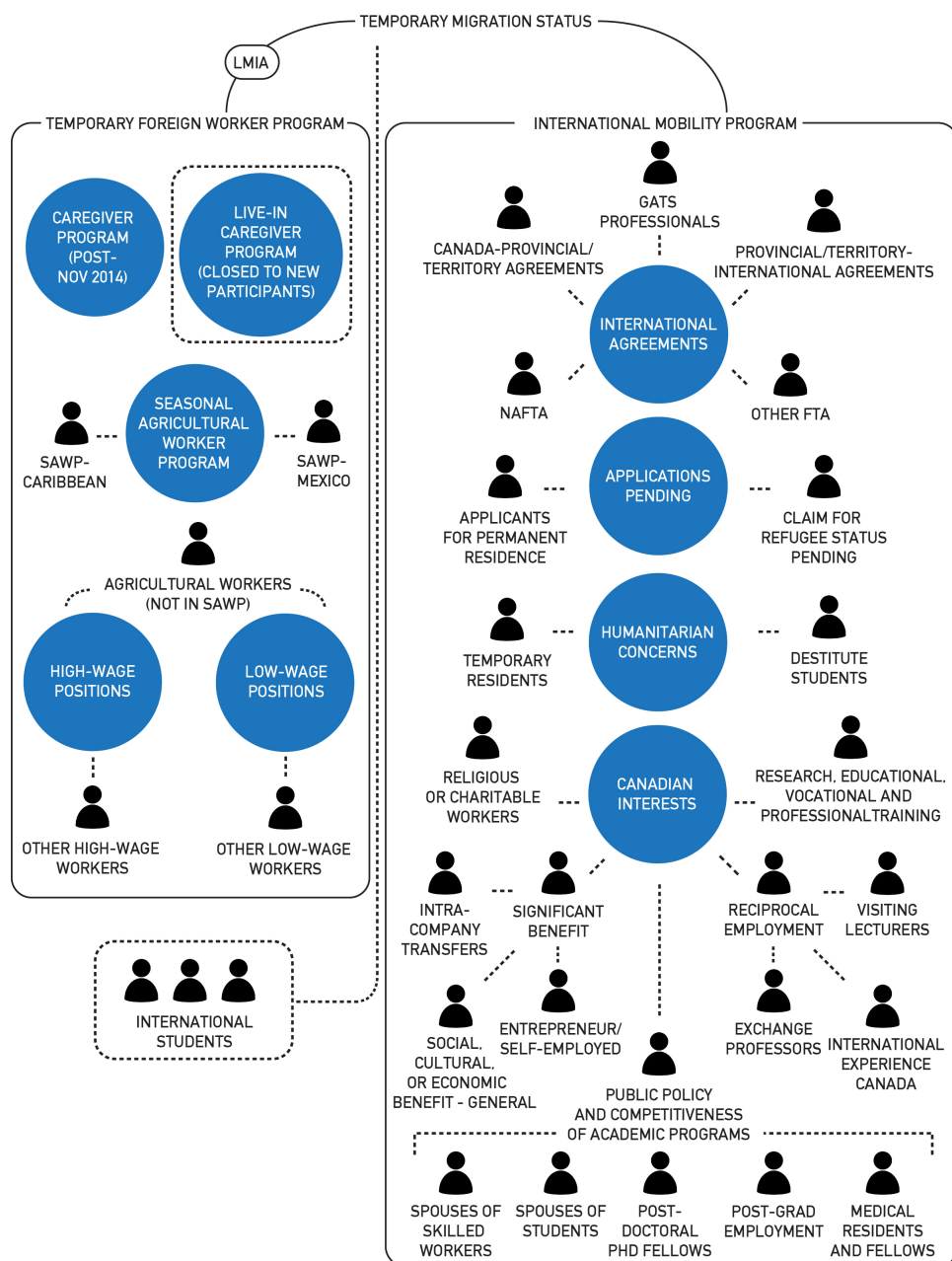
The **Temporary Foreign Worker Program (“TFWP”)**, now managed by the Ministry of Employment and Social Development Canada, encompasses workers in occupations of all NOC levels who must be employed on work permits authorized by a Labour Market Impact Assessment. It covers migrant workers in both low-wage and high-wage positions that are not included within the IMP. The TFWP encompasses labour migration under the following programs:

- Caregiver Program
- Seasonal Agricultural Worker Program
- Stream for Low-Wage Positions
- Stream for High-Wage Positions

Agricultural workers from countries that are not part of the Seasonal Agricultural Worker Program enter Canada under the Streams for Low-Wage and High-Wage Positions.

The TFWP and the IMP facilitate the entry of workers under the following labour migration programs:

Labour Migration Programs



This division of program streams did not alter the general nature of the underlying labour migration programs in either stream; those migration programs had always been subject to different legal requirements and conferred different entitlements on workers.²⁵ But the following three observations are significant.

1. Program Changes Complicate Comparisons Over Time

If one looked only at the program name — Temporary Foreign Worker Program — and compared figures for the program before, and after, 2014, it may appear that the total number of workers in Canada with temporary status has decreased sharply. That conclusion would be incorrect. The scope of workers with temporary migration status continues to include *both* workers under the **International Mobility Program** *and* workers under the **Temporary Foreign Worker Program**. The onus falls to researchers, advocates, and policy makers to pay close attention to how migration levels rise or fall under the two streams and under the distinct programs within each stream. In addition, in 2014 the government's methodology for recording and reporting statistics was revised. As a result, some data before and after 2014 is not directly comparable, impeding both year-over-year and longer-term comparison.²⁶

²⁵ For example, under the programs in the International Mobility Program stream, many workers are able to receive open work permits or sector/industry based work permits rather than permits that tie an individual worker to an individual employer. Also, many workers in those programs are able to bring their spouses and dependents with them while working in Canada. This is quite different from the more restricted entitlements, particularly for lower wage workers under the TFWP who are on tied permits and who are not able to bring their spouses or dependents with them.

²⁶ *Facts and Figures Temporary Residents 2014*, above note 2 at p. 2 indicates that:

"In this publication, CIC has revised its reporting methods to count permit holders by using:

- Permit holders with a valid permit on December 31st. This measure only counts the most recently signed permit of each type that is valid on the last day of a given year.
- Permit holders with valid permit(s) in the calendar year. This measure is a unique count of all persons who held one or more valid permits between January 1st and December 31st in a given year."

In some respects the new data provides valuable new information by identifying the number of unique individuals who were granted work permits in each program each year. However, this figure on its own does not capture the total number of workers present as it excludes workers who are present on valid permits that were granted in prior years. Moreover, shifting the date used to provide a snapshot of the number of workers "present" in Canada significantly alters the picture. Beginning with 2014, the snapshot is taken on 31 December rather than 1 December so those figures are not directly comparable to prior years. More significantly, tracking back over the past decade, the number of workers with temporary work permits present in Canada is significantly lower on 31 December than on 1 December every single year, with the result that when using the 31 December snap shot the "workers present" figure drops by 18% and 35% in any given year. Figures are based on a comparison of statistics reports in *Facts and Figures Temporary Residents 2013* (Ottawa: 2014), p. 14, *Facts and Figures Temporary Residents 2012* (Ottawa: 2013) at p. 68 and *Putting Canadians First*, above note 7 Table 4 at p. 5.

2. Vulnerable Workers are Present Under Both the TFWP and the IMP

The two new streams do not reflect a clear demarcation between workers who are vulnerable and workers who are secure. There are relatively privileged workers in high paying jobs who enter Canada under the **Temporary Foreign Worker Program**. Likewise, there are workers in low paying jobs, with limited labour market security and capacity to enforce rights, employed under the **International Mobility Program**. For example, while International Exchange Canada workers include young professionals from OECD countries, they also include racialized workers employed in janitorial and construction work. Moreover, neither the TFWP nor the IMP figures include international students who are legitimately working on- or off-campus without permits within the constraints of their study permits or who are working off-campus on work permits either concurrently with their study or post-graduation. International students — including students on one-year visas — constitute a rapidly growing stream of migrant labour and they are increasingly raising concerns about exploitative recruitment and employment practices similar to those raised by low-wage workers under the TFWP.²⁷

3. Reliance on Temporary Migration is Expanding Under the IMP

To the extent that employers' rapid shift towards reliance on labour with temporary migration status has driven public concern about labour migration, it is important to note that this concern is not confined to the TFWP. The IMP is the larger program and IMP migration is expanding rapidly, along with concerns about the vulnerability of workers in that stream. In particular, the IMP's intra-company transfer and international experience streams tripled in size between 2004 and 2014.²⁸ The migration streams under the **International Mobility Program** have been subject to considerably less public scrutiny and study than the low-wage programs under the **Temporary Foreign Worker Program**. In announcing the creation of the **International Mobility Program**, the

²⁷ The number of international students over age 15 present in Canada has increased from 106,476 in 2000 to 320,124 in 2014: *Facts and Figures Temporary Residents 2014*, above note 2 at pp. 28-29. Increasingly international students are raising concerns with community organizers that they have been subject to the same predatory practices by private third-party recruiters that low-wage migrant workers face, being charged as much as \$10,000 to \$15,000 each to be placed in post-secondary institutions with the promise that securing a Canadian post-secondary diploma or degree will secure a pathway to permanent immigration.

²⁸ The number of migrant workers in Canada on intra-company transfers more than tripled from 8,190 in 2004 to 27,596 in 2014. Meanwhile, the number of migrant workers in Canada under the International Experience Canada program increased from 35,398 workers in 2004 to 103,478 in 2014: *Facts and Figures Temporary Residents 2013*, above note 26 at p. 30; *Facts and Figures Temporary Residents 2014*, above note 2 at p. 21.

government itself acknowledged that there were concerns about whether the intra-company transfer program (see Sidebar 1) and the International Experience Canada program (see Sidebar 2) were being used in ways that were consistent with their original conceptions or were being used in ways that undermined workers' security and working conditions. In June 2014, Employment and Social Development Canada stated:

The Government of Canada is undertaking a comprehensive review of the IMP programs, with a view to ensuring that all streams under this program should remain LMIA-exempt. Streams that do not warrant an exemption will be reclassified under the Temporary Foreign Worker Program and workers will require an LMIA.²⁹

Concerns are also being raised about the extent to which international trade agreements, such as the Trans-Pacific Partnership, may enable companies from countries covered by trade agreements to employ migrant workers without an LMIA on terms that exempt them from compliance with established minimum standards.³⁰

Ultimately the range of migrant workers in Canada with temporary status who may face precarious employment and vulnerability to exploitation extends beyond workers who are found in low-wage positions that are filled under what is formally called the "Temporary Foreign Worker Program."³¹

The remainder of this report focuses on the experience of those low-wage migrant workers who arrive in Canada under the current **Temporary Foreign Worker Program**.

²⁹ Employment and Social Development Canada, *Reforming the International Mobility Program* (modified 2014-09-29) online at http://www.esdc.gc.ca/eng/jobs/foreign_workers/reform/imp.shtml (accessed 10 March 2016). The federal government also gave notice to the provinces that it would be amending the foreign worker annexes to provincial and territorial immigration agreements to restrict the range of positions that the provinces or territories could designate as being LMIA exempt: *Putting Canadians First*, above note 7 at p. 13.

³⁰ See, for example, Bill Curry, "TPP deal contains some exemptions on temporary foreign workers", *The Globe and Mail* (15 October 2015), online at <http://www.theglobeandmail.com/news/politics/tpp-deal-contains-some-exemptions-on-temporary-foreign-workers/article26817494/>. As a point of comparison, within the European Union, concerns have arisen about how "posted workers" have been employed based on the labour standards of their employer corporation's home state rather than the higher standards of the state in which the labour is performed: see Catherine Barnard, "Enforcement of Employment Rights by Migrant Workers in the UK: The Case of EU-8 Nationals" and Samuel Engblom, "Reconciling Openness and High Labour Standards? Sweden's Attempts to Regulate Labour Migration and Trade in Services", both in *Migrants at Work: Immigration and Vulnerability in Labour Law*, Cathryn Costello and Mark Freedland, eds. (Oxford University Press, 2014). See also a legal opinion prepared by Goldblatt Partners, *Labour Rights and Mobility in the Trans-Pacific Partnership* (18 April 2016).

³¹ In addition to the intra-company transfers, international exchange workers, workers under trade agreements and international students noted in this discussion, other particularly vulnerable workers who have been seeking assistance from community organizers include workers whose status in Canada is contingent on their spouse's status, refugees and undocumented workers.

SIDEBAR 1:
INTRA-COMPANY TRANSFERS (“ICTs”)

ICTs allow Canadian corporations to transfer Canadian employees to offices overseas and to allow foreign nationals from overseas offices to transfer to Canadian offices without an LMIA. ICTs are also permitted under some international trade agreements. These transfers were originally intended for workers who have specialized knowledge and skills. Particular focus was brought to this program in early 2013 when long-serving RBC workers were required to train migrant workers in Canada who would then replace them as RBC contracted out their jobs overseas. Concerns were also raised by the ways in which transnational staffing agencies were using the ICT stream to circumvent the stricter scrutiny that should have applied under the TFWP to restrict hiring to circumstances involving true labour shortages.³² In June 2014, the federal government acknowledged concerns about misuse of this program:

“There is some evidence, though, that these provisions have been misused. For example, in some situations, foreign nationals were able to enter Canada for jobs that may not have been as specialized as the program intends, as suggested by providing wages lower than the Canadian prevailing wage for their occupation.

“To address this, guidelines have been put in place to better define ‘specialized knowledge’ and officers will compare an applicant’s intended salary to the prevailing Canadian wage for that job to ensure that the applicant is truly specialized in his or her field. The new guidelines also clearly state that these types of workers cannot receive training in Canada that would result in the displacement of Canadian workers. A wage floor has been imposed for foreign nationals from countries that Canada does not have a free trade agreement with, set at the prevailing wage for the worker’s occupation and region of destination.”³³

SIDEBAR 2:
INTERNATIONAL EXPERIENCE CANADA

International Experience Canada is the largest reciprocal employment program under the IMP. Under this umbrella, Canada has agreements with 32 countries that permit young Canadians (typically between the ages of 18 to 35) to live, work, and travel in the participating countries without labour market restrictions for up to two years and young nationals of the participating countries to do the same in Canada.³⁴ This program has, however, come under increasing scrutiny as the number of workers coming to Canada under the IEC has skyrocketed while disproportionately low numbers of Canadians make the reverse journey.

³² See, for example, Kathy Tomlinson, “RBC replaces Canadian staff with foreign workers” (6 April 2013), *CBC News Go Public*; Kathy Tomlinson, “Insiders say Canada ‘scammed’ by foreign worker industry” (29 April 2013), *CBC News Go Public*.

³³ See Employment and Social Development Canada, *Reforming the International Mobility Program* (modified 2014-09-29) online at http://www.esdc.gc.ca/eng/jobs/foreign_workers/reform/imp.shtml (accessed 10 March 2016).

³⁴ Employment and Social Development Canada, *Reforming the International Mobility Program* (modified 2014-09-29) online at http://www.esdc.gc.ca/eng/jobs/foreign_workers/reform/imp.shtml (accessed 10 March 2016).

PART III

RECONFIGURING THE TFWP

Since 2000, criticism of Canada's Temporary Foreign Worker Program has been building steadily among migrant workers, worker advocates, trade unions, and researchers.³⁵ As early as 2009, the TFWP had even drawn serious criticism from the federal Auditor General³⁶ and from the House of Commons Standing Committee on Citizenship and Immigration.³⁷ However, beginning in 2012, escalating media coverage, community-level organizing, and legal and policy analysis exerted sustained political pressure for reform by keeping the spotlight on stories of workers who were being exploited and of employers who had bypassed or replaced Canadian employees in favour of hiring more precarious migrant workers under the TFWP.

As public discourse deepened, these stories could now be seen as interconnected patterns of exploitation that were rooted in the very design of the TFWP. As public pressure for reform intensified — especially with a focus on concerns arising in the fast food sector — on 24 April 2014, the federal government imposed a sudden moratorium. The moratorium prohibited employers in the food services sector from accessing the TFWP pending a review of the Program.³⁸ On 20 June 2014, the federal government announced changes to the Program³⁹ and lifted the moratorium.⁴⁰ On 31 October 2014, further amendments were announced to the Live-in Caregiver Program that took effect on 30 November 2014.⁴¹

The following three sections review the changes to the TFWP and the targeted changes to the LCP. While the 2014 changes were presented as a general

³⁵ See *Made in Canada (Full Report)*, above note 4 at pp. 12-13 and related footnotes.

³⁶ *2009 Report of the Auditor General of Canada*, Chapter 2: Selecting Foreign Workers Under the Immigration Program (Ottawa: Office of the Auditor General of Canada, 2009)

³⁷ House of Commons Canada, *Temporary Foreign Workers and Non-Status Workers*, Report of the Standing Committee on Citizenship and Immigration (Ottawa: May 2009)

³⁸ Statement by the Honourable Jason Kenney, Minister of Employment and Social Development (24 April 2014); Government of Canada, Operational Bulletin 574 (21 May 2014), "Instructions in regard to the Temporary Foreign Worker Program Food Services Sector Labour Market Opinion and Work Permit Suspensions".

³⁹ *Putting Canadians First*, above note 7.

⁴⁰ Government of Canada, Operational Bulletin 574A (20 June 2014), "Instructions in regard to the Temporary Foreign Worker Program Food Services Sector Labour Market Opinion and Work Permit Suspensions"

⁴¹ Citizenship and Immigration Canada, "Improving Canada's Caregiver Program", news release and background.

overhaul to the TFWP, numerous exemptions in fact create an uneven patchwork of regulation. Of particular note, those exceptions normalize the enduring use of temporary migrant labour in agriculture, caregiving, and seasonal work where the majority of low-wage migrants under the TFWP are employed.⁴²

A. “Putting Canadians First”: Reiterating a Legal Obligation that Already Existed

Prior to June 2014, employers seeking to hire workers under the Temporary Foreign Worker Program needed to receive a **Labour Market Opinion** (“LMO”), from Employment and Social Development Canada, confirming that the proposed hiring would have either a positive or neutral impact on the Canadian labour market. For many years concerns have been raised about whether the government exercised appropriate scrutiny over such requests.⁴³ As early as 2009 the federal Auditor General flagged this issue, noting a troubling lack of documentation to support LMO applications and a lack of consistency and quality assurance to ensure LMO decision-making conformed with the legal requirements of the *Immigration and Refugee Protection Act* (“IRPA”) and *Regulations*.⁴⁴

The government’s policy document introducing the amendments to the TFWP in June 2014 was called “Putting Canadians First.” It emphasized that Canadian citizens and permanent residents would receive priority in filling jobs.

What is important to stress, however, is that this orientation was not new. Despite this political framing, the *Regulations* under the IRPA **had always expressly required that Canadian citizens and permanent residents have priority** and that authority to hire migrant workers be granted only when it would not negatively affect Canadian workers.⁴⁵

That same legal obligation remained in place, unaltered, after June 2014. Accordingly, the issue underlying the public critique of the LMO was not a question of the government lacking the legal capacity or legal obligation to ensure that employers would not adopt strategies to displace or bypass Canadian

⁴² While the available statistics do not separately identify seasonal workers, in 2014, caregivers and agricultural workers alone accounted for 68,455 of the 109,457 low-wage migrant workers present in Canada under the TFWP (62.5% of all low-wage migrant workers): *Facts and Figures Temporary Residents 2014*, above note 2 at p. 20. Caregivers and agricultural workers also accounted for 57% of all positions approved on LMIsAs in 2014: Employment and Social Development Canada, *Annual Labour Market Impact Assessment Statistics 2007-2014* (modified 2016-04-27), online at http://www.esdc.gc.ca/en/reports/foreign_workers/2014/lmia_annual_statistics/index.page (accessed 22 May 2016)

⁴³ *Made in Canada (Full Report)*, above note 4, p. 29 and note 44.

⁴⁴ 2009 Report of the Auditor General of Canada, Chapter 2

⁴⁵ IRPR, s. 203(3).

“Those legal obligations were always present. Those criteria by law had always set the threshold preconditions for accessing migrant labour. The critical issue, rather, was one of implementation — whether the government chose to rigorously enforce those legal obligations or not.”

citizens and permanent residents, and to ensure prevailing wages and working conditions that meet Canadian standards were maintained. *Those legal obligations were always present. Those criteria by law had always set the threshold preconditions for accessing migrant labour.* The critical issue, rather, was one of implementation — whether the government chose to rigorously enforce those legal obligations or not. Ultimately, the re-branded LMIA process serves the same threshold function of ensuring compliance with the same legal objectives that the LMO did. While the new LMIA forms⁴⁶ contain more detailed questions than the earlier LMO forms, the new questions solicit information relating to the same legal criteria for authorizing the hiring of migrant workers that have been in place for many years.

SIDEBAR 3:

REGULATIONS UNDER THE IRPA

Prior to June 2014, the Regulations expressly required that a Labour Market Opinion be determined based on:

- (a) whether the employment of the foreign national will or is likely to result in direct job creation or job retention for Canadian citizens or permanent residents;
- (b) whether the employment of the foreign national will or is likely to result in the development or transfer of skills and knowledge for the benefit of Canadian citizens or permanent residents;
- (c) whether the employment of the foreign national is likely to fill a labour shortage;
- (d) whether the wages offered to the foreign national are consistent with the prevailing wage rate for the occupation and whether the working conditions meet generally accepted Canadian standards;
- (e) whether the employer will hire or train Canadian citizens or permanent residents or has made, or has agreed to make, reasonable efforts to do so;
- (f) whether the employment of the foreign national is likely to adversely affect the settlement of any labour dispute in progress or the employment of any person involved in the dispute; and
- (g) whether the employer has fulfilled or has made reasonable efforts to fulfill any commitments made, in the context of any opinion that was previously provided under subsection (2), with respect to the matters referred to in paragraphs (a), (b) and (e).

With the exception of paragraph (g) which was introduced in December 2013, virtually identical language had been in place for many years and remains in place today.

⁴⁶ As of time of writing, the LMIA form was most recently updated in March 2016: *Labour Market Impact Assessment Application High-Wage and Low-Wage Positions*, ESDC EMP5602 (2016-03-007).

SIDEBAR 4:
NEW LABOUR MARKET IMPACT ASSESSMENT APPLICATIONS

The new Labour Market Impact Assessment Application High-Wage and Low-Wage Positions application form is used to review employers' requests for authorization to hire migrant workers at any skill or wage level under the TFWP. The form contains more questions than the earlier LMO application form and seeks additional information about:

- (a) the number of employees currently employed by the employer, by work location and by occupation for which a migrant worker is sought, including a breakdown of how many current workers are Canadian citizens/permanent residents and how many are migrant workers;
 - (b) whether any employees were laid off in the 12 months prior to the application, again including a breakdown of Canadian citizens/permanent residents and migrant workers;
 - (c) the wage range for employees currently working in the occupation at the work location, whether the work is full-time, and whether the work is seasonal; and
 - (d) the efforts the employer made to recruit Canadian citizens and permanent residents, including information on the number of applications/resumes received, applicants interviewed, job offers made to Canadian citizens/permanent residents, Canadian citizens/permanent residents hired, job offers declined, and number of Canadian citizen/permanent resident applicants who were not qualified for the job. An explanation is required for why each Canadian citizen/permanent resident applicant who was turned down was considered not to meet the requirements of the job.
-

B. Hiring Migrant Workers Through the TFWP

While the new LMIA process serves the same objectives of ensuring that Canadian citizens and permanent residents receive priority in hiring and that Canadian labour market conditions are not undermined, there are new administrative practices that are significant. These are addressed thematically in relation to (i) general LMIA application requirements; (ii) scrutinizing the impact on the Canadian labour market; (iii) ensuring employer compliance with LMIA requirements; (iv) public transparency and accountability of the TFWP; and (v) exemptions from the amended procedures.

1. General LMIA Requirements

Three policy changes apply to the processing of LMIA applications.

First, employers are required to pay a **higher non-refundable application processing fee of \$1,000**. This fee is increased from \$275.⁴⁷

Second, before applying for an LMIA, employers must now undertake more **extensive and longer efforts to recruit local workers**. Previously, an employer only needed to advertise for 14 days. Now, an employer must generally advertise the position in the national Job Bank and through at least two other

⁴⁷ The \$275 application fee itself was only introduced on 31 July 2013. Before that date, no fee had been charged for LMO applications.

methods that are consistent with recruitment for that position for four consecutive weeks during the three months that precede the LMIA application. In addition, the job opening “must remain posted to actively seek qualified Canadians and permanent residents until the date a positive or negative LMIA is issued.”⁴⁸

Third, the government has committed to **accelerated processing** of “LMIA’s for **highest-demand** occupations (skilled trades), **highest-paid** (top 10 percent) occupations **or short-duration** work periods (120 days or less)” which will be processed “within a 10-business day service standard.”⁴⁹

2. Scrutinizing the Impact on the Canadian Labour Market

The LMIA process now examines, more closely, how a request to hire migrant workers relates to that specific employer’s employment strategy for Canadian citizens and permanent residents. Taking the position that “[w]age is a more objective and accurate reflection of skill level and labour need in a given area,”⁵⁰ the government established different obligations for employers based on whether they are hiring employees into “High-Wage” or “Low-Wage” positions. Whether a position is considered “High-Wage” or “Low-Wage” is defined with reference to the median hourly wage rate in each province. Any positions paid below the provincial median hourly wage rate are considered “Low-Wage.” Any positions at or above the median are considered “High-Wage.” For example, in 2015, Ontario’s median hourly wage was \$22.00.⁵¹ This “Low-Wage” designation

⁴⁸ *Made in Canada (Full Report)*, above note 4 at p. 29. The current general requirements are set out in: Employment and Social Development Canada, *Hire a temporary foreign worker in a high-wage position - Recruitment and advertisement* (modified 2016-05-10), online http://www.esdc.gc.ca/en/foreign_workers/hire/median_wage/high/recruitment.page and *Hire a temporary foreign worker in a low-wage position - Recruitment and advertisement* (modified 2016-05-10), online http://www.esdc.gc.ca/en/foreign_workers/hire/median_wage/low/recruitment.page. Variations to or exemptions from this general advertising standard are set out in: Employment and Social Development Canada, *Temporary Foreign Worker Program: Variations to the Minimum Advertising Requirements* (modified 2016-04-21), online http://www.esdc.gc.ca/en/foreign_workers/hire/variations.page (accessed 22 May 2016).

⁴⁹ *Putting Canadians First*, above note 7 at p. 14. See also Employment and Social Development Canada, *Ensuring Canadian Workers Come First: Restricting Access to the Temporary Foreign Worker Program*, “Using Wage Instead of National Occupation Codes” (modified 2014-11-12), online: http://www.esdc.gc.ca/eng/jobs/foreign_workers/reform/restrict.shtml (accessed 27 September 2015). The specific skilled trades and the high income threshold that are eligible for the 10-day “speed of service” processing as listed at Employment and Social Development Canada, *Unemployment, Median Wages, 10-day Speed of Service Tables* (modified 2016-04-29), online at http://www.esdc.gc.ca/en/foreign_workers/hire/service_tables.page#tbl-2 (accessed 22 May 2016).

⁵⁰ Employment and Social Development Canada, *Ensuring Canadian Workers Come First: Restricting Access to the Temporary Foreign Worker Program*, “Using Wage Instead of National Occupation Codes” (modified 2014-11-12), online: http://www.esdc.gc.ca/eng/jobs/foreign_workers/reform/restrict.shtml (accessed 27 September 2015).

⁵¹ Employment and Social Development Canada, *Unemployment, Median Wages, 10-day Speed of Service Tables*, above note 49.

is nearly double the \$11.25 provincial minimum wage, which makes the definition itself contested (see Sidebar 5).

SIDEBAR 5:

REDEFINING THE MEANING OF “LOW-WAGE” WORK

The TFWP now defines a “Low-Wage” job as one that is paid below the provincial median hourly wage rate. This program-specific definition of “Low-Wage” positions does not correspond to the research and advocacy work that has been done for many years to address the exploitation of the most precariously placed low-wage migrant workers — workers who have been paid piece rate and/or paid below, at or marginally above the provincial minimum wage. Moreover, the newly defined “Low-Wage” positions encompass not only the highly precarious low-wage NOC C- and D-level positions that remain excluded from pathways to permanent residence but also higher paid, more secure NOC B-level positions that have pathways to permanence. The reorientation of the language in the TFWP away from NOC levels to wage levels co-opts the language of migrant worker research and advocacy and distorts it. It redefines that language in ways that obscure the experience of the most precariously placed of those workers at the same time that they impose greater constraints on those very workers. The redefinition of “Low-Wage” also obscures the extent to which NOC levels remain the controlling concept that determine eligibility and entitlements within Canada’s economic immigration/labour migration system and obscures which workers are denied access to permanent residence. It suggests an equivalence of status amongst workers who in fact have significantly different legal entitlements, different labour market leverage, and different capacity to enforce rights.

High-Wage Positions:

Employers seeking to hire migrant workers into “High-Wage” positions must, with some exceptions,⁵² submit a **Transition Plan** outlining how the employer plans to transition the positions to a Canadian workforce. Transition plans can involve recruiting, retaining, or training Canadian citizens/permanent residents; recruiting from underrepresented populations within Canada; or facilitating the hired migrant workers to transition to permanent residence.⁵³ Employers are required to report on their compliance with the Transition Plan if they are selected for a compliance review or when they apply for a subsequent LMIA.

⁵² The “High-Wage” positions that are exempt from Transition Plans are: positions in agriculture; positions in caregiving; and positions that last fewer than 120 days, that will not be filled after the migrant worker leaves or that are for a non-recurring project that lasts more than 120 days but less than two years.

⁵³ Employment and Social Development Canada, *Hire a temporary foreign worker in a high-wage position - Program requirements* (modified 2016-01-29), online http://www.esdc.gc.ca/en/foreign_workers/hire/median_wage/high/requirements.page (accessed 22 May 2016).

Low-Wage Positions:

The June 2014 changes introduced three key revisions that affect “Low-Wage” positions by (i) imposing a hard cap on the number of migrant workers who can be present in any employer’s workforce; (ii) shortening the period for which a work permit is granted; and (iii) prohibiting the hiring of migrant workers in specific sectors in locations with high regional unemployment.

Migrant Workers Capped at 10% of Employer’s Workforce: For employers seeking to fill Low-Wage positions, migrant workers cannot exceed 10% of the employees at any specific worksite. Employers who, on 20 June 2014, employed migrant workers at levels above that cap were given two years to incrementally reduce their migrant workforce to meet the 10% cap by 1 July 2016.⁵⁴

Transitioning to the Caps: Workers who were in Canada on 20 June 2014 and whose workplaces exceeded the 10% cap were permitted to continue working at their worksite for the remainder of their valid work permit but any subsequent application to renew their permit was subject to the cap phase-in.⁵⁵

Exemptions from the Caps: The caps do not apply to employers with fewer than ten employees nationally or to positions in on-farm primary agriculture, caregiving, highly mobile positions that cross provincial, territorial and/or international boundaries, and positions that last for fewer than 120 days.⁵⁶ In February 2016, the government added an exemption for any low-wage “seasonal” positions that last no more than 180 days.⁵⁷

Shorter Work Permits: Previously, low-wage migrant workers received work permits that were valid for two years.⁵⁸ Effective June 2014, a migrant worker filling a “Low-Wage” position approved on an LMIA is only eligible for a one-year work permit. To continue employing migrant workers,

⁵⁴ The two-year phase in required employers to meet at 30% cap by 1 July 2014, a 20% cap by 1 July 2015 and a 10% cap by 1 July 2016. Employment and Social Development Canada, *Hire a temporary foreign worker in a low-wage position - Program requirements* (modified 2016-02-18), online: http://www.esdc.gc.ca/en/foreign_workers/hire/median_wage/low/requirements.page (accessed 22 May 2016).

⁵⁵ *Putting Canadians First*, above note 7 at p. 10.

⁵⁶ Employment and Social Development Canada, *Hire a temporary foreign worker in a low-wage position - Program requirements* (modified 2016-02-18), online: http://www.esdc.gc.ca/en/foreign_workers/hire/median_wage/low/requirements.page. See also *LMIA Application Form*, above note 46, pp. 6-7 and *Schedule E: Cap for Low-Wage Positions*, ESDC EMP5597 (2016-02-007).

⁵⁷ *LMIA Application High-Wage and Low-Wage Positions*, above note 46, p. 7 and *Schedule E: Cap for Low-Wage Positions*.

⁵⁸ The exceptions are workers under the Seasonal Agricultural Worker Program who receive permits that allow them to work for up to eight month in any calendar year and caregivers who receive permits up to four years.

employers must reapply for an LMIA every year and must continue to prove that the hiring has a neutral or positive impact on the Canadian labour market.⁵⁹ Individual workers remain subject to the 4-in/4-out rule, which requires that after completing four years' work in Canada, they are banned from working in Canada for four years.⁶⁰

No LMIs Granted in Specific Sectors when there is High

Regional Unemployment: LMIs will not be granted for ten specific NOC D-level (low-skilled) positions in the accommodation, food services, and retail trade sectors⁶¹ in any Statistics Canada economic region where the annual unemployment rate exceeds 6%.⁶²

3. Scrutinizing Compliance with LMI Commitments

Prior to June 2014, the government already had powers to require employers to keep records to verify their compliance with a LMO; had power in the course of the LMO application process to review employer's compliance with their obligations to migrant workers hired on previous LMO applications; and had power to conduct inspections to ensure employer compliance with the obligations to migrant workers employed in current LMO-approved positions. Employment and Social Development Canada also had the power to either revoke or suspend LMOs that had previously been approved. These powers continue in effect.

⁵⁹ *Putting Canadians First*, above note 7 at p.12. See also Employment and Social Development Canada, *Ensuring Canadian Workers Come First: Restricting Access to the Temporary Foreign Worker Program*, (modified 2015-11-24) online

http://www.edsc.gc.ca/eng/jobs/foreign_workers/reform/restrict.shtml (accessed 8 March 2016).

⁶⁰ *IRPR*, s. 200(3) (g). In June 2014 the government announced that it would be shortening the cumulative period that any individual migrant worker filling a position in the Low-Wage stream could remain in Canada: *Putting Canadians First*, above note 7 at p.12. See also Employment and Social Development Canada, *Ensuring Canadian Workers Come First: Restricting Access to the Temporary Foreign Worker Program*, (modified 2015-11-24) online

http://www.edsc.gc.ca/eng/jobs/foreign_workers/reform/restrict.shtml (accessed 8 March 2016).

However, to date, the regulation setting out the 4-in/4-out Rule has not been amended. See also: Citizenship and Immigration Canada, *Temporary Foreign Worker Program: Cumulative duration (four-year maximum)* (modified 2015-03-06), online

<http://www.cic.gc.ca/english/resources/tools/temp/work/cumulative.asp> (accessed 8 March 2016).

⁶¹ The positions subject to this prohibition are: Food Counter Attendants, Kitchen Helpers and Related Occupations (NOC 6641); Light Duty Cleaners (NOC 6661); Cashiers (NOC 6611); Grocery Clerks and Store Shelf Stockers (NOC 6622); Construction Trades Helpers and Labourers (NOC 7611); Landscaping and Grounds Maintenance Labourers (NOC 8612); Other Attendants in Accommodation and Travel (NOC 6672); Janitors, Caretakers and Building Superintendents (NOC 6663); Specialized Cleaners (NOC 6662); and Security Guards and Related Occupations (NOC 6651).

⁶² *Putting Canadians First*, above note 7 at p. 12. See also Employment and Social Development Canada, *Ensuring Canadian Workers Come First: Restricting Access to the Temporary Foreign Worker Program*, "Using Wage Instead of National Occupation Codes" (modified 2015-11-24), online:

http://www.edsc.gc.ca/eng/jobs/foreign_workers/reform/restrict.shtml (accessed 22 May 2016).

Yellowknife has been granted an exemption to this provision as the unemployment rate in the city is significantly lower than in the territory as a whole.

In June 2014, changes were announced that:

- promised to enhance employers' record keeping obligations;
- promised to provide more capacity to review and inspect employers for compliance with LMIA's;
- created enhanced penalties for non-compliance;
- introduced a hotline to allow Canadians to report suspected abuses of the TFWP;
- promised to use the pre-existing employer blacklist to identify non-compliant employers;
- enhanced funding for the Canada Border Services Agency to increase its capacity to investigate employers for *IRPA* offences; and
- committed to negotiate improved information sharing arrangements to enhance oversight of compliance.

While the federal amendments outlined above suggest that there will be enhanced enforcement of employer compliance with LMIA requirements, it is important to note that migrant workers are not guaranteed any security in this enforcement process. The federal process is focussed on identifying **employers' lack of compliance with their LMIA applications**. An inspection may lead an employer to bring their practices into compliance and so rectify some wage and other contract violations.⁶³ However, the federal oversight is very different from a process in which the migrant worker is a direct party to proceedings oriented towards enforcing their rights under a contract. As stated in the instructions to the sample Employment Contract posted on the Employment and Social Development Canada website:

"The Government of Canada is not a party to the contract. Employment and Social Development Canada (ESDC)/Service Canada has no authority to intervene in the employer-employee relationship or to enforce the terms and conditions of employment. It is the responsibility of the employer and worker to familiarize themselves with laws that apply to them and to look after their own interests.

"The contract assists ESDC/Service Canada officers in forming their Labour Market Opinions, pursuant to their role under the *Immigration and Refugee Protection Regulations*."⁶⁴

⁶³ Response to Inquiry of Ministry, Question 27 by MPP Niki Ashton (21 January 2016), p. 17

⁶⁴ Temporary Foreign Worker Program, Employment Contract, online at http://www.esdc.gc.ca/assets/portfolio/docs/en/foreign_workers/hire/median_wage/low/employment_contract.pdf (accessed 26 May 2016)

Where the LMIA enforcement process identifies a violation, the penalty is to **suspend or revoke the employer's LMIA** and/or to **order fines that are paid to the government**. Significantly, in this process, no security is provided to the migrant worker. Where an employer's LMIA is revoked, any and all work permits that were authorized under that LMIA become invalid because they were tied to that employer. This immediately places any affected migrant workers out of status and vulnerable to removal from the country by CBSA, which as outlined above, has received enhanced funding. No security of status — even as a temporary resident — is guaranteed to a migrant worker who may come forward to raise concerns about mistreatment, even when that migrant worker is coming forward to raise complaints about human trafficking. It is possible to apply for a temporary resident permit, but these permits are discretionary, which provides no security for a worker who is weighing whether to come forward. Moreover, temporary resident permits are of short duration, which means that even where they are granted, workers' status remains insecure and must be continually renewed.

SIDEBAR 6:

LMIA COMPLIANCE MEASURES

The following are specific LMIA Compliance Measures that were announced in 2014:

- (a) **Record keeping:** Employers must keep records proving that they have provided migrant workers with substantially the same terms and conditions of work that were promised in the offer of employment and confirmed in the LMIA application, letters and annexes for a period of six years.⁶⁵ Previously employers were required to keep records for two years. However, this change applies only on a going-forward basis, starting as of 2014, so the six-year review period will not be fully in place until the year 2020.⁶⁶
- (b) **Reviews and inspections for employer compliance:** At either the LMIA application stage or after an LMIA is approved, an employer can be randomly selected to be reviewed for compliance with all program requirements set out in the LMIA application. In June 2014, the government announced an intention to increase the number of inspections so that through a combination of random selection and tips about employers suspected of non-compliance, "one in four employers using temporary foreign workers will be inspected each year."⁶⁷ In 2014, 33,189 employers received at least one positive or negative LMIA;⁶⁸ of these, only 2,046 employers were subject to an inspection.⁶⁹ In 2015, 2,746 employers were subject to inspection,⁷⁰ remaining significantly below the one-in-four benchmark. From these limited number of reviews in 2015, 75 employers were found to be non-compliant, typically associated

⁶⁵ *IRPR*, s. 209.3(1)(c).

⁶⁶ *LMIA Application Form*, above note 46, p. 2.

⁶⁷ *Putting Canadians First*, above note 7 at p. 17.

⁶⁸ ESDC, *Annual Labour Market Impact Assessment statistics 2007-2014*, above note 42.

⁶⁹ Response to Inquiry of Ministry, Question 27 by MPP Niki Ashton (21 January 2016), p. 13.

⁷⁰ Response to Inquiry of Ministry, Question 27 by MPP Niki Ashton (21 January 2016), p. 13.

with wages, occupation, or working conditions, and a further 1,226 had to take steps to be considered compliant.⁷¹ Significantly, the inspections taken to date have been primarily paper reviews. Between 2013 and 2015, a total of only 8 on-site inspections were initiated.⁷²

- (c) **Hotline:** In April 2014 a confidential 1-800 hotline was launched through which “all Canadians who have concerns or information” were encouraged to submit complaints about the TFWP.⁷³ As set out later in this report, the fact that “all Canadians” (not migrant workers) were encouraged to submit complaints about the TFWP — in the context of program revisions introduced under the banner of “Putting Canadians First” — reinforced a marginalization and demonization of both migrant workers and racialized workers who are citizens and permanent residents. Between April 2014 and December 2015, 3,395 tips were received on the hotline and online tip portal; 340 were inspected.⁷⁴
- (d) **Employer blacklist:** For years, Employment and Social Development Canada (“ESDC”) has had the authority to publicize a “blacklist” of employers who have failed to justify their failure to provide migrant workers with substantially the same wages, occupation, and working condition as promised under their LMO/LMIA applications.⁷⁵ Prior to April 2014 no employer had ever been listed. The first three non-compliant employers were listed in 2014, shortly before the program changes were introduced and in the wake of extensive media coverage of those particular employers’ non-compliance. As of the date of writing only four non-compliant employers, all dating from 2014, are listed as having had LMIAs revoked; none are listed as suspended.⁷⁶
- (e) **Monetary fines and suspensions for employer non-compliance:** Before the 2014 amendments, an employer who failed to comply with obligations under the IRPA Regulations could be subject to a two-year ban on hiring migrant workers.⁷⁷ Effective 1 December 2015, this was replaced by a sliding scale of penalties for non-compliance that include monetary fines ranging from \$0 to \$100,000 for repeat offenders and that include suspensions from accessing the TFWP that range from no suspension to a permanent suspension.⁷⁸ The penalties only apply on a go-forward basis for offences that occur on or after 1 December 2015.
- (f) **Enhanced funding for Canada Border Services Agency:** As of the autumn of 2014, increased funding was provided to Canada Border Services Agency (“CBSA”) to increase its capacity to investigate employers for offences under the IRPA, such as employing foreign nationals that are not authorized to work in Canada, for counselling misrepresentation, engaging in misrepresentation, or engaging in human trafficking.⁷⁹

⁷¹ Response to Inquiry of Ministry, Question 27 by MPP Niki Ashton (21 January 2016), pp. 13, 16-17

⁷² Response to Inquiry of Ministry, Question 27 by MPP Niki Ashton (21 January 2016), p. 8.

⁷³ *Putting Canadians First*, above note 7 at p. 19, emphasis added.

⁷⁴ Response to Inquiry of Ministry, Question 27 by MPP Niki Ashton (21 January 2016), p. 11-12.

⁷⁵ This power is currently set out in *IRPR*, s. 209.91.

⁷⁶ Employment and Social Development Canada, *Employers who have broken the rules from the Temporary Foreign Worker Program* (modified 2016-01-27) online http://www.esdc.gc.ca/eng/jobs/foreign_workers/employers_revoked.shtml?_ga=1.231917724.2041653443.1440093566 (accessed 22 May 2016).

⁷⁷ *IRPR*, s. 203(2), (5)

⁷⁸ *IRPR*, Division 6, sections 209.91 to 209.997, Schedule 2, Tables 1 to 5. See SOR/2015-144 for the Regulatory Impact Statement explaining the basis for the amendments and SOR/2015-144 s. 11 for the effective date.

⁷⁹ *Putting Canadians First*, above note 7 at p. 20; Employment and Social Development Canada, *Timeline of Measures Coming into Force* (modified 2014-08-27) online

- (g) **Increased Information Sharing:** The federal government committed to negotiate improved information sharing arrangements between government departments and other levels of government to enhance oversight of compliance.⁸⁰

4. Public Transparency and Accountability

In introducing the June 2014 revisions to the TFWP, the federal government announced that it would be taking steps to improve the clarity, transparency, and accountability of the TFWP. In particular, the government committed as follows:

To further increase transparency and accountability beginning in fall 2014, ESDC will publicly post data on the number of temporary foreign workers approved through the TFWP on a quarterly basis and will post the names of corporations that receive positive LMIAs.⁸¹

ESDC further committed to releasing that data quickly so that it was available in the quarter following the period to which it relates.

The disclosure of this data was significantly delayed until the spring of 2016 and as of the time of writing the posted data is only current to the end of 2014. The annual LMIA statistics that have been posted by ESDC track the number of migrant workers positions approved on LMIAs, the number of migrant worker positions requested on LMIAs, and the number of employers who received at least one positive or negative LMIA.⁸² The quarterly LMIA statistics provide more detailed information by geographical region, NOC classification, top occupations and separate statistics regarding agriculture and caregiving.⁸³ In

http://www.esdc.gc.ca/eng/jobs/foreign_workers/reform/timeline.shtml (accessed 27 September 2015). Worker advocates have raised concerns about the degree to which workers, rather than employers, bear the burdens of this surveillance. Community organizers in BC have raised concerns about how workers have been deported under a CBSA program called Project Guardian that specifically addresses alleged "misuse" of the Caregiver Program. Organizers report that caregivers have been subject to deportation after employers have reported them for leaving abusive employment relationships. Interviews with community organizers (March 2016). See also, Matt Kieltyka, "Caregivers unfairly targeted by CBSA: B.C. MLA", *MetroNews* (9 March 2016), online:

<http://www.metronews.ca/news/vancouver/2016/03/09/mla-says-caregivers-targeted-by-cbsa.html>

⁸⁰ *Putting Canadians First*, above note 7 at pp. 20-21.

⁸¹ *Putting Canadians First*, above note 7 at p. 6. See also Employment and Social Development Canada, *Improving Clarity* (modified 2015-02-25), online at

http://www.esdc.gc.ca/eng/jobs/foreign_workers/reform/index.shtml (accessed 10 March 2016). In late 2015, the language on the website was amended so rather than stating that ESDC "will publicly post data", it now refers to the fact that "ESDC has committed to posting data."

⁸² ESDC, *Annual Labour Market Impact Assessment statistics 2007-2014*, above note 42.

⁸³ Employment and Social Development Canada, *Quarterly Labour Market Impact Assessment statistics* (modified 2016-03-11), online at http://www.esdc.gc.ca/en/reports/foreign_workers/2015/lmia_quarterly_statistics/index.page (accessed 22 May 2016).

addition, in May 2016, for the first time, the government has posted the list of employers that have received positive LMIA's, along with the number of approved migrant worker positions⁸⁴ and a list of employers that have received negative LMIA's.⁸⁵

5. Exemptions From the Changes to the TFWP

Despite this wide range of changes, there are many exemptions to these general revisions to the TFWP. Most significantly, many of the changes do not apply to agriculture and caregiving — the two programs through which, together, roughly two-thirds of low-wage migrant workers are hired (see Sidebar 7).

These exemptions underscore the double standard/dual narrative in Canadian labour migration policy in which a *choice* has been made to treat certain sectors of work as “zones of exceptionality”⁸⁶ — zones that are purported to be unusual or “exceptional” in some way and so are excluded from the rules, rights, and protections that otherwise apply. These “zones of exceptionality” are then constructed such that they will be permanently staffed by precarious migrant workers with temporary status. The rationale for the differential treatment is typically that “Canadians won’t do the work.” The differential treatment of these two key economic sectors normalizes and entrenches the two-tier labour market in these areas. It has also created an “exception” that employers in other sectors are seeking to replicate. For example, employers in fish processing in Atlantic Canada and employers in tourism and hospitality sectors have been seeking similar permanent exemptions from the TFWP similar to the Seasonal Agricultural Worker Program (“SAWP”).⁸⁷ In February 2016, the government exempted all areas of seasonal employment (up to 180 days) from the cap on

⁸⁴ Employment and Social Development Canada, *Employers who were issued a positive Labour Market Impact Assessment (from June 20 to December 31, 2014)* (modified 2016-05-03), online at http://www.esdc.gc.ca/en/reports/foreign_workers/2014/positive_lmia/index.page (accessed 22 May 2016)

⁸⁵ Employment and Social Development Canada, *Employers who were issued a negative Labour Market Impact Assessment (from June 20 to December 31, 2014)* (modified 2016-05-03), online at http://www.esdc.gc.ca/en/reports/foreign_workers/2014/negative_lmia/index.page (accessed 22 May 2016)

⁸⁶ In using this term I draw on the notion of legal “exceptionalism” by which farmworkers have historically, and continuing to the present, been excluded from many core labour protections: see, for example, Eric Tucker, “Farm Worker Exceptionalism: Past, Present and the Post-*Fraser* Future”, in *Constitutional Labour Rights in Canada*, above note 14. Drawing on Chris Hedges’ work, I have also often referred to these zones of permanently temporary labour as “sacrifice zones”: see, for example, Chris Hedges and Joe Sacco, *Days of Destruction, Days of Revolt* (Vintage Canada, 2013).

⁸⁷ See, for example, Rachel Ward, “Foreign worker rules should be eased for fish processing industry, pre-budget report says”, *CBC News* (13 March 2016), online at <http://www.cbc.ca/news/canada/nova-scotia/temporary-foreign-worker-seafood-fishery-1.3488877> (accessed 22 May 2016); Bill Curry, “Ottawa allows seasonal exemption to temporary foreign worker rules”, *The Globe and Mail* (16 March 2016) online at <http://www.theglobeandmail.com/news/politics/ottawa-allows-seasonal-exemption-to-foreign-worker-rules/article29268616/> (accessed 22 May 2016)

low-wage migrant workers. That exemption is currently in place until the end of 2016.⁸⁸

SIDEBAR 7:

EXEMPTIONS IN AGRICULTURE:

All employers hiring migrant workers for on-farm labour in primary agriculture — employers using the Seasonal Agricultural Worker Program (SAWP) or the High-Wage or Low-Wage streams of the TFWP — are exempt from:

- (a) paying the new \$1,000 LMIA application fee;
- (b) LMIAs that are restricted to only one year (their LMIAs can be for a longer period);
- (c) complying with the 10% cap on the percentages of their workforce that may be comprised of migrant workers; and
- (d) requiring a Transition Plan for High-Wage positions that would either require that those positions transition to a Canadian citizen/permanent resident workforce or require a transition plan to enable the migrant worker doing the work to obtain permanent status.

Moreover, employers using the SAWP are also exempt from the 4-in/4-out rule that caps the maximum years any individual migrant worker can provide labour in Canada. They are also exempt from any potential reduction in the cumulative period that migrant workers may work in Canada.

EXEMPTIONS IN CAREGIVING:

The June 2014 changes required employers of caregivers to pay the new \$1,000 LMIA application fee. However, in the 2015 election campaign and in the Minister for Immigration's current mandate letter, the government has promised to exempt employers of caregivers from this fee.⁸⁹ Beyond this, employers of caregivers are exempt from:

- (a) LMIAs that are restricted to one year;
 - (b) the 10% cap on the percentages of their workforce that may be comprised of migrant workers;
 - (c) requiring a Transition Plan for High-Wage caregivers; and
 - (d) any potential reduction in the cumulative period that workers may remain in Canada.
-

The proliferation of such “zones of exceptionality” creates a labour market with a patchwork of differential rights and pockets of permanent precarity that entrench reliance on temporary labour migration. This proliferation of zones of exceptionality also fails to investigate or address the conditions that drive worker turnover or labour shortages and fails to address the reality that Canada will always have a significant number of industries that are seasonal. Instead the

⁸⁸ *LMIA Application Form*, above note 46 at p. 7.

⁸⁹ Liberal Party of Canada, *Real Change: A New Plan for Canadian Immigration and Economic Opportunity* (2015) at p. 3; Office of the Prime Minister, *Minister of Immigration, Refugees and Citizenship Mandate Letter* (2015), online at <http://pm.gc.ca/eng/minister-immigration-refugees-and-citizenship-mandate-letter> (accessed 22 May 2016)

zones of exceptionality normalize a model in which the most precarious, difficult, dangerous, and/or dirty jobs are done by low-paid racialized workers with temporary status, no legal right to work elsewhere in Canada's labour market, and no voice in the democratic process. As has transpired in agriculture and caregiving, this drives a reality in which wages and conditions in these zones are depressed and in which workers' entitlements to even those diminished rights are eroded in practice.

Finally, the proliferation of zones of exceptionality treats important, enduring sectors of the economy as being "outside the norm." This profoundly affects broader social and economic policy development. The reliance on labour migration in these zones relieves any pressure to ensure that general social and economic policy — such as employment insurance, access to healthcare, social supports, training, collective bargaining rights, and so on — that is aimed at supporting sustainable, decent work and social security, is responsive to the employment rhythms of these sectors and the needs of the workers who labour there. In this respect, labour migration provides a precarious stop gap that masks the underlying tensions in those sectors without providing a sustainable resolution for them. Because the work is being done by workers who are framed as being "outside" the community — both "temporary" and "foreign" — there is no impetus to ensure that social and economic policy is built with a long-term view to raising the floor of security for those who do that labour.

With so many carve-outs to the announced changes, the following chart helps track which provisions apply to which groups of migrant workers.

Application of Key TFWP Requirements to Different Categories of Migrant Workers

	Agriculture	Caregiving	Low-Wage	High-Wage
\$1000 LMIA Fee	No	Yes, but removal promised	Yes	Yes
10-day LMIA processing	No	No	May be available for positions less than 120 days	Yes for positions in high-wage skilled trades; and top 10% wage earners; may be available for positions less than 120 days
Transition Plans	No	No	No	Yes, but <u>not</u> for positions that are less than 120 days; 120 days to 2 years non-recurring project; or positions in agriculture or caregiving
10% cap on migrant workforce	No	No	No for “seasonal” positions of less than 180 days Yes for positions longer than 180 days	No
Hiring bar in regions of high unemployment	No	No	Yes — ten occupations in accommodation, food service, and retail trade sectors; exemption for Yellowknife	No
1-year permits	Yes for workers outside the SAWP. No, for workers under the SAWP who have 8-month permits.	No. Caregivers are receiving permits for up to 4 years.	Yes	No
4 in-4-out rule	Yes, for workers outside the SAWP. No for workers under the SAWP	Yes	Yes	No

C. Migrant Caregivers: Narrower and More Precarious Pathways to Permanent Residence

The general amendments to the TFWP outlined above overwhelmingly concentrate on controlling **which workers can enter Canada to work in which sectors in what numbers**. Only one of the June 2014 general amendments addresses **the terms on which migrant labour will be performed**. That change was to shorten the term of work permits for low-wage workers from two years to one year. The November 2014 changes exclusively focussed on policies affecting migrant caregivers. These policy choices again addressed which workers can enter Canada. They also introduced some changes that determine the terms on which caregiving labour can be performed. But the most significant changes concentrate on **controlling which workers can access permanent status**. In that respect, the November 2014 changes have made the pathways to permanent residence narrower and significantly more precarious.

1. Live-in Caregiver Program (“LCP”) Has Been Replaced by the New “Caregiver Program”

The one immigration program that had provided a clear pathway to permanent residence for workers in NOC C-level occupations was the **Live-in Caregiver Program (“LCP”)**. The LCP was established under the *Immigration and Refugee Protection Act* and related *Regulations*.⁹⁰ Under the LCP, foreign nationals came to Canada to work in private homes providing live-in care to children, the elderly, and persons with disabilities. Workers initially arrived and worked in Canada with temporary status on time-limited work permits. After completing two years of full-time work or 3900 hours as a live-in caregiver within four years of arrival, the worker could apply for permanent residence.

Since its inception in 1992, the LCP has been a two-step program for *permanent immigration* by economic class immigrants.⁹¹ The key feature of the LCP was that the federal program made a clear commitment that every migrant worker who completed the mandatory two years of caregiving work could apply for and obtain permanent residence upon meeting the other standard health, financial, and security requirements for admissibility.

⁹⁰ *IRPA* s. 12 provides the authority for economic class immigration programs. Under this authority, the Live-in Caregiver Program was created in *IRPR*, s. 110-115.

⁹¹ *IRPR*, s. 110-115. The LCP itself continued a series of programs, in place since 1955, through which foreign nationals who provided live-in care could, through their labour, earn a right to permanent residence. See *Made in Canada (Full Report)*, above note 4 at p. 33 and related footnotes.

Effective 30 November 2014, however, the federal government replaced the LCP with the new **Caregiver Program** which severed the previously firm and explicit shared commitment through which labour was exchanged for permanent residence. Under the new Caregiver Program, a worker must complete the designated two years of caregiving work but she is no longer guaranteed eligibility for permanent residence. There are at least three elements of the revised Program which make access to permanent residence narrower and much more precarious for migrant workers who provide caregiving labour under that new program. Meanwhile, caregivers who entered Canada under the former LCP face heightened pressure to remain with current employers, regardless of treatment, to ensure their continued entitlement to permanent residence under the LCP.

The Caregiver Program establishes two separate two-step immigration programs which provide limited access to permanent residence:⁹²

- (a) Under the **Caring for Children Class** a foreign national has a *potential opportunity* to apply for permanent residence if she acquires two years of full-time work experience within four years as a home childcare provider. In addition, she must meet Canadian Language Benchmark level 5 in either English or French and have a Canadian education credential of at least one year of post-secondary education or equivalent foreign credential that is supported by an Educational Credential Assessment.⁹³ The foreign national's full-time work experience must have been acquired through work authorized under a work permit while holding temporary immigration status. It cannot involve work during any period when the foreign national was self-employed or enrolled in full-time study.⁹⁴
- (b) Under the **Caring for People with High Medical Needs Class**, a foreign national has a *potential opportunity* to apply for permanent residence if she acquires two years of full-time work experience in Canada providing care to persons with high medical needs as a:
 - registered nurse or registered psychiatric nurse (NOC group 3012);
 - licensed practical nurse (NOC group 3233);
 - nurse aide, orderly or patient service associate (NOC group 3413);
 or

"Under the new Caregiver Program, a worker must complete the designated two years of caregiving work but she is no longer guaranteed eligibility for permanent residence"

⁹² Ministerial Instructions Establishing the Caring for Children Class (24 November 2014) and Ministerial Instructions Establishing the Caring for People with High Medical Needs Class (24 November 2014), 148:48 Canada Gazette Part I (29 November 2014)

⁹³ Ministerial Instruction (Caring for Children), above note 92, s. 2(1)

⁹⁴ Ministerial Instruction (Caring for Children), above note 92, s. 2(2)

- home support worker or related occupation (NOC group 4412).⁹⁵
- (c) The care can be provided either in a private home or in a healthcare facility.⁹⁶ The foreign national's full-time work experience must have been acquired through work authorized under a work permit while holding temporary immigration status. It cannot involve work during any period when the foreign national was self-employed or enrolled in full-time study.⁹⁷ All of the two years of qualifying work must be work experience in a single eligible occupation. In addition to meeting the 2-year work requirement, the foreign national must also meet the licensing requirements of the appropriate provincial professional regulatory body, if any; must meet Canadian Language Benchmark 7 (if a registered nurse or registered psychiatric nurse) or Canadian Language Benchmark 5 (for the other occupations); and must have a Canadian education credential of at least one year of post-secondary education or equivalent foreign credential that is supported by an Educational Credential Assessment.⁹⁸

2. "Live-in" Requirement Removed

For both streams, the Caregiver Program has eliminated the prior requirement under the LCP that the migrant caregiver live in the employer's private home. Migrant workers, advocates and researchers had long identified the live-in requirement as a factor that made migrant caregivers particularly subject to exploitation through excessive hours, unpaid labour, demands for labour beyond or inconsistent with their work contracts, control over social relations and opportunities for social contact, invasions of privacy, and physical and sexual violence. The right of migrant caregivers to live outside of their employer's home is also a key element of protection for decent labour recognized under ILO Convention 189 *Concerning Decent Work for Domestic Workers*.⁹⁹ Accordingly, this amendment is one that had been requested by and was welcomed by caregivers. However, other elements of the new Program create greater insecurity for migrant caregivers.

3. Increased Precarity for Migrant Caregivers

The November 2014 changes increased precarity for migrant caregivers in three ways by: (i) making the Caregiver Program itself only a time-limited program

⁹⁵ *Ministerial Instructions (Caring for People with High Medical Needs)*, above note 92, s. 2(1).

⁹⁶ Government of Canada, news release, "Improving Canada's Caregiver Program" (31 October 2014).

⁹⁷ *Ministerial Instruction (Caring for People with High Medical Needs)*, above note 92, s. 2(2).

⁹⁸ *Ministerial Instruction (Caring for People with High Medical Needs)*, above note 92, s. 2(1).

⁹⁹ Convention 189, *Domestic Workers Convention* (2011), adopted 100th International Labour Conference session (16 June 2011), Article 9.

that will expire in 2019; (ii) restricting access to permanent residence; and (iii) expanding the spheres in which migrant caregiving is now permitted.

a. Structural Precarity of a Program Established under Ministerial Instruction

The new Caregiver Program was created by way of Ministerial Instruction. Under s.14.1 of the *Immigration and Refugee Protection Act*, the Minister of Citizenship and Immigration has broad power to establish a class of economic immigrants and to set the terms and conditions that apply to that class. This power can be exercised quickly and does not require Parliamentary debate or the degree of review that applies when making regulations. Accordingly, the existence of the Caregiver Program sits on an uncertain foundation. During the course of its existence, it **can be altered or even cancelled at any time by the Minister**.

Moreover, even in the absence of amendment, the Caregiver Program's existence is necessarily temporary. Section 14.1(9) of the *IRPA* ensures that there is a sunset clause for any Ministerial Instruction. A Ministerial Instruction can only apply for a maximum of five years from the date it took effect. The legislation expressly states that, "No amendment to or renewal of an instruction may extend the five-year period."¹⁰⁰ The two Ministerial Instructions that create the Caregiver Program expressly state that they will cease to have effect on 29 November 2019. Accordingly, the decades-old enduring pathway to permanent residence that existed under the LCP and its earlier incarnations has been replaced by a **time-limited program that will cease to have effect on 29 November 2019**. This means that caregivers can only be granted permanent residence under this program until 2019. That calendar deadline presents even greater precarity when combined with the permanent residence caps outlined below.

b. Restricted and Uncertain Access to Permanent Residence

The most significant element of increased precarity with the new Caregiver Program is that the route to permanent residence is no longer guaranteed. This element also stems from the fact that the new program is created by way of Ministerial Instruction. Under s. 14.1(2) of the *IRPA*, no more than 2,750 applications in an economic class created by Ministerial Instruction may be processed in any year. Accordingly, the Childcare Class and the High Medical Needs Class each have a **hard cap of 2,750 caregivers who can apply for permanent residence in any calendar year**. That cap is fixed by law; it cannot be increased.

¹⁰⁰ *IRPA*, s. 14.1(9)

“Under the new Caregiver Program, workers face greater insecurity because the promise at the foundation of the earlier program — labour exchanged for permanent residence — is eroded.”

Under the LCP, there was no cap on the number of workers who could receive permanent residence — any workers who completed the mandatory work requirement could apply for and receive permanent residence. Under the new Caregiver Program, workers face greater insecurity because the promise at the foundation of the earlier program — labour exchanged for permanent residence — is eroded. There is a disconnect between the number of workers who may receive work permits to provide caregiving labour with temporary status and the number of those migrant workers who may ultimately be able to apply for and receive permanent residence. There is no cap on the number of *work permits* that may be granted in any given year. The number of work permits granted will depend upon employer demand and employers’ ability to receive approval to hire a migrant caregiver under an LMIA. Regardless of how many work permits are granted, in any given year no more than 2,750 caregivers can receive permanent residence in the Childcare Class and no more than 2,750 applicants can receive permanent residence in the High Medical Needs Class. A worker has no guarantee upon entering the program that she will ultimately be eligible for permanent residence. At most, the worker has a *chance* at a *potential opportunity* to apply.¹⁰¹ This places increased pressure on workers to stay with a given employer — regardless of whether they are being mistreated — so they can complete their two-year work term as quickly as possible and so have a chance to apply for permanent residence before the annual cap is filled.¹⁰²

¹⁰¹ The Citizenship and Immigration Canada website advises: “If the cap has been reached when you are ready to apply [for permanent residence], you may choose to wait until the pathway re-opens or use the *Come to Canada* tool to see if you may be eligible to apply under another program”: online at: <http://www.cic.gc.ca/english/helpcentre/answer.asp?q=963&t=28> (accessed 22 September 2015)

¹⁰² Under the last full year of the LCP’s operation, a total of 13,335 caregiver positions were approved on LMIAs. See Employment and Social Development Canada, *Labour Market Impact Assessments — Annual Statistics, Number of temporary foreign worker positions on Labour Market Impact Assessments (LMIAs) confirmations issued under the Live-in Caregiver Program, by province/territory 2006-2013*, online http://www.esdc.gc.ca/eng/jobs/foreign_workers/lmo_statistics/annual-lcp.shtml (accessed 22 September 2015). Using this figure as a benchmark of employer demand for migrant caregivers (demand which is not subject to any cap), the demand for caregivers far outstrips the 5,500 potential spots for permanent residence (2,750 child care; 2,750 high medical needs) that are allowed under the Caregiver Program. As the government introduced the shift from the LCP to the new Caregiver Program, the number of caregiving permits that were granted through the first half of 2015 dropped precipitously. Between 1 December 2014 and 31 March 2015, although 917 applications had been filed seeking LMIAs, only 96 positive LMIAs were issued — 22 to hire workers to provide care for children and 76 to hire workers to provide care for people with high medical needs. The government attributed this to a reduced number of applications during the program transition, and to employers’ difficulty adjusting to the new program requirements, which left most applications incomplete or required employers to repost the positions to comply with new advertising requirements. See, for example, Nicholas Keung, “Low acceptance and backlog stifles foreign nanny program” (16 May 2015) *Toronto Star*. After this slow start, the number of caregiving permits granted increased such that preliminary figures indicate 7,418 caregiver permits were granted in 2015. See IRCC, *Canada — Temporary Foreign Worker Program work permit holders by program and year in which permit(s) became effective Q4 2010 to Q4 2015* (preliminary figures only) (February 2016). Even this reduced figure, however, still outstrips the potential spots available for permanent residence under the

c. Expanding the Zone of Exceptionality for Caregiving Labour

As described above in Part II.B.5 “Exemptions from the Changes to the TFWP,” the double standard in Canada’s labour migration policy has treated caregiving as a “zone of exceptionality” in which migrant work with temporary status has been normalized and in which it is expected that this work will continue to be performed by workers with temporary status even though this is enduring core work in the economy. The new Caregiver Program expands the zone of exceptionality so migrant workers with precarious temporary status can provide caregiving services in a broader range of workplaces under a broader range of occupations:

- Migrant caregivers will not only work in private homes, but now can also be hired to provide care to people with high medical needs in healthcare facilities. The Program then normalizes the spread of labour with precarious status in a broader range of workplaces.
- Under the High Medical Needs Class migrant workers can be hired into an expanded range of female-dominated occupations, including occupations that are rated at the high skill levels of NOC A (registered nurses, registered psychiatric nurses) and NOC B (licensed practical nurses).¹⁰³ On one hand, this expansion recognizes that a significant proportion of migrant caregivers have advanced qualifications, particularly within the healthcare field, and it enables these workers to be employed in Canada at a level commensurate with their professional training, thereby maintaining their skills. On the other hand, prospective immigrants with these precise skills may be eligible to apply for permanent residence under the Federal Skilled Worker Class *without* Canadian work experience or under the Canadian Experience Class based on *one* year of full-time Canadian work experience. It is unexplained why under the Caregiver Program these female-dominated skilled professions must complete *two* years of full-time Canadian work experience before being eligible to apply for permanent residence.

4. Heightened Precarity for Caregivers Still Under the LCP

The introduction of the Caregiver Program also has implications for migrant workers who are currently in Canada under the LCP. No new caregivers can enter the LCP. But migrant caregivers whose original work permit was based on

Caregiver Program. The disparity is in fact greater because while the annual permanent residence caps are constant, the pool of caregivers seeking permanent residence is not limited to caregivers admitted in a single calendar year, but includes caregivers who were admitted to Canada over the course of several years.

¹⁰³ The other occupations that are newly included in the Caregiver Program are rated at NOC C (nurse aide, orderly or patient service associate, and home support worker).

an approved LMIA that was submitted on or before 30 November 2014 can continue to work under the LCP, be governed by the terms of the LCP, and apply for permanent residence without an annual numerical cap upon completion of the LCP requirements.¹⁰⁴ Accordingly the two programs will continue to run side by side until the existing cohort of workers in the LCP completes their migration journey.¹⁰⁵

But to remain in the LCP, the migrant caregiver must continue to live-in with their employer and provide care to children, the elderly, or persons with disabilities in that private home. Workers in the LCP do **not** have the option to provide care on a live-out basis and still remain in the LCP. To provide care on a live-out basis and have it count towards eligibility for permanent residence, the worker must switch into the new Caregiver Program and be subject to the terms of that Program. This means their employer must make a new LMIA application to (re-)hire the caregiver on a live-out basis and receive LMIA approval to do so; the caregiver must apply for a new work permit; and after completing the required two years of work,¹⁰⁶ the caregiver's application for permanent residence must be subject to the numerical caps under the Caregiver Program.

Caregivers who are currently in the LCP can change employers but in practice they may face difficulties finding an employer who is able to hire them to provide care on a live-in basis. Before hiring a caregiver on a live-in basis, an employer must obtain an LMIA authorizing them to do so. After 30 November 2014, employers can no longer make the live-in requirement mandatory unless they can establish exceptional circumstances that make live-in care necessary. Employers can offer live-in arrangements as an optional term of employment. As a result, before getting an LMIA, the employer would need to show they were unable to hire a caregiver on a live-out basis. Since December 2014, the number of LMIA's approved for migrant caregivers overall has dropped.¹⁰⁷ This heightens the insecurity of caregivers currently in Canada under the LCP. They feel

¹⁰⁴ Citizenship and Immigration Canada website, "Live-in Caregivers", online <http://www.cic.gc.ca/ENGLISH/work/caregiver/index.asp> (accessed 23 September 2015).

¹⁰⁵ Migrant caregivers could, potentially, be working under the LCP until at least 2019. Caregivers admitted on LMIA's submitted before 30 November 2014 would have arrived in Canada in 2015 and have a four-year window after arrival to complete their two years of caregiving service.

¹⁰⁶ Work completed on a work permit under the LCP may count towards the two year requirement under the Caregiver Program but only if that work experience lines up with the specific work/occupation requirements under the Childcare or High Medical Needs class to which the worker is applying.

¹⁰⁷ IRCC's preliminary figures for 2015 indicate that 7,418 caregiving permits were granted in 2015, down from 11,832 in 2014. IRCC, *Canada - Temporary Foreign Worker Program work permit holders by program and year in which permit(s) became effective Q4 2010 to Q4 2015* (preliminary figures only) (February 2016). These figures only indicate the year in which permits were granted; they do not record the total number of caregivers who are *present*. The number of caregivers who are *present* is larger as it includes workers whose permits were granted in previous years.

significant pressure to remain with their current employers,¹⁰⁸ even in the face of mistreatment, because any attempt to change employers puts at risk the prospect of completing their required work term and applying for permanent residence under the LCP.

5. Continuing Delays in Processing Caregivers' Applications for Permanent Status

Finally, while the Caregiver Program promises to process applications for permanent residence within six months, the reality for caregivers under the LCP is that the time to process permanent residence applications is measured in years, not months, and the processing time has increased since 2012. As of October 2014, government documents disclosed to CBC following an access to information request indicated there was a backlog of more than 60,000 individuals awaiting permanent residence on outstanding applications under the LCP.¹⁰⁹ While the government announced in October 2014 that it would accelerate processing of applications from the backlog,¹¹⁰ as of May 2016, the **processing time for a live-in caregiver's permanent residence application stands at 49 months**. This delay of *more than four years* follows after caregivers have already spent *two to four years* completing the labour required to earn eligibility to apply for permanent residence. This prolonged family separation is particularly damaging to caregivers and their families. It is raised repeatedly by caregivers as a primary and urgent area of concern and real suffering. The human toll exacted by this delay is measured in decreased mental and emotional health, frayed and fractured family relationships, and increased difficulty establishing family reunification and reintegration.

¹⁰⁸ In some cases they have been advised by recruiters not to change employers: Diamond Personnel email, 3 November 2014 (on file with author).

¹⁰⁹ Susana Mas, "Foreign caregivers backlog grows as families wait for residency" (19 October 2014), *CBC News*, online: <http://www.cbc.ca/news/politics/foreign-caregivers-backlog-grows-as-families-wait-for-residency-1.2778317> (accessed 23 September 2015).

¹¹⁰ In 2014, 11,693 principal applicants and 5,999 spouses and dependents were granted permanent residence under the LCP: *Facts and Figures Temporary Residents 2014*, above note 2 at p. 6. The current backlog in the LCP is not publicly posted with CIC's other statistics on permanent resident application backlogs in its Quarterly Administrative Update: <http://www.cic.gc.ca/english/resources/statistics/data-release/2014-Q4/index.asp> (accessed 23 May 2016).

PART IV

DEEPENING INSECURITY THROUGHOUT THE LABOUR MIGRATION CYCLE

Rights-Based Framework for Measuring Migrant Workers' Security

Distilling the principles and values outlined in Canadian and international law, migrant workers' security can be measured with reference to the extent to which they can access and experience:

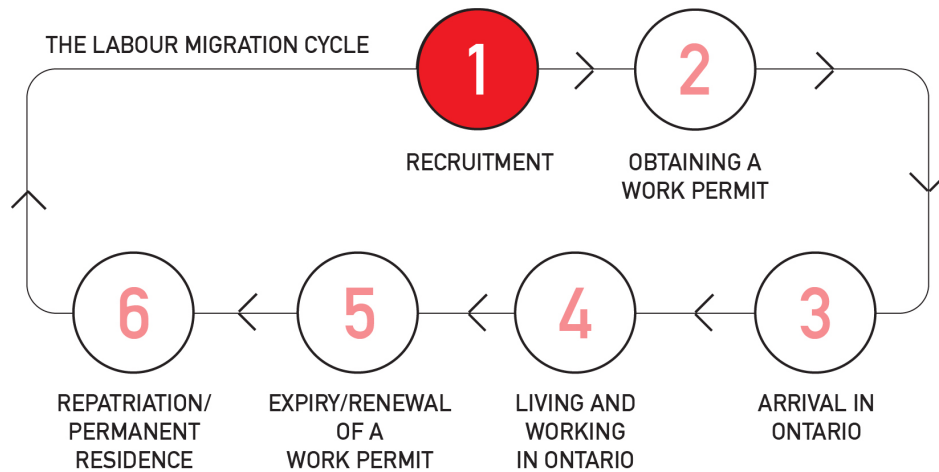
- a. Fundamental human rights;
- b. Rights at work;
- c. Voice;
- d. Social inclusion;
- e. Social security;
- f. Effective rights enforcement.

As detailed in Part III, changes to the TFWP have primarily consisted of administrative changes that control **how many** of **which workers** can enter Canada to work in **which positions**. These changes indicate how the federal government intends to exercise its pre-existing authority to scrutinize and approve requests to hire migrant workers. Only two changes relate specifically to the terms on which migrant labour will be performed — the shortened period for which work permits are valid, and the lifting of the 'live-in' requirement for caregivers in the new Caregiver Program. A third change narrowed the pathway to permanence for caregivers.

None of the changes introduced altered the key structures in Canada's labour migration programs that have made, and continue to make, migrant workers particularly vulnerable to exploitation by employers. In fact, many of the changes put migrant workers in an even more precarious position than they had been previously. The *extent* to which their insecurity is being intensified can be tracked throughout the course of their labour migration cycle. The *impact* of their deepening precarity can be measured using the rights-based framework mentioned in Part I and mapped out in *Made in Canada*.¹¹¹

¹¹¹ *Made in Canada (Full Report)*, above note 4, at pp. 47-57

1. Recruitment



As outlined in *Made in Canada*, and examined in even greater detail in the Metcalf Foundation's 2014 report *Profiting from the Precarious*, exploitative practices by third-party recruiters — based both in Canada and abroad — are the norm for a very significant proportion of low-wage migrant workers who come to Canada.¹¹² Low-wage migrant workers from around the globe are routinely subject to demands for payment by recruiters. The recruitment fees are frequently equivalent to two years' wages or more in a worker's home currency and are subject to extortionate compounding interest rates. Failure to pay the fees promptly results in threats and other material consequences to the migrant worker, the migrant workers' family, and the migrant workers' home community.¹¹³ The various experiences of debt bondage, surveillance, extortion, threats, and intimidation that arise from exploitative recruitment practices undermine workers' capacity to enjoy their rights at each stage of their labour migration cycle and fundamentally eviscerate migrant workers' capacity to exercise voice, experience social inclusion, experience social security, and pursue effective enforcement of their legal rights.

Exploitative transnational labour recruiting was also the focus of UN Special Rapporteur on the human rights of migrants François Crépeau's 2015 Thematic Report to the UN General Assembly. That report reiterates the ways in which exploitative recruitment undermines migrant workers' labour rights, human rights, and security. The report echoes many of the recommendations made in *Profiting from the Precarious*, underscoring the need for action by governments

¹¹² See Fay Faraday, *Profiting from the Precarious: How recruitment practices exploit migrant workers* (Metcalf Foundation, 2014). Both the *Full Report* and a *Summary Report of Profiting from the Precarious* are available for download at www.metcalffoundation.com.

¹¹³ For a full analysis of the experience of exploitative recruitment practices, see *Profiting from the Precarious*, above note 112.

“The 2014 federal amendments did not make robust provincial protection against recruitment abuse a pre-requisite for granting LMIA’s to employers based in a province.”

to establish effective and enforceable laws to regulate, monitor, and license recruiters; to ensure effective labour inspection of workplaces where migrant workers are employed and of supply chains through which their labour is recruited; to ensure the judicial system can tackle labour exploitation issues in a competent and timely manner; and to take action in a way that empowers migrant workers. The report calls for governments to establish national-level plans to eliminate recruitment exploitation as well as to develop multi-stakeholder subnational, regional, and international actions plans.¹¹⁴

Despite the heightened awareness of the widespread nature of exploitative recruitment among low-wage migrant workers, and the depth of the harms caused by it, this issue has not been seriously addressed. The 2014 federal amendments did not make robust provincial protection against recruitment abuse a pre-requisite for granting LMIA’s to employers based in a province. Instead, the LMIA application simply requires an employer to declare that:

“all recruitment done, or that may be done on my behalf, by a third-party was, and will be, in accordance with federal/provincial/territorial laws governing recruitment. I acknowledge and understand that I will be held accountable for the actions of any third-party recruiting TFWs on my behalf.”¹¹⁵

This new declaration is less direct than the previous LMO declaration which required an employer to endorse the statement that: “I will pay all recruitment costs related to the hiring of the foreign worker and will not recoup, directly or indirectly, any of these costs from the worker.” But regardless of the wording, a passive declaration to comply with the law without a process for oversight that proactively and systemically guards against and pre-empts known exploitative practices is of limited assistance.

In announcing its June 2014 changes to the TFWP, the federal government took the position that it was the responsibility of the provinces and territories to “establish and enforce laws on recruitment.”¹¹⁶ The federal government saw its contribution to this effort as being to develop information sharing arrangements to help provincial agencies prioritize what area they wished to investigate within provincial jurisdiction (be it labour laws, health and safety standards, or recruitment). This is a far cry from the UN rights-based approach of developing robust national laws to proactively prevent recruitment abuse through active regulation, licensing, monitoring, and inspection. Moreover,

¹¹⁴ United Nations, *Report of the Special Rapporteur on the human rights of migrants, Mr. François Crépeau*, U.N. Doc. A/70/310, (Aug. 11, 2015).

¹¹⁵ *Labour Market Impact Assessment Application High-Wage and Low-Wage Positions*, ESDC EMP5602 (2015-09-004), p. 9.

¹¹⁶ *Putting Canadians First*, above note 7 at p. 21-22.

none of the federal-provincial information sharing puts information into the hands of migrant workers or into the public domain to empower workers to know whether they are being recruited by legitimate recruiters,¹¹⁷ being recruited into positions with legitimate employers, or being employed by employers who are under investigation for or have histories of non-compliance with LMIA requirements, workplace rights, or human rights obligations.

In Ontario, effective 20 November 2015, the *Employment Protection for Foreign Nationals Act* (“EPFNA”) was amended to extend its coverage to all migrant workers in the province. Until that date, the Act had only applied to live-in caregivers. It now prohibits recruiters from charging recruitment fees to any migrant workers; prohibits employers from recouping any fees from migrant workers; prohibits employers and recruiters from withholding passports, work permits or other documents; prohibits intimidation and reprisals for attempting to enforce the Act; and requires employers or recruiters to provide all migrant workers with information about their rights under the Act and the *Employment Standards Act*.¹¹⁸

While the extension of EPFNA is a limited first step to extending protection, as *Profiting from the Precarious* documented, the number of caregivers who were able to use the legislation to recoup illegal recruitment fees was exceedingly small. The profound weakness of the legislation is that it depends upon individual workers to bring forward complaints. This puts them at considerable risk for termination, homelessness, and retaliation from recruiters and money lenders to whom they owe outstanding recruitment fees. As long as migrant workers are subject to oppressive recruitment practices, threats, and intimidation, they will be unable to enforce their rights to decent work and security throughout the rest of their labour migration cycle. This singularly powerful practice of oppression undermines migrant workers’ rights throughout all other stages. On the whole, Ontario’s modest legislative extension of EPFNA falls well short of the rigorous proactive protection of registration, investigation, and enforcement under global best practice legislation such as Manitoba’s *Worker Recruitment and Protection Act*.¹¹⁹

Moreover, international students in Ontario are increasingly reporting to community organizers that they are being forced to pay as much as \$10,000 to \$15,000 in fees to third-party recruiters to obtain places in diploma- and degree-granting programs at post-secondary institutions. As access to pathways

¹¹⁷ The information about licensed recruiters that is publicly available is provided through provincial governments that have adopted their own legislation to implement proactive licensing and investigation of recruiters: see *Profiting from the Precarious (Full Report)*, above note 112 at pp. 70-71, 76-79

¹¹⁸ *Stronger Workplaces for a Stronger Economy Act, 2014*, S.O. 2014, c. 10, Schedule 1 amending *Employment Protection for Foreign Nationals Act, 2009*, s.

¹¹⁹ *Worker Recruitment and Protection Act*, C.C.S.M., c. W197; Jennifer Gordon, *Global labour recruitment in a supply chain context* (ILO: Geneva, 2015), esp. at pp. 22-26 which endorses the Manitoba model.

to permanent residence narrow and increasingly rely upon two-step immigration programs, workers are being promised access to permanent residence through international study programs as an alternative to the TFWP.¹²⁰ As a result, they are paying overwhelming recruitment fees on top of international student tuition fees and fees to obtain a work permit while in Canada without any guarantee that they will ultimately be able to immigrate with permanent status.

Once again, Manitoba has led the way with proactive legislation to protect international students at all levels of education from exploitative recruitment practices. Effective 1 January 2016, Manitoba's *International Education Act* and associated *Regulations* force established a proactive system to register and accredit educational programs that are permitted to recruit international students, maintain lists of recruiters who recruit for specific educational programs, and establish enforceable codes of conduct that will apply to both recruiters and education providers to safeguard international students from misleading or exploitative conduct.¹²¹

Meanwhile, the new federal and provincial Express Entry programs for managing applications for permanent economic immigration are structured in a way that gives both employers and recruiters enhanced and direct power to select which potential immigrants will be invited to apply for permanent residence. Even before the Express Entry model existed, concerns were raised about the way in which provincial nominee programs, which similarly depend on employer nomination of workers for permanent residence, create an imbalance of power that leaves workers open to exploitation.¹²² As an existing job offer for permanent employment has now become the single most significant factor in awarding points towards an invitation to apply for permanent residence, this creates a further opportunity for recruiters to once again leverage workers' desperation to exploitative ends.

One positive development on the recruitment front is that under the SAWP, since mid-2015, Caribbean workers are no longer subject to a mandatory 25% holdback on their wages, a portion of which had until then been applied to cover the costs of administering the SAWP.¹²³

¹²⁰ Interviews with community organizers October-December 2014, 2015, and March 2016.

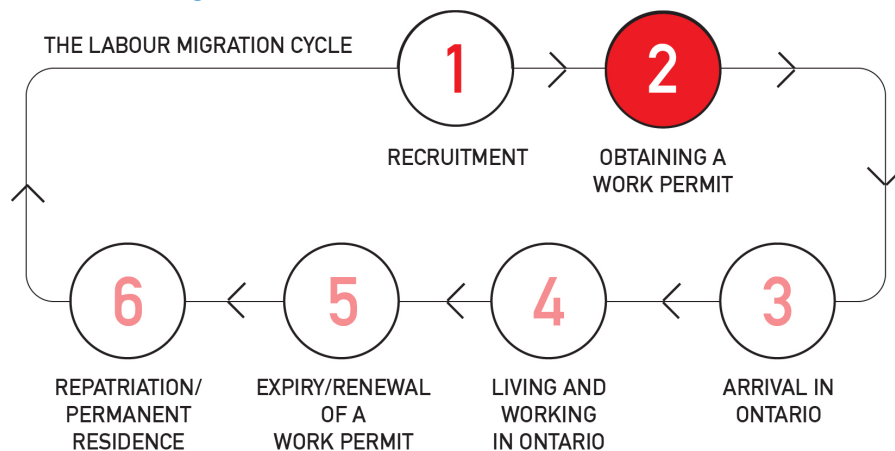
¹²¹ *International Education Act*, S.M. 2013, c. 52; *International Education Regulation*, Regulation 218/2015; *Code of Practice and Conduct Regulation*, Regulation 1/2016; Manitoba, *Guide to the Code of Practice and Conduct Regulation for Manitoba Designated Education Providers, Their Staff Recruiters and Contracted Agents*; and Manitoba, *Public Register of Designated Education Providers*.

¹²² See, for example, Jamie Baxter, *Precarious Pathways: Evaluating the Provincial Nominee Programs in Canada* (Law Commission of Ontario, 2010).

¹²³ While the 25% holdback has been eliminated, the 2016 SAWP contract for Caribbean workers still anticipates the possibility of deductions that would cover the government's cost of administering the program. The relevant portions of Part IV, Clause 1 and 2 of the contract provide that:

WORKER agrees:

2. Obtaining a Work Permit



The next stage in the labour migration cycle is obtaining a work permit. Five aspects of the revised TFWP significantly deepen migrant workers' insecurity when obtaining an initial work permit or when seeking to renew or change a work permit. These developments further deepen migrant workers' inability to exercise voice, to experience the rights to which they are entitled, and to effectively enforce rights in their workplaces.

(a) Tied permits: None of the revisions to the TFWP eliminate the key feature of the work permit that leads low-wage migrant workers to experience exploitation. The work permits remain tied permits that restrict the migrant to working only for the one specific employer named on the work permit, at the location named on the permit, doing the specific job identified on the work permit, for the specified time period identified on the permit. This restriction on a worker's mobility makes them dependent on, and beholden to, that one employer for their status in the country. And that dependence is heightened when that same employer may provide their housing while in Canada, be it through a bunkhouse on the employer's property, in rental accommodations

1. That the EMPLOYER shall deduct a portion of the WORKER'S wages and send this amount to the GOVERNMENT AGENT for each payroll period at the time of delivering the pay sheets required by Section VI. These deductions are to cover costs associated with the physical and financial protection of the WORKER while in Canada and to ensure the WORKER'S safe arrival to Canada from his country of origin. These costs include deductions related to: ...

e) government administrative fees for provision of services such as preparation of documents; ground transportation; lodging during transit to and from Canada; orientation sessions; legal assistance; examination of worker accommodations; and, required background, security and criminal record checks.

2. That deductions under Section IV clause 1 can only be made with the consent of the WORKER, as indicated by initialing the space provided. If the WORKER does not consent to these deductions, the WORKER agrees to pay the cost of the specified goods and services directly.

arranged by (and sometimes owned by) the employer, or in the employer's home. Tied permits also make workers particularly vulnerable to employer and recruiter practices that deliberately place them out of status through contract substitution or work placements that put them in jobs inconsistent with their work permits.¹²⁴

(b) One-Year Work Permits: Apart from the SAWP and caregivers,¹²⁵ work permits for low-wage workers are now limited to a term of no more than one year. This keeps workers in a state of perpetual instability. It typically takes two years of work in Canada before a worker can pay off the recruitment fees that they paid to obtain a position in Canada. With a shorter work permit, a worker is under intensified and continuing pressure to abide by any demands of their employer and put up with any abusive treatment they may face so they can retain their job, continue to renew their work permits, earn enough money to repay the recruiter and send money home to their family. The shortened term of the work permit acts as an overwhelming impediment to exercising voice in the workplace and the community, and to enforcing contractual or legislated rights when they are violated.

(c) New LMIA Application Fee — Part I: Because the LMIA application fee has increased to \$1,000, employers are more reluctant to make applications. This results in it being more difficult for migrant workers who are presently in Canada to obtain a work permit when they wish to change employers due to abusive treatment. While it is technically possible for a worker to change jobs, the process of finding an employer who is willing to make a LMIA application, complete the required advertising period, obtain LMIA approval, and then apply for a new work permit can take 5 or 6 months. During this period, the migrant worker cannot legally work without a valid work permit. Yet, they must continue to meet their rent and daily living expenses and continue to repay any recruitment debts. Due to these pressures, workers are more vulnerable to falling out of status or being actively driven into undocumented work while trying to seek a new work permit to escape ill treatment.

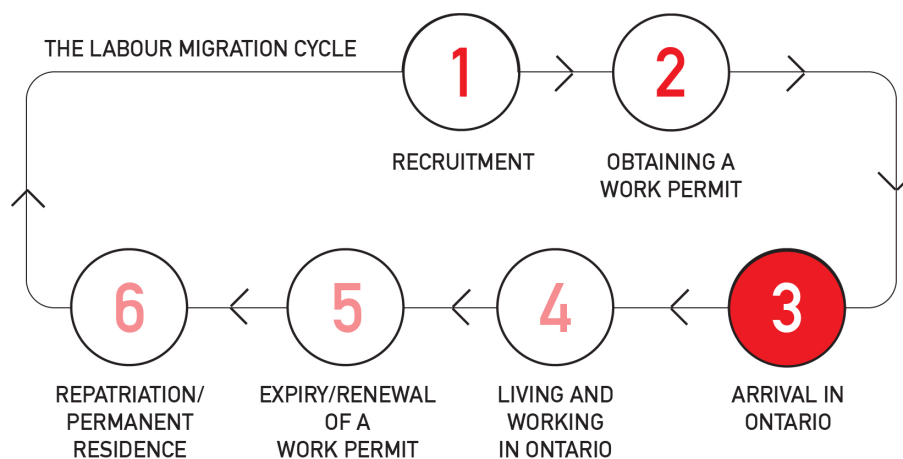
¹²⁴ See *Profiting from the Precarious (Full Report)*, above note 112 at pp. 38-40; see also Jenni Sheppard, "Mac's Convenience Stores facing class-action lawsuit from temporary foreign workers", *CBC News* (18 December 2015), online at <http://www.cbc.ca/news/canada/british-columbia/temporary-foreign-workers-macs-lawsuit-jobs-1.3372599>; Koskie Glavin Gordon, "Class action against Mac's Convenience Store and Overseas Immigration Consulting", link to class action materials at <http://www.koskieglavin.com/class-action-against-macs-convenience-store/>

¹²⁵ Work permits under the SAWP have been and remain limited to a period of no more than 8 months in any calendar year with no limitation on the number of years in which a migrant worker can return to Canada. Caregivers are continuing to receive permits of up to four years.

(d) New LMIA Application Fee — Part II: Despite the fact that employers are prohibited from recouping LMIA application fees from migrant workers, some employers do in fact require migrant workers to pay these fees. This is particularly so with the enhanced application fee. The shorter work permit and heightened pressure outlined above provide these employers with greater leverage than before to extract these fees.¹²⁶

(e) Caps on the Percentage of Migrant Workers in a Workplace: The hard cap on the number of migrant workers who may be employed at any individual worksite makes it increasingly difficult for a migrant worker in a low-wage position to renew a work permit. This is because employers who had previously employed workers beyond the caps must now reduce the number of positions available. This creates pressure on migrant workers to stifle any complaints about mistreatment and to do excessive work to please an employer in order to be retained under the cap. Migrant workers who were in Canadian workplaces before the declining caps were introduced were forced to compete with each other to keep their jobs in the face of the caps. This gave employers particular leverage to extract excess labour and erode workplace rights. These changes also create opportunities for employers to pressure migrant workers to continue working with undocumented status over and above the caps. Finally, the caps have a normative effect of driving a wedge between migrant workers and local workers — framing the migrant workers as “others” or “outsiders” who are a threat to local labour.

3. Arrival in Ontario



Employment and Social Development Canada reports that migrant workers arriving in Canada are now provided with an information package by Canada Border Services Agency (“CBSA”) that outlines their rights in Canada. Basic

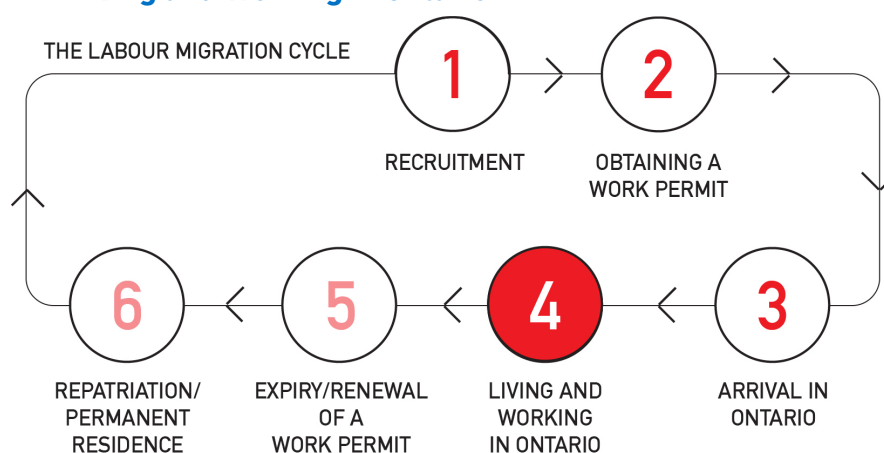
¹²⁶ Interviews with community organizers and migrant workers.

information on rights enforcement is also now posted on the Citizenship and Immigration Canada website.¹²⁷

This is an improvement and is a practice that was recommended in *Made in Canada*. However, the information that is provided remains brief and there is no mechanism in place that connects those workers with migrant worker groups, labour advocates, or community organizations on the ground who are available to assist and support them. Providing this contact information proactively is particularly important as abusive recruiters frequently intimidate workers before and after their arrival, warning them not to contact community supports or worker advocates in Canada. Abusive recruiters also exercise close surveillance of workers while in Canada which impedes workers ability to seek out assistance on their own. While the information identifies *government* bodies that can be contacted, many migrant workers face serious barriers to approaching government institutions, particularly when they are arriving from countries where their experience gives them a reasonable basis to mistrust or fear government authorities.

In Ontario, community groups have developed a range of information brochures and pamphlets to inform migrant workers of their rights and to provide them with information on how to connect with worker groups, unions, community groups, and services that can provide assistance. However, without publicly accessible information about where migrant workers are employed, there remain persistent barriers in ensuring that information is in fact available to them. Access to this information is a fundamental prerequisite for workers knowing their rights, developing links in the community that facilitate their social inclusion and social security, exercising their right to voice, and enforcing their rights.

4. Living and Working in Ontario



¹²⁷ Citizenship and Immigration Canada, *Temporary foreign workers — Your rights are protected* (modified 2013-02-19) online: <http://www.cic.gc.ca/english/resources/publications/tfw-rights.asp> (accessed 27 September 2015)

Revisions introduced in 2014 do not in any way alter the fact that migrant workers in Ontario must depend on highly fragmented complaint-driven mechanisms to enforce their workplace rights. Workers remain overwhelmingly non-unionized. Caregivers working in their employers' homes and agricultural workers in Ontario remain excluded from the right to unionize under the *Labour Relations Act*.¹²⁸ Denial of a meaningful right to unionize continues to erode their fundamental right to collective action¹²⁹ and their capacity to exercise effective voice. This is particularly significant as most of the limited number of legal proceedings to enforce migrant workers' rights have been brought forward with the support of unions and community organizations.

Because they are overwhelmingly not unionized, migrant workers continue to rely on the *Employment Standards Act* as the source of protection for their workplace rights. While the provincial government has invested more resources towards promoting proactive enforcement of the *ESA*, only 40 of the 198 employment standards officers in the province are dedicated to proactive enforcement and those 40 are responsible for proactive investigation for all workplaces in Ontario, not simply those which employ migrant workers.¹³⁰ Where the province has undertaken proactive investigation of workplaces that employ migrant workers, they have found widespread non-compliance with mandatory minimum standards. A three-month proactive blitz from September to November 2014 inspected 50 workplaces that employed migrant workers, of which 27 workplaces (54%) were non-compliant.¹³¹ A further three-month blitz from May to July 2015 inspected a further 64 workplaces, of which 40 (62.5%) were non-compliant.¹³² While these blitzes reveal a significant non-compliance problem — and at levels that are consistent with the widespread non-compliance that has been identified when proactive enforcement has been pursued in other

"A three-month proactive blitz from September to November 2014 inspected 50 workplaces that employed migrant workers, of which 27 workplaces (54%) were non-compliant."

¹²⁸ Caregivers working in their employers' homes are wholly excluded from the right to unionize, while agricultural workers remain subject to the *Agricultural Employees Protection Act*: see *Made in Canada (Full Report)*, above note 4 at p. 85.

¹²⁹ The Supreme Court of Canada has repeatedly ruled that the right to unionize and the right to bargain collectively are constitutionally protected exercises of the freedom of association: *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 SCR 391, 2007 SCC 27; *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1.

¹³⁰ Sara Mojtehedzadeh, "In bid to tackle workplace abuse, a model that works", *Toronto Star* (22 February 2016), online: <http://www.thestar.com/news/gta/2016/02/18/in-bid-to-tackle-workplace-abuse-a-model-that-works.html>

¹³¹ Ontario, Ministry of Labour, *Blitz Results: Vulnerable and Temporary Foreign Workers* (1 April 2015), online: http://www.labour.gov.on.ca/english/es/inspections/blitzresults_vtfw.php (accessed 10 March 2016). In that blitz over \$34,725 in unpaid wages was recovered by workers.

¹³² Ontario, Ministry of Labour, *Blitz Results: Precarious Employment and Temporary Foreign Workers* (16 November 2015), online: http://www.labour.gov.on.ca/english/es/inspections/blitzresults_vw2015.php (accessed 10 March 2016). In that blitz over \$17,000 in unpaid wages was recovered for workers.

provinces¹³³ — the number of workplaces that have been inspected is microscopic in comparison to the number of workplaces in which migrant workers are employed. Moreover, while the Ministry has conducted these blitzes, employers are given advance notice of when the employment standards officer will arrive. This is in sharp contrast with the Ministry's occupational health and safety proactive inspections, which are not announced in advance. Current Minister of Labour Kevin Flynn has conceded that the rate of non-compliance is not "tolerable" but acknowledged that some businesses "build it [non-compliance] into their business plan" as part of their strategy to maximize profits.¹³⁴

The capacity to proactively enforce laws remains dependent on developing a system which allows the enforcement branch to know where migrant workers are employed and a system that is appropriately resourced to do the work. And while there are isolated cases in which migrant workers have been able to use legal mechanisms to enforce their rights — including a 2015 Human Rights Tribunal ruling providing significant redress to migrant workers who were sexually assaulted by their employer¹³⁵ — these cases remain remarkable outliers, not representative of a significantly increased flow of complaint-driven enforcement. Overall, the impediments to rights enforcement that are detailed in *Made in Canada* remain present. And the barriers to rights enforcement are exacerbated by the fact that workers are on shorter work permits. With permits of only one year's duration (and a fragile opportunity to seek permit renewal), migrant workers have less time than before to learn of their rights and less security to pursue enforcement.

Where a legal process depends upon a migrant worker with precarious status to come forward to blow the whistle on their employer's non-compliance but demands that they risk their very status to remain in the country to file that complaint, it is clearly a process that fails to protect worker security. Again, when measured against the rights-based touchstones of voice, social inclusion, social security and effective rights enforcement, the reality remains remarkably

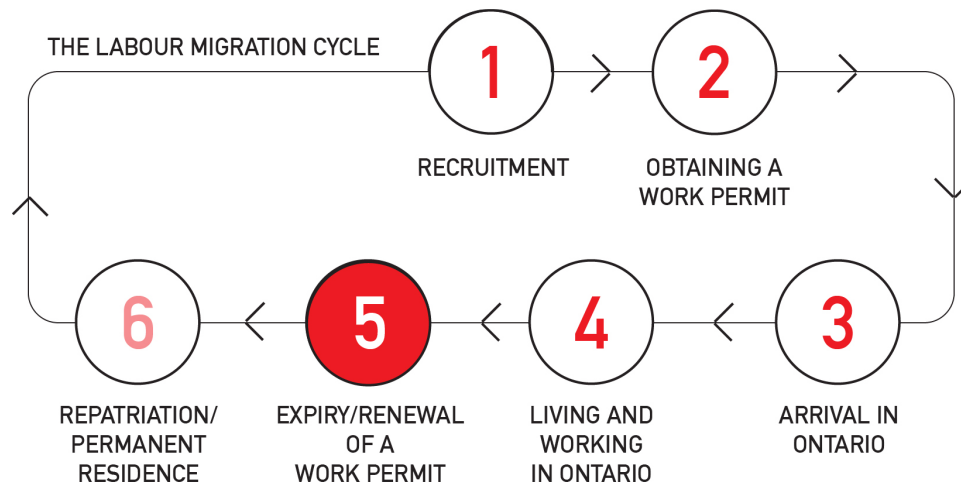
¹³³ See *Made in Canada (Full Report)*, above note 4 at p. 88; *Profiting from the Precarious (Full Report)*, above note 112 at p. 72

¹³⁴ Brennan Leffler, "Why employers are getting away with breaking Canada's labour laws", *Global News* (15 April 2016), including video interview with Minister Flynn, online at <http://globalnews.ca/news/2641197/how-employers-are-getting-away-with-breaking-canadas-labour-laws/>. See also, Brennan Leffler and Robert Cribb, *The Labour Trap* (documentary), 16 x 9, Global TV, online at <http://globalnews.ca/video/2652208/full-story-the-labour-trap> (originally aired 16 April 2016)

¹³⁵ *O.P.T. v. Presteve Foods Ltd.*, 2015 HRTO 675. It is important to note as well that even this case illustrates the barriers to rights enforcement as the entire process took *seven years* to complete. The case originally involved *more than forty individual migrant workers* but, over the course of the intervening years, most lost their status in Canada and/or dropped out of the litigation process. Only two workers remained parties to the final Tribunal decision. It is also important to note that virtually all of the cases involving workers with temporary status which have gone forward to litigation have been supported by unions and community organizations. These cases remain exceedingly rare relative to the frequency with which wage theft and rights violations occur.

deficient. When rights enforcement, voice, social inclusion and social security are undermined, any rights that exist on paper remain simply that — mere words on paper. They do not translate into an experience of rights in practice, which is the cornerstone of a society subject to the rule of law.

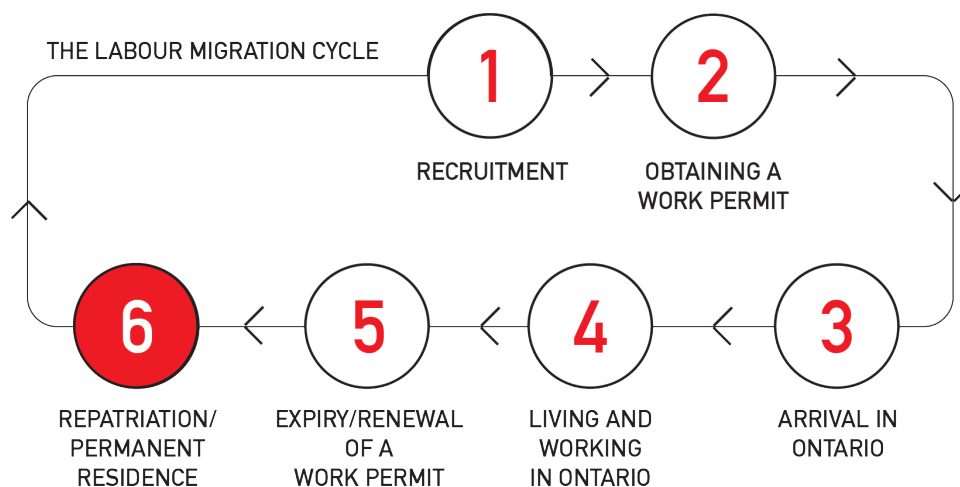
5. Expiry and Renewal of Work Permits



As outlined above, the shorter, one-year term for low-wage migrant workers' permits heightens their insecurity. Over the course of their permissible four-year maximum work period, workers must now seek to renew permits *three* times. The process to renew an LMIA must begin at least three months before the expiry of a current work permit, or only nine months into a worker's existing contract. To ensure that an employer puts a worker's name forward for renewal, the worker is under considerable pressure to comply with any demands made by the employer, even when those demands are inconsistent with their work permit or job requirements, and to put up with any treatment, even when it erodes rights that exist under a contract or applicable laws. In essence, the worker remains in a state of perpetual instability trying to retain their existing job. The more frequent renewals also place workers under greater control of recruiters who use the repeated renewals as opportunities to charge additional fees (including improperly downloaded LMIA application fees) to secure a worker's continuing right to work in Canada. Meanwhile workers in the SAWP have no guarantee of being able to return from one season to the next, regardless of how many seasons they have worked in Canada. They remain subject to a system that

gives employers unilateral discretion to identify them by name (to “name” them) to return each year.¹³⁶

6. Repatriation or Routes to Permanent Residency?



Since *Made in Canada* was published in 2012, the range of pathways to permanent residence that are available to professional, managerial, and skilled workers has expanded.¹³⁷ By contrast, recent revisions to the TFWP have not provided any new routes that enable low-wage migrant workers to secure permanent status in Canada despite their years of labour in the country. Instead, as set out in detail in Part III, revisions made to the Caregiver Program have made the one clear pathway to permanence narrower and considerably more precarious.

On 1 April 2015, the 4-in/4-out rule resulted in the first waves of long-term migrant workers being forced to leave Canada. The first migrant workers to leave were the ones who had worked in Canada longest, many of whom had been working full-time, full-year for nearly a decade. They were well-established members of their communities and their workplaces. And they were leaders amongst the migrant worker community. Despite their long-term contributions to the economy and their communities, with very rare exceptions, these migrant workers had no opportunity to apply for permanent residence in Canada. The federal permanent immigration pathways do not recognize their work experience. In Ontario, the provincial nominee program also does not recognize their work experience as it occurred at the NOC C- or D-level. Thousands of workers continue to lose their status as their 4-year clock runs out resulting in

¹³⁶ See *Made in Canada (Full Report)*, above note 4 at pp. 74-75; *Profiting from the Precarious (Full Report)*, above note 112 at pp. 42-45.

¹³⁷ An overview of the multiple pathways that are available for permanent immigration for economic class immigrants is provided at Appendix B to this report.

workers departing the country or slipping into undocumented status where they are even more vulnerable to exploitation.

The 4-in/4-out rule remains in place, but the June 2014 revisions also announced a plan to *reduce* the cumulative period during which migrant workers can remain in the country. That change has not been made but it hovers as a factor that creates uncertainty and ratchets up the pressure on workers to work while they can. Moreover, the reduced work permit period means that every year workers face the possibility that they will be required to leave the country. The revisions to the program have created a dynamic fast-revolving door: migrant workers can be cycled in and out of the country even faster than before and workers who dare to assert their rights can be removed more quickly even before their 4-year window is up. Apart from creating deeper insecurity for migrant workers at an individual level, it creates deeper insecurity at a collective level as community leaders are forced to leave the country, and remaining workers have less time and security to develop into leaders who know and are able to enforce their rights.

As set out in Part III, the reconfiguration of the LCP into the Caregiver Program replaced the promise of permanent residence with a much slimmer, more uncertain chance to apply for permanent residence subject to hard caps on the number of workers who will can be granted permanent residence in any year.

This element of the TFWP most glaringly reveals the double standard that shapes Canadian labour migration policy. Canada's embrace of two-step immigration policies over the last decade espouses the value that an individual's demonstrated ability to contribute economically and to integrate socially in Canada merits a path to permanent residence. But while some workers' labour is valued, others' is treated as disposable. While thousands of low-wage migrant workers have worked full-time, full-year for many years, or have worked full-time in seasonal industries year after year,¹³⁸ in core sectors of the economy, their contributions to building Canadian businesses and Canadian communities are devalued. They are treated as interlopers and when they reach their prescribed "expiry date," they are shown the door. It remains a profoundly dehumanizing and socially corrosive approach to economy and social policy.

"But while some workers' labour is valued, others' is treated as disposable. While thousands of low-wage migrant workers have worked full-time, full-year for many years, or have worked full-time in seasonal industries year after year, in core sectors of the economy, their contributions to building Canadian businesses and Canadian communities are devalued."

¹³⁸ For example, the Seasonal Agricultural Worker Program is currently in its 50th year of existence. On average workers participate in the SAWP for 7 to 9 years, although many return to Canada for more than 25 years: Jenna Henneby, "Permanently Temporary? Agricultural Workers and Their Integration in Canada" (February 2012) *IRPP Study No. 26*, at p. 13. F.A.R.M.S. is the organization that acts as agricultural employers' representative in coordinating LMIA applications and placement of migrant workers. F.A.R.M.S. promotional video refers to one worker who has been returning to work in Canada for 46 years: *Helping Ontario Grow: A Video on the Seasonal Agricultural Worker Program* (November 2015), online at http://www.farmsontario.ca/media_centre/new-sawp-video/ (accessed 24 May 2016).

PART V

CONCLUDING COMMENTS: CHOOSING DECENT WORK AND DECENT LIVES OR ENTRENCHED EXPLOITATION?

There is no doubt that Canada has lost its innocence regarding temporary labour migration. The ways in which federal and provincial laws intersect to construct systemic insecurity and precariousness for migrant workers and to support practices of widespread exploitation have been thoroughly documented. Extensive public engagement with the issue, right across the country, has also catalogued countless stories of shameful exploitation and exposed how quickly Canadians' sense of their own economic insecurity can be fanned into hostility, racism, and xenophobia.

At the same time, Canada's recent embrace and welcome of Syrian refugees has demonstrated that active decisions to change policy can be made and can foster values of solidarity, compassion, and inclusion. As Canada embarks on a review of the Temporary Foreign Worker Program it is important to put front and centre the question of what values will inform this round of policy choices. It is also important to remember that in reforming laws and policies, government is in fact exercising an active *choice* to promote the consequences that those policies produce. If the exploitation we have seen is not the outcome we want, we must choose again and choose differently.

What kind of community are we choosing to build? Who will be part of that community? Who will benefit from it?

Made in Canada provided a strong critique of the political discourse that is anchored in the pejorative label of the "unskilled temporary foreign worker":

To the extent that laws construct particular work and workers as "temporary" and "unskilled," this obscures the ways in which the work itself is integral to the functioning of our communities. It devalues the work. To the extent that laws construct workers as "temporary," "foreign," and "unskilled," they likewise devalue the real contributions of these workers to the functioning of our economy and communities and construct the workers as "other," as "not us," as persons outside the community to whom we need not be accountable. To the extent that laws fail to

respond to known practices which systemically marginalize and disempower migrant workers, they sustain those conditions and practices which produce insecurity and undermine the possibility of decent work.¹³⁹

Following from this, *Made in Canada*'s fundamental recommendation was that "Canadian immigration policy must be reframed to ensure that workers of all skill levels can apply to immigrate to Canada with permanent resident status."¹⁴⁰

Instead of extending this security, the 2014 revisions exploited the discourse of "migrant workers stealing Canadian jobs." The very report that announced the revisions was called *Putting Canadians First*. It introduced provisions that divided Canadian citizens/permanent residents and migrant workers on the shop floor by explicitly restricting the number of migrant workers who will be permitted in any single workplace, thus explicitly framing migrant workers' very presence as aberrant and undesirable. It was a strike that aimed to disrupt the solidarity that was emerging between migrant and domestic workers in the face of growing appreciation of the extent of exploitation that migrant workers faced. Further, in a move reminiscent of the discourse of "bogus refugees" and "bogus marriages," before announcing changes to the Live-in Caregiver Program, then-Minister Jason Kenney announced that the Filipino community was abusing the LCP as a family reunification strategy and that most Filipino caregivers were in fact working for family members.¹⁴¹ At the same time, academic research drawing on interviews with over 600 Filipino caregivers across the country indicated that less than 10% were employed by family members.¹⁴² That framing was also an active policy choice by government — a choice to spread insecurity and encourage exclusion of an already marginalized constituency. This framing had material consequences on the ground not only for migrant workers but for racialized workers who are Canadian citizens and permanent residents who were also being targeted by racist and xenophobic harassment for "stealing Canadian jobs."

¹³⁹ *Made in Canada, (Summary Report)*, above note 4 at p. 33.

¹⁴⁰ *Made in Canada, (Summary Report)*, above note 4 at p. 33

¹⁴¹ See, for example, Jennifer Hough, "Canada's live-in caregiver program 'ran out of control' and will be reformed: Jason Kenney", *National Post* (24 June 2014), online at <http://news.nationalpost.com/news/canada/canadian-politics/canadas-live-in-caregiver-program-ran-out-of-control-and-will-be-reformed-jason-kenney> (accessed 23 May 2016); Nicholas Keung, "Filipino Canadians fear end of immigrant dreams for nannies", *Toronto Star* (23 July 2014), online at https://www.thestar.com/news/immigration/2014/07/22/filipino_canadians_fear_end_of_immigrant_dreams_for_nannies.html (accessed 23 May 2016)

¹⁴² Gabriela Transitions Experience Survey, *From 'Migrant' to 'Citizen': Learning from the Experiences of Former Caregivers Transitioning out of the Live-in Caregiver Program*, Preliminary Analysis (July 2014).

"At this current crossroads, there is the opportunity to choose a different future built on different values. There is an opportunity to end the double standard that weaves through Canada's labour migration policy and to build policies that prioritize human rights, economic security for all, secure permanent status, social integration and family reunification."

"At this current crossroads, there is the opportunity to choose a different future built on different values. There is an opportunity to end the double standard that weaves through Canada's labour migration policy and to build policies that prioritize human rights, economic security for all, secure permanent status, social integration and family reunification."

The most fundamental shift must come through embracing a policy preference for permanence over temporariness. It is no longer sufficient to say that some workers' economic contributions and social integration built through living and working in Canada will be recognized but others' will not. Jobs of all skill levels will always be part of our economy and policies that devalue working class jobs and make them more precarious are socially corrosive for our communities as a whole.

Since 2012 there has been **a spreading call for the structural instability and exploitation that occurs under the TFWP to be replaced by a renewed and robust immigration system that provides pathways to permanent residence for workers of all skill levels.** Groups across the country, from a diversity of political perspectives and economic interests, have endorsed demands for robust immigration based on permanent not temporary status, including pathways to permanence for migrant workers who are in Canada. It is not just migrant workers, labour advocates and settlement organizations that are endorsing this demand, although they certainly are doing so.¹⁴³ A wide range of employer organizations, provincial governments and political parties are also demanding change that provides real security — to workers *and employers* — through broadening access to permanent residence.¹⁴⁴

Secondly, building security by recognizing workers' full humanity and human connectedness is critical to building a fair migration policy. The UN's leading human rights instrument on the rights of migrants expressly embraces both migrants and their families, referencing migrants' families in its very title. The *International Convention on the Protection of the Rights of All Migrants and Members of Their Families* strongly expresses the principle that migrant workers must not be commodified; they must be treated as full human beings

¹⁴³ As just a small sample, see: Canadian Labour Congress, "Temporary Foreign Workers: the revolving door" (23 March 2015); Migrant Workers Alliance for Change, www.migrantworkersalliance.org; Coalition for Migrant Worker Rights Canada, www.migrantrights.ca; Canadian Council for Refugees, <http://ccrweb.ca/en/migrant-workers-issues>.

¹⁴⁴ See, for example, Canadian Federation of Independent Business, *Taking the Temporary out of the TFW Program* (December 2014) at p. 28. Employers in the meat processing industry have negotiated collective agreements with UFCW Canada which facilitate the nomination of migrant workers for permanent residence through provincial nominee programs. See also: John Cotter, "Food processors want foreign workers that can become Canadian citizens", *Edmonton Journal* (12 June 2015). See also: Theresa Woo-Paw, *Impact of the Temporary Foreign Worker (TFW) Program on the Labour Market in Alberta* (August 2011), Report submitted to the Alberta Minister of Employment and Immigration at p. 4, 24.

who are members of families and communities. The Convention states that “due regard shall be paid not only to labour needs and resources, but also to the social, economic, cultural and other needs of migrant workers and members of their families involved, as well as to the consequences of such migration for the communities concerned.”¹⁴⁵ In this context, **the right to family unity, including processes to ensure reunification of workers with their spouses and dependent children, is of fundamental concern.**

Family reunification is also a value that is a cornerstone of Canada’s immigration policy. Yet, the TFWP is specifically premised upon prolonged family separation over a period of many years for workers doing working class jobs. Rather than leveraging family separation in an instrumental way to encourage the circularity of migration, a rights-based, humane approach must recognize workers as whole human beings with a need for family support and connection. The ability to migrate with their families, and to secure speedy family reunification if a worker chooses to migrate alone, builds social security and capacity for effective settlement both before and after workers receive permanent residence.

Finally, the double standard with respect to **promoting sustainable, secure forms of work must be addressed.** The proliferation of precarious forms of work for both local and migrant workers has been well documented, as have the profoundly corrosive social harms that flow from that intensifying precarity. Those harms are measured not simply in poverty, but also in declining social cohesion, trust, social connectedness, physical and mental health, and other qualitative factors that relate to both individual and community stability.¹⁴⁶ The values that inform policy development must **prioritize economic security and a real experience of meaningful protection for workplace rights and human rights for all.** We cannot afford to build and maintain low-wage, low-rights zones of exceptionality which normalize and perpetuate permanent insecurity for workers in our communities.

¹⁴⁵ Adopted by the UN General Assembly resolution 45/158 (18 December 1990), Article 64.

¹⁴⁶ See, for example, Poverty and Employment Precarity in Southern Ontario (PEPSO), *Its More Than Poverty: Employment Precarity and Household Well-Being* (February 2013); PEPSO, *The Precarity Penalty: Employment Precarity’s Impact on Individuals, Families and Communities and What to do about It* (December 2015); Guy Standing, *The Precariat: The New Dangerous Class* (Bloomsbury, 2011); Richard Wilkinson and Kate Pickett, *The Spirit Level: Why Equality is Better for Everyone* (Penguin, 2009)

Recommendations:

Fundamental Principles for a Rights-Based Approach to Policy

As explored in *Made in Canada*, a multi-dimensional rights-based approach is needed to build effective protection for decent work. Such an approach must be anchored in human rights and labour rights, including both domestic constitutional and human rights law and international human rights principles. It must reject the commodification of labour and be anchored in a firm commitment to worker protection. It must be anchored in a consistent narrative that recognizes and values the economic and social contributions and connectedness of all migrant workers in Canada; that upholds the value of family of reunification; and that is grounded in a commitment to secure, decent work and decent lives for all. Such an approach must weave together:

- (a) strong, proactive government oversight and enforcement;
- (b) protection for the effective and meaningful exercise of fundamental rights, including collective representation;
- (c) substantive workplace and social rights that are responsive to migrant workers' real circumstances and that establish standards that ensure decent work and decent lives;
- (d) effective and accessible mechanisms for enforcing rights; and
- (e) active involvement of community organizations to support migrant workers' voice.

Building Permanence, Building Security

The fundamental recommendations of this report are that:

1. Canadian immigration policy must be reframed to ensure that workers of all skill levels can apply to immigrate to Canada with permanent resident status.
2. Migrant workers of all skill levels who are working in Canada should have access to secure pathways to apply for and receive permanent residence. They should be able to do so independently without requiring a nomination by their employer.
3. Migrant workers must have a voice in shaping the policies that govern their treatment in Canada.

Building Security to Pre-empt and Resist Worker Exploitation

To the extent that workers with temporary status are and continue to be admitted to Canada, a range of reforms are necessary to build a real experience of decent rights for them. Those recommendations must address the precarity that is built into all phases of labour migration policy and all phases of the

labour migration cycle. Detailed recommendations are set out in *Made in Canada* and *Profiting from the Precarious* and remain relevant to future policy development. Further recommendations in light of the 2014 policy changes are set out below.

4. Migrant workers must be provided with protection for secure status so that they are able to file complaints and raise concerns about rights violations without risking deportation. The security of their status must enable them to remain in Canada until any legal proceedings relating to such rights violations are finally determined. This must ensure protection for security of status, security of housing and security of employment under open permits while any legal dispute about their employment is ongoing.
5. An employer's failure to comply with an LMIA must not jeopardize a migrant worker's right to remain and work in Canada.
6. Federal and provincial collaboration is necessary to provide multi-dimensional protection against exploitation through transnational labour recruiting.
7. Provincial legislation must be adopted that aims to eliminate exploitation through transnational labour recruitment by establishing a proactive system of employer registration, recruiter licensing and proactive government inspection, investigation and enforcement in line with the best practices adopted under Manitoba's *Worker Recruitment and Protection Act* and *Regulations*. Such protection must also address exploitative recruitment of international students.
8. Employers must be jointly and severally liable with recruiters for rights violations that relate to migrant worker recruitment, including but not limited to the charging of recruitment fees and/or requiring workers to pay LMIA fees, travel costs or other costs that are properly borne by the employer.
9. Tied work permits should be eliminated. Work permits should be open permits, or at the very least sector-specific, or province-specific. In addition, work permits must be framed in a way that allows a worker to engage in alternate work or modified duties in the event of injury or illness.
10. Hard caps on the number of migrant workers in individual workplaces must be eliminated because they set arbitrary thresholds that may be unresponsive to actual labour requirements and because they stigmatize and marginalize migrant workers within a workplace.
11. Migrant workers in all sectors — including caregiving and agriculture — must have access to effective and meaningful legal protection for the right to unionize and bargain collectively. Where appropriate, models for

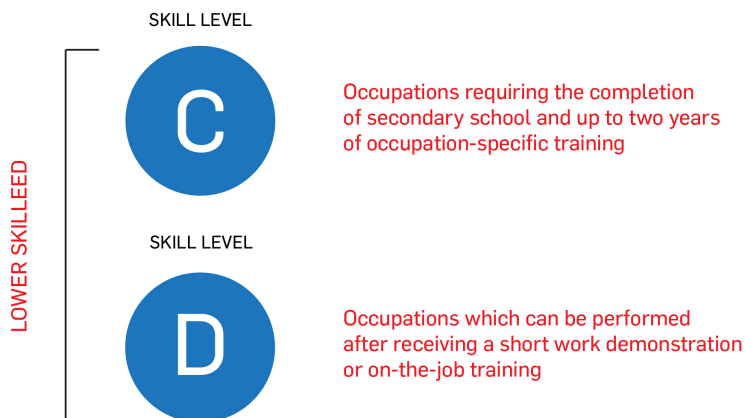
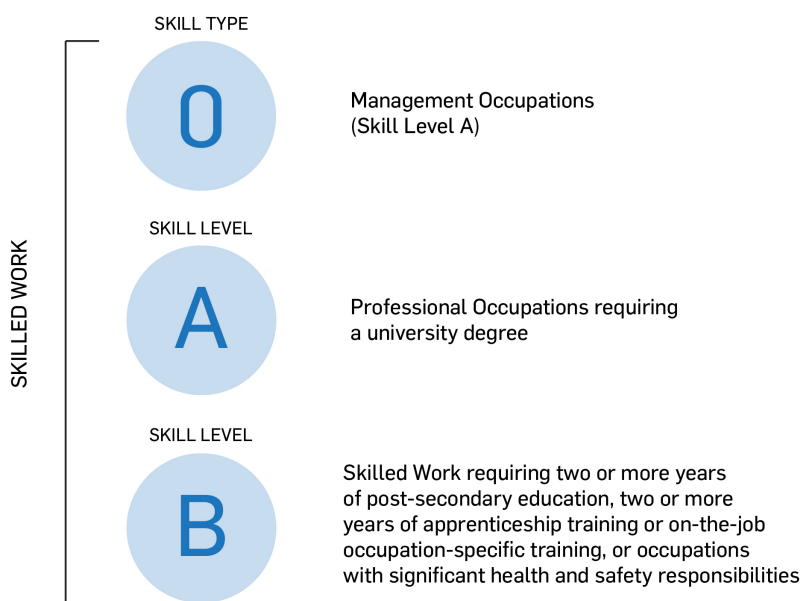
broader based bargaining must be developed to ensure that the rights are effective and accessible in practice.

12. Resources must be devoted to prioritize and deliver broad proactive enforcement of employment standards in sectors and workplaces employing migrant workers.
13. Caregivers' security of access to permanent residence must be restored so that all caregivers under the Caregiver Program have a certain path to permanent residence.
14. The 4-in/4-out rule must be repealed. Migrant workers who were required to leave Canada as a result of this rule's application should have an opportunity to apply for permanent residence.

APPENDIX A

THE NATIONAL OCCUPATIONAL CLASSIFICATION (NOC) SYSTEM

NATIONAL OCCUPATION CLASSIFICATION (NOC) MATRIX



Under Canada's system for admitting economic class immigrants,¹⁴⁷ a migrant worker's and potential immigrant's eligibility to access routes to permanent residence depends upon the value attributed to their occupational skills. The National Occupational Classification¹⁴⁸ ("NOC") system rates occupations on a matrix with ten different skill types (labelled 0 to 9) and four different skill levels (labelled A to D). The five categories relevant to the immigration system are 0, A and B (which the immigration system categorizes as "skilled" labour) and C and D (which the immigration system categorizes as "low skilled" labour).

¹⁴⁷ Each year, the federal government sets targets for anticipated immigration levels. Economic class immigrants form the largest category (roughly 65%), followed by family class (roughly 25%) and refugee class (roughly 10%). In 2014, Canada admitted 165,088 economic class immigrants (principal applicants, spouses and dependents), 66,659 family class immigrants, 23,286 refugee class and 5,367 other immigrants: Citizenship and Immigration Canada, *Facts and Figures: Immigrant Overview Permanent Residents* (Ottawa: Citizenship and Immigration Canada, 2014), p. 5. The targets for 2015 are 181,300 economic class; 68,000 family class; and 29,800 refugee class: Citizenship and Immigration Canada, news release, "Ensuring Long-Term Prosperity and Economic Growth" (31 October 2014).

¹⁴⁸ Statistics Canada, *National Occupational Classification (NOC) 2011*. Statistics Canada Catalogue No. 12-583-X. (Ottawa: January 2012)

APPENDIX B

ROUTES TO PERMANENT RESIDENCE FOR ECONOMIC CLASS IMMIGRANTS

In January 2015, the federal government introduced a new process called “Express Entry” to manage applications for permanent immigration to Canada.¹⁴⁹ However, the underlying economic immigration programs continue to determine eligibility with reference to the NOC matrix.

Under the *Immigration and Refugee Protection Act*, there are now seven¹⁵⁰ different immigration programs¹⁵¹ that provide pathways to permanent residence for principal applicants employed in Managerial (NOC Type o), Professional (NOC Level A) and Skilled Occupations (NOC Level B):

- (a) The **Federal Skilled Worker** class is open only to candidates with at least one full year of experience in managerial, professional or skilled occupations (NOC o, A and B). As of 1 January 2015, the class is no longer restricted to a specific list of occupations in demand and there are no longer caps on the number of applicants per occupation.
- (b) The **Federal Skilled Trades** class is a new immigration stream that was introduced in 2013.¹⁵² It provides a route to permanent immigration for workers in six specific NOC categories of skilled trades and occupations, each of which is rated at Skill Level B.¹⁵³ To be eligible under this stream, a worker must meet designated thresholds for English or French language skills,¹⁵⁴ have the equivalent of two years full-time work within the last five years in the relevant skilled trade,

¹⁴⁹ *Ministerial Instructions for the Express Entry Application Management System* (28 November 2014), 148:10 Canada Gazette Part I (1 December 2014). The Express Entry system will be addressed in more detail below with reference to workers experience of recruitment.

¹⁵⁰ The seventh of these programs — the Provincial Nominee Program — itself has eleven different provincial and territorial variations.

¹⁵¹ In addition, Quebec exercises its authority to govern immigration into that province.

¹⁵² *Immigration and Refugee Protection Regulations*, s. 87.2

¹⁵³ *Immigration and Refugee Protection Regulations*, s. 87.2(1). Occupations in the following NOC groups are eligible for this program: Major Group 72, industrial, electrical and construction trades; Major Group 73, maintenance and equipment operation trades; Major Group 82, supervisors and technical occupations in natural resources, agriculture and related production; Major Group 92, processing, manufacturing and utilities supervisors and central control operators; Minor Group 632, chefs and cooks; and Minor Group 633, butchers and bakers.

¹⁵⁴ Applicants must take an approved language test and meet Canadian Language Benchmark 5 for speaking and listening and Benchmark 4 for reading and writing.

meet the employment requirements for the trade other than having the provincial certification of qualification, and have a Canadian job offer for at least one year of full-time work in that trade.

- (c) The **Canadian Experience Class** continues to provide a two-step pathway to permanent residence for workers who have first worked in Canada with temporary status in NOC O, A or B rated positions. The threshold for skilled workers to apply through this program was lowered in 2013 so that an applicant need only have the equivalent of one year — rather than two years — of full-time employment in Canada in positions rated at NOC O, A or B.¹⁵⁵ The applicants must also meet designated thresholds for English or French language skills.¹⁵⁶
- (d) The **Self-Employed Class** provides a route to permanent residence for applicants who have relevant experience in cultural activities or athletics at a world-class level, who have been self-employed in cultural activities or athletics, or who have experience in managing a farm.
- (e) The **Start-Up Visa Class** was introduced in 2013.¹⁵⁷ It provides a route to permanent residence for entrepreneurs with the ability to establish businesses in Canada that create jobs in Canada and that compete internationally. Applicants must have a letter of support proving that the proposed business is supported by a designated organization (designated venture capital fund, designated angel investor group, or designated business incubator). The business must meet specified business ownership criteria, the applicants must meet designated thresholds for English or French language skills and the applicants must have sufficient funds to independently support themselves and their families upon arrival.
- (f) The **Immigrant Investor Venture Capital Program**¹⁵⁸ opened in 2015 and provides an opportunity for a maximum of 60 investors to immigrate based on their willingness to make an at-risk investment in a venture capital fund investing in Canadian start-ups. Applicants must have a personal net worth of at least \$10 million that was acquired through lawful private sector business or investment activity and must

¹⁵⁵ Any period of self-employment or employment while an applicant was enrolled as a full-time student does not count towards the 1 year Canadian work experience: *IRPR*, s. 87.1(3)(a)

¹⁵⁶ Applicants must take an approved language test and meet Canadian Language Benchmark 7 for NOC O or A positions and Benchmark 5 for NOC B positions.

¹⁵⁷ The program was originally introduced by way of Ministerial Instruction on 31 March 2013 although those Ministerial Instructions have been amended since. The most current version is *Ministerial Instruction Respecting the Start-Up Business Class, 2015* (12 May 2015) 149:21 Canada Gazette Part I (23 May 2015)

¹⁵⁸ *Ministerial Instructions Respecting the Immigrant Investor Venture Capital Class* (14 January 2015), 149:4 Canada Gazette (24 January 2015).

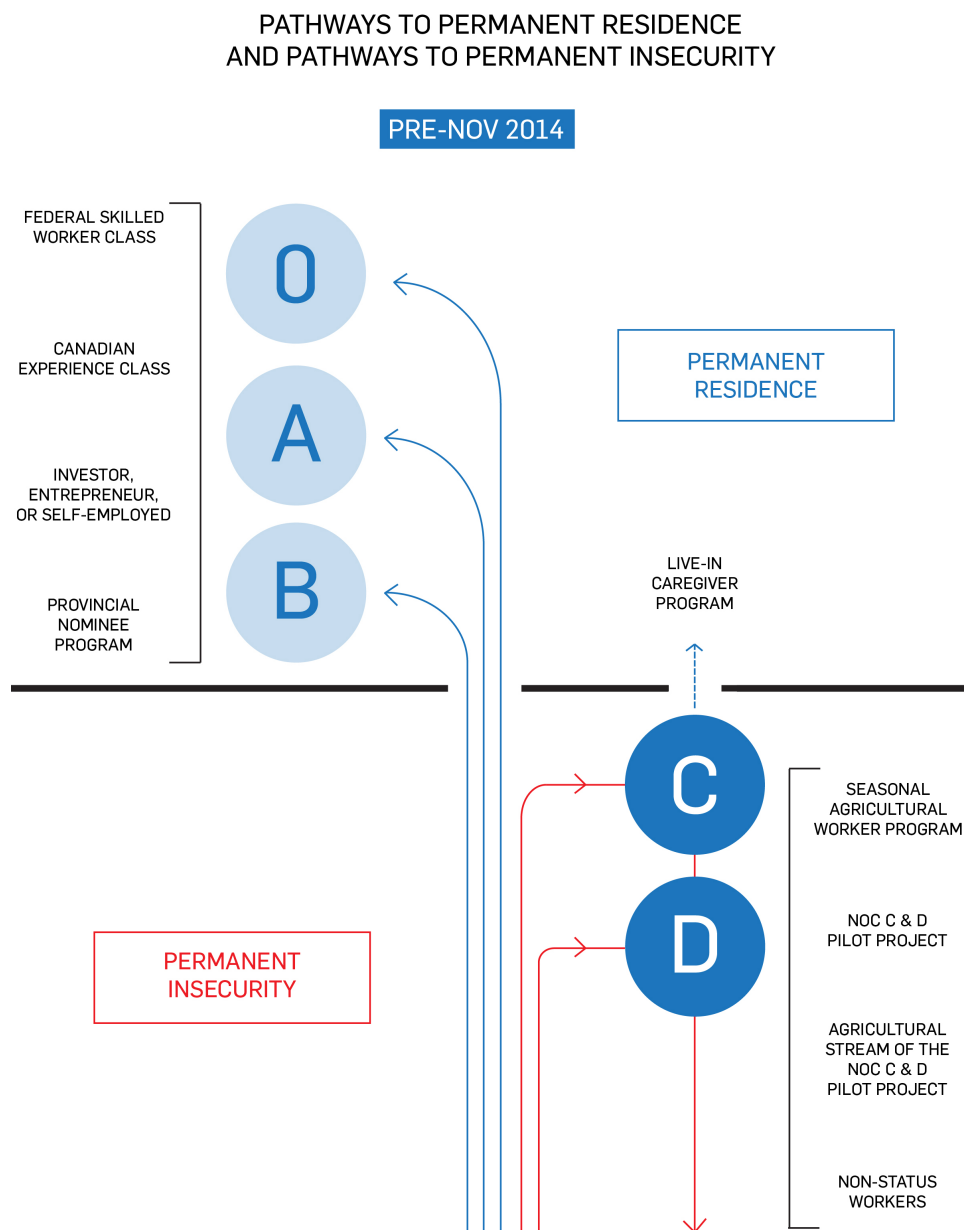
be willing to invest at least \$2 million for about 15 years in the Immigrant Investor Venture Capital Fund.

- (g) **Provincial Nominee Programs** exist in eleven provinces and territories under which the province or territory can nominate economic immigrants for permanent residence. The province can either nominate an applicant who is outside Canada or nominate an applicant who is working in Canada with temporary immigration status. The terms of the programs vary but in most cases are open only to skilled workers in NOC o, A or B occupations. For example, the Ontario Immigrant Nominee Program (OINP) allows the province to nominate up to 5,200 applicants each year who have approved job offers for permanent full-time, full year work in the province in NOC o, A or B occupations.¹⁵⁹

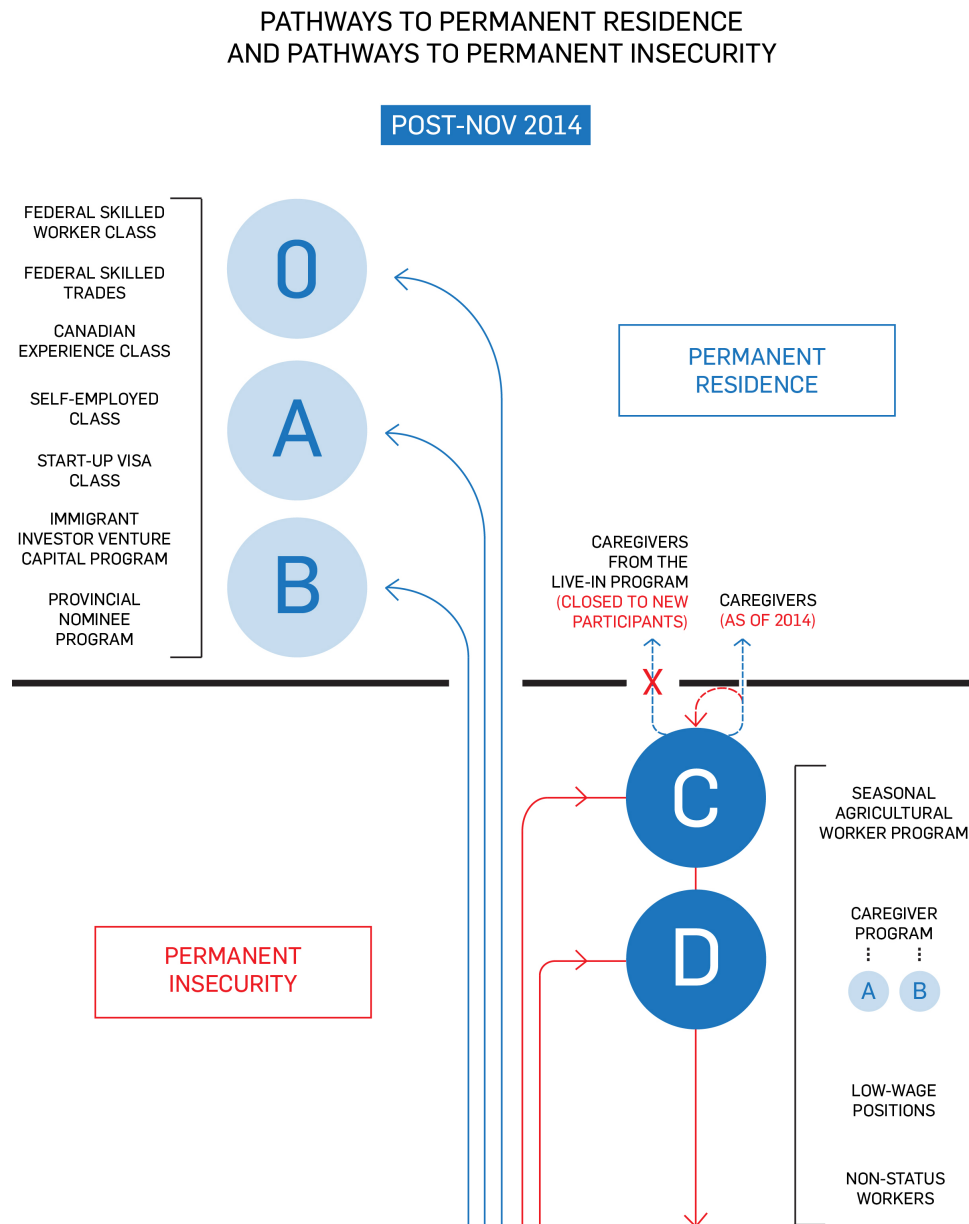
While there are multiple routes to permanence for NOC o, A and B workers, the immigration system provides only very restricted opportunities for workers who perform Semi-Skilled or Lower Skilled Occupations (NOC Levels C and D) to immigrate in their own right and secure permanent resident status through provincial nominee programs. No new pathways to permanent residence have been created for Workers in NOC C and D rated occupations. Meanwhile, the one clear pathway to permanence for NOC C level workers that existed under the former Live-in Caregiver Program has been constricted under the new Caregiver Program.

¹⁵⁹ Ontario Immigrant Nominee Program: http://www.ontarioimmigration.ca/en/pnp/OI_PNPABOUT.html (accessed 23 September 2015).

Pathways Pre-November 2014



Pathways Post-November 2014



Canada's Choice

Decent work or entrenched exploitation for Canada's migrant workers?

Toronto: June 2016

This report was prepared by: Fay Faraday

Graphics by: Meredith Holigroski and Mercedes Sharpe Zayas

ISBN: 978-1-927906-11-8

Published by:

The George Cedric Metcalf Charitable Foundation
38 Madison Avenue
Toronto, Ontario M5R 2S1

Phone: (416) 926-0366

Fax: (416) 926-0370

E-mail: info@metcalffoundation.com

Website: metcalffoundation.com

This work is made available under the Creative Commons
Attribution-Non-Commercial-No Derivative Works 2.5
Canada License. To view a copy of this license, visit
<http://creativecommons.org/licenses/by-nc-nd/2.5/ca/>