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“Silence Means Yes Here in Canada”: Precarious Migrants, Work and the Law

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A growing number of workers in the Canadian labour force have precarious migration status as participants in authorized temporary work programs, or have no status at all. This article reports the findings of a study that interviewed precarious migrants in British Columbia, and employees of agencies which provided services to them, with a view to assessing the impact of migration status on their conditions of work and on the practical availability to them of legal protections set out in provincial legislation on employment standards, occupational health and safety, and workers' compensation. Data gathered from the interviews indicate that precarious migration status was associated with deskilling, decreased job security and mobility, illegally low pay and long hours, and various health and safety risks. Provincial laws and policies regulating the workplace do not exclude anyone from protection on the basis of migration status. However, federal law gives employers a great deal of employer discretion over the status of temporary foreign workers, aggravating the employer-employee power imbalance and making those workers fearful of seeking redress for violations of their rights under provincial law. The author suggests that local initiatives emphasizing the provision of access to services “without fear” for workers with precarious migration status, or with no status, can help to overcome their marginalization and recognize their place in Canadian society.

1. INTRODUCTION

The increase in temporary labour migration into Canada, and the working conditions of temporary foreign workers, have been the subject of much recent attention and debate in public and policy spheres. This article discusses the results of a study conducted with migrants and migrant-serving agencies in Vancouver, British Columbia, and which focused on the relationship of migration status to conditions of work as reported by migrants and on the availability of legal protections to these workers. Part 2 provides an overview of available federal data on the numbers and types of precarious migrants, and introduces the

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concept of labour and migration precariousness. Part 3 explains how this study arose, and describes the methodology used to recruit and interview participants, code the data, and structure the analysis. Part 4 explores the theme of deskilling, as reflected in the discrepancy between migrant workers' earlier training and the occupations they found in Canada. Part 5 looks at how the difficulty in obtaining work permits, especially open work permits, affects job security and mobility. Part 6 treats the impact of precariousness on pay, working hours and job duties, and offers data to the effect that statutory minimum standards may not be sufficient to protect precarious migrants. Part 7 focuses on safety and health concerns at work, and reviews data indicating that although migrant workers are not formally excluded from employment standards or workplace safety legislation, their immigration status in fact serves as a barrier to protection. Part 8 considers available forms of legal redress, and limitations on access to them by precarious migrant workers. The Conclusion argues that while formal rights-based approaches remain valuable, advocacy strategies which directly address migrants' membership in the workforce at a local level have great potential for improving their legal and practical entitlements, and enhancing their membership in Canadian society.

2. PRECARIOUS MIGRANTS IN CANADA – AN OVERVIEW

There is good reason to believe that at least 700,000 people in Canada have temporary immigration status of some type, and that this number has increased over the past ten years. Federal government data indicate that as of December 1, 2012, there were 773,758 temporary residents in Canada, of whom 338,213 were authorized foreign workers. The former number includes visitors and students who did not have work permits, but excludes individuals who were in Canada without legal status or whose legal status had lapsed. The same data show an annual increase in the number of authorized foreign workers in every year since 1996, as well as an increase in the proportion of foreign workers relative to economic class permanent immigrants.¹

1 Citizenship and Immigration Canada, *Digital Library: Facts and Figures, Immigration Overview — Permanent and Temporary Residents* (Permanent Residents by Gender and Category, Temporary Residents by Yearly Status) (Ottawa: CIC, 2012). Note the exception of the years 2000 and 2001, in which the number of authorized foreign workers is reported as being exactly the same.

Annual figures indicating an increase in people without permanent resident status do not show the number who were working without such status, nor do they capture unauthorized work or migration, but they do indicate that there has been an increase in temporary migration in comparison to permanent immigration.² Although migration status and labour market participation often shift during the course of a person's stay in Canada, there is a clear line between those who have permanent resident status and those who do not. Furthermore, recent legal and policy shifts form part of an ongoing pattern in which this number is likely to continue to increase,³ especially for migrants at the more vulnerable end of the spectrum.⁴

Leah Vosko has described the idea of precariousness in the Canadian labour market (as it applies to all workers, not only migrant workers) in terms of "limited social benefits and statutory entitlements, job insecurity, low wages, and high risks of ill-health."⁵ She notes that precariousness is aggravated by particular economic and political conditions, and by social stratification on the basis of such factors as gender and race.⁶ Migration status has a similar effect, in a labour market that is increasingly precarious for all workers. Furthermore, migration status is directly linked to inferior conditions

2 *Ibid.* The terms "immigrant" and "immigration" are used in this paper to denote movement that is authorized by a grant of permanent status from the receiving state. The terms "migrant" and "migration" refer to movement that may be temporary or permanent, and authorized or unauthorized, but is not subject to a grant of permanent status by the receiving state. "Authorization" refers to a grant of temporary or permanent status from the receiving state. Much existing scholarship deploys a similar distinction and usage: see e.g. Geraldine Pratt, "From Migrant to Immigrant: Domestic Workers Settle in Vancouver, Canada" in Lise Nelson & Joni Seager, eds, *A Companion to Feminist Geography* (Malden, MA: Blackwell, 2005) 123.

3 Sarah Marsden, "Assessing the Regulation of Temporary Foreign Workers in Canada" (2011) 49:1 Osgoode Hall LJ 39.

4 Judy Fudge & Fiona MacPhail, "The Temporary Foreign Worker Program in Canada: Low-Skilled Workers as an Extreme Form of Flexible Labor" (2009) 31 Comp Lab L & Pol'y J 5 at 15-21.

5 Leah F Vosko, "Precarious Employment: Towards an Improved Understanding of Labour Market Insecurity" in Leah F Vosko, ed, *Precarious Employment: Understanding Labour Market Insecurity in Canada* (Montreal: McGill-Queen's University Press, 2005) 3.

6 *Ibid.*

of work;⁷ even authorized temporary foreign workers have limited labour mobility, through the operation of the *Immigration and Refugee Protection Regulations*,⁸ as well as lesser entitlements to health and employment insurance.⁹ Wage disparities, poor working conditions, and inability to unionize are well documented in the experiences of temporary foreign workers,¹⁰ as are the detrimental social and health impacts of “falling out of status.”¹¹

Sociologist Luin Goldring and her colleagues provide a framework for understanding precarious migration status as an alternative to the dichotomy of legal and illegal (or documented and undocumented) migration:

In our view, precarious status is marked by the absence of any of the following elements normally associated with permanent residence (and citizenship) in Canada: (1) work authorization, (2) the right to remain permanently in the

7 Bridget Anderson, “Migration, immigration controls and the fashioning of precarious workers” (2010) 24:2 *Work, Employment and Society* 300 at 306; Judy Fudge, “Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers” (2012) 34 *Comp Lab L & Pol’y J* 95 at 96.

8 *Immigration and Refugee Protection Regulations*, SOR/2002-227, s 185(b)(iii) [*Immigration Regulations*].

9 See e.g. *Health Insurance Act*, RSO 1990, c H.6. Status-based distinctions may also be due to conditions of the work permit. In the case of access to employment insurance, for example, foreign workers may have more difficulty meeting the statutory requirement of “availab[ility] for work” if their work permit is bonded to one employer (*Employment Insurance Act*, SC 1996, c 23, s 18).

10 See e.g. Malcolm Sargeant & Eric Tucker, “Layers of vulnerability in occupational safety and health for migrant workers: case studies from Canada and the UK” (2009) 7:2 *Policy and Practice in Health and Safety* 51; Kerry Preibisch, “Pick-Your-Own-Labor: Migrant Workers and Flexibility in Canadian Agriculture” (2010) 44:2 *International Migration Review* 404; Employment and Skills Development Canada, “Hiring Seasonal Agricultural Workers,” online: <<http://www.hrsdc.gc.ca>>; Leigh Binford, “From Fields of Power to Fields of Sweat: The dual process of constructing temporary migrant labour in Mexico and Canada” (2009) 30:3 *Third World Quarterly* 503; Employment and Social Development Canada, “Hiring Live-in Caregivers and Nannies,” online: <<http://www.hrsdc.gc.ca>>; Ping-Chun Hsiung & Katherine Nichol, “Policies on and Experiences of Foreign Domestic Workers in Canada” (2010) 4:9 *Sociology Compass* 766.

11 Samia Saad, “The Cost of Invisibility: The Psychosocial Impact of Falling Out of Status” in Luin Goldring & Patricia Landolt, eds, *Producing and Negotiating Non-citizenship: Precarious Legal Status in Canada* (Toronto: University of Toronto Press, 2013) 137 at 137.

country (residence permit), (3) not depending on a third party for one's right to be in Canada (such as a sponsoring spouse or employer), and (4) social citizenship rights available to permanent residents (e.g. public education and public health coverage).¹²

This framework brings many legally distinct migrant situations together on a single spectrum, on the basis of their less-than-permanent status and the resulting differential entitlement to benefits rather than on the basis of the presence or absence of legal authorization.¹³ The poor working conditions associated with precarious migration status are not unique to migrants, but can be understood as one manifestation of how workers as a whole are subject to labour precariousness.¹⁴

12 Luin Goldring, Carolina Berinstein & Judith K Bernhard, “Institutionalizing precarious migratory status in Canada” (2009) 13:3 *Citizenship Studies* 239 at 240.

13 For example, a sponsored spouse waiting for approval within Canada can be understood as having precarious status until she receives permanent residency, as can an authorized temporary foreign worker with a work permit which may be revoked if he ceases to work for the single employer named on the permit. A refugee claimant in Canada waiting for determination of her claim would fit within the definition of a precarious migrant, as would migrants working without permits after failing to extend their stay, or migrants who never had any type of permit authorizing their stay.

14 While the focus of this article is on the working life of precarious migrants, multiple commentators have noted the increasing prevalence of labour market precariousness for both permanent and migrant workers, in Canada and globally, in the form of casual, contract and temporary work. Sylvia Fuller & Leah F Vosko, “Temporary Employment and Social Inequality in Canada: Exploring Intersections of Gender, Race and Immigration Status” (2008) 88:1 *Social Indicators Research* 31; Martha MacDonald, “Income Security for Women: What about Employment Insurance?” in Marjorie Griffin Cohen & Jane Pulkingham, eds, *Public Policy for Women in Canada: The State, Income Security and Labour Market Issues* (Toronto: University of Toronto Press, 2009) 251; Leah F Vosko, *Managing the Margins: Gender, Citizenship and the International Regulation of Precarious Employment* (London: Oxford University Press, 2009); Guy Standing, “The Precariat: From Denizens to Citizens?” (2012) 44:4 *Polity* 588. Landolt and Goldring’s recent research also reveals a complex interrelationship between precarious work and precarious migration status. Patricia Landolt & Luin Goldring, “The Social Production of Non-citizenship: The Consequences of Intersecting Trajectories of Precarious Legal Status and Precarious Work” in Patricia Landolt & Luin Goldring, eds, *Producing and Negotiating Non-Citizenship: Precarious Legal Status in Canada* (Toronto: University of Toronto Press, 2013) 154.

One of the few available data sources on temporary residents' engagement with the labour market is the Canada Revenue Agency's record of individual tax filers whose returns are based on a temporary Social Insurance Number (SIN). These figures show that more and more people without permanent status are filing tax returns: in 2004, 193,250 returns were filed by people with temporary SINs, and by 2010 that number had increased to 338,840.¹⁵ While they refer primarily to individuals who hold work permits, the figures are not disaggregated by the type of permit but group together many types of workers. These range from corporate executives and entrepreneurs to low-skilled employees, participants in the seasonal agricultural worker and live-in caregiver programs, and open work permit holders. The impact of temporary status can vary widely among these categories. Nor do the Canada Revenue Agency figures include individuals without status, or those with status who may be working without SINs. Therefore, although those figures are useful in establishing an increase in the number of tax filers who do not hold permanent status and are therefore potentially subject to status precariousness, they do not capture all migrants who are subject to such precariousness and they capture some who are not subject to it. These numbers show an increasing number of nonpermanent workers in Canada, but their utility is limited in terms of measuring the impact of migration status.

Data collected by Citizenship and Immigration Canada confirm that the number of work permits issued for low-skilled occupations is growing in proportion with the number of tax returns filed by people without permanent status. While those data are more precise than the Canada Revenue Agency figures in capturing the increase in the number of workers who are in low-skill fields and are therefore less likely to obtain permanent resident status under federal immigration law and policy,¹⁶ they too provide only a broad indication of the extent of migrant precariousness.

There is a compelling need for better quantitative data on the numbers, locations, entry points, and social and material well-being of

15 Data released to the author by Canada Revenue Agency, March 23, 2011, as part of Access to Information Request A-054461, requesting numbers of individual tax filers with a SIN starting with 9, which denotes persons who are neither citizens nor permanent residents.

16 Marsden, *supra* note 3.

precarious migrants in Canada, particularly undocumented migrants. At best, there exist only guesses about the exact numbers and locations of people who were or are currently without status. This study does not seek to provide such data. However, by canvassing the experiences of migrants across various temporary migration programs, the study provides a qualitative example of how migration status affects working conditions, labour mobility and access to state-based worker protections.

3. METHODOLOGY AND CONTEXT

(a) Recruitment of Participants, Collection and Analysis of Data, and Limitations of the Study

I was drawn to this research through my involvement as a lawyer and advocate in immigration and refugee law, and particularly through my interaction with people whose status fell short of permanent residence. Several aspects of that experience compelled me to learn more. First, it was clear that there were many ways in which people could have less than full legal status — ways intimately related to the operation of law but not specifically articulated in statutes or policies. It seemed to me that there was more to know about how legal status can shape and govern people’s lives than one could learn by looking at entitlements and procedures set by law. Second, migration status was clearly a major concern for the people I met. Most of the goals that clients articulated to me pertained to obtaining status, making their status more stable, or moving from temporary to permanent status. Third, while I was initially trained to work mainly with federal immigration structures, it was evident to me that the experience of nonpermanent migrants without permanent status brought them into multiple legal spheres, including workplace law, which is mainly within provincial jurisdiction and operates separately from federal immigration law. Finally, I was troubled by a contradiction which arose repeatedly in peoples’ experience: both the state and employers seemed to rely on migrants for their labour, but the migrants had difficulty in obtaining equal treatment in the workplace. The primary emphasis of my study was therefore on the experience and aims of migrants as subjects governed by the law, rather than on the law’s prerogative in governing them.

In structuring this study, I used sociologist Dorothy Smith's institutional ethnography as a primary methodology. Institutional ethnography commits the researcher to start with the actualities of life for a person or group, and moves from there to consider how that experience is embedded in social relations and institutional functioning.¹⁷ I conducted semi-structured interviews with 28 migrants, and with five individuals employed by migrant-serving agencies. The interviews canvassed issues of migration status, work, access to legal protections, and access to public services such as health care and education. Participant data gathered through these interviews then informed the collection of data from other sources, such as policy materials, legal texts, and case law from multiple institutional sites, including the institutions responsible for protecting worker health and safety and other workplace rights.

Migrant participants in this study came from various cultural, national and class backgrounds.¹⁸ Their legal status varied from completely undocumented to permanent residence and citizenship — but all were workers. The chart set out in Appendix A details the migration status, country of origin, sex, and type of work done by each migrant who participated in the study.

In recruiting participants, I used a purposive sampling strategy. Participants were recruited through third parties, through multilingual posters at migrant-serving agency sites and high-traffic public areas, and through referrals from participants already in the study. Recruitment

17 Dorothy E Smith, *Institutional Ethnography: A Sociology for People* (Lanham, MD: AltaMira Press, 2005).

18 At some point before the time of the interview, all 28 migrant participants had been in Canada with no legal status or with temporary status. Four had entered Canada with no status. Each of the other 24 had entered with some kind of status, through a work permit, study permit or visitor visa. Three of the four who entered without status claimed refugee status at some point after entering, and two of them eventually obtained permanent residence after a positive refugee determination. Of the 24 who entered Canada with legal status, 13 entered with a work permit, five with a visitor visa only, and two with a study permit. Four came in initially with a visitor visa, but later re-entered with a work permit. All of the 13 who entered with a work permit were in positions which required a labour market opinion, held "closed" work permits bonded to a single employer and job, and were in jobs classified as "low-skilled." Twelve of the 13 were in the Live-in Caregiver Program, and one was in the Seasonal Agricultural Worker Program.

letters were written in English and distributed by email to contacts in the legal community, to paralegal advocates, and to migrant-serving agencies. Posters and consent forms were written in English, Tagalog, Spanish, Punjabi and simplified Chinese. I also used snowball sampling: study participants were offered copies of the recruitment letter and poster in the appropriate language, to be passed on to others.

As participants, I chose individuals who identified themselves as migrants who had experienced uncertain status or lack of status, whether in the past or present, and had encountered difficulties in obtaining services or difficulties at work. I also recruited a few representatives of migrant-serving agencies, because I wanted to speak not only with people who had less-than-permanent status but also with people who had worked closely with them. However, I limited the number of agency participants to five, to ensure that a strong majority of participants were migrants.

For migrants, I framed questions that focused on their direct experiences. For agency representatives, I pursued the same general topics but asked questions focusing on their clients' experiences rather than their own. To give a more precise idea of the questions asked of the interviewees, a sample interview script (which was generally followed in each interview) is set out in Appendix B.

Confidentiality was of primary concern to migrant participants, and was carefully protected due to the risk that they might be identified as unauthorized migrants. Consequences of enforcement action for migrants engaged in any unauthorized activity could include detention, deportation and charges under the *Immigration and Refugee Protection Act*, as well as loss of work and detrimental impact on social entitlements. Confidentiality concerns were also relevant to agency representatives, who could be perceived as being complicit in providing assistance to unauthorized migrants. In transcripts and all other documents, participants were identified only by a number and by the group to which they belonged. Participants were never asked to provide names or other identifying information, and if any such information was given, it was permanently redacted from the interview transcripts. Any potentially identifying information found at later stages was generalized beyond the point of recognition.

There are some important limitations in the sample relied on in this study. First, as the sample was established through self-selection and referrals, it was not random, and may not be representative of all

precarious migrant workers. Second, the study cohort may disproportionately include individuals who were less at risk, or who had other specific reasons for being willing to participate. We do not know the attributes of those who did not participate, or why they did not participate, but the perception of risk was probably a major factor in that regard. If that is true, migrants who had no legal status, or who had already experienced immigration enforcement problems, may be under-represented in the study. Third, due regard for the potential risk to migrants without legal status restricted the scope of questioning, precluding the provision of information on such matters as the names of specific employers or specific work sites. Finally, such factors precluded any attempt to obtain the employers' version of what participants reported in their interviews. In any event, this study seeks to give voice to migrant workers with precarious status, and to use their testimony to provide perspective on the operation of the law, rather than to weigh their accounts against those of their employers.

(b) The Link between Work and Precariousness

In deciding how to code the data and structure the analysis, I focused primarily on the priorities and specific themes articulated by participants in the interviews. Paid work was clearly a primary axis of their lives and experiences. Participants needed it to meet their basic living costs in Canada, and often to do the same for family members abroad. They emphasized the difficulties they encountered with regard to hours of work, pay, health and safety at work, job security and job mobility, and they spoke of how their own trajectories had changed, often from skilled to unskilled labour, when they came to Canada. A dominant theme was the power disparity they encountered in employment relationships, and its frequent association with working conditions ranging from inadequate to abusive.

Many of the workplace problems described by participants are in principle addressed by rights-based protection through two main legal avenues within provincial jurisdiction: the employment standards regime and the workers' compensation/occupational health and safety regime. In British Columbia, the statutes governing those systems do not exclude workers on the basis of status.¹⁹ Workers'

19 *Employment Standards Act*, RSBC 1996, c 113, s 1(1) [ESA]; *Workers Compensation Act*, RSBC 1996, c 492 s 1 [WCA].

compensation policy explicitly provides for the redress of workers' complaints regardless of migration status.²⁰ All migrant participants in the study reported incidents or conditions which would in some way have breached employment standards or workers' compensation law, but few had actually interacted with the state to obtain redress. Those who did seek to invoke state protections found access to them to be impaired or delayed.

For study participants, their migration status affected access to legal rights and protections for paid work in two main ways. First, provincial law and policy appear to assume that all workers will have the labour mobility and other advantages enjoyed by permanent residents and citizens. This leads to differential effects in the application of provincial legislation, by failing to account for the presence of a class of workers whose job security and mobility are limited by federal immigration law. Second, the federal law makes the employer-employee power disparity categorically greater for precarious migrant workers, whose legal status is often contingent on an employer's decision to endorse a worker through confirmation of employment or through a Labour Market Opinion (LMO) justifying the worker's place in the Canadian economy. This at once makes poor working conditions more likely and worker reporting or redress less likely. It resonates with Fudge and MacPhail's characterization of the labour of precarious migrants as “an extreme form of flexible labor.”²¹

4. LABOUR TRAJECTORIES AND DESKILLING

Migrant worker participants were asked about the type of work they were doing in Canada, as well as their work and educational experiences before entering the country. The vast majority reported that they were doing low-skilled work, which in Canada generally denotes work that does not require post-secondary education.²²

20 Terrance J Bogyo, “WorkSafeBC's policy, legislation and responses to OHS and newcomer workers” (February 2009), online: Institute for Work & Health <<http://www.iwh.on.ca>>.

21 Fudge & MacPhail, *supra* note 4 at 5. That article deals specifically with the low-skilled worker program in Canada, but the observations it makes are confirmed by recent scholarship on workers with precarious migration status.

22 Human Resources and Skills Development Canada, “Introduction to the National Occupational Classification (NOC) 2011,” online: <<http://www5.hrsdc.gc.ca>>.

However, many of these participants also disclosed that they had received post-secondary education of some kind, whether in a trade or in college or university. Agency representatives confirmed that this was the case in their clients' experience.

The primary labour segments in which migrant participants had worked in Canada were live-in and live-out domestic work, childcare, construction/painting/site labour, food service and kitchen work, administrative assistance and agriculture. Domestic and childcare workers were all women. Workers in construction-related fields and agriculture were almost all men, and those in food service, kitchen work and administrative assistance were women. Only two migrant participants identified themselves as working in high-skilled fields in Canada. One was a woman who had student status and was working as a researcher; the other was a man who had come to Canada on a high-skilled work permit in order to work in a business he partly owned.

Migrant participants who came to Canada under the live-in caregiver program²³ made up the majority of the respondents who were in domestic work. Before coming to Canada, most had educational backgrounds and work experience associated with high-skilled work; many had university degrees (in business administration, business English, nursing, education and medicine) and had worked as nurses, teachers, doctors and export consultants.²⁴ Their self-reports are consistent with previous research confirming the prevalence of university credentials among live-in caregivers.²⁵ Deskilling has been found to persist after the acquisition of permanent status, and to affect not only

23 In Ontario, specific legislation aims to provide certain protections to live-in caregivers. *Employment Protection for Foreign Nationals Act (Live-in Caregivers and Others)*, SO 2009, c 32. There is no equivalent legislation in British Columbia.

24 The live-in caregiver program requires applicants to have completed the equivalent of a Canadian secondary school education (*Immigration Regulations*, *supra* note 8, s 112(b)).

25 Geraldine Pratt, "From Registered Nurse to Registered Nanny: Discursive Geographies of Filipina Domestic Workers in Vancouver, B.C." (1999) 75:3 *Economic Geography* 215 at 227; Philip Kelly, "Filipinos in Canada: Economic Dimensions of Immigration and Settlement," online: (2006) CERIS Working Paper 48 at 18-19 <<http://www.ceris.metropolis.net>>.

the caregiver herself but also her family members upon reunification in Canada.²⁶

Migrant participants who worked in construction, painting, warehouse labour and similar jobs in Canada disclosed backgrounds that included human resource management training at the university level, skilled trades certificates, and financial management experience. Several workers ascribed the shift to lower-skilled work to their inability to speak English well enough or to the lack of opportunity to convert their certifications and education to a format recognized in the Canadian labour market.

Workers without authorization reported that they were working in labour segments where informal labour markets were more readily accessible, notably in construction and related work. On the other hand, certain types of work are formally associated with particular ways of acquiring status through regulated work permit programs. For example, both the Live-in Caregiver Program and the Seasonal Agricultural Worker Program specifically recruit foreign workers into a certain labour segment, and for the most part limit them to working with named employers. Workers outside of these programs who hold closed work permits must also work for a particular employer. Although those workers are not specifically restricted to a certain labour segment, the requirements for changing a work permit are onerous and rely heavily on employer collaboration. As for those with open work permits, they have relatively more labour mobility, but the types of work that are in fact open to them may be limited by their visibility as temporary work permit holders, all of whose SINs start with the number 9.

Foreign worker programs in Canada and elsewhere are commonly associated with work that is dangerous, dirty or difficult (sometimes referred to as 3D labour).²⁷ This is often work which cannot be done offshore or is not well-paid enough to attract permanent

26 Geraldine Pratt, Philippine Women Centre & Ugnayan ng Kabataang Pilipino sa Canada, “Deskilling Across the Generations” (2008) Metropolis Working Paper Series No 08-06 at 16.

27 See e.g. Abigail B Bakan & Daiva K Stasiulis, “Marginalized and Dissident Non-Citizens: Foreign Domestic Workers” in Barrington Walker, ed, *The History of Immigration and Racism in Canada: Essential Readings* (Toronto: Canadian Scholars’ Press, 2008) 264 at 267.

residents and citizens.²⁸ Although both high-skilled and low-skilled temporary workers are recruited through authorized foreign worker programs, low-skilled workers comprise a growing proportion of the foreign workers admitted to the country.²⁹ In British Columbia, the top specific occupations for foreign workers are harvest labourer, domestic worker, cook and food counter attendant.³⁰ The absence of construction labour from this group may be due to the association between informal labour in the construction industry and lack of legal migration status.

Deskilling trajectories are not unique to foreign workers with less-than-permanent status; there is evidence that new permanent residents also experience significant labour deskilling upon arrival due to language and certification requirements and to racial and cultural bias.³¹ However, precarious migrant workers experience these barriers in a categorically distinct way, because of the disentanglements and limitations associated with less-than-permanent status. Unlike many of the other concerns of precarious migrants discussed in this paper, deskilling is not subject to any specific legal rights or protections. The increasing concentration of precarious migrant workers in lower-skilled, lower-paid or undesirable work,³² as well as in the informal economy, is an important part of the context within which migration status and the law shape their lives, especially in light of the fact that workers classed as lower-skilled are much less likely than those classed as higher-skilled to be able to obtain permanent residence.³³

28 Nandita R Sharma, *Home Economics: Nationalism and the Making of "Migrant Workers" in Canada* (Toronto: University of Toronto Press, 2006).

29 Citizenship and Immigration Canada, "Facts and Figures 2011 — Immigration overview: Permanent and temporary residents: Canada — Total entries of foreign workers by gender and occupational skill level," online: <<http://www.cic.gc.ca>>.

30 Employment and Skills Development Canada, "Labour Market Opinion — Annual Statistics, British Columbia," online: <<http://www.esdc.gc.ca>>.

31 See e.g. Daniel Hiebert, Silvia D'Addario & Kathy Sherrell for the National Secretariat on Homelessness, *The Profile of Absolute and Relative Homelessness Among Immigrants, Refugees, and Refugee Claimants in the GVRD, Final Report* (Vancouver: MOSAIC, 2005).

32 Citizenship and Immigration Canada, "Facts and Figures 2012 — Immigration overview: Permanent and temporary residents: Canada — Total entries of foreign workers by gender and occupational skill level," online: <<http://www.cic.gc.ca>>.

33 Marsden, *supra* note 3 at 48.

5. JOB SECURITY AND MOBILITY

None of the workers interviewed for this study were in unionized jobs, and many did not have written contracts. For migrant workers with less-than-permanent status, job mobility and security are inextricably linked with status. Unlike permanent residents or citizens, they cannot work without specific authorization from the federal government by way of a work permit, and many such permits require employer initiative. In this section, I will explore how job mobility and job security issues arose for workers in the study, as well as the impact of migration status on these aspects of workforce engagement.

Workers across the labour segments represented in the study reported issues with lack of continuity and with the sporadic nature of their work — issues often intrinsically connected to their status. One agency worker said that Seasonal Agricultural Worker Program workers who were sick or had a medical condition were reported to the program, and were more likely to be refused work permits in the following year. Women agricultural workers who had complained of sexual abuse or harassment on the job spoke of similar experiences. The potential for discontinuity of work arising from the refusal of a work permit also dissuaded the reporting of illness, injury or abuse on the job.

Participants working in the informal labour market also identified problems of job insecurity, in addition to problems with pay. In one example, a painter had been told by his employer that he was an independent contractor, despite strong evidence that he met the legal definition of an employee. His employment proceeded as a series of short projects, with no formalized arrangement. In his words, “[t]here is insecurity in terms of getting paid, and there’s no stability because it’s not something formal.”

For live-in caregivers, job security is tied directly to the potential for obtaining permanent residence, which requires two years of full-time work within a four-year period, or 3,900 hours within a 22-month period.³⁴ Because federal law requires the employer’s endorsement if a worker is to obtain authorization to take on a new job, and only work so authorized counts toward permanent residence, threats to job

34 *Immigration Regulations*, *supra* note 8, s 113(1)(d).

security are amplified by the risk of losing not only existing status but also access to permanent residence. Disruptions to job continuity were frequently reported because of changes in the lifestyle or needs of the family who had hired the caregiver, such as the start of school for young children. One caregiver felt that having a four-year work permit would “protect [her] work, without unemployment.”

Some workers reported that employers had threatened termination in order to enforce employer-determined work requirements. One participant observed:

The first time I was doing something wrong and I assumed I made a mistake. I arrived late at work and that was my mistake and for that I was fired. The thing I really don't like is that they gave me a letter and in the letter they made sure that they were going to inform immigration about it.

Even in cases where the employer had made no explicit threat, workers were often reluctant to complain or to request changes to working conditions, for fear of being dismissed and losing legal status.

A related concern was job mobility. Two workers described how the legal structure governing migration status interacted with the operation of the labour market to reduce mobility for precarious migrants:

The thing about the work permits . . . it's really tricky; people have to get one employer [whose] name's on the work permit.

In my case, I always got the temporary work permit[s] and they were restricted. I was only allowed to work for that employer All the time there will be the pressure in the background, “We can fire you. We can fire you. And we did it once so we can do it twice.”

Once workers have an open work permit, they are able to better circulate in the labour market. Nevertheless, discrimination in hiring on the basis of temporary status may serve as a further barrier to labour mobility. A construction worker reported bias in hiring when employers found out that his SIN started with the number 9:

Because when you have the 913 social security number . . . they say on the paper that you can find a job in whatever, but bottom-line this is not true because you are not applying for [a] . . . certain job and especially [for] a government job they . . . reject you. . . .

One live-in caregiver reported that an employer was unwilling to sign the paperwork she needed for a work permit because of her SIN. It

appears that the particular employer wanted to ensure that she was legally authorized to work, but did not want to wait for the processing of her permit.³⁵ Impacts on job mobility also impeded movement away from low-skilled work and toward occupations closer to those for which people had originally been trained. Mobility did, however, improve once workers had obtained open work permits.

In addition to the fact that regulatory structures tend to stream foreign workers into jobs requiring less skill than those they were trained for, the requirement of closed work permits also precludes labour mobility once workers arrive in Canada. This compounds the problem of deskilling, as it limits the chances of finding and being available for higher-skilled jobs. Mobility is further hindered by the ever-present fear of losing authorization to work.

[U]nder the live-in caregiver program you are not allowed to work with anybody else [except] with the one who is on the contract. That is the hardest part, and . . . in my situation where I [was] not . . . released by my employer, I was not able to look for another job. It's just like taking the risk of working unauthorized.

Employers were also reported to have used the threat of refusing to supply references and recommendation letters as a way of keeping workers in their jobs. For caregivers, the fear of losing a job with a particular employer was a major concern, and tended to cement the power relationship. In the words of one of them:

I'm completely without a will. I don't dare to resist because my contract states that I have to stay with the same employer for two years. So I have to listen to them. I have to obey. If I don't listen, there are huge implications in changing employer[s].

Federal work authorization for precarious migrants relies heavily on the information given by the employer to Human Resources and Skills Development Canada. To obtain a positive or neutral LMO, an employer must provide evidence of specific employment needs that cannot be met by citizens or permanent residents. For a foreign worker who has to change jobs, this can lead to a loss of status, or at

35 However, as every foreign worker with authorization to remain in Canada has a SIN starting with the number 9, it would seem illogical for an employer to reject someone on that basis if the employer does aim to hire a foreign worker.

best to a waiting period of several months (during which the worker cannot work legally) while a new employer's application for an LMO is processed.

In conclusion, precarious migration status impairs job security by increasing the risk of losing a job and making it harder to find another one. The vulnerability of workers without status or without work permits greatly enhances the employer's ability to unilaterally terminate the employment relationship, and aggravates the consequences of unemployment. Employers wield even more power over temporary foreign workers with closed work permits, because those workers cannot obtain or retain a permit without the support of a specific employer.³⁶

6. HOURS OF WORK, PAY, AND JOB DUTIES

While many conditions of work, including wages and hours, are regulated by provincial minimum standards laws and policies, participants reported that they were often subjected to working conditions well below the statutory standards. In this section, I will briefly review the law as it applies to precarious migrant workers in British Columbia, and will then discuss the shortfalls in working conditions experienced by those migrants.

The *Employment Standards Act (ESA)* sets minimum standards for workplaces in British Columbia, and establishes a complaint-based enforcement process administered by the Employment Standards Branch. Standards set by the *ESA* include minimum wages, hours of work, leaves, notice and grounds for termination, advertising of work, and recruitment practices. Section 1(1) of the *ESA* defines employees and employers without reference to immigration status.³⁷ All of the provisions of the statute apply equally to citizens, permanent residents, students and temporary workers (whether with or without status).³⁸ With regard to hours of work, employees cannot be made to work more than five hours without a meal break of at least

36 *Immigration Regulations*, *supra* note 8, ss 198(2), 203(1).

37 *ESA*, *supra* note 19, s 1(1).

38 Pursuant to ss 31-45 of the *Employment Standards Regulation*, BC Reg 396/95, certain occupations and types of workers based on industry and job description are excluded from specific provisions of the *ESA*.

half an hour, and must have at least eight hours free between shifts and 32 consecutive hours free each week.³⁹ The *ESA* also requires the payment of a minimum hourly wage, as set by regulation.⁴⁰ Wages must be paid at least semi-monthly,⁴¹ and overtime pay is mandated for more than eight hours a day or 40 hours a week.⁴² The *ESA* applies to domestic workers, including live-in caregivers. Among several provisions specific to domestic workers is the requirement of a written employment contract indicating hours of work, duties, wages, and room and board.⁴³

Nonetheless, participants in various labour segments reported that they had put in unpaid overtime. The most extreme examples came from those in the Live-in Caregiver Program. An agency representative described the situation of a caregiver who was "practically enslaved" by her employer, made to work six days a week from 6 a.m. to 9 or 10 p.m. — not unusually long for workers in this program. One caregiver stated:

A: The first employer had two children and I had to wake up and start working at 7 in the morning. I would work all day with one hour of break in between Sometimes I would finish work at 8 and the latest was 11:30.

Q: Did you ever talk to your employer about that?

A: I'd be afraid to voice those concerns. Once I expressed any dissatisfaction with the work conditions, the employer would be unhappy.

Another caregiver described very similar conditions, and added: "When I came to Canada I was completely alone. I didn't know anybody here, so when my employer demanded me to work whatever hours, I complied."

Usually, caregivers were paid a fixed amount per month, calculated on the basis of a notional 40-hour workweek at minimum wage. However, because they actually worked much longer hours, their real hourly pay ended up well below the statutory minimum wage. One worker reported that the employer went so far as to include about six

39 *ESA*, *supra* note 19, ss 32, 36.

40 *Ibid*, s 26.

41 *Ibid*, s 17.

42 *Ibid*, ss 35, 40.

43 *Ibid*, s 14.

hours a day of unpaid overtime in her schedule. Several caregivers reported that when they needed to find a new job, often because of a layoff or poor working conditions, prospective employers would demand a “trial period,” during which the worker would have to work without authorization while the employer decided whether to complete the application needed to renew the permit.

Wage problems were not limited to caregivers. A restaurant worker mentioned that she was making more per hour as a babysitter than at her restaurant job. Another restaurant worker, who had no authorization, described having to work shifts with no meal or rest break, and being required to do extra work (e.g., cashier and kitchen work) without any extra pay. She reported having been paid only \$200 for two months of work.

As a counterpoint to the difficulties faced by precarious migrants, a construction worker who was a naturalized Canadian at the time of her interview said that her former employer preferred unauthorized workers and “immigrants,” because their lack of labour mobility made them more willing to accept extreme hours:

A. They pay \$10 to me but the rest of the people, the illegals, they pay the minimum \$9. . . .

Q: What do you think is the real reason they fired you?

A: Because they knew I was Canadian.

Q: And what does that mean to them?

A: That means Canadians, we know our rights

That worker also reported that her husband, who was employed at the same worksite and was without authorization, was working 19 hours a day.

Another construction worker commented on the impact of status differentials on both wages and tasks at his workplace:

They pay less [to workers without status] . . . and I know people who work and they don't get paid . . . because they are always afraid that the police are going to be stop them and [they will] be caught Let's say there is this roofing company and there are ten people working on a house . . . and people who have papers get more than \$15 per hour, the rest [get] less.

Overall, it was not so much the fact of overtime work itself as the terms on which it was required that was problematic for migrants. On

the basis of what they shared during their interviews, many would likely have accepted overtime work if it had been voluntary and paid at an overtime rate, or paid at all. Migrants in many fields of work felt that they could not refuse to do unpaid work because their status was associated so closely with their relationship to employers.

Participants who did both authorized and unauthorized work also stressed the inadequacy of their income to meet basic living costs, which they attributed to their migration status. One participant, who was the wife of a migrant worker, described the impact of her husband's lack of status on his earning capacity and on their family, highlighting the limitations posed by the combination of lower wages and insecure employment:

He couldn't work a lot of hours. So before I came here he had to pay for his rent, his pass, his transportation. He had to send money to us for our kids' school and food for us. [He wasn't making] enough . . . in comparison to the expenses.

In some interviews, basic food security arose as a problem. A parent in one refugee claimant family explained: “It's hard for the couple, because I didn't eat so my wife and my kids could eat We took not so much food because the kids had to eat.” An agency participant described an occasion with one of her caregiver clients:

I had a client today . . . who does not have a job yet. She doesn't have her work permit yet and it's been so long that her application has been at (Citizenship and Immigration Canada in) Vancouver. So she doesn't have any money. I saw her for about an hour and a half, helping her to prepare for her work permit interview, and I said, “I've got another appointment, can you wait for another hour and I'll see you again after that?” She said, “Yes. But the problem is I'm really hungry.” And she was obviously ashamed of telling me that.

Workers from various communities and in different types of jobs indicated that wages were so low that it was a struggle to cover basic necessities of life. One said that the combination of welfare payments and job income was “enough to live on,” although collecting undisclosed income while receiving welfare is illegal in British Columbia. Another participant who was in Canada as a student but was working in an unauthorized low-wage job said that she was receiving “barely enough.” One caregiver reported that she had been fired for taking on a second job in her off hours.

For caregivers, extra hours of work were also associated with employer demands to do work beyond and different from what was stipulated in the contract of employment. Caregivers reported regularly doing extra work housecleaning, cooking, shopping, and outdoor cleaning and maintenance. One said that she had been dismissed when she refused to do extra work (cleaning an eight-bedroom house).

Several workers, especially women live-in caregivers from China and the Philippines, spoke of having incurred debt in order to apply for a work permit to come to Canada, often as a result of fees paid to a recruitment agency or "middleman."⁴⁴ Participants from China reported having paid recruitment fees ranging from about \$10,000 to \$25,000, and some indicated that they planned to pay off the resulting debt from income earned in Canada. Recruiters sold the chance to work in Canada, and participants saw the payment of recruitment fees as a prerequisite to obtaining status. Looking beyond simple misinformation, it is clear that the people offering loans to cover those fees were trading on status insecurity. None of the participants in this study said that they had refused to pay their recruitment debt, which presumably could be enforced (formally or otherwise) against family members remaining in the country of origin.

Inadequate pay, work beyond the job description, and illegally long hours are not unique to precarious migrants, but the data from this study indicate that migration status can magnify the effect of those conditions on workers. Unlike permanent residents and citizens, precarious migrants are restricted in their right to reside and work in Canada, and this bears directly on their experience of the employment relationship. Their narratives suggest that the power differential inherent in the employer-employee relationship is increased when a worker has fewer options in the labour market or needs employer authorization to maintain legal status in Canada. While employment standards legislation does not formally exclude anyone based on migration status, it appears to take no account of the effect of such status on the employment relationship.

44 Charging fees for employment opportunities is strictly regulated in Canada. It was not within the ambit of this paper to determine whether that was also the case in the participants' countries of origin, where the debts were incurred.

7. SAFETY AND HEALTH VIOLATIONS, AND OTHER FORMS OF ABUSE AT WORK

Most Canadian provinces have legislation to protect worker health and safety,⁴⁵ and a separate workers' compensation statute providing for indemnification for work-related injuries and illnesses. British Columbia is somewhat distinctive in that both occupational health and safety and workers' compensation are regulated by the *Workers Compensation Act*⁴⁶ (WCA) and its associated regulations, particularly the *Occupational Health and Safety Regulation*.⁴⁷ The WCA entitles workers to compensation for disabilities that arise “out of and in the course of employment,”⁴⁸ and it defines employers and workers as those who are in an employment relationship or have an employment contract.⁴⁹ Coverage by the legislative regime does not depend on any residency or immigration status requirement, and the policy of WorkSafeBC (the agency responsible for administering the WCA) is that “a worker is a worker” regardless of immigration status.⁵⁰ The WCA states that a worker must report an injury as soon as possible to the employer,⁵¹ who must then report it promptly to WorkSafeBC.⁵² The *Occupational Health and Safety Regulation* mandates employers to maintain a safe workplace,⁵³ sets out basic safety standards for all workplaces, and refers to violence and threats as potentially dangerous working conditions.⁵⁴

45 For example, *Occupational Health and Safety Act*, RSO 1990, c O.1.

46 WCA, *supra* note 19.

47 BC Reg 296/97.

48 WCA, *supra* note 19, s 5(1).

49 *Ibid*, s 1.

50 In a presentation dealing specifically with “newcomer” workers, the agency states that foreign workers (whether or not they are documented, and whether or not they are working under a legal contract) are covered by the WCA. The presentation includes a sample analysis of foreign worker claims, and a discussion of work vulnerability and strategies in place at WorkSafeBC to improve access to services (including providing service in languages other than English). Bogyo, *supra* note 20.

51 WCA, *supra* note 19, s 53(1).

52 *Ibid*, ss 54(1), 54(5).

53 *Supra* note 47, s 4.1.

54 *Ibid*, ss 5.27, 4.28.

Like the legislation governing employment standards, occupational health and safety law does not formally exclude workers on the basis of their migration status. From the perspective of the participants in this study, however, precarious migration status both increases the risk of health and safety problems in the workplace and makes workers less able to obtain support in dealing with those problems.

(a) Physical Health Problems

Study participants reported experiencing workplace injuries and other work-related conditions resulting in both acute and chronic health problems. Among the physical consequences, they reported were these: skin problems; joint mobility problems; fever, chills and headaches while living in unheated quarters; insufficient food; and loss of appetite and vomiting associated with stress and anxiety.

Participants in some fields of work identified a failure by employers to take sufficient protective measures. An agency representative who had worked with meat-cutters recalled:

At the beginning, I had one case. He was working at the meat-cutting industry and all the meat that they are cutting is frozen and after just a few months, he was already suffering from severe pain from the cold. And there were times when he could not work any more . . . I said, "Do they not give you gloves?" He said, "Sometimes we have gloves but sometimes we cannot also work when we have to cut thin slices, it's hard to handle the cutter when you are wearing thin gloves." His arms are already swollen from arthritis.

In other cases, employers were said to have been complicit in creating barriers to injured workers' access to health care. An agency representative stated:

A migrant worker with an ear infection . . . asked the manager, because that's usually the normal procedure . . . for permission to go to a walk-in clinic. The manager ignored him. [For] three days he asked him, "Could you please take me to see a doctor, I need to see a doctor." Ignored again. A week later he started bleeding, then the manager brings him to a physician who has some kind of affiliation with . . . the farm owner. . . . These physicians that are somehow affiliated with the farm owners will not do a proper assessment, will not fill out all the forms, neither for example if the migrant worker needs to

rest for a couple days [or] for a week. Of course they are not going to do that because they work with the farm owners.⁵⁵

(b) Mental Health Problems

The WCA makes clear that mental disorders arising from "work-related stressor[s], including bullying or harassment," are covered by workers' compensation where they result in a psychiatric diagnosis.⁵⁶ Problems with stress are certainly not unique to workers with precarious migration status, but they were commonly referred to in interviews with both agency representatives and migrant participants, who described experiencing them in ways that were linked with status. For example, a migrant caregiver expressed the feeling she was "so different from a regular person" because of her status. When I asked how that feeling was related to her status, she said, "[w]ithout the status we need, we can be easily abused or mistreated." Participants attributed stress to one or other of these factors: low pay; the need to rely on the employer to obtain or renew a work permit; being out of status or having irregular status; delay in obtaining status documents or changes; non-enforcement interaction with immigration authorities; not being paid by the employer because of the lack of papers; not being able to plan the future; family separation; coerced marriage; and unemployment based on status. One worker described the mental impact of her tenure as a caregiver in these terms: "There's [the] emotion of the loss of the initial beauty of coming to Canada. A day goes by like a year."

55 These results are reported in detail in Sarah Marsden, *Law's Permissions, Law's Exclusions: Precarious Migration Status in Canada* (Ph.D. thesis, University of British Columbia, 2013) [unpublished] ch 5 at 148ff, online: <<http://www.circle.ubc.ca/handle/2429/44753>>. Differential access to health care on the basis of status is also documented in Paloma E Villegas, "Negotiating the Boundaries of Membership: Health Care Providers, Access to Social Goods, and Immigration Status" in Luin Goldring & Patricia Landolt, eds, *Producing and Negotiating Non-citizenship: Precarious Legal Status in Canada* (Toronto: University of Toronto Press, 2013) 221.

56 WCA, *supra* note 19, s 5.1(1)(a)(ii).

(c) Sexual Abuse

Sexual abuse of women migrant workers was reported across different labour segments, including restaurants, agricultural work and domestic work. Workers had told an agency participant that they had to exchange sex with employers to get the extra hours needed to bring their workweek up to full-time. That agency participant noted several status-related reasons why a worker might not report sexual abuse, including fear that the employer would refuse to endorse renewal of the work permit.⁵⁷

(d) Other Forms of Abuse and Humiliation

Domestic workers described various kinds of humiliating and degrading treatment by employers: extreme surveillance; being forced to pay for broken items; being blamed for household problems unrelated to their duties; having their food intake scrutinized, and not having enough nutritious food; and not being allowed private phone conversations. Live-in caregivers reported that employers exercised control over their sleeping hours, their ability to enter or leave the residence, and their ability to access community services such as English lessons. One worker described feeling “that at the beginning I was in a state of feudalism where I was a slave. I had no dignity whatsoever.” Another said:

My contract stated that I have to take care of children and to attend to simple domestic tasks. Now I am a cleaner and they live in a big house. We have a large gate outside the house and they asked me to scrub the fencing and . . .

57 Citizenship and Immigration Canada has a written policy allowing it to issue “emergency” work permits to live-in caregivers in abusive situations (“IP 4 — Processing Live in Caregivers in Canada” (January 2011)), online: <http://www.cic.gc.ca/english/resources/manuals/ip/ip04-eng.pdf>. However, such permits still require a labour market opinion from a new employer — a highly impractical requirement in many of the situations described in this article. While interviews were being done for this study, Immigration Minister Jason Kenney issued a press release describing several purported improvements for live-in caregivers. Citizenship and Immigration Canada, “News Release — Minister Kenney announces important change for live-in caregivers” (December 2011), online: <http://www.cic.gc.ca>. There are no data yet on the effect of those changes.

there's certain areas [where] I have to use a toothbrush to clean the small areas. I have to do that work in the rain while holding an umbrella.

One worker explicitly associated her employer's ability to humiliate her with the structure of the immigration program and the employer's role in the immigration process: "She's paying me and she knows that I need to work two years before I can begin my immigration." Some caregivers reported that although they often cooked for the entire family (despite the fact that their contracts usually stipulated that they only had to prepare meals for the people they cared for), they were prohibited from sharing freshly prepared food or otherwise restricted in eating household food. In one case, a worker attributed her digestive problems to lack of fresh fruit and vegetables in her diet. When asked why she did not speak with her employer about the situation, she explained that she felt compelled to comply with the employer's limits on what she could eat.

One caregiver adopted the strategy of refusing to accept pay in order to convey to the employer that she was not simply working for pay and could not be paid to tolerate abuse. This exchange took place during her interview:

A: [The employer] would constantly say, "I'm paying you to work." And I wanted to let her know that I wasn't working for the money. What I wanted to do was to help the family within my abilities.

Q: When you had that discussion, did it change the dynamic?

A: I think that after that conversation, it's slightly amusing, after that it seemed like on the exterior there were not many changes but I noticed that she knows I'm not a person who holds onto the money issue and I'm not connected to money that closely . . . I felt that she'd still be angry or criticize me, but I felt like I had a little bit of collateral to reply in certain instances.

8. DIFFICULTIES IN OBTAINING REDRESS

In British Columbia, as in other provinces, any employee, former employee or other person may complain to the Employment Standards Branch about a contravention of the *ESA*,⁵⁸ and the Act gives the Branch the authority to assess fines, file orders in court,

58 *ESA*, *supra* note 19, s 74.

seize property and otherwise enforce decisions made under the Act.⁵⁹ However, data from these interviews indicate that migration status in fact limits the ability of precarious migrant workers to obtain recourse for violation of their statutory rights with respect to employment standards, workers' compensation and occupational health and safety.⁶⁰

In response to a request for information under the *Freedom of Information and Protection of Privacy Act*,⁶¹ the Employment Standards Branch indicated that although its services were available to workers regardless of migration status, it did keep track of complaints made by "foreign workers," which included workers with and without temporary work permits. Since it started tracking this information in January 2008, the Branch had heard from 56 to 98 complaints per year from that group of workers. It had found various employer contraventions of the *ESA*, including unauthorized deductions, failure to pay regular wages or other types of pay owing, failure to keep records, and taking reprisals for the bringing of complaints.⁶² Many complaints had been abandoned, withdrawn, or voluntarily resolved or settled. When the Branch made a determination against an employer, it imposed a penalty ranging from \$500 to \$2,500,⁶³ in addition to any compensation awarded to the worker.

59 *Ibid*, ss 98, 92, 91. Workers must first follow a "self-help" process, through which they raise the matter directly with the employer. In some cases, this requirement is waived (for example, where there are language difficulties or where the worker is a farm or domestic worker). Ministry of Jobs, Tourism and Skills Training and Responsible for Labour, "Employment Standards Self-Help: Solving Workplace Problems," online: <<http://www.labour.gov.bc.ca/esb>>.

60 A comprehensive review of the use of court litigation (and the problem of accessing legal counsel for such litigation) is beyond the scope of this article. However, one recent case bears mentioning. In 2011, a group of temporary foreign workers brought a class action in the Supreme Court of British Columbia against Northland Properties, which operates Denny's restaurants, claiming compensation for unpaid wages, recruitment fees, injury to dignity, and airfare costs. The case was settled before trial in March 2013. See Krystle Alarcon, "Denny's Settles With Filipino Migrants," Migrant Workers Rights (1 March 2013) online: <<http://www.migrantworkersrights.net>>.

61 RSBC 1996, c 165.

62 Custom Excel spreadsheet "TFW Info-UBC" provided by the British Columbia Employment Standards Branch via e-mail on July 7, 2011 in response to a written request made under the Act.

63 These amounts are prescribed by regulation, based on the number of previous violations by the particular employer. *Employment Standards Regulation*, *supra* note 38, ss 29(1)(a)-(b).

The Employment Standards Tribunal is the only formal avenue in which to seek review of decisions made by the Employment Standards Branch. The *ESA* specifies that decisions of the Branch can be appealed to the Tribunal for error of law or breach of natural justice, or because new evidence has become available since the initial hearing.⁶⁴ Tribunal decisions concerning precarious migration status have been rare, and have primarily involved the Tribunal’s interpretation of an LMO. In a 2009 case, for example, the LMO set out a higher wage rate than the worker had been paid. The employer argued that the Tribunal had no jurisdiction to enforce the terms of the LMO. The Tribunal found that the wage rate in the LMO was evidence of the agreement between the parties, and could be considered by the Tribunal.⁶⁵

In the area of worker health and safety, WorkSafeBC is empowered to make awards to workers and to make orders against employers, including orders to re-hire workers in certain circumstances.⁶⁶ Records disclosed by WorkSafeBC in response to a freedom of information request demonstrate that it has regularly processed applications for benefits for temporary and undocumented workers. Over the

64 *ESA*, *supra* note 19, s 112. Section 115 empowers the Tribunal to confirm or vary the original decision, cancel the original order, or refer it back to the Branch for redetermination. Individual decisions of the Employment Standards Branch are not publicly available, but those of the Employment Standards Tribunal are.

65 6307485 *Canada Ltd* (20 November 2009), D121/09, online: B.C. Employment Standards Tribunal <<http://www.bcest.bc.ca>>. On the other hand, in a much older case, the Tribunal found that an LMO and work permit in themselves did not establish the existence of an employment relationship where there was evidence that the parties had a different kind of relationship (in that case, a joint business venture). *Super Cat International Enterprises Ltd* (22 October 1998), D483/98, online: B.C. Employment Standards Tribunal <<http://www.bcest.bc.ca>>. In 2007, the Tribunal found that it had “no jurisdiction to award damages based on mistreatment of a foreign national working under visa.” *Sejung Jung* (12 October 2007), D094/07 at para 18, online: B.C. Employment Standards Tribunal <<http://www.bcest.bc.ca>>. In 2009, the Tribunal upheld the validity of a contract attached to an LMO — specifically, the standard form contract used for low-skilled workers and live-in caregivers — and ordered the worker to pay money back to the employer from wages owing to the worker for room and board as set out in the contract. *Jeff Rolando* (14 September 2010), D094/10, online: B.C. Employment Standards Tribunal <<http://www.bcest.bc.ca>>. But see *Koo v 5220459 Manitoba Inc*, 2010 MBQB 132, 254 Man R (2d) 62, where the Court found that the terms of an LMO could not be enforced as part of the contract.

66 *WCA*, *supra* note 19, s 153.

past few years, the number of claims for such workers ranged from several hundred a year to over a thousand in each of 2009 and 2010, across a wide range of industries.⁶⁷

Workers can appeal WorkSafeBC's initial assessment of a claim to the Workers' Compensation Appeal Tribunal (WCAT). The WCAT has considered several cases in which there appears to have been a link between the claimant's migration status and the subject matter of the claim. In a 2009 case, for example, a temporary foreign worker had been hired as a truck driver, but the employer did not allow him to work in that capacity because he did not meet the licensing requirements. He ended up living at the employer's house and doing various household tasks without pay, which he understood he was doing in exchange for room and board. He was injured while painting the house, and the WCAT found that the injury arose "in the course of employment,"⁶⁸ even though the work in question was outside the terms of his work permit and would have constituted an offence under the *Immigration and Refugee Protection Act*. In a 2010 case, a temporary foreign worker on a construction site argued that language barriers and a lack of information on how to report injuries had precluded him from reporting an injury for which he later made a claim. The WCAT did not accept the argument on the facts of the case. It found that he had sufficiently disclosed his injuries to medical personnel, and rejected his assertion that he did not understand the obligation to describe them fully in his compensation claim.⁶⁹

The perspectives of participants in this study illuminated how the ever-present fear of loss of status served to restrict their access to the statutory protections outlined above. Even if the employer did not explicitly threaten to undermine a worker's status, and even if the worker was compliant with immigration requirements, the fear of

67 Custom Excel spreadsheet "RM-00049560_foreignworker_summary_v5 (FOI).xlsx" provided by WorkSafe BC via e-mail on August 25, 2011 in response to a written request made under the *Freedom of Information and Protection of Privacy Act*, *supra* note 61.

68 WCAT-2009-03264 (17 December 2009), online: WCAT <<http://www.wcat.bc.ca>>. For further cases concerning foreign workers see e.g. WCAT-2003-02365 (4 September 2013), WCAT-2006-02437 (7 June 2006), WCAT-2009-02956 (16 November 2009), online: WCAT <<http://www.wcat.bc.ca>>.

69 WCAT-2010-01513 (1 June 2010), online: WCAT <<http://www.wcat.bc.ca>>.

losing status contributed to a sense of inability to speak up about lack of pay or other workplace abuses. In one worker's words:

Without the status we need, we can be easily abused or mistreated. Because there is no extension of justice into this realm of our lives, [the employer] could very well say that white is black and black is white. And even in instances where I was surely being reasonable and I had a voice of reason, it was completely disregarded.

One caregiver saw passivity as an unavoidable aspect of working as a caregiver in order to obtain permanent status:

This passivity, specifically speaking, means we have to be obedient toward our employers, secondly we have to listen to the government and what they say about our lives and our situations, we have to abide by their regulations in order to wait out this period. That's it.

Another caregiver said that her employer had made oblique threats, which she interpreted as being specific to her status:

My employer would say to me, "You know if you don't work up to my standards, I have more severe ways to treat you." . . . My employer knows that I am completely reliant and dependent on them for reference letters and my immigration application. They know you have no friends here, no people to help you.

This was echoed by yet another worker, who saw it as an aspect of Canadian culture that workers' silence is interpreted as consent to poor working conditions. In her words, "silence means yes here in Canada."

The *ESA* does not prohibit employers from terminating employees, but if an employee is discharged without cause, the employer must give a certain number of weeks of notice or payment in lieu of notice, to allow the worker some time to obtain a new position.⁷⁰ The benefits of this provision for workers with precarious migration status

70 *ESA*, *supra* note 19, s 63. At common law, employees are often entitled to severance-based compensation beyond the statutory minimum. My focus in this article is limited to the statutory regime, for two reasons. First, the Employment Standards Branch is much more accessible than the courts; its procedures are designed for public access and self-representation. In contrast, civil lawsuits in employment matters generally require retaining and paying a lawyer out of pocket, so they are more likely to be used by workers with above-average incomes. Second, because the *ESA* sets out the minimum to which workers are entitled, it functions as a part of the basic rights framework for workers.

are less certain than for citizens and permanent residents. Workers with a closed work permit may not simply change jobs; they must first find an employer willing to offer them a job, obtain a positive or neutral LMO, and then obtain a new permit from immigration authorities — a process that can take many months.

A few study participants spoke specifically about the availability of assistance for precarious migrants through the Employment Standards Branch. One worker reported success in using that help to protect her rights, but an agency participant said that fear of being deported or losing status had nonetheless stopped workers from making complaints.

On the topic of the Employment Standards Branch process, one migrant worker commented that she and others in similar situations knew “nothing about laws” when they arrived in Canada. Another worker thought that working “illegally” would prevent her from making use of statutory remedies. Yet another perceived her assertion of rights as being a determining factor in her termination:

Actually it happened for the first family . . . because I talked to them when I know more about Canada and the laws . . . after 3 or 4 months, and then I just said it's in the contract that I should work 8 hours and how much I should be paid. And then they agreed, and I think that's why they let me go at the end of the year because they were not expecting that to happen. They expected I [would] stay there for any time they want[ed].

With regard to occupational health and safety, the legislation does not formally bar any worker from reporting an injury, and one participant reported receiving workers' compensation without complication. However, an agency representative reported that some precarious migrant workers saw the threat of immigration enforcement as a barrier to reporting:

They don't qualify [for compensation] because the owner is not reporting them and they are scared to be deported if they are in an accident. Some accidents, they prefer to deal [on] their own, seeing a doctor who doesn't require any documents, just a payment.

A construction worker saw the fact that she had been working in the informal economy as a bar to accessing the workers' compensation process: “The condition to work was cash . . . and if I work cash I [could] not go to the authorities to ask for protection once I had my accident.”

An agricultural worker on a work permit described a situation where the employer directly interfered with his access to workers' compensation:

When we started to work, I felt unwell I mentioned to my boss that I wanted to see a doctor and he had a friend who was a chiropractor. But there was no result for me. So I talked to WCB and that bothered my boss. He wanted to fire me . . . then I was reported to abandon my job and that was sent to Colima to the Consulate of Mexico My boss gave his version and it's his word versus my word

For a worker in the Seasonal Agricultural Worker Program, the employer's threat to report a job as abandoned clearly has consequences beyond those faced by a citizen or permanent resident, as the renewal of the worker's status and livelihood depends on being selected by the employer to come back to Canada for the next harvest season. This was not unique to agricultural workers. Precarious migrants in multiple labour segments expressed fears about the employer's role in reporting on the worker's performance and about the potential loss of status. As a result, employers who disregard their legal obligation to report the occurrence of injuries to those workers are far less likely to be held accountable under the legislation.

9. CONCLUSION

Paid work is a primary axis of life for precarious migrants, and a venue through which they become socially and economically connected to Canada. In this article, I have explored the impact of precarious migration status on labour force engagement and on the protections offered by provincial laws and policies in the area of employment standards, occupational health and safety, and workers' compensation. From the perspective of study participants, precarious migration status emerges as an influential force on migrants' engagement with the labour market. Non-permanent status influences their decisions in a way that results not only in differential access to legal protections, but also in deskilling, job insecurity and decreased labour mobility. Canada's immigration policies strongly encourage temporary labour migration, but by tying migration status to employer discretion, federal law creates a power dynamic that favours employers and makes workers less willing to seek redress for violations of their statutory rights under provincial law.

Precarious migrants may lack any immigration status at all, they may have closed work permits restricted to a single employer, or they may have open work permits but remain identifiable through their SINs and the fact that they are subject to a work permit. Study participants associated all three of these variations on precarious status with problems of job security and job mobility, and with the amplification of the power differential between workers and employers. Even where provincial law ostensibly protects precarious migrant workers, the risk of losing status undermines the practical availability of these protections. Although provincial employment standards and occupational health and safety/workers' compensation regimes expressly extend to precarious migrant workers, those regimes do not account for the interaction of migration status with the employment relationship and for the resulting impact on migrants' relations with state-based protections. The experiences of precarious migrants canvassed in this study reveal the law as a complex set of structures that operate both as a promoter of formal egalitarian values and a catalyst for substantive inequality.

The stakes of unemployment are particularly high for precarious migrants. Workers without status or with a closed work permit may be compelled by poverty to accept unauthorized work in order to survive; most of the workers interviewed for this study admitted that they had worked beyond the specific conditions of their permit or had worked without any authorization at all. But the stakes of doing so are high; precarious migrants who seek or accept work outside the terms of their work permits risk deportation, criminal sanctions and the loss of the right to reside in Canada. The marginalization they face can only be addressed by taking into account the role of membership and outsider status as an aspect of marginalization in a social and political context, and integrating them into rights analysis.⁷¹

Emerging movements such as the Solidarity City campaign in Toronto provide compelling examples of how the concept of membership is being redefined to offer the hope of more security to workers with precarious status. In 2013, Toronto City Council adopted a motion which called for (among other things) the following: a review by municipal officers of "opportunities for City-funded agencies to

71 Saskia Sassen, *Guests and Aliens* (New York: New Press, 1999) at 135.

improve access without fear”; “providing training for front line staff and managers to ensure that undocumented residents can access services without fear”; “a complaints protocol and a public education strategy to inform Torontonians of our policy”; a request that the federal government “establish a regularization program for undocumented residents”; and a request that the provincial government “review its policies for provincially-funded services for undocumented residents with a view to ensuring access to health care, emergency services, community housing and supports. . . .”⁷² The motion was supported by a network of researchers, legal service providers, community centres and groups, city councillors and labour organizers, and it was accompanied by a report detailing the difficulties faced by undocumented workers in obtaining services and in negotiating employment situations.

Data gathered for this study support the view that municipal action and other localized policy changes could strengthen entitlements for precarious migrant workers and lower the barriers to access to services, building status through a variety of avenues rather than relying exclusively on decisions made by a centralized federal authority. Connecting multiple avenues under the rubric of “access without fear” could help to decompartmentalize migrants’ lives, promoting their acceptance as members of society as well as a source of labour. Working to improve access to migrant services in multiple local sites could culminate in the creation of a form of status apart from that dictated by federal law. Such a declaration of non-citizen membership could, in Peter Nyers’ words, be “generative of a political subjectivity.”⁷³ Through “democratic iterations”⁷⁴ of that sort, local action might strengthen the voices of migrant workers in the setting of federal immigration policy, and lead to more meaningful dialogue in their struggle for inclusion.

72 City of Toronto, Motion CD 18.5, “Undocumented Workers in Toronto,” adopted 20 February 2013, online: <<http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2013.CD18.5>>.

73 Peter Nyers, *Rethinking Refugees: Beyond States of Emergency* (London: Routledge, 2006) at 125.

74 Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge: Cambridge University Press, 2004) at 179.

APPENDIX A
Migrant Participant Profiles

<i>Nationality</i>	<i>Sex</i>	<i>Migration Status</i>	<i>Type of Work</i>
Mexican	M	Seasonal Agricultural Worker Program	Agricultural
Mexican	M	Visitor, Non-Status	Construction
Mexican	M	Visitor, Refugee Claimant	Painter
Colombian	M	Non-Status, Refugee Claimant, Permanent Resident	Warehouse Worker
Chinese	F	Live-In Caregiver (working outside conditions of permit)	Domestic
Chinese	F	Live-In Caregiver (working outside conditions of permit)	Domestic
Chinese	F	Live-In Caregiver (working outside conditions of permit)	Domestic
Chinese	F	Live-In Caregiver	Domestic
Chinese	F	Live-In Caregiver (working outside conditions of permit)	Domestic
Chinese	F	Live-In Caregiver	Domestic
Chinese	F	Live-In Caregiver (working outside conditions of permit)	Domestic
Mexican	F	Visitor, Refugee Claimant, Non-Status	Painter
Chinese	F	Live-In Caregiver (working outside conditions of permit)	Domestic
Mexican	F	Temporary Foreign Worker (low-skilled), Visitor, Non-Status	Food Service
Mexican	F	Visitor, Non-Status, Temporary Foreign Worker (low-skilled)	Food Service, Live-Out Caregiver
Chinese	F	Live-In Caregiver	Domestic
Mexican	F	Non-Status, Refugee Claimant, Permanent Resident	Office Administration
Colombian	F	Non-Status, Refugee Claimant	Retail Sales
Guatemalan	M	Non-Status, Refugee Claimant	Construction

<i>Nationality</i>	<i>Sex</i>	<i>Migration Status</i>	<i>Type of Work</i>
Mexican	M	Non-Status	Construction
Chinese	F	Live-In Caregiver (working outside conditions of permit)	Domestic, Massage Therapy
Chinese	M	Temporary Foreign Worker (high-skilled)	Office
Filipina	F	Temporary Foreign Worker (high-skilled), Permanent Resident	Business Management
Filipina	F	Live-In Caregiver (working outside conditions of permit), Permanent Resident	Domestic, Live-Out Childcare
Bolivian	F	Study Permit	Research/ Academic
Korean	F	Study Permit, Work Permit	Food Service
Mexican	F	Non-Status, Permanent Resident	Construction
Filipina	F	Live-In Caregiver (working outside conditions of permit)	Domestic, Housecleaning

APPENDIX B
Sample Interview Script (April 2011)

1. Have you/your clients experienced times where you/they had uncertain status or lack of status?
 2. What were the factors that contributed to the uncertain status or lack of status?
 3. Do you/your clients have family members in Canada, and if so, was their status uncertain or lacking as well?
 4. What were the impacts of uncertain status or lack of status?
 5. Did you/your client change anything in your/their life because of uncertain status or lack of status?
 6. Did you/your client have any interactions with the law when you/they had uncertain status or lack of status?
 7. Did you/your client have any health care needs when you/they had uncertain status or lack of status? If so, did you/they seek treatment, and was this affected by lack of status/uncertain status?
 8. Did you/your client have any interaction with the education system when you/they had uncertain status or lack of status? If so, how was this affected by lack of status/uncertain status?
 9. Did you/your client have any need of welfare or other social benefits when you/they had uncertain status or lack of status? If so, was this affected by lack of status/uncertain status?
 10. Did you/your client seek employment or work while they had uncertain status or lack of status? If so, was working life affected by lack of status/uncertain status?
 11. Did you/your client have interactions with immigration authorities while you/they had uncertain status or lack of status?
 12. Did you/your client have interactions with other authorities while you/they had uncertain status or lack of status?
 13. Did you/your client attempt to regularize status? If so, what were the factors that affected this decision and the process of trying to obtain status?
 14. Are there any other ways you/your client and family have been affected by uncertain status or lack of status?
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