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**PATHWAYS TO PERMANENCY: CITIZENSHIP AND THE TEMPORARY  
FOREIGN WORKER PROGRAM IN CANADA**

by

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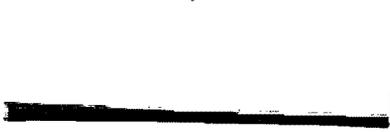
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# PATHWAYS TO PERMANENCY: CITIZENSHIP AND THE TEMPORARY FOREIGN WORKER PROGRAM IN CANADA

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## ABSTRACT

The Canadian temporary foreign worker program (TFWP) has grown exponentially in recent years and Canada now accepts more temporary residents than permanent residents on a yearly basis. Employers are increasingly becoming reliant on foreign labour to maintain their competitive advantage in a global market while failing to address exploitation issues. This study will examine modern notions of citizenship based on the principle of *jus domicile*, applying it to the TFWP in Canada. I argue that *jus domicile* can be used as a legal basis for long-term policies toward pathways to optional permanency. This study will present a forward looking approach to the Canadian TFWP by providing long-term policy recommendations, by taking into consideration current policies at the federal and provincial levels, and by examining ways in which the Canadian labour market can permanently incorporate TFWs.

Key Words: Citizenship, Temporary Foreign Worker, Canada, *Jus Domicile*, Labour

For my parents, Lee and Isabelle.

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## List of Acronyms

British Columbia	B.C.
Canadian Experience Class	CEC
Canadian Pacific Railway	CPR
Citizenship and Immigration Canada	CIC
Expedited Labour Market Opinion	e-LMO
Foreign Agricultural Resources Management Services	FARMS
Federal Skilled Worker	FSW
Federal Skilled Worker Program	FSWP
General Agreement of Trades and Services	GATS
Human Resource and Skills Development Canada	HRSDC
Immigration and Refugee Protection Act	IRPA
Labour Market Opinion	LMO
Live-In Caregiver Program	LCP
Memorandum of Understanding	MOU
Ministry of Labour	MOL
National Occupation Classification	NOC
Non-Governmental Organization	NGO
Non-Immigrant Employment Authorization Program	NIEAP
North American Free Trade Agreement	NAFTA
Occupations Under Pressure	OUP
Organization for Economic Cooperation and Development	OECD
Provincial Nominee Program	PNP
Seasonal Agricultural Workers Program	SAWP
Temporary Foreign Worker	TFW
Temporary Foreign Worker Program	TFWP
World Trade Organization	WTO

## Introduction

Patterns of migrant labour have increased worldwide from low-income to high-income countries, Canada included. In recent years, Canada has begun to accept a larger number of temporary migrant labourers than permanent residents. The shift in temporary migration to Canada has come with serious consequences. Exploitation is widely documented and pathways to permanency are either narrow or nonexistent. Historically, Canada has been a migrant receiving nation having relied on migrant labour since its beginnings to help build the nation. Therefore, why the negative attitude toward temporary foreign labourers and their citizenship acquisition? As many migrants are low-skilled and come from non-traditional migrant sending nations<sup>1</sup>, Canada's self-image of the nation-state and its citizens is put into question. Citizenship, and its structural and normative notions, lies at the root of temporary foreign workers'<sup>2</sup> (TFWs) lack of pathways to permanency.

Structural and normative notions of citizenship can be explained in reference to the nation-state. Structural notions of citizenship linked to nation-state boundaries are constructs connecting a territory with its citizens in order to maintain sovereignty and power. Structural notions have become normalized, institutionalized, and unquestioned. This outdated structural notion of citizenship represents a territorial conception of national rootedness constituting normal and desirable conditions (Gustafson, 2005). Similarly, normatively driven notions of citizenship assume that the state has the authority to determine who receives citizenship and how it is defined. This allows the

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<sup>1</sup> The traditional migrant sending nations to Canada are the United States, England, and France.

<sup>2</sup> In this essay I make use of the term "temporary foreign worker". Additionally, the terms migrant/immigrant worker, migrant/immigrant labourer, offshore labour, and guest worker all refer to the same idea.

state to legitimize citizenship policies, identify the acts that privilege citizens within the state, as well as for citizens to accept and internalize the policies.

This study will examine the Temporary Foreign Worker Program (TFWP) and will take a forward looking, practical approach to finding ways to incorporate and fairly equip these workers with rights they can claim to enter the Canadian labour market on a permanent basis. The purpose of this study is to develop an understanding of how the TFWP can be situated within Canada's long-term labour market needs and how Canada can create pathways to permanency for TFWs by exploring the citizenship principle of *jus domicile*.

In regards to literature on the TFWP, it is evident that the Canadian government has no interest in pursuing pathways to permanency for TFWs. This would defeat the purpose of the program as the very intention behind it lies in the fact that workers are temporary and cannot become permanent. Rather, the issue of this study focuses on the rights and entitlements that TFWs accrue over the long-term. Although the notion of rights and entitlements for TFWs contradicts government intentions, government cannot continue to overlook the long-term implications of the TFWP in relation to the failing human capital model of the Federal Skilled Workers Program (FSWP) and economic migration to Canada. Whether government admits it or not, low-skilled labour is becoming the future of migration to Canada.

Firstly, the study will look at theories and practices of naturalization laws<sup>3</sup>, which includes developing an understanding of *jus domicile*. Secondly, an analysis of labour migration to Canada and the development of the TFWP will be presented. Thirdly, *jus*

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<sup>3</sup> In this study I refer to the term naturalization laws, however, the same concept can also be referred to as citizenship principles.

*domicile* will be applied to the case study of the TFWP to outline the implications of this naturalization status. Finally, policy recommendations will be given for long-term incorporation of TFWs in Canada.

## **Reconfigurations of Citizenship**

### **History**

In order to understand how notions of citizenship affect the TFWP, an examination of how citizenship has evolved and developed over time is needed. The history of citizenship can be traced back to the Greek city state, the Roman Empire, feudal settings during the Middle Ages, and the creation of the modern nation-state throughout the late eighteenth century. This was the time of the Constitution of the United States (1787) and the French Declaration of the Rights of Man (1789) during the French Revolution (1789-1799) where granting citizens' rights were forefront. At the turn of the nineteenth century, citizenship began to embody certain levels of economic, social, and educational wellbeing, which worked to empower citizens' civil and political rights (Castles & Davidson, 2000). Modern notions of citizenship often begin with the frequently cited T.H. Marshall (1965), who is viewed as marking the beginning of the contemporary theoretical developments on citizenship. For Marshall, the concept of citizenship had three components: civil, political, and social:

The civil aspects of citizenship arose with the emergence of the bourgeoisie in the 18<sup>th</sup> century and involved a set of individual rights including liberty, freedom of speech, equality before the law, and the right to own property. Political rights, the access to the decision making process through participation in the choice of parliament by universal manhood suffrage, emerged in the 19<sup>th</sup> century and reflect in part the demands of the working classes for citizenship. Social rights, which include welfare, security, and

education have become a major component in the definition of citizenship in the 20<sup>th</sup> century (Lipset in Marshall, 1965).

Although Marshall provides a good starting point for the evolution of citizenship, his ideas of citizenship have also been challenged. It has been argued that adding economic citizenship and the right to work to Marshall's basic rights are important factors in the evolution of citizenship. Additionally, cultural rights, also missing from Marshall's thesis, have become important to many citizens of migrant-receiving countries (E. Cohen, 2009). Furthermore, a lack of agency is missing from Marshall's account of citizenship in that he does not address the matter of who pushed for the promotion of these various rights and who resisted at particular historical moments (Kivisto & Faist, 2007). Consequently, an appreciation of the struggle and contestations of citizenship is overlooked. Finally, Marshall does not specifically address immigration as related to the expansion of rights and citizenship. Written in the geographical context of Britain, similar pathways of the evolution of citizenship may not be easily applied to other countries.

Citizenship evolved over time and became strongly linked to the nation-state and nationality. The nation-state was created as the "natural" focal point of human welfare (Kostakopoulou, 2008). The boundary of the state became congruent with the boundaries of the nation. However, with increased mobility of people worldwide, the notion of citizenship tied to nation-state boundaries is not serving migrants' needs. It is also questioned how well nation-state boundaries serve citizenship principles and provide evidence of a true stake in the national community (Bellamy, 2008). Normative notions are being dismantled as migrants, and those with little or no rights, are growing in number. Although the state intends to regulate citizenship through its citizenship policies

and naturalization laws, a growing number of migrants without formal citizenship are left powerless and exploited. The state's attempts to control citizens' actions are undermined by increased migration.

During the 1980s and 1990s liberal notions of citizenship were prominent. Liberal theorists argued for equality among individuals and viewed humans as freely choosing agents who deserve equal and individual protections (Bloemraad, Korteweg, & Yurdakul, 2008). Following liberal theory, multicultural citizenship emerged (Kymlica, 1995) and was premised on the idea of group rights, where different ethno-racial groups existed together within a multicultural society. Multicultural citizenship can be defined as the right to be treated as a full, equal and respected participant in a political community (Kostakopoulou, 2008). Multiculturalism challenges the liberal philosophy of universalism incorporating collective rights within liberalism's individualistic framework. Both liberal and multicultural citizenship theories are criticized in that they perpetuate or exacerbate inequalities as well as reify cultural distinctions (Bloemraad, et al., 2008; Bloemraad, 2000; Young, 1989 in Bloemraad, 2000; Kostakopoulou, 2008), by maintaining structures of inequality and domination. Liberal and multicultural citizenship also fail in that they can only be understood with reference to the differential context within which they operate and hence perpetuate (Kostakopoulou, 2008). Although Kymlica's (1995) argument for multicultural citizenship attempts to theorize greater inclusion within pluralistic societies, it maintains ethnic differences and masks real differentiation and inequalities.

Recently, much literature has focused on citizenship rights distancing from the citizen linked to territory toward personhood, universal and human rights (Basok, 2004;

Kofman, 2005; Soysal, 1994). Migrants who lack formal citizenship status are said to also lack the power to claim basic human rights, which has become a significant way in which minority groups justify their rights in pluralistic societies. The problem with advocacy efforts is that realistically, no international agency has the right to interfere in the internal affairs of states (Yuval-Davis, 1999). Therefore, advocacy efforts can be easily curtailed and pushed aside by the state's authority. Despite the reality of continued nation-state authority, however, citizenship and human rights literature fosters a deconstruction of normative citizenship notions and sheds light on the state's responsibility for individuals without full citizenship status.

In recent years, there has also been a shift towards a "thickening" of political belonging. It can be suggested that with heightened security concerns, ethnic boundaries of citizenship have become more visible and contribute to reconfigurations of citizenship. The concept of differentiated citizenship recognizes that not all citizens are equal and does not hide that fact that citizens have different rights and entitlements within society. Differentiated citizenship emerged out of the critique of liberal citizenship during the 1990s. Differentiated citizenship challenges neutral and liberal norms and practices that are partial and biased (Kostakopoulou, 2008; Young, 1989). As differentiated citizenship emerges, liberalism, universalism, and multiculturalism's failure to deliver equality within pluralistic societies becomes more apparent.

While challenging the structural and normative nature of citizenship is necessary, it is also important to maintain a pragmatic approach. Kostakopoulou (2008) emphasizes the need to produce alternative institutional designs while analyzing obstacles and considering possible objections. Citizenship cannot be defined exclusively by norms, or

by citizens' choices and actions, some political authority must identify which acts will be permitted and whose performance will be regarded as citizenly (Cohen, E., 2009). While globalization challenges understandings of citizenship as state-centered and state-controlled, nation-states continue to hold substantial power over the formal rules and rights to citizenship (Bloemraad, et al., 2008). Contemporary notions of citizenship discard state boundaries and the state's authority; however with increased attention to security, the state will remain the highest authority.

### **Contemporary Citizenship**

In order to reconfigure notions of citizenship, there are several less traditional perspectives that are important to examine for the purposes of this study, including nested citizenship (Kivisto & Faist, 2007), transnational citizenship (Bauböck, 1994), post-national citizenship (Soysal, 1994), and stakeholder citizenship (Bauböck, 2008). All perspectives suggest the idea of multiple citizenships functioning simultaneously with one another. Furthermore, it has been questioned whether state-based citizenship should be the key way of understanding membership and the allocation of rights in the first place (Bloemraad, et al., 2008). This study argues that with increasing transnational and circular migration flows, individuals share their loyalties across multiple borders.

#### **Nested Citizenship**

Nested citizenship is based on a geographical idea of multiple memberships located in circles around a single focus (Kivisto & Faist, 2007). Nested citizenship refers to multiple citizenships. It is one in which multiple citizenship connotes full membership on multiple governance levels. Similar to Brubaker (1992) who argues that membership is

founded on an inner circle of citizenship based on nationality, and an outer circle of denizenship (explained later in further detail) based on residency. Kivisto (2007) describes nested citizenship as expanding circle of ties that move from the locality through the region to the transnational scale. Although the authors recognize that residential location and length of time can alter one's citizenship ties, the problem with this model lies in that full membership cannot realistically be expected at all levels of governance and across borders. Nested citizenship presumes that the different levels of citizenship are interconnected, rather than operating autonomously and serves well the idea that multiple citizenships can exist and overlap (Kivisto & Faist, 2007). However, nested citizenship remains focused on one type of citizenship being more important than others; giving formal citizenship more importance at the center of the circle than informal citizenship at the outer rings of the circle. In effect, multiple citizenships are not focused on one single centre, but rather a variety of interconnected foci.

Similar to the idea of multiple citizenships are dual citizenship debates producing divided loyalties across nation-states. Using the example of dual citizenship, authors recognize that individuals can have overlapping and multiple formal memberships. This allows foreign citizens to secure citizenship in their countries of external residence without giving up the advantages of their original citizenship. Spiro (2007) argues that plural citizenship facilitates the identification of individuals with state-based communities by allowing individuals to formalize their multiple national attachments. This allows for a more flexible notion of citizenship and dual loyalties to nation-states, yet it only encompasses formal citizenship. Plural citizenship may also emerge as a defining feature of a new era in which membership in states is demoted to the level of

membership in other forms of association (Spiro, 2007). This approach continues to place emphasis on formal citizenship, and informal citizenship rights and entitlements are given less credibility and importance.

### **Transnational Citizenship**

A transnational order is what dismantles the rules and organization of the nation-state system throughout the world. Transnational citizenship is characterized by an expansion of citizenship beyond the national framework. Bauböck (1994) uses three components to define transnational citizenship: the clash between normative principles of liberal democracy and current forms of exclusion from citizenship at the level of nation-states; second, the emergence of interstate citizenship in certain regions of the world; and third, the evolution of human rights as an element of international law. The transnational system not only delegitimizes migrant-receiving state actions for not incorporating foreign populations, it requires the state to protect them. The fact that rights, and claims to rights, are no longer confined to national boundaries further reinforces multiple citizenship models and supports the basis for multiple memberships. Transnationalism, however, is a broad concept and difficult to define, and it can be seen as too general to pragmatically describe any type of citizenship.

Transnationalism and migrant mobility have led to the notion of flexible citizenship. Flexible citizenship refers to the cultural logistics of capitalist accumulation, travel, and displacement that provoke migrants to respond fluidly and opportunistically to changing political-economic conditions, or more specifically to borderless market conditions (Ong, 1993; 2006). Flexible citizenship can be used as a mechanism for diverse actors to call upon unstructured notions of citizenship as the basis for resources,

entitlements, and protection. However, similar to transnationalism the notion of flexible citizenship remains vague. Additionally, flexible citizenship is written within the framework of migrant mobility to maximize competitiveness and wealth within a global economy (Ong, 1999). This attributes migrant transnationalism to the globalized economy and to more affluent migrants who are able to live and work in multiple countries simultaneously. Thus, flexible citizenship fails to address migrant agency from lower income countries and the situational context in those countries which generates or engenders the need to migrate.

### **Postnational Citizenship**

The postnational model of citizenship is based on transnational discourse and structures; however, it is different than transnational citizenship in the sense that it is based on claims and entitlements of human rights. It is a model of citizenship anchored in territorialized notions of belonging. Postnational citizenship awards the right and duty of participation of every person within the authority structure and public life of a polity, regardless of their historical or cultural ties to that community (Soysal, 1994). This form of citizenship undermines the basis of national citizenship by extending rights and entitlements to foreign populations. While Soysal (1994) bases her argument in international human rights law, she also stresses the importance of differential citizenship. Unlike universal human rights approaches or liberal notions of citizenship, differential citizenship allows for rights and entitlements based on length and location of residency, and encourages a climate for diverse claims to an expansion of rights (Kostakopoulou, 2008).

One of the challenges to postnationalism and other types of non-structural notions of citizenship is the argument that the nation-state is weakening and being replaced by supranational constructs (Soysal, 1994; Kivisto, 2007; Benhabib, 2004). Sprio (2007) furthers this notion by arguing that postnationality and the decline of the state has diluted the state-based identity and strengthened non-state attachments. A shared identity is contingent on solidarity within the nation-state; therefore a lack of solidarity will weaken the nation-state concept. J. Cohen (1999) further argues that if the ideals of nation-state sovereignty and territoriality are left aside, if a plurality of governances are acknowledged, and if some rights are guaranteed then supranational institutions of a postnational nature can exist.

However, others argue that the nation-state cannot be replaced by relocating sovereignty in supranational institutions and constructs (Cohen, E., 2009), but rather the meaning and content of national belonging will be transformed as the structural basis of national citizenship continues to be undermined (Tambini, 2001). With globalization, the importance of space and territorial boundaries declines, as well as the importance of the institution defined by space and territory: the state (Spiro, 2008; Joppke, 2010). The structural basis of national citizenship is being undermined as modern society becomes increasingly transnational, unlike the less mobile societies upon which citizenship policies have historically been based.

While postnationalism may weaken the boundaries of the state, it is simultaneously held responsible for upholding human rights norms based on territorial control rather than citizenship affiliation (Spiro, 2007). Postnationalism assumes that the erosion of the state is a positive consequence in that human rights protect individuals from a subjective

state, yet the state maintains power within a given territory. Citizenship continues to be linked to a political unit with the ability to exercise jurisdictional authority, thus formal citizenship remains an important form of membership, security, status, and power (Bloemraad et al., 2008; Bosniak, 2000; Cohen, J. 1999). However, postnational citizenship may also be a path to reduced social benefits as citizenship is increasingly defined according to the global market (Bloemraad, et al., 2008). In other words, the authority of the state in regards to citizenship can be seen as positive in that the state also protects its citizens from the pressures of the international labour market.

### **Stakeholder Citizenship**

Similar to postnational citizenship is the notion of stakeholder citizenship. This idea of citizenship based on rights and entitlements is also grounded in place of residence. It can be argued that everyone residing in a territory that is subject to the laws should also be represented in the making of the laws as stakeholders. Stakeholders in this sense have a moral claim to be recognized as citizens and to be represented in democratic self-government (Bauböck, 2008). These stakeholders then have a right to make claims based on their stake in the community. Although residency is not synonymous with the notion of stakeholder, the idea clearly encompasses those who reside in the territory of a state (Weinstock, 2008). Bauböck (2008) posits that citizenship status and rights should be extended to all persons whose circumstances of life tie their personal fate to the long-term prospects of a political community.

Along the same lines, the concept of “denizen” has been introduced; defined as foreign citizens who enjoy domestic rights derived from residence in a country different

than their country of birth (Bauböck, 2008; Hammar, 1990). This concept associates a name to those foreign residents residing for an indefinite period of time in a different country than their country of birth. As Hammar (1990) notes, the term denizen is derived from an old English word that up to the 1840s was used for foreigners who were granted resident status by the monarch and were not allowed to hold public office or purchase land. Giving foreign citizens with residency rights an official category furthers their claims for residency rights and formally includes them as members of a community with a differential status.

### **Naturalization Laws**

There are two widely used naturalization laws in the most countries today: *jus soli*, and *jus sanguinis*. Most countries use a variation of these two types of naturalization laws. Naturalization law is defined as the way through which an individual becomes a citizenship of a nation-state. *Jus sanguinis* is citizenship based on blood and lineage. This is the principle applied in Germany where children of German emigrants carry German citizenship even though they have never set foot in the country. On the other hand, *jus soli* is citizenship based on the land. Canada follows this naturalization law where individuals born within the nation-state are awarded citizenship regardless of their parent's status (Castles & Davidson, 2000).

A rarely used naturalization law is *jus domicile*: citizenship based on length of time and location of residency (Kostakopoulou, 2008). *Jus domicile* can then be said to enhance the allocation of *jus soli* or *jus sanguinis* citizenship when there is a permanent inconsistency between place of birth or blood lineage and country of residence. This can

be viewed as a solution to correct the allocation of citizenship by *jus soli* when there is a permanent discrepancy between place of birth and country of residence. It is also argued that *jus domicile* could be regarded as a more legitimate ground for citizenship than the “chance factor” of birth in a territory or blood lineage (Grawert in Bauböck, 1994). The fact that migrants arguably choose to migrate and become citizens of another country can attest to their loyalty for that chosen country, rather than having been born into a family or in a given territory.

At the core of *jus domicile* is the idea of a permanent home and the intention to become an inhabitant. In addition to having the intention of becoming an inhabitant indefinitely, the option to do so also needs to be given by the state. The word domicile demonstrates the legal connections and bonds of association that a person has with a political community and its legal system. Domicile is acquired by being an inhabitant of a country through taking up residence with the intention to remain there for an indefinite period of time (Bauböck, 1994). More importantly, *jus domicile* can only be obtained when the state gives inhabitants the option to remain for an indefinite period of time, consequently giving rights and entitlements to those inhabitants. Two requirements are needed for domicile: *factum* – the taking up of residence in a particular country as an inhabitant, and *animus* – a freely formed intention to reside there permanently or indefinitely (Kostakopoulou, 2008). *Jus domicile* is not a new idea; it was previously used in the United Kingdom in 1972 where the Committee of Ministers of the Council of Europe defined it as:

The concept of domicile imports a legal relationship between a person and a country governed by a particular system of law or a place within such a country. This relationship is inferred from the fact that a person voluntarily establishes or retains his sole or principal residence within that country or at

that place with the intention of making a retaining in that country or place the centre of his personal, social and economic interests. This intention may be inferred, *inter alia*, from the period of his residence, past and prospective, as well as from the existence of other ties of a personal or business nature between that person and that country or place (as cited in Hammar, 1990).

*Jus domicile* can be viewed as problematic in that the terms domicile, residence, or habitual residence are not defined and interpreted in the same way in each country. However, each community does have the authority to choose their definition of the term. Hammar (1990) describes habitual residence as based on the duration of residence as well as on other indications of ties between a person and their residence. Despite the differences in vocabulary, the general idea highlights the connections of association and bonds formed during the time of residence in a territory, as well as the feeling of establishment through living and participating in the life and work of the community.

Kostakopoulou (2008) also argues for the idea of multiple citizenships from a legal perspective. She differentiates between domicile (or residence) of choice and domicile of birth arguing that citizenship and entitlements based on domicile of choice can coexist with citizenship based on *jus soli*. Therefore, multiple citizenships could function together: *jus soli* or *sanguinis* tied to lineage and country of birth, and *jus domicile* tied to current long-term residency.

*Jus domicile* is sensitive to the realities of the modern world where migration and human mobility are an everyday occurrence. Today, immigration is a vital part of the social, political, and economic makeup of Canada; its naturalization laws need to evolve to suit modern times. If international norms pull states towards more expansive applications of *jus soli*, such as *jus domicile*, entrenched acceptance of multiple citizenships may result (Spiro, 2007). Residential citizenship holds the possibility of

defining every member of the population as a potential citizen (Bauböck, 1994). This is precisely the problem with TFWs, as Canada has not been ready to include them as potential citizens and imagine them as part of the national framework.

### **Research Contributions**

There are three main gaps in the citizenship literature previously examined. Firstly, the citizenship literature is mainly theoretical in nature and most studies are not based on empirical research. As Bloemraad, et al. (2008) argue, future research needs to address the gap between philosophy and practice because the scarcity of empirical studies allows political actors to make strong claims based on weak evidence. By applying citizenship principles to the TFWP, this study seeks to partly bridge this gap in applying theory to an important issue in Canadian society today. Secondly, none of the studies above link citizenship theory to a realistic naturalization law, they simply focus on how *jus soli* or *jus sanguinis* do not meet today's realities of immigration. Thirdly, seldom does the literature take a legal perspective to realistically incorporating new forms of citizenship principles. This study seeks to fill these gaps by applying citizenship principles to the case study of the TFWP through the legal status of *jus domicile* to provide a long-term pathway to permanency for TFWs in Canada. This will give TFWs the means to provide them with rights and entitlements in order to obtain eventual pathways to permanency to enter the Canadian labour market.

Additionally, there is little research completed on the TFWP, its growing low-skilled program, or the long-term implications of current initiatives including the Canadian Experience Class (CEC) and Provincial Nominee Programs (PNPs). Many

gaps exist and most studies address the growth of TFWs in the agricultural industry (Preibisch, 2007), as well as the Live-In Caregiver Program (LCP). The TFWP provides an example of the international trend toward a proliferation of temporary migration program for low-skilled workers (Fudge & MacPhail, 2009). Much research has already been completed regarding the integration of the FSWP migrants in Canada; however, now that TFWs surpass the number of federal skilled workers (FSWs) (CIC, 2009b), this immigrant class merits increased attention due to the unique issues they pose within already existing immigration policies.

### **The History of Foreign Labour in Canada**

Throughout Canada's history, foreign-born workers have been unequally incorporated into the Canadian labour market, either with the possibility of settlement based on certain conditions, permanent settlement, or temporary residence. These categories were created based on the state's authority. As Satzewich (1991) notes, "...attached to the importance of migration not only as a means for the resolution of labour shortages and as fuel for the process of capital accumulation, but also as a source of future permanent citizens who would contribute to the reproduction of the imagined community which constituted the nation" (p. 124). Historically, many TFWs have not been an imagined part of Canadian nation.

As early as the nineteenth century, TFWs' labour was exploited<sup>4</sup>. During the 1880s, around 15,000 Chinese labourers were brought to Canada to work on the western portion of the Canadian Pacific Railway (CPR). Employers favoured the Chinese as there were

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<sup>4</sup> Note that Marxists have a particular idea of when a worker is exploited; for example, when someone else (capital) is appropriating surplus value created by labour.

not enough workers in the West willing to do the job and travel from Asia to the West Coast was fairly easy. Notably, Chinese workers were relatively easy to secure, were more servile than most other workers, and were willing to work for lower wages than those paid to white labourers. At the end of their contracts, Chinese labourers found themselves without savings or employment and homeless. Worse yet, both the federal and provincial governments denied any responsibility for the workers (Kelly & Trebilcock, 2000).

Left largely unrepresented by trade unions, lacking political leverage, often unable to speak English, and desperate for work, TFWs throughout Canada's history were vulnerable to harsh forms of exploitation, abuse, and discrimination. Federal and provincial governments deliberately ignored exploitative recruitment and employment practices in relation to migrant labour (Kelly & Trebilcock, 2000). Also, safety standards were not imposed, leading to high accident rates attributed to immigrant workers' unfamiliarity with English and lack of skills (Avery, 1988). Denying all knowledge of exploitation, the Canadian government took no responsibility for TFWs.

Migrant labour has also been an important part of Canada's agricultural production. Since the 1940s there has been a need for seasonal contract workers due to difficulty recruiting and retaining Canadian-born workers for the duration of the harvest (Satzewich, 1991). Although many TFWs were not given the option of permanent residency, others were. Many unskilled agricultural labour migrants, particularly those from Europe, were enabled eventual economic integration and settlement desired by the Canadian government. Most agricultural settlers to Canada were actively recruited from

Scandinavia, Germany, and Eastern Europe to settle and farm the prairies (Kelly & Trebilcock, 2000).

In 1973 a more structured, government controlled program created the official category of TFW. The Non-Immigrant Employment Authorization Program (NIEAP) began. Between 1973 and 2002 the number of TFWs entering Canada went from just over 14,000 to over 228,000 (Sharma, 2006). Due to the restrictive nature of the NIEAP, workers were unable to challenge the structural aspects that created the substandard working conditions, such as employer-tied work permits, restrictions regarding entry and mobility within the labour market, and having to leave Canada to apply for subsequent work visas (Fudge & MacPhail, 2009; Sharma, 2006). NIEAP also gave employers greater flexibility by employing a more disciplined and cheaper workforce (Sharma, 1996).

Overall, the NIEAP fostered a growth in the number of TFWs in Canada in and organized restrictive conditions which sought to prohibit permanent residency. Two main streams began to emerge; one for high-skilled and the other for low-skilled workers each with differing entitlements and obligations. Additionally, the NIEAP established a rotational system of migration where migrants would continuously come and go. Additionally, the NIEAP established a rotational system of migration where migrants would continuously come and go, establishing the basic principles and foundations for what is today the TFWP.

## **The TFWP: A Case Study**

In 2002, the Immigration and Refugee Protection Act (IRPA) made amendments to the TFWP. While many of the basic foundations from the NIEAP remained, some changes were made. As Fudge and MacPhail (2009) argue, the IRPA reinforced and facilitated the polarization within the TFWP because it provided for a wide array of different mechanisms for giving different categories of foreign workers access to Canada. The current TFWP created a separate category for low-skilled workers encompassing National Occupation Classification (NOC) C & D<sup>5</sup> skill levels. NOC C is classified as intermediate and clerical positions, and NOC D as elemental and labourers (HRSDC, 2010c). These positions usually require no more than a high school diploma or a maximum of two years job-specific training (HRSDC, 2010d). As statistics over recent years show, the sharply increased number of TFWs attests to the program's growing importance in Canada.

### **Characteristics of the TFWP**

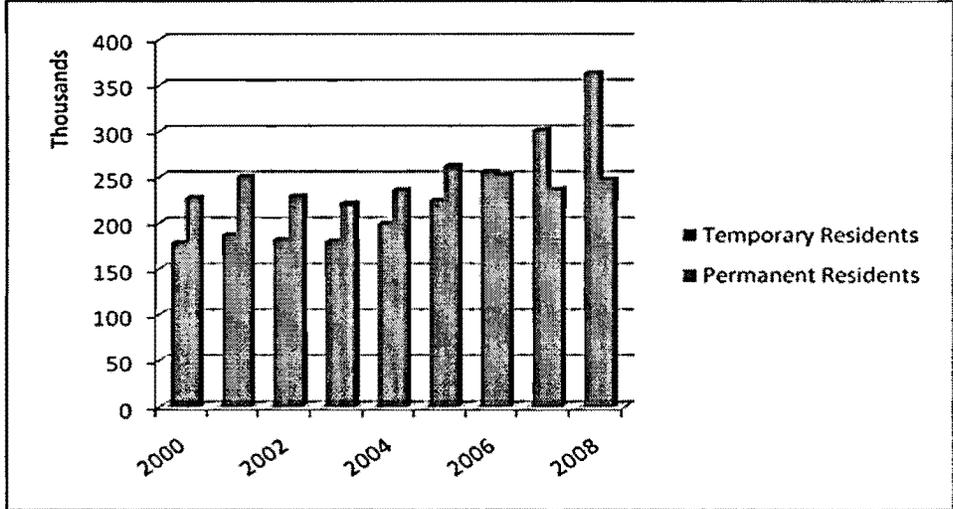
Overall, there has been a global growth in temporary worker program in many Organization for Economic Cooperation and Development (OECD) countries (Thomas, 2010), Canada included. According to Citizenship and Immigration Canada (CIC) data, the number of non-permanent residents who entered Canada in 2008 exceeded the number of permanent immigration of all types who landed that same year (see Figure 1) (CIC, 2009b; Thomas, 2010; Sharma, 2006; Fudge & MacPhail, 2009). In 2008, Canada

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<sup>5</sup> Lower levels of formal training occur in occupations that usually require at most a high school diploma or a maximum of 2 years of job-specific training according to the NOC system and are coded at the NOC C or D skill level (HRSDC).

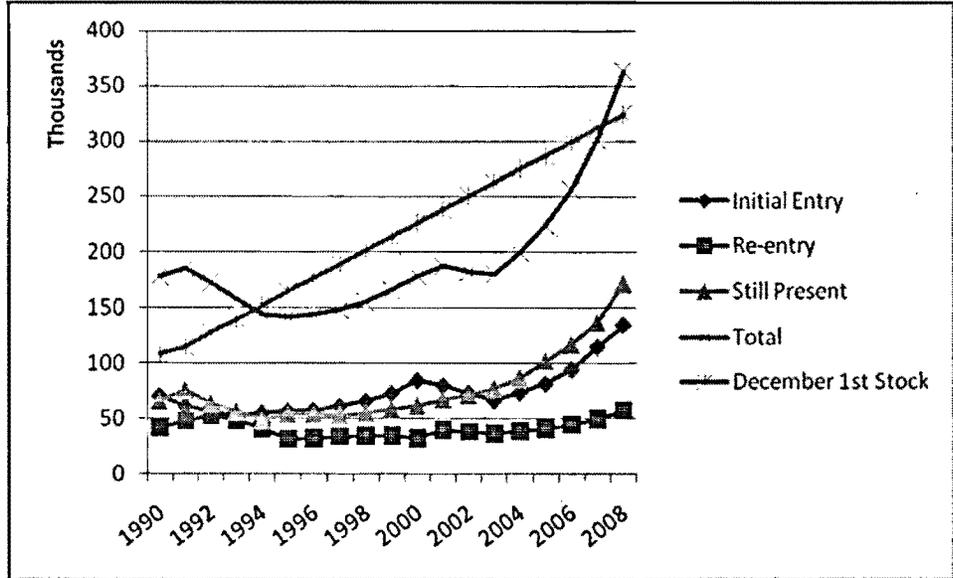
admitted just under 400,000 non-permanent residents and just under 250,000 permanent residents (OAG, 2009; CIC, 2009b; Thomas, 2010)<sup>6</sup>.

**Figure 1: Annual Levels of Permanent Resident and TFW Entrants in Canada 2000-2008**



Source: CIC Facts & Figures 2008 (2009)<sup>7</sup>.

**Figure 2: Annual Flow, Total Entry, and December 1<sup>st</sup> Stock of Temporary Residents in Canada.**

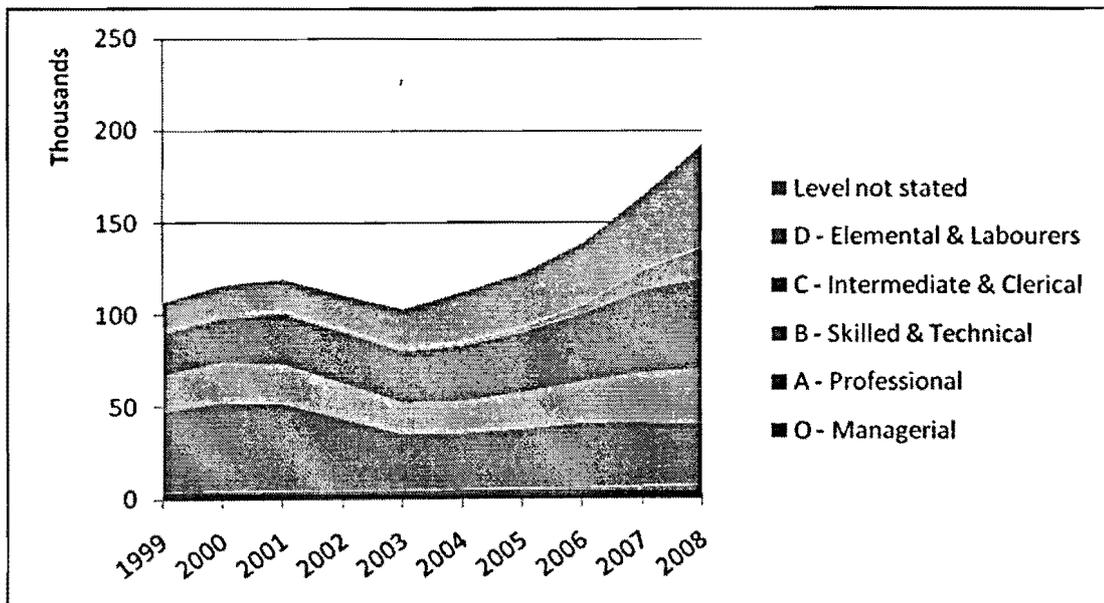


Source: CIC, Facts & Figures 2008 (2009).

<sup>6</sup> The exact number of TFWs in 2008 was 399,523 and of permanent residents 247,243 (Thomas, 2010).  
<sup>7</sup> The number of TFWs is based on initial entry, re-entry, and those still present.

The number of TFWs has sharply risen in recent years. As shown in Figure 2, the total entry is equal to the sum of TFWs' initial entry, re-entry, and those still present. The December 1<sup>st</sup> stock of TFWs present on that day provides an alternative measuring tool. The increase of TFWs has been especially notable in Alberta where the majority are employed. The total entries of TFWs increased threefold between 2004 and 2008 (CIC, 2009b). Particularly, there has been a shift toward more lower-skilled occupations (see Figure 3).

**Figure 3: Total Entries of Foreign Workers by NOC Occupational Skill Level.**



Source: CIC, Facts & Figures 2008 (2009).

More specifically, Nakashe and Kinoshita (2010) have gathered that in 2002, 57% of all TFWs were in skilled occupations (NOC O, A, & B), and correspondingly, 26% were in low-skilled occupations (NOC C & D). However, in 2008 the numbers shifted to 37% skilled workers, and 34% low-skilled workers. As can be seen in Figure 3, the largest increase was in NOC D occupations. Although the statistics in this figure only

represent the occupational skill level of the number of entries of TFWs in Canada (and not the total number of TFWs present), it highlights an increased shift toward NOC C & D low-skilled labourers and a decline of NOC A, B, and O high-skilled labourers. Additionally, “level not stated” accounts for about one in five TFWs in Canada. This category can include family members of foreign workers accepted into the TFWP, of which a large proportion is working in low-skilled occupations. This category also points to the administrative weakness of the TFWP as it can signify that Human Resources and Skills Development Canada (HRSDC) is unaware of the occupation that the Labour Market Opinion (LMO) stipulates (Byl, 2009).

The TFWP in Canada can be divided into three parts: the Seasonal Agricultural Workers Program (SAWP), the LCP, and the TFWP which includes all other types of work. The proportion of non-permanent residents working full time in Canada whose country of birth is in South East Asia, Latin America, or South Asia has increased while the traditional source countries such as the United States, Western Europe, and the Caribbean have declined (Thomas, 2010). This represents a shift in the growing number of workers from low-income countries and raises concerns of racialization with the increase of visible minority TFWs in Canada. Concerns have been raised about whether enough is being done for TFWs who may face significant language, cultural, and racial challenges in Canada (Byl & Foster, 2009; Nakashe & Kinoshita, 2010).

Barriers are being removed in terms of the amount of time TFWs are able to remain in Canada. Within NIEAP, TFWs were able to remain in Canada for 12 months and were then required to leave the country in order to apply for another work visa (Fudge & MacPhail, 2009). Since May 2009, employers are able to renew TFWs’ work permits for

another 12 months without the stipulations that existed in NIEAP (CIC, 2009b). This legislation eases employers' administrative requirements in re-hiring TFWs for the same position. It also satisfies employers' need by allowing increased workforce flexibility to remain in Canada as long as the need exists, creating a situation in which TFWs remain indefinitely in Canada (Nakache, 2010).

Additionally, TFWs can sponsor family members to join them in Canada; however the TFW is responsible for all costs (Fudge & MacPhail, 2009); therefore, most low-skilled workers cannot afford this option. Contrarily, high-skilled workers' families are encouraged to immigrate to Canada and settle through the Canadian Experience Class (CEC). However, the CEC only allows skilled TFWs to apply for permanent residency in Canada (NOC O, A, & B)<sup>8</sup>. Low-skilled TFWs are hence excluded from this program; their only chance for permanent residency is through the PNPs in selected provinces. PNPs are employer-driven programs, where employers and the province can nominate TFWs for permanent residency based on labour market gaps. TFWs nominated through the PNPs are regarded by the government as an economic contribution to the province or territory and are able to establish themselves successfully as permanent residents (CIC, 2008). Provinces and employers are able to recruit an indefinite number of TFWs to fill labour market needs as there are no limits, which contributes to the increasing employer-driven immigration selection process.

### **The Employer-Driven Process**

There are several steps that are followed before TFWs enter Canada. To begin, the TFWP is managed jointly by HRSDC, CIC, with Memorandums of Understanding

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<sup>8</sup> NOC O refers to managerial occupations, NOC A to professional occupations, and NOC B to technical occupations and skilled trades (CIC, 2010h).

(MOU) with the various provinces and territories. In order to hire TFWs, an employer must put forth a request for a LMO. This is based on several criteria: a genuine job offer; wages and working conditions comparable to those offered to Canadians working in the occupation; employer efforts to hire or train Canadians for the job; the worker fills a labour shortage; the employment of the foreign worker creates new job opportunities or helps retain jobs for Canadians; the foreign worker transfers new skills and knowledge to Canadians; and the hiring of foreign workers does not affect labour disputes or the employment of any Canadian worker involved in a dispute (HRSDC, 2010b).

The criteria mentioned above is misleading in that the quick LMO processing time delegitimizes the LMO's credibility as an accurate labour market assessment and the decision on extensions have no regulatory authority (Nakache, 2010). The Office of the Auditor General (OAG, 2009) found that directives on how to assess whether employers meet some or all of the factors outlined in the LMO regulations were not clear or were incomplete, interpretations varied from one regional office to another, and even within the same office. Furthermore, employers are exempt from obtaining an LMO if they are recruiting persons in certain occupations covered by North American Free Trade Agreement (NAFTA) and General Agreement of Trade in Services (GATS)<sup>9</sup> (Thomas, 2010). This signifies that employers have increased control over the number of TFWs they request, which may lead employers to target certain member countries for the ease with which they can call on a flexible labour force.

In 2002, the Low-Skilled TFW Pilot Project was launched due to increased employer demand (CIC, 2009a). As previously mentioned, this included lower levels of

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<sup>9</sup> NAFTA countries include Canada, the United States, and Mexico. GATS countries include some 140 member countries that are a part of the World Trade Organization (WTO).

training such as NOC C & D; in addition, between 2007 and 2010, another pilot project was implemented called the expedited LMO (e-LMO). The e-LMO Pilot Project was put in place to accelerate the application process to hire TFWs in certain occupations in Alberta and B.C. LMO applications from employers who qualified to participate in the pilot project were processed approximately within five business days of HRSDC having received them (HRSDC, 2010a). The e-LMO Pilot Project further facilitated employer's flexibility in suddenly calling upon foreign workers.

In 2007, the government announced further changes to the TFWP to facilitate employers' requests to hire low-skilled workers. Regional lists of Occupations Under Pressure (OUP) were compiled to further reduce obligations on employers demonstrating their efforts to recruit Canadians citizens first (Fudge & MacPhail, 2009). The only limited definition given regarding what actually constituted an occupation under pressure was if the employer stated that they were unable to find a Canadian worker. In B.C. alone, 203 occupations under pressure were listed, facilitating employers' various needs. Moreover, with the introduction of the OUP, employers simply need to claim that they have advertised a job for seven days without enforcement (Flecker, 2010). The TFWP is clearly employer-driven as legislation facilitates their use of flexible and cheap labour and OUP legislation is lenient in order to easily access TFWs. Without caps on the number of TFWs allowed through PNPs and LMO requests (Nakashe & Kinoshita, 2010), the program will continue to grow as employers increasingly prefer TFW over Canadian-born workers.

## **FSWP in relation to the TFWP**

The current FSWP attracts a decreasing number of skilled workers each year (CIC, 2009b). Once in Canada, it is widely known that immigrants' skills are not recognized for a variety of reasons (see Reitz, 2005). Therefore, skilled immigrants who enter Canada through the FSWP are not filling Canadian labour market needs, and TFWs are taking their place.

The FSWP has long been considered unresponsive to short and long-term labour market demands. Criticisms include the lack of credit given to those workers with skills in demand, the large backlog of applicants seeking permanent residency, and the challenges that many immigrants face in gaining meaningful employment in jobs that matched their education, skills and experience (Kitagawa, Krywulak, & Watt, 2008; see also Reitz, 2005). In order to correct these issues, Bill C-50<sup>10</sup> was passed in 2009 giving increased control to the Minister of Citizenship, Immigration, and Multiculturalism Canada over FSWP decisions. FSW applications are now partially based on the following: 38 "high demand" occupations (see Appendix 1), prearranged employment, and Canadian work or education experience, among other things (CIC, 2010d). Interesting enough, these criterion all point toward the FSWP moving alongside similar TFWP criteria as it is now based on short-term labour market needs. Consequently, immigrants who wish to apply for permanent residency and who do not fall within one of these categories consider alternative immigration routes, one of which is the TFWP. Temporary migration in Canada increasingly has become a "transmission belt" to permanent immigration (Alboim, 2009b), which has indirectly affected the way the

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<sup>10</sup> Refer to Appendix 1 for ministerial instructions and the list of occupations "in-demand" in Bill C-50.

TFWP works and interacts with other programs such as the FSWP, CEC, and PNP for immigration to Canada.

### **Problems with the Current TFWP**

Current concerns with the TFWP lie in issues of exploitation, labour market segmentation and the permanency of labour market gaps, as well as a lack of formal citizenship status.

#### **Exploitation**

Exploitation is well documented throughout the literature on TFWs, especially within the agricultural sector. In general, there are structural circumstances that foster TFW exploitation, such as employer-tied contracts, the evaluation process, as well as the lack of TFW representation. TFWs are only permitted to work in Canada with a specific employer (Basok, 2002; Preibisch, n.d.; CIC, 1994). The Ministry of Labour (MOL) assigns workers to an employer for the duration of their contract and they do not have the right to circulate freely in the labour market (Binford, 2009).

Most complaints are not filed due to the paternalistic relationship between employers and TFWs and the fear that employers will deport the workers based on false pretexts in line with their paternalistic relationship (AFL, 2009; Preibisch, n.d.; Basok, 2000; 2002). The reserve of foreign labour is continuous, therefore employers have a dispensable workforce that they are able to replace anytime. “Deportability” is a large factor in employer power; no worker can state with certainty that it is guaranteed they will return to work regardless of previous experience (Binford, 2009). As a result, foreign workers do not come forth or complain of issues for fear of not being chosen

again to work in Canada. Issues such as sickness and injury, subordinate working conditions, long work hours, and substandard housing arise, among other problems (Basok, 2000; 2002; Binford, 2009; Preibisch & Binford, 2007; Preibisch, *n.d.*; Smart, 1997).

Furthermore, employers are required to write an evaluation for the TFW at the end of each contract period. Complaining could easily amount to a negative evaluation by the employer, which could cause the TFW either to be put back into the general lottery system, a one to two year suspension, or permanent expulsion from the program (Binford, 2009). Employers also have the power to decide whether to invite or “name” workers back for the following year, and therefore complaints are suppressed providing workers want to be named for the following year (Preibisch & Binford, 2007; Binford, 2009; Basok, 2000; Preibisch, *n.d.*). A high number of TFWs are named back to work with the same employer<sup>11</sup>. TFWs are rewarded for “good” behaviour: reliable, hardworking, obedient, as well as physically and emotionally resilient (Preibisch & Binford, 2007). A non-written “behavioural code” exists where TFWs adopt a conservative strategy, accelerate work rhythms, extend workdays, and accede to employers’ requests for overtime (Binford, 2009). Several authors have documented the centrality of racism and the process of racialization in the selection of TFWs (Stasiulis & Bakan, 2005; Satzewich, 1991; Sharma, 2002; 2006).

Finally, there is little representation for TFW issues as many TFWs are prevented from unionizing and have little power to enforce their labour rights (Fudge & MacPhail,

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<sup>11</sup> In a Foreign Agricultural Resources Management Services (FARMS) (2005) study, the percentage of workers named back to work with the same employer in 2002 were: Barbados 83.8%, Jamaica 91.4%, the Organization of Eastern Caribbean States 84.9%, Trinidad & Tobago 78.4%, and Mexico 79.7% (FARMS 2005, as cited in Preibisch, *n.d.*).

2009). Also, consular representatives provide no help as they are reluctant to become too aggressive with employers for fear of losing them to a competitor TFW source country (Preibisch & Binford, 2007; Binford, 2009; Preibisch, n.d.).

TFWs vulnerability stems from their precarious status, lack of citizenship and the associated rights and entitlements. The immigration industry seeks to profit while playing a role in migrant exploitation. The growth of the previously unregulated migration recruitment industry shows that TFWs bear the costs of labour migration (Hennebry, 2008). Recruitment agencies have been found to be associated with abusive practices such as charging workers large fees, misrepresenting terms and conditions of employment, withholding passports and travel documents, and human trafficking (Martin, 2003). This issue has recently been scrutinized by the Canadian government (CIMM, 2009), and new legislation has been put forth concerning “ghost consultants”<sup>12</sup>. The Act will make it a crime for unauthorized individuals to provide immigration advice for a fee; it would also amend the IRPA so that fees for immigration services could only be charged by authorized consultants, lawyers and notaries who are members in good standing of a governing body authorized by the Minister (CIC, 2010a).

Although some measures have been put in place by the government to protect workers from exploitation, few have been successful (Fudge & MacPhail, 2009). In the end, exploitation undermines the legitimacy of the program within the national consciousness and on an international scale.

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<sup>12</sup> Ghost consultant refers to immigration consultants that are known to occasionally and illegally charge large amounts of money to facilitate migrants' entry into Canada. Many consultants act dishonestly or illegally by charging significant fees, and by promising potential immigrants high-paying jobs or fast-tracked visas, and often sell them counterfeit travel documents which are used to deceive Canadian immigration officials (CIC, 2010a).

## **The Canadian Labour Market**

In 2006, the Conservative government declared its intention, "...to create the best educated, most skilled, and most flexible workforce in the world" (as cited in Flecker, 2010). In a knowledge-based economy, Canadians are becoming better educated; consequently, Canadians are less willing to take precarious employment positions, and TFWs are filling Canada's flexible labour market needs.

The majority of TFWs cluster in specific occupations in the lower levels of the labour market, particularly in service-producing industry sectors (HRSDC, 2010a). This allows the Canadian-born to occupy the higher sectors with better pay, benefits, and with the freedom to file complaints or choose employers. Canadian citizens maintain their privilege and access to the higher sectors of the labour market while TFWs occupy the lower segments (Bauder, 2006; Satzewich, 1991; Bonacich, 1972; Sharma, 2002). The primary (upper) segment of the labour market can be described as capital-intensive with high levels of technology and the secondary (lower) segment is labour intensive, with only minimal investments in machinery and technology (see Piore, 1979). The flow of migrants is rotational or cyclical, and is used as an expendable reserve of labour (Satzewich, 1991; Fudge & MacPhail, 2009; Sharma, 2006; Bauder, 2006). This in turn helps to secure higher paying jobs for the Canadian-born.

Labour market segmentation is becoming more pronounced as an increasing number of TFWs are admitted to Canada each year (CIC, 2010g; see also Galabuzi, 2006). Canada is thus creating and maintaining an internationally segmented labour market within its own borders (Bauder, 2006). Global labour markets have become

dependant on temporary migration and immigration policies reinforce the permanent nature of the TFWP in order to maintain its' competitive advantage within the global political economy (Preibisch, 2007).

As global labour markets become increasingly dependant on temporary migration, the temporariness of the work they fill is increasingly permanent. Shortages are often defined not by the absence of actual workers ready and able to work, but by the existence of particular characteristics of the labour supply that prohibit the accumulation of capital so as to enter the labour market permanently (Sassen, 1998; Sharma, 2006). Arat-Koc (1992) uses the LCP to argue that the temporary status of workers is applied on a permanent basis. Many countries, including Canada, have brought "...great numbers of temporary workers in to occupy economic roles that nationals of these countries no longer wanted to perform, but without the intention of ever including them as full members, they have found themselves with communities of temporary economic migrants who were temporary in name only" (Weinstock, 2008, p. 5).

The TFWP has been established to continuously admit TFWs on a permanent basis to meet Canada's economic self-interest. As Avery (1995) argues, migration policy has been based on the utility of migrant workers. The difference today lies in the fact that Canada is not focused on permanent residency, but rather rotational migration. Employers are being given priority when it comes to more easily accessing foreign labour. As previously mentioned, certain policies allow employers to "name" workers (Preibish, n.d.). In 2002, a study revealed that a large percentage of TFWs in the agricultural industry were named back to the same farm (FARMS, 2005 as cited in Preibisch, n.d.). Basok (2000) found that among the 155 Mexican workers interviewed,

the average number of years worked in Canada was 6.5, although many had worked in Canada for ten or more years. Although these studies specifically refer to the SAWP, similar inferences can be made in the more general TFWP. Despite the economic recession of 2009, the number of TFWs increased in Canada (CIC, 2010g). Therefore, even though Canadians are less willing to work in the lower sectors of the labour market, TFWs are still filling positions, reinforcing the divide between high and low sectors of labour market.

### **Citizenship**

Citizenship policy is crucial to the imagined community, the demographic development, as well as the labour force development of the nation. The lack of citizenship fosters inequality within a nation-state for groups which also lack rights-bearing forms of membership in the territory where they are working and residing (Stasiulis & Bakan, 1997). Formal citizenship and the associated rights and entitlements are purposely denied to TFWs in an effort to maintain their precarious and exploitable status. TFWs lack of citizenship is what makes the TFWP temporary as it disallows TFWs to claim any rights and entitlements. As Balibar (2000) argues, those without citizenship rights should be able to earn citizenship through the contribution they make to society. In other words, those who do the work of making a society function should have an entitlement to some type of membership in the community. Entitlements could include some form of political, social, economic or moral membership within Canada. Those without full citizenship have shown that, "...it is not necessary to be a national citizen in order to contribute responsibly to the life of the civic community..." (Balibar, 2000, p. 43). Therefore, citizenship can take different forms and be defined not solely as

a birthright of *jus soli* or *jus sanguinis*, but also something that can be acquired and earned over time. As it stands today, TFWs are not subject to any naturalization laws of *jus soli* or *jus sanguinis* and are excluded within society; Canada owes them recognition of their ongoing contribution to the country.

### ***Jus Domicile Applied to the TFWP***

Along similar naturalization laws of *jus soli* and *jus sanguinis*, *jus domicile* can be used as a formal legal mechanism for TFWs to claim rights and entitlements based on economic contributions within a community. TFWs participate in labour markets as well as the local economy; these contributions are grounded in place of residency and connections become stronger the more time accrued.

*Jus domicile* has kept current with the evolution of citizenship, including the principles of citizenship previously mentioned; nested, transnational, post-national, and stakeholder citizenship. Firstly, nested citizenship is based on concentric circles referring to multiple citizenships: the inner circle based on nationality and the outer circle based on “denizenship” (Kivisto & Faist, 2007; Brubaker, 1992). *Jus domicile* will allow multiple citizenships to exist and overlap as it can function in combination with *jus soli* or *jus sanguinis*. *Jus domicile* also allows for multiple national attachments without the renunciation of one’s original citizenship of birth. Although formal national citizenship is given more importance, *jus domicile* provides the authority for rights and entitlements in TFWs’ long-term country of residence and employment.

Secondly, transnational citizenship is an expansion of citizenship beyond the national framework based on liberal democratic principles and human rights as international law (Bauböck, 1994). *Jus domicile* provides a formal citizenship principle

in order to expand citizenship beyond the nation-state. Transnational citizenship requires the state to protect migrants as rights and claims to rights exist across boundaries. Therefore, *jus domicile* can be used as an international human rights law to foster migrant-receiving nation's responsibility to protect TFWs within their territory. As Spiro (2007) argues, the state is held responsible for upholding human rights norms based on sovereignty and not citizenship affiliation. Consequently, if the state has control over its territory and the people within it (those who are subject to its laws), then there is reason for the state to protect all individuals within its territory.

Thirdly, postnational citizenship awards the right and duty of participation to individuals within the authority structure and public life of a polity (Soysal, 1994). *Jus domicile* formalizes the right and formally recognizes the participation and contribution of TFWs in the public life of a polity, regardless of their country or birth and consequent citizenship. Local communities and institutions can also be understood in terms of participatory citizenship. As Bloemraad, et al. (2008) argue, participatory citizenship allows immigrants to make citizen-like claims on the state even in the absence of formal citizenship status. If TFWs were given the legal mechanisms to claim entitlements based on participation and the contribution they make to the territory where they reside, they would be given the opportunity to accrue residency in order to have the eventual option of permanency. Furthermore, differential citizenship allows for different rights and entitlements based on length of residency (Kostakopoulou, 2008), *jus domicile* would act as a citizenship principle that would formalize this notion. *Jus domicile* itself would not allow temporary residents to become citizens immediately like *jus soli* or *jus sanguinis*, however it would recognize residents' rights in their contribution to public life, most

notably to the economy. This would then lead to an accumulation of time, which would allow TFWs to be eligible for permanent residency.

Finally, stakeholder citizenship grounded in rights and entitlements based on residence is exactly what *jus domicile* entails. Using *jus domicile*, TFWs would be able to make claims based on their stake in the community, which mainly comprises an economic stake. “Denizens”, foreign citizens who enjoy domestic rights derived from residence in a different country than their country of birth, describe precisely what *jus domicile* would provide for current TFWs in Canada.

Similar to the LCP, TFWs could apply for permanent residency through the naturalization law of *jus domicile*. After 24 months of work in Canada, Live-In Caregivers are able to apply for permanent residency (CIC, 2010b). As Bauböck (1994) mentions, host states can easily manipulate residence permits so that some immigrants are not allowed to stay long enough to become citizens. Although the option of permanent residency does not prohibit employers from partaking in exploitative practices, it does allow TFWs to accrue some residency time toward *jus domicile*, which would at least provide TFWs with some bargaining power. While this study suggests that TFWs should have the right to eventual permanent residency, it acknowledges the fact that not all TFWs may want to migrate to Canada, living far from family and friends. However, for those who do wish to remain in Canada, *jus domicile* would give them the option to do so.

For the reasons mentioned above, *jus domicile* remains the natural and responsible decision for migrant-receiving countries like Canada to apply toward the TFWP. *Jus domicile* should be given to TFWs as they contribute greatly to the Canadian economy

across many essential sectors. It would only be appropriate to offer all TFWs some rights and entitlements with the eventual option of permanent residency in Canada for their continuous contribution, dedication, and loyal to Canada's economy year after year. There are however, advantages and disadvantages to *jus domicile* that exist.

### **Advantages**

Once TFWs are able to claim entitlements based on *jus domicile*, they would receive rights through differential citizenship, while accruing time needed for permanent residency. Some rights and entitlements are awarded to potential future citizens in Canada, permanent residents. Although permanent residents do not have the right to vote, they have the right and are encouraged to participate socially and economically in Canadian society (CIC, 2007, 2010c). Therefore, types of differentiated citizenship or rights and entitlements already exist for non-citizens. Awarding TFWs, possible future citizens, fundamental citizenship rights and entitlements as a result of their residency in Canada is not counter to the citizenship principles that already exist. Recent legislation allows TFWs to remain in Canada for a maximum period of two years without having to leave the country in order for employers to renew workers' LMOs (CIC, 2009a). The legislation now allows workers to continuously work without interruptions caused by LMO processing times. However, this already established legislation could also function to benefit TFWs in the sense that it sets up the framework for TFWs to accumulate uninterrupted residency that could be used toward *jus domicile* and permanency in Canada. *Jus domicile* would simply formalize the intermediary step that TFWs would take toward permanent residency. Territory would simple serve as a replacement for determining who can be rightfully subject to laws because the scope of state legislation is

delimited by territorial borders (Bauböck, 1994). *Jus domicile*, as a formal naturalization status provides a legitimate basis for TFWs to acquire permanency in Canada through residency requirements.

TFWs can be considered as potential permanent residents through *jus domicile*, something that is consistent with Canada's history of labour migration. Many generations of Canadians have become citizens through the work and dedication they have contributed to Canada and today's low-skilled TFWs deserve the same opportunity. Canada has historically linked migration with citizenship acquisition, which has been poorly handled in the TFWP (Siemiatycki, 2010). *Jus domicile* for TFWs would fill temporary labour market gaps on a permanent basis; the jobs gaps themselves would no longer need to be classified as temporary. This does not mean that the TFWP would no longer be needed; however, some labour market gaps could eventually cease to exist with time. Labour market gaps would also change over time and new gaps would appear.

A major advantage for *jus domicile* is that it would eliminate the necessity for TFWs to go underground, working and living illegally in Canada. At present, TFWs who experience exploitation and wish to leave their workplace or who wish to remain in Canada after their contract expires have the option of remaining in Canada illegally. This presents a problem as these individuals are channelled into the informal and highly exploitative sectors of the economy and face the threat of deportation on a daily basis. Furthermore, it presents unwanted results for the state, as the CIC Manual for Hiring Temporary Foreign Labourers (2008) states:

While there is a reluctance on the part of CIC and HRSDC to support work permits for lower-skilled workers because their skills profile would not normally qualify them for permanent immigration to Canada, concerns

regarding these persons going out of status and remaining in Canada illegally are mitigated when the foreign national has been nominated for permanent residence... (CIC, 2010f).

Furthermore, *jus domicile* will allow TFWs to excel in the labour market entering Canada with a work permit and gaining Canadian work experience and skills. It is widely known that there is a mismatch between migrants' education and skills and employment once in Canada: as well, immigrants who migrate through the FSWP often experience unemployment as their skills are not recognized in the Canadian context (see Reitz, 2005). Employers most often attribute unemployment to a lack of Canadian work experience and a lack of recognized foreign credentials. *Jus domicile* would allow TFWs to gain recognized Canadian work experience through already approved employment, having resided in Canada they would be better prepared to remain in the Canadian labour market (similar to the Canadian Experience Class discussed in further detail in the following section). By attracting foreign residents who have already experienced success in the Canadian labour market and whose skills are in demand, the difficulties that many recent immigrants have experienced in transferring their pre-immigration human capital would be alleviated (Sweetman, 2010).

Through an analysis of the 2006 Statistics Canada Census, Thomas (2010) found a number of temporary resident characteristics attest to their ability to integrate into the labour market better than FSWs who enter Canada through the point system. Firstly, temporary residents<sup>13</sup> were slightly more likely to speak English than were recent immigrants; were younger than permanent residents; were more likely to live in less

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<sup>13</sup> Non-permanent residents include foreign students, TFWs, as well as asylum seekers in Canada.

populated settings; and finally, were more likely to have postsecondary education<sup>14</sup>. Additionally, Warman (2009; 2010) found that the weekly earnings of male TFWs were much higher than those of recently landed immigrants. These characteristics, all of which are included in the FSWP<sup>15</sup>, confirm TFWs' promising potential in the Canadian labour market as well as integration into society in the long-term.

Moreover, if given *jus domicile* citizenship TFWs would formally be able to fairly compete against other immigrants and the Canadian-born for jobs in all sectors of the labour market. Recent history has shown that newer cohorts of immigrants perform poorly in the labour market and TFWs have been very successful in comparison (Warman 2009; 2010). TFWs are recruited to fill specific vacancies, they know their credentials will be accepted, and they start work on arrival. As a result, the average weekly earnings of temporary residents working full time exceed those of more recent immigrants who migrated between 2000 and 2005 (Thomas, 2010). Once TFWs obtain *jus domicile* and have the chance to compete on a more level playing field in the labour market, employers may worry that they will lose the readily available cheap labour source. TFWs will either have the bargaining power to demand higher wages through unionization, or will change employers. This may also lead to the self-regulation of unscrupulous employers as workers would have the option to leave inferior employers and would be likely to work for reliable employers.

Lastly, *jus domicile* would simply recognize the links that already exist between TFWs and their Canadian communities. With the recent legislation allowing TFWs to

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<sup>14</sup> Specifically, the percentage of temporary residents with degrees increased from 24% in 1991 to 46% in 2006 (Thomas, 2010: 40).

<sup>15</sup> The FSWP is based on (but not limited to) the following criteria: education, abilities in English and/or French, work experience, age, arranged employment, and adaptability (CIC, 2010e).

remain in Canada for longer periods of uninterrupted time (CIC, 2009a), they are able to accrue a longer length of residence, which will strengthen their connections within communities. 2006 Census data indicate that 29% of temporary workers resided in Canada five years before the census date (Thomas, 2010). This points not only to the permanency of their employment positions, but also to the connections they establish over time. Thomas' (2010) data indicate that TFWs have an ongoing connection to Canada, which is an important factor in legitimizing TFWs' rights to be permanently incorporated into Canadian society.

### **Disadvantages**

It is also important to consider the negative consequences of *jus domicile*. If TFWs received *jus domicile*, the entire TFWP would lose its lure for employers. TFWs would no longer be willing to work under precarious conditions and would acquire the bargaining power to demand higher wages and benefits. This in turn may raise wages, which would inflate prices and Canada would no longer be competitive in the global economy. Contrarily, a scenario most often used by Canadian labour unions is the opposed idea that TFWs "drive down" wages for the Canadian born (Sweetman, 2010). Evidence suggests that the presence of TFWs can depress wages for local workers, at least those in the lower wage brackets (Canadian Issues – Interview with Jason Kenney, 2010). However, this study suggests that wages will not lower as unions will have the power to maintain decent wage standards. Another consequence of *jus domicile* and the incorporation of low-skilled workers may be that the Canadian labour market will further segment into high and low sectors leaving higher wage jobs for the Canadian-born, and

lower wage jobs for immigrants. Several authors argue that the labour market is currently starkly segmented into these two categories (see also Galabuzi, 2006; Teelucksingh & Galabuzi, 2005).

In terms of social integration, with the current neoliberal context and a decrease in the welfare state, it can be argued that low-skilled TFWs who possess lower language and education levels will require more integration services. If TFWs, especially those who are low-skilled, acquire *jus domicile* they may require higher settlement costs, yet their Canadian work experience may override other integration efforts. This means that TFWs have a higher employment success rate than immigrants who entered Canada through the FSWP (Thomas, 2010), and thus their integration may actually prove to be less costly as possessing employment may lead to greater social networks, language acquisition, and a better standard of living. A common counter argument to increased immigration is the notion that immigrants will become a greater burden on Canada's welfare system. However, as Thomas' (2010) analysis suggests, TFWs have similar if not better characteristics of integration than FSWs.

## **Objections**

Kostakopoulou (2008) outlines three main objections to the idea of *jus domicile* which can be fittingly applied to the TFWP in Canada. Firstly, it can be argued that resident migrants lack the loyalty required in order to be full members of a political community after a relatively short period of residence. This point of view can be attributed to the normative notion of national origin connected to one's foundation of loyalty. TFWs are legitimately excluded from citizenship as if they are assumed to be

unable to develop an appreciation of, or commitment to Canada. If there is an emphasis on democratic participation in a community and TFWs acquire connections over time in their communities, then *jus domicile* can be seen as a positive contribution to the community.

Secondly, from a transnational perspective, *jus domicile* holds on to territoriality when in reality individuals are already transnational. Therefore, according to this objection there would be no need for *jus domicile*, and transnationalists would argue that the conception of citizenship needs to be conceived more radically in terms of de-territorialisation. However, the pluralisation of identities across borders has not erased the reality of the state's authority, nor has it erased the relevance of formal citizenship. Logistically, it has been argued that *jus domicile* can produce multiple citizenships in the sense that it would lead to a potential accumulation of citizenships by migrants moving from one country to the next (Bauböck, 1994). However, this study argues that once an individual leaves the habitual residence, begins to accrue time, and establishes connections in another country, the previous *jus domicile* would be renounced. Multiple *jus domiciles* would not be accumulated over time for one individual. These formal citizenships could combine together and function alongside one another.

Finally, the idea of *jus domicile* can be seen as an idealistic concept unlikely to be empirically feasible. This is precisely the reason for which the idea of *jus domicile* needs to be explored in a detailed manner and applied to the TFWP in Canada. Kostakopoulou (2008) contends that ideas matter as they make constraints of existing paradigms more visible. In terms of the TFWP, the idea of *jus domicile* also opens up future possibilities and allows for less traditional notions of citizenship.

## The Long-Term Implications of Economic Migration to Canada

The TFWP does not stand alone in terms of economic migration to Canada, it is related, affected, and influenced by the other migration programs and changing policies such as the PNP, the CEC, as well as the FSWP. Taking into consideration the declining number of migrants entering through the FSWP, and their increasing numbers in PNP and TFWP, the long-term implications of the TFWP need to be examined in relation to the bigger economic migration picture in Canada. In 2009, according to the Office of the Auditor General (OAG), CIC projections indicate a significant change in the immigration target levels of each category within the economic migration classes (see Table 1).

**Table 1: CIC Immigration Target Levels – Permanent Economic Migrants**

Category	2009	2012	Average Variation +/- %
FSWP	68,200	18,000	- 73.6%
PNP	20,000	40,000	100%
CEC	5,000	26,300	426%

*Source:* CIC Annual Report to Parliament on Immigration and the Office of the Auditor General's analysis on projections (2008).

Permanent economic migration is being channelled through the PNP and CEC programs as a pathways to permanency for high and low-skilled workers. As will be shown, the idea of permanent residency for TFWs does not contradict Canada's current immigration programs and goals.

### The Canadian Experience Class

The CEC, in part, already follows the idea of *jus domicile* through the option of eventual permanent residency for high-skilled TFWs. As previously mentioned, the CEC

began in 2008 and was designed as a pathway for highly skilled workers (NOC A, B, & O) as well as international students with Canadian educational experience. In 2009, the federal government expected between 10,000 and 12,000 applicants for CEC, but only received about 1,000 applications (CIC, 2009b). In terms of low-skilled temporary foreign labour (excluding the LCP), the CEC does not provide a pathway to permanency, which may explain the low numbers of applications and demonstrate Canada's objectives in attracting and retaining high-skilled workers (Nakashe & Kinoshita, 2010). The government may be fearful of including low-skilled TFWs in the CEC, as it would mean that Canadian immigration would no longer be based on the human capital model.

The implications for this program constitute a shift toward an employer and labour market-driven immigrant selection process based on provincial labour market needs. The number of individuals eligible to seek permanent residency through CEC are few. However, with the introduction of the CEC, the high-skilled TFWP now has a substantial nation-building component (Sweetman, 2010), something that could be extended to low-skilled TFWs. The CEC also emphasizes and endorses Canadian work or education experience, something that TFWs possess.

Although the CEC attempts to retain skilled immigrants once in Canada, it targets a relatively small number of potential permanent residents. Furthermore, the CEC intends to offset the mismatch between migrants' skills and employment in Canada with the FSWP. If the CEC were to widen its scope to include low-skilled labour such as NOC C & D, then TFWs would have a pathway to permanency. Problems lie in the fact that employers would increasingly choose who to admit into Canada based on a different set of criteria most important, which may not be beneficial to the country as a whole.

Employer-driven immigration decision-making is potentially problematic in that employers do not have the training, background information, or national perspective when selecting immigrants. Furthermore, employers base their decisions for employment on different selection criteria such as experience in the field and language capabilities. Although employers' criteria are beneficial for eventual immigrant settlement, they do not have the larger picture and long-term implications in mind.

Additionally, the CEC is based on a TFW's current employment, which constitutes a positive shift in immigrant decision-making as it is based on actual employability and is better able to address labour market needs (Canadian Chamber of Commerce, 2008). At the same time, the short-term occupation focus has been criticized for not serving Canada well in the long-term (Alboim, 2009b; Lowe, 2010). In the long run, even though the CEC takes current employment into consideration, TFWs still gain as their Canadian employment experience and financial means allow them to move freely within the labour market.

### **The Provincial Nominee Programs**

PNPs are an attempt by the federal state to allow provinces to regulate their own migration according to provincial or regional labour market needs. Like the TFWP, the PNPs have also seen rapid growth; from fewer than 500 provincial nominees in 1999 to more than 22,000 in 2008 (Nakashe & Kinoshita, 2010). Provinces are allowed to tailor their own selection criteria and decide whom they would like to nominate for immigration; however, CIC continues to hold authority over issuing permanent resident visas to all approved applicants.

Although the PNPs provide a pathway to permanency for TFWs in Canada, there are several issues that arise. Currently, both the provinces and the federal state hold shared responsibilities over the TFWP, which can provide confusion and downloading issues. This also poses a problem as TFWs may be eligible for permanent residency in certain provinces and not others based on the province or territory of their original work permit (House of Commons Canada, 2009). In addition, applications from TFWs for permanent residency through a PNP are tied to a job with a specific employer. If the worker is laid off prior to attaining permanent residency, the application is often cancelled (Nakashe & Kinoshita, 2010). Therefore, as previously mentioned, TFWs may not accrue sufficient length of residence to acquire *jus domicile* or eventual permanent residency.

The most progressive of all provinces is Manitoba where employers are able to nominate low-skilled TFWs after only six months of residency in the province. Approximately 70% of all immigrants who arrive in Manitoba do so through the PNP (Bucklaschuk, Moss, & Annis, 2009). Manitoba's PNP is the most progressive and is unique in Canada, while B.C., Alberta, and Saskatchewan have recently expanded their PNPs to include NOC C & D occupations in specific industries (Nakashe & Kinoshita, 2010). Therefore, lower-skilled workers can only access permanent residence through a PNP by following a narrow employer-driven pathway. It is argued that PNPs are short sighted, focusing on immediate labour market needs and on qualifications for specific occupations rather than on human capital characteristics (Alboim, 2009a). However, it can also be argued that with Bill C-50 the FSWP is based on similar criteria as the TFWP in that the criteria facilitates those with Canadian work experience and those whose skills

fit jobs in “high demand”. Therefore, all of Canada’s economic migrants are now being chosen according to immediate short-term labour market needs.

There is no legislation that provides a sufficient number of low-skilled TFWs to Canadian provinces which has further implications. As the CIC TFW Guidelines (2010f) state, “If a province feels a foreign national is sufficiently needed in its labour market to nominate that person, then having that job filled is clearly important, irrespective of where in the NOC that particular job is classified” (p. 67). This signifies that employers, through the PNPs, are able to recruit an unlimited number of TFWs at any skill level and possibly nominate them for permanent residency. Moreover, PNP agreements do not require provinces or territories to obtain CIC’s approval when they create new PNP categories; they are only required to inform them (CIC 2009c). There is an increasingly worrisome sub-contracting role that employers and provincial governments are playing in immigrant decision-making in Canada to suit their own needs.

### **Policy Recommendations**

The Canadian government should give current TFWs the option of permanent residency after having completed 24 months of Canadian work experience. This will allow current labour market gaps to be filled, and will also formally recognize TFWs’ connections and contributions to Canada. In the meantime, the CIC should temporarily cease processing LMOs for a period of time in order to examine the current TFWP. This will allow the government to re-evaluate the purpose and outcome of LMO evaluations. A comprehensive examination of economic migration to Canada by provinces, territories, and the federal government is needed so that future decisions regarding TFWs

can then be taken. Although some academics believe the program should be terminated (Byl, 2009; Alboim, 2009a), using the TFWP as a pathway to permanent residency would be beneficial for Canada.

Additionally, given the low number of CEC applications based on CIC targets in 2008, CIC needs to re-evaluate their approach in retaining Canadian employed and educated migrants. CIC needs to determine whether the CEC should be expanded to occupations requiring lower levels of education (i.e. NOC C & D). Another option would be to expand the NOC B list of trades to include all workers in trades and not simply supervisors. That way, TFWs would be eligible for the CEC leading them on a pathway to permanency.

### Conclusion

Citizenship has traditionally been linked to rigid notions of the nation-state and images of its people allowed to live within its boundaries. Recently, less rigid notions of citizenship have emerged grounded not in territorial demarcations, but rather in rights and entitlements for individuals and groups across borders. Normative notions of citizenship acquisition through the state are also being dismantled by universal human rights. Although modern notions of citizenship are increasing, however, the nation-state remains the main authority.

As Canada has historically admitted and offered citizenship to migrants to fill labour market needs, *jus domicile* can be used as a framework for long-term naturalization in order to offer eventual and optional permanent residency for TFWs in Canada. The option of permanent residency has both advantages and disadvantages; however, it is Canada's responsibility to protect those living and working within its

borders and in the long run it will better serve Canada's labour market needs. While the CEC and PNPs already offer pathways for high-skilled labour, they also offer potential pathways for low-skilled labour. The PNPs are the most viable pathways to permanency, as they are based on provincial labour market needs and only require that provinces declare certain occupations "in-demand".

If Canada continues on its current path, the integrity of the immigration system will be discredited for a number of reasons. First, TFWs are prone to exploitation and increased numbers will magnify exploitation issues on a national and possibly an international scale. Second, the FSWP will become obsolete due to long processing times and the existing problems FSWs face once in Canada due to a lack of skill and credential recognition. Third, skilled immigrants will find alternative pathways to permanency through the CEC, or the low-skilled pathways to permanency through the PNPs.

Increasing numbers of TFWs suggest that the federal government will continue to subcontract immigration decision-making matters to provinces. Provinces will increasingly decide on the occupations for which they need immigrants, which also shows a shift toward an increase in the flexibility for allowing lower skilled TFWs pathways to permanency based on provincial labour market needs.

As labour migration continues to increase worldwide, Canada's traditional economic migration strategies and Canada's point system through the FSWP are not successful in immigrant integration. Immigrants from non-traditional source countries not only want to migrate to Canada and become citizens, but they are also needed within the Canadian labour market. Notions of citizenship and images of the nation-state and its citizens are the root of Canada's reluctance to incorporate low-skilled labour on a

permanent basis. Once Canada realizes TFWs' potential to successfully integrate into Canadian society and become part of the social makeup of the country, only then will Canada openly include them as eventual citizens.

## Appendix 1: Bill C-50 and Occupations In-Demand

### Immigration and Refugee Protection Act

#### Part 6 – Section 87.3

(3) For the purposes of subsection (2), the Minister may give instructions with respect to the processing of applications and requests, including instructions

(a) establishing categories of applications or requests to which the instructions apply;

(b) establishing an order, by category or otherwise, for the processing of applications or requests;

(c) setting the number of applications or requests, by category or otherwise, to be processed in any year; and

(d) providing for the disposition of applications and requests, including those made subsequent to the first application or request.

#### Occupations In-Demand:

0111: Financial Managers

0213: Computer and Information Systems Managers

0311: Managers in Health Care

0631: Restaurant and Food Service Managers

0632: Accommodation Service Managers

0711: Construction Managers

1111: Financial Auditors and Accountants

2113: Geologists, Geochemists and Geophysicists

2143: Mining Engineers

2144: Geological Engineers

2145: Petroleum Engineers

3111: Specialist Physicians

3112: General Practitioners and Family Physicians

3141: Audiologists and Speech Language Pathologists

3142: Physiotherapists

3143: Occupational Therapists

3151: Head Nurses and Supervisors

3152: Registered Nurses

3215: Medical Radiation Technologists

3233: Licensed Practical Nurses

4121: University Professors

4131: College and Other Vocational Instructors

6241: Chefs

6242: Cooks

7213: Contractors and Supervisors, Pipefitting Trades

7215: Contractors and Supervisors, Carpentry Trades

7217: Contractors and Supervisors, Heavy Construction Equipment Crews  
7241: Electricians (Except Industrial and Power System)  
7242: Industrial Electricians  
7251: Plumbers  
7252: Steamfitters, Pipefitters and Sprinkler System Installers  
7265: Welders and Related Machine Operators  
7312: Heavy-Duty Equipment Mechanics  
7371: Crane Operators  
7372: Drillers and Blasters – Surface Mining, Quarrying and Construction  
8221: Supervisors, Mining and Quarrying  
8222: Supervisors, Oil and Gas Drilling and Service  
9212: Supervisors, Petroleum, Gas and Chemical Processing and Utilities

**NOTE:** the occupations above are all Skill Type O (managerial occupations) or Skill Level A (professional occupations) or B (technical occupations and skilled trades) on the Canadian NOC list.

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