

“For Here or To Go?”
Migrant Workers and the Enforcement of Workplace Rights in Canada:
Temporary Foreign Workers in the British Columbia Hospitality Sector

by

Danielle Allen
J.D., Osgoode Hall Law School, 2009
B.A. (Hons), York University, 2005

A Thesis Submitted in Partial Fulfillment
of the Requirements for the Degree of

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Supervisory Committee

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Abstract

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Why do temporary foreign workers employed in the British Columbia hospitality sector have difficulty enforcing their workplace rights? Using the themes of people, place and time, this thesis explores the demand and supply of migrant workers in the British Columbia hospitality sector, and the challenges temporary foreign workers face at the intersection of immigration law, employment law, occupational health and safety law, and workers' compensation law. The thesis argues that the low-skilled Temporary Foreign Worker Program shifts the negative consequences of unfair working conditions and workplace health and safety risks over people, place and time: from Canadian workers and employers onto temporary foreign workers; from Canada to elsewhere; and from the present into the future. Workplace rights are not enough for hospitality sector workers, what is needed is better tools for the enforcement of those rights.

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Dedication

For my family.

Chapter 1: Introduction

1. The 2014 TFWP Scandal

In April 2014, an employer who owned three McDonald's franchises in Victoria, British Columbia ("BC"), found himself inadvertently in the middle of a controversy over the Temporary Foreign Worker Program ("TFWP"). Between his three McDonald's locations, there were 26 Filipino Temporary Foreign Workers ("TFWs") on staff.¹ The controversy started when a young Canadian McDonald's worker complained to the Canadian Broadcasting Corporation's ("CBC") investigative reporting program *Go Public* that the Filipino TFWs were getting higher pay and better hours than Canadian workers, and that his employer was turning away job applications from Canadian applicants. The McDonald's owner had hired and paid a majority of the TFWs as "supervisors"² - likely in order to obtain the required government approvals and facilitate recruitment.

Following CBC's coverage of the Victoria McDonald's complaint, reports of other restaurant employers abusing the TFWP across the country began to emerge. In Wyburn, Saskatchewan, two Canadian waitresses who were long-time employees at a local restaurant said they lost their jobs to newly hired TFWs.³ In Edmonton, Alberta, five Belizean TFWs employed at a McDonald's restaurant said they were forced to rent an overpriced apartment from their employer and were not reimbursed for visa fees.⁴ The widespread abuse of the TFWP became a national scandal.

The federal government reacted quickly. Within a day Employment and Social Development Canada ("ESDC") launched an investigation into the three Victoria McDonald's franchises, which resulted in the restaurants being blacklisted from the

¹ Kathy Tomlinson, "McDonald's Accused of Favouring Foreign Workers," *CBC Go Public*, April 14, 2014, accessed May 24, 2017, <http://www.cbc.ca/news/canada/british-columbia/mcdonald-s-accused-of-favouring-foreign-workers-1.2598684>.

² Tomlinson, "McDonald's Accused of Favouring Foreign Workers."

³ Geoff Leo, "Waitresses in Saskatchewan Lose Jobs to Foreign Workers," *CBC*, April 18, 2014, accessed May 24, 2017, <http://www.cbc.ca/news/canada/saskatchewan/waitresses-in-saskatchewan-lose-jobs-to-foreign-workers-1.2615157>.

⁴ Kathy Tomlinson, "McDonald's Foreign Workers Call It 'Slavery'," *CBC Go Public*, April 17, 2014, accessed May 24, 2017, <http://www.cbc.ca/news/canada/edmonton/mcdonald-s-foreign-workers-call-it-slavery-1.2612659>.

TFWP on allegations the franchisee provided misleading information on his applications to hire TFWs.⁵ By the end of the same month, EDSC placed an immediate moratorium on all government approvals to hire TFWs for food services employers in order to conduct a full review of the TFWP.⁶

Response to the scandal and moratorium was markedly divided. Employer associations supported the continuance of the TFWP. For instance, Restaurants Canada (which represents about 30,000 employers in the food services industry) took the position that there were not enough Canadian workers available to fill vacant positions and that restaurants needed low-skilled TFWs in order to keep their businesses open. Restaurants Canada even began an online petition against the federal government's April 2014 moratorium on access to the TFWP for food services employers.⁷

Labour unions split over whether the TFWP should continue. The BC Federation of Labour and the United Steelworkers Union supported a moratorium on the entire TFWP (both high-skilled and low-skilled streams) so that the program could be re-evaluated. The BC Federation of Labour argued that the TFWP takes away jobs from Canadian workers, and TFWs have fewer rights on the job than Canadian workers due to their precarious immigration status.⁸ In contrast, United Food and Commercial Workers Canada ("UFCW") supported the continuance of the TFWP, and argued the program should be changed to allow low-skilled TFWs to remain in Canada and become Canadian citizens. UFCW also argued that low-skilled TFWs are denied workplace rights due to their precarious immigration status, such as the right to form a union.⁹

Migrant advocacy groups like Justicia for Migrant Workers and the Migrant Workers Alliance for Change supported the continuance of the TFWP. However, these groups

⁵ Tomlinson, "McDonald's Accused of Favouring Foreign Workers."

⁶ Mark Gollom, "Temporary Foreign Worker Moratorium: 'We'll See Some Restaurants Close'," *CBC*, April 25, 2014, accessed May 24, 2017, <http://www.cbc.ca/news/canada/temporary-foreign-worker-moratorium-we-will-see-some-restaurants-close-1.2622139>.

⁷ "Temporary Foreign Worker Moratorium: Take Action," Restaurants Canada, accessed June 6, 2014, <https://www.restaurantscanada.org/en/issues/article/temporary-foreign-worker-moratorium-take-action-2955>.

⁸ "BC Unions Take Aim at Foreign Worker Program With Hard Hitting Radio Ad," BC Federation of Labour, accessed June 9, 2014, <http://bcfed.ca/bc-unions-take-aim-at-temporary-foreign-worker-program-with-hard-hitting-radio-ad/>.

⁹ "Justice and Dignity for Temporary Foreign Workers," UFCW Canada, accessed June 6, 2014, http://www.ufcw.ca/Theme/UFCW/images/en/socialjustice/downloadables/trifold_leaflet_EN_online.pdf.

called on the federal and provincial governments to work together to ensure TFWs have the same rights in practice as all Canadian workers. They wanted the Canadian government to issue TFWs open work permits so workers are not tied to one employer, and extend pathways to citizenship to all TFWs.¹⁰

Finally, conservative think tank the C.D. Howe Institute came out with a report arguing that the TFWP increased unemployment in BC and Alberta between 2007 and 2010. During this time period, employers in BC and Alberta were given easier access to TFWs in certain occupations including food and hotel services due to alleged labour shortages. C.D. Howe argued there was, in fact, no labour shortage during this period at all.¹¹

Two months later, in June 2014, the food services moratorium was lifted when the ESDC released a report titled “Overhauling the Temporary Foreign Worker Program: Putting Canadians First.”¹² The report introduced significant changes to the TFWP. Then ESDC Minister Jason Kenny said that certain employers had started to rely on access to low-wage TFWs as an employment model. He announced that the government was looking towards phasing out access to low-wage TFWs, starting with a 30% limit on the percentage of TFWs per workplace and gradually reducing the limit to 10% by 2016.¹³ The changes introduced by the “Putting Canadians First” report included no access to the TFWP for employers in regions with an unemployment rate of 6% or more, a reduction in the maximum work permit validity period from two years to one, an increase in information sharing between federal and provincial/territorial labour ministries, and an increase in the application fee for government approval from \$250 to

¹⁰ Chris Ramsaroop & Adrian A. Smith, “The Inherent Racism of the Temporary Foreign Worker Program,” *Toronto Star*, May 21, 2014, accessed May 24, 2017, http://www.thestar.com/opinion/commentary/2014/05/21/the_inherent_racism_of_the_temporary_foreign_worker_program.html.

¹¹ Dominique Gross, “Temporary Foreign Workers in Canada: Are They Really Filling Labour Shortages?” *C.D. Howe Institute Commentary No. 407*, April 2014, accessed May 24, 2017, <https://www.cdhowe.org/public-policy-research/temporary-foreign-workers-canada-are-they-really-filling-labour-shortages>, at 15.

¹² Employment and Social Development Canada, “Overhauling the Temporary Foreign Worker Program: Putting Canadians First,” Government of Canada Publications, accessed May 24, 2017, http://publications.gc.ca/collections/collection_2015/edsc-esdc/Em4-1-2015-eng.pdf.

¹³ Bill Curry, “Low-Wage Foreign Worker Program Faces Elimination: Kenney,” *Globe and Mail*, June 25, 2014, accessed May 24, 2017, <http://www.theglobeandmail.com/news/politics/elimination-of-foreign-worker-program-will-be-on-the-table-in-2016/article19322845/>.

\$1000 per job.¹⁴ The “Putting Canadians First” report emphasised that employers should consider offering additional wages or benefits to attract local Canadian workers, and should make an effort to recruit underemployed groups, such as youth, people with disabilities and members of Indigenous communities.¹⁵ In sum, the Conservative federal government did a complete about-face against changes they had made to allow easy access to low-wage workers in 2007, with Minister Kenney going so far as to describe TFWs as “quasi-indentured”¹⁶ labour and the TFWP as a form of government subsidy that distorted local wages.¹⁷

2. Workplace Law and Immigration Law Meet

The 2014 TFWP scandal is an interesting entry point into examining what happens when workplace law and immigration law meet. At the heart of the scandal was the ugly truth that workers in Canada are treated differently by employers based on their citizenship. Reaction to the scandal presented hospitality TFWs as both an underclass of workers with less rights who should be better protected, and a source of unfair competition for Canadian workers. Consequently, hospitality TFWs were framed as workers who should be simultaneously pitied and scorned.

My thesis is an attempt to examine in more detail what happens when workplace law and immigration law meet. My main research question is: why do TFWs in the BC hospitality sector have difficulty enforcing their workplace rights? My answer has more widespread implications: all hospitality workers in BC have difficulty enforcing their workplace rights, TFWs just have more difficulty because of their immigration status. In BC’s complaint-based legal framework, TFWs are not on the same footing as Canadian workers to enforce their rights because making a complaint may jeopardize their immigration status or chance at Canadian citizenship. Workplace rights are not enough

¹⁴ “Putting Canadians First,” 11, 12, 20 -21, and 25.

¹⁵ “Putting Canadians First,” 13.

¹⁶ Teresa Wright, “Q&A: Employment Minister Jason Kenney on EI and TFW,” *The Guardian* (Charlottetown), September 18, 2014, accessed May 24, 2017, <http://www.theguardian.pe.ca/News/Local/2014-09-19/article-3875241/Employment-Minister-Jason-Kenney-on-EI-and-TFW/1>.

¹⁷ Wright, “Q&A: Employment Minister Jason Kenney on EI and TFW.”

for hospitality sector workers, what is needed is better tools for the enforcement of those rights.

In this chapter, I start by introducing the three core themes I use to explore what happens when immigration and workplace law meet: people, place and time. A key feature of the hospitality sector is that it is primarily made up of interactions between people, and is place-based and time-specific. I argue that the appearance of a hospitality worker and how a hospitality worker acts towards customers form part of the product being sold. The connection of worker and product leads to a) hospitality workers being stratified based on race, gender and age; b) a preoccupation with “authentic” workers, be it culturally authentic or emotionally authentic; and c) a drive for employers to keep wages low and reduce worker turnover because labour costs make up a large part of production costs. I argue that hospitality work is place-based and time specific because production and consumption are collapsed into a simultaneous process that occurs in one place at one time. Hospitality sector employers are therefore extremely sensitive to the ebbs and flows of the local labour supply and use a variety of strategies to overcome local labour shortages, such as actively recruiting from national and international labour pools.

I discuss the demand and supply of TFWs in BC in Chapter 2. First, I give a detailed overview of how the TFWP works and where it fits within the Canadian migration and immigration system. Second, I discuss theories about the demand and supply of migrant workers, and argue that the demand and supply of temporary migrant workers is a dialectical process shaped by social, cultural and economic change at multiple geographic scales. Next, I present my research findings about the demand and supply of low-skilled TFWs in the BC hospitality sector. The demand for TFWs in the hospitality sector depends on location. There is a higher demand for hospitality workers outside of the lower mainland than inside the lower mainland. In addition, the types of employers who hire hospitality TFWs inside and outside the lower mainland are different. Inside the lower mainland, there is a higher demand for hospitality TFWs by small restaurants who sell cultural cuisines. Outside the lower mainland, the majority of employers who hire hospitality TFWs are fast food chains and corporate restaurants. As for supply, the majority of TFWs come from the Philippines, are male, and are between the ages of 25 and 34. I argue that the demand and supply of low-skilled TFWs in the BC hospitality

sector is about skill level and wage rates. Finally, I argue that three characteristics of TFWs line-up with the needs of hospitality employers in a way that make TFWs an ideal labour pool for hospitality employers to recruit from: a) employers can surreptitiously recruit TFWs based on race, gender and age through the use of international recruitment agencies; b) TFWs are dependent on their employer for their migration status, which makes them more loyal and more eager to please than domestic workers; and c) hospitality employers are able to rely on Canada's reputation as a desirable place to work in order to recruit highly qualified TFWs for low-wage jobs. I will show that a key aspect of the low-skilled TFWP is the way the needs of hospitality employers map onto the desires of TFWs, and the way TFWs have adapted to find work.

In Chapters 3 and 4 I discuss how the low-skilled TFWP affects fairness and safety at work. In Chapter 3, fairness at work, I outline the basic legal framework that governs employment relationships in BC. I argue that, even for local workers, workplace law in BC creates an obstacle course of competing legal forums with multiple deadlines and inadequate enforcement. I then use two case studies to demonstrate how the low-skilled TFWP creates two additional systemic barriers to achieve fair working conditions for TFWs: the need to address complex legal issues that expand far beyond the already confusing landscape of workplace law into immigration law, landlord tenant law and agency law; and the tremendous power imbalance between TFWs and their employers that creates a disincentive to complain about unfair working conditions. I argue that the low-skilled TFWP shifts the negative consequences of unfair working conditions over people, place and time: from Canadian workers and employers onto TFWs; from Canada to elsewhere; and from the present into the future.

Similarly in Chapter 4, safety at work, I argue that the low-skilled TFWP shifts workplace health and safety risks across people, place and time. The structure of the low-skilled TFWP facilitates the transfer of workplace health and safety risks from Canadian workers to workers from low-income countries in the global south through: a) immigration laws that tie low-skilled TFWs' immigration status in Canada and chances of gaining citizenship to their employer; and b) the absence of mandatory training in local workplace health and safety rights, and specific hazards on the job. Workplace health and safety risks are transferred across space through a) time restrictive work permits that

may prevent a worker from making a successful workers' compensation claim; b) lower workers' compensation rates due to wage rate disparities between Canada and the country an injured TFW returns to; and c) access to the same quality of health care as Canadian workers due to healthcare disparities between Canada and the country an injured TFW returns to. Finally, the structure of the low-skilled TFWP transfers workplace health and safety risks across time into the future through time restrictive work permits, which prevent an injured TFW who must return home from accessing the same rehabilitation and retraining services as a Canadian worker, or enforcing their right to be accommodated back to work.

I used a mix of quantitative and qualitative methods in conducting my research. To complete my analysis of the demand for and supply of TFWs in BC in Chapter 2, I requested information about employer applications for approval to recruit TFWs from ESDC and I contacted Citizenship and Immigration Canada (CIC) for statistics about TFWs entering Canada destined for BC. I also contacted WelcomeBC to obtain statistics about the number of applicants and approved nominees under BC's Provincial Nominee Program (PNP). For Chapter 3, I attempted to obtain information about the number of employment standards complaints made by workers in BC without citizenship or permanent residency. I made a Freedom of Information request, and was informed that there were no records located for my search. I followed up with a staff member at the Employment Standards Branch to see if it was possible to amend my request, and was informed that the Branch does not collect information about citizenship status and could not provide the information I was looking for. For Chapter 4, I obtained information about the number of workers' compensation claims made in the BC hospitality sector by workers with and without permanent residency or citizenship from WorkSafeBC through a Freedom of Information request. I processed all of the data I received in Excel. Table 1 provides a summary of the quantitative data I requested.

I also conducted key informant interviews with a range of people with first-hand knowledge about the challenges TFWs face in the workplace. Interviews took place in person, over the phone, or in writing. I conducted the in-person and telephone interviews in a semi-structured format, with a set of open questions that allowed for flexibility and follow-up questions. I interviewed six advocates who gave legal assistance to TFWs to

find out how TFWs access legal services and the types of legal issues TFWs face. I interviewed four government policy advisors to understand whether the provincial government or its agencies make special considerations for TFWs in the regulation of BC workplaces. I interviewed a staff member from the Consulate General of the Philippines in Vancouver to gain a wider perspective on the challenges TFWs face while working in Canada. I also interviewed one hospitality TFW who worked in BC to learn about their experiences. Unfortunately, my attempts to recruit additional TFWs to interview were unsuccessful despite my best efforts; for example: I mailed recruitment posters to a number of advocacy organizations across BC; I asked advocates to pass on email requests for interviews; and I amended my ethics protocol to provide a \$50 honorarium to TFWs who participated in an interview. In accordance with my ethics protocol at the University of Victoria, interviews with government policy advisors, consulate staff, and the TFW were anonymized. Table 2 provides a summary of my informant interviews.

Finally, in Chapter 3 I used two case studies to explore the challenges hospitality TFWs in BC have enforcing their workplace rights: a class action brought against Denny's restaurants, and a human rights complaint brought against a Tim Hortons franchisee and the Tim Hortons franchise.

Table 1: Research Data

Agency	Summary of Data Requested	How Data was Requested	Data Obtained?
Employment and Social Development Canada (ESDC)	The number of positive Labour Market Impact Assessments issued for NOC C and D Temporary Foreign Workers in the Province of British Columbia in the years 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, and 2014, broken down each year by: a) country of origin of the workers; b) gender and age range of the workers; c) whether the workers speak English or not; d) employers and locations of the proposed jobs; e) job titles; f) length of the proposed employment contracts in BC; and g) whether the request was made by a third-party agent of the employer, or the employer directly.	Access to information request (file number A-2013-00810 / HJK)	Yes, received on March 26, 2014.
Citizenship and Immigration Canada (CIC)	The number of work permits issued under the Low-Skilled Pilot Project of the Temporary Foreign Worker Program (now known as the Lower-Skilled Occupations stream of the Temporary Foreign Worker Program) in the Province of British Columbia for the years 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013 and 2014 broken down each year	Request to the External Statistical Reporting Group (file number CR-15-0160)	Yes, received on June 8 2015.

	by: country of origin, gender, and age range of the work permit holders.		
WelcomeBC	The number of temporary foreign workers who applied to and who were nominated in the BC PNP under the “Entry-Level or Semi-Skilled Worker” stream in the years 2008, 2009, 2010, 2011, 2012 and 2013, broken down each year by the tourism and hospitality sector; long-haul trucking sector, and food processing sector.	Freedom of Information request	Yes, received on September 10, 2014.
WorkSafeBC	The number of claims by temporary residents (SIN starting with the number 9) and permanent residents (SIN starting with a number other than 9) for the years 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012 and 2013 made by workers in 23 different Classification Units in the sub-sector “Accommodation, Food, and Leisure Services.”	Freedom of Information request (File number WCB-14-340)	Yes, received on July 4, 2014.
Employment Standards Branch	The number of ESA complaints by made by temporary residents (SIN starting with the number 9), permanent residents (SIN starting with a number other than 9), and complaints without a SIN listed in the years 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012 and 2013 who were employed in a list of 21 hospitality National Occupational Classifications (NOC).	Freedom of Information request (File number LBR-2014-00021)	No

Table 2: Informant Interviews

Informant	Position	Date Interviewed
Anonymous	Government Policy Advisor	Written answers received on March 13, 2015.
Anonymous	Two Government Policy Advisors	In-person, September 9, 2014.
Anonymous	Government Policy Advisor	By telephone, September 30, 2014.
Anonymous	BC Hospitality TFW	In-person, February 28, 2015.
Devyn Cousineau	Lawyer at the Community Legal Assistance Society	In-person, January 16, 2015.
Natalie Drolet and Darla Tomeldan	Staff Lawyer and Legal Advocate at West Coast Domestic Workers’ Association	In-person, December 3, 2015.
Anonymous	Staff member from the Consulate General of the Philippines in Vancouver	In-person, December 11, 2014.
Charles Gordon	Lawyer, co-counsel for the representative litigant in the Denny’s class action case study	By telephone, May 8, 2017. ¹⁸
Rene Nichols	Lawyer who assisted TFWs	In-person, March 3, 2016.
Annette Beech	President of the Victoria Filipino-Canadian Caregivers Association	In-person, October 17, 2014.

¹⁸ I met with Charles Gordon and Christopher Foy (counsel for the representative litigant in the Denny’s class action case study) informally on October 10, 2013, before I began writing my thesis. My interview with Charles Gordon by telephone on May 8, 2017 was brief to confirm information for my thesis.

3. Key Characteristics of the Hospitality Sector: People, Place and Time

Two key characteristics of the hospitality sector are important for my research. First, the hospitality sector is primarily made up of interactions between people. Compared to jobs in, for example, manufacturing or agriculture, the appearance of a hospitality worker and how a hospitality worker acts towards customers form part of the service being provided. Turn to any online review of a restaurant or hotel and the quality of the service from staff always forms part of the product being reviewed - just as much as how good the food tastes or how clean the bathrooms are. Restaurant servers are expected to smile, to care for their customers' needs, and to get food and drink to the table quickly. Bartenders are supposed to be fun, friendly, and pour drinks with a certain flare. Counter attendants at fast food restaurants are supposed to work quickly, quietly, and without complaint. If a hospitality worker is rude, dismissive, smelly, or dirty the customer may not return.

The second characteristic is that the hospitality industry is place-based and time-specific. For instance, in the manufacturing industry production can take place oceans away from the point of consumption. There can be months or miles between the time and place a product is manufactured and the time and place a product is consumed. In the hospitality sector, in contrast, production and consumption are collapsed into a simultaneous process that occurs in one place at one time.¹⁹ A bartender takes a customer's order, mixes a drink in front of the customer, and serves the customer within a span of minutes. A hotel room attendant cleans a customer's room, makes a customer's bed, restocks the mini-bar, and brings fresh towels within a span of hours. The location and immediacy of the service is a key element of the product, whether it is accommodation beside a world famous beach or the only restaurant open after 10pm. Hospitality work cannot be transferred offshore to places where wages are lower or regulations are more relaxed. Instead, workers need to be onsite and paid local wages.

People, place and time are the three core themes I use throughout my thesis to explore what happens when workplace law and immigration law meet. In this section, I summarize selected research on hospitality work in Canada, the US and the UK to

¹⁹ John Urry, *The Tourist Gaze: Leisure and Travel in Contemporary Societies* (London: Sage Publications, 1990) at 38.

highlight features of hotel and restaurant work that I think are relevant for my research on the working conditions of hospitality TFWs in BC. Under the theme of people, I argue that mixing together a worker's appearance and how the worker performs with the product being sold leads to three important consequences: a) work in the hospitality sector tends to be stratified based on personal attributes such as race, gender and age; b) workers in the hospitality sector are part of creating an "authentic" experience for the customer; and c) hospitality sector employers need to keep local wages low and reduce worker turnover in order to remain competitive because local labour costs make up the bulk of the cost of production. Under the themes of place and time, I argue that hospitality sector employers are extremely sensitive to the ebbs and flows local labour supply. Hospitality sector employers use a variety of strategies to recruit loyal workers who will commit to stay in the long-term, including recruiting from national and international labour markets.

A. People: Hospitality Workers Form Part of the Product Being Sold

i) Work in the Hospitality Sector is Generally Stratified Based on Personal Attributes, Such as Race, Gender and Age

The first important consequence of mixing a worker's appearance and how the worker performs with the product being sold is that employment in the hospitality sector is generally stratified based on a worker's personal attributes as much as skill level. The colour of a worker's skin, the thickness of a worker's accent, how tall or attractive the worker is, or how charming a worker is with customers all affect where a worker fits within the workplace hierarchy.

Research into the working conditions and demographics of hotel work in the US is helpful to understand how hotel workers are stratified based on race, gender and age. American historian Andrew K. Sandoval-Strausz gives a history of US hotels in the 1800s. Prior to the establishment of hotels in the US, travellers stayed in small-scale, family run inns and taverns. The inns and taverns had the same architecture of family homes, and domestic divisions of labour. Work was performed by unwaged family members. The male owner of the inn or tavern, usually the family patriarch, would greet guests himself. Meals were cooked and served at the family hearth, and patrons

socialized in the family living room. Patrons had very little privacy; they shared one or two guestrooms upstairs, and often had to sleep side-by-side in the same bed.²⁰

The introduction of hotels changed travel in the US. Hotels introduced a new kind of institutional architecture that stacked small private rooms, connected by long corridors, one on top of the other in a multi-story building. Hotels could house hundreds of guests at a time, each patron with their own private room and bed.²¹ Guests were no longer given individualized service, or greeted by the owner. Instead, guests were greeted by an impersonal front desk clerk who was eager to assign the guest a room number and move on to the next patron. Meals were still included with the stay. However, meals were served at a specific time with a set menu and patrons dined together. In-house restaurants, bars and banquet halls were a critical additional revenue stream that kept hotels financially viable. Mealtime became a large social event; locals would dine and socialize alongside hotel guests. The hotel included large banquet halls for large occasions, and elaborate lobbies where guests and the public were encouraged to mingle. The first hotels spaces were gendered, with a separate ladies' entrance for women travellers (and travellers accompanying women) in order to protect upper class ladies from interactions with strangers.²²

The first hotels in the US also introduced a new group of waged labourers performing work that would have formerly been performed by domestic servants or family members: changing sheets, cleaning rooms, laundering clothing, polishing shoes, or styling hair. Sandoval-Strausz likens the emergence of hotel service labour to the emergence of commodity production where work was moved away from the home and subdivided among workers.²³ In order to remain competitive, hotel managers had to simultaneously keep wages low while still ensuring workers performed the physically demanding work “smiling all the while for customers.”²⁴

²⁰ Andrew K. Sandoval-Strausz, *Hotel: An American History* (New Haven: Yale University Press, 2007), 144-145.

²¹ Sandoval-Strausz, *Hotel: An American History*, 145-150.

²² Sandoval-Strausz, *Hotel: An American History*, 160-171.

²³ Sandoval-Strausz, *Hotel: An American History*, 151.

²⁴ Sandoval-Strausz, *Hotel: An American History*, 179.

Sandoval-Strausz documents how hotel work in the early days of the US hotel industry was stratified by race and gender. At the top of the hierarchy were supervisory jobs such as hotel managers, headwaiter, or head clerk, who were paid middle-class wages. Supervisors were all male, white, and recruited from national and regional labour markets instead of local. Below supervisors were semi-skilled front-of-house jobs that required direct interaction with guests, such as waiters, doormen, bellhops, or lower clerks. Clerks were white protestant males, whereas waiters, doormen and bellhops could be white Protestant, Black or Irish males. Cooks were also in the middle of the hierarchy, and were usually semi-skilled male European immigrants who did not have the language skills to interact with guests. The lowest status and lowest income jobs were at the back of house away from guests, such as laundry and housekeeping. These jobs went to local women, almost exclusively Irish or Black, who had very few employment options.²⁵ The low wages of hotel workers combined with the vulnerability of patrons who were dependant on hotel staff for their basic needs meant that tipping became a widely accepted part of a hotel stay in order to ensure good service.²⁶

American sociologists Patricia Adler and Peter Adler found a similar workplace hierarchy based on race, gender and age in an eight-year ethnographic study of Hawaiian luxury resort workers, conducted between 1995 and 2003. At the time of the Adlers' study, over 20% of Hawaii's jobs were in tourism.²⁷ Like British Columbia, Hawaii's hotel and tourism sector relies on its natural beauty and abundance of natural geographical features conducive for site-specific recreational sports, like surfing or kite boarding.

Adler and Adler demonstrate that work in contemporary Hawaiian resort hotels is deeply stratified along racial, ethnic, age, and gender lines. They divide resort workers into four main groups, which they label "managers," "seekers," "locals" and "new immigrants." Each group occupies a different place within the resort worker hierarchy. "Managers" are at the top of the resort worker hierarchy with the highest paying jobs and

²⁵ Sandoval-Strausz, *Hotel: An American History*, 179-180.

²⁶ Sandoval-Strausz, *Hotel: An American History*, 160.

²⁷ Patricia Adler and Peter Adler, *Paradise Laborers: Hotel Work in the Global Economy* (Ithaca: Cornell University Press, 2004), 5-6.

no physical labour. “Managers” work in supervisory positions in each department, and are mostly white men from the mainland. They are careerists who have degrees in hospitality and tourism management and travel around the world from resort to resort working their way up the career ladder. “Seekers” are educated white people from the mainland who come to Hawaii for the lifestyle. They are usually young, and more often male than female. They occupy the second-highest place in the hotel hierarchy and work in higher paying jobs such as wait staff, recreational instructors, massage therapists and pool attendants. Management place “seekers” in positions where they will interact the most with guests because “seekers” speak standard American English, and can relate to guests because they come from a similar background.²⁸ “Seekers” often take jobs that were more seasonal in nature to accommodate off-season travel, and sometimes work as independent contractors providing service work (like aerobics instruction or personal training) to a number of different resorts. Turnover is high among “seekers” as they usually do not stay in the same place for more than three to five years.²⁹ “Seekers” also call in sick more often, especially when the weather is nice. “Locals” are one step below “seekers.” They work in jobs that require guest contact and English language skills such as pool attendants, front desk attendants, valets, bell hops, servers and as office workers in payroll, human resources and reservations.³⁰ To be considered local in Hawaii, a person needs not only to be raised in Hawaii but also speak the local dialect, demonstrate local mannerisms, and have brown skin to reflect Hawaii’s mixed ethnic population.³¹ The “locals” are simultaneously valued by resorts for their authentic Hawaiian appearance and accents, and limited in career advancement by their ethnicity, skin colour, lack of formal education, and strong commitment to family values. “New immigrant” workers occupy the lowest place in the hierarchy. They perform the most menial, dirty jobs, such as housekeeping, stewarding (bringing carts of dishes back and forth from banquets, and dishwashing) and landscaping, for the lowest pay. Adler and Adler suggest that “new immigrants” take jobs already settled Americans reject because of their lack of

²⁸ Adler and Adler, *Paradise Laborers*, 65.

²⁹ Adler and Adler, *Paradise Laborers*, 183.

³⁰ Adler and Adler, *Paradise Laborers*, 53.

³¹ Adler and Adler, *Paradise Laborers*, 49.

local education, poor English skills, and lack of employment options.³² Adler and Adler note that despite the stigma associated with “new immigrants” work, “new immigrants” are more likely to take pride in their work, have low turnover rates, and low absenteeism rates compared to other groups of hotel workers.³³ “New immigrants” are thankful for their jobs,³⁴ and often work two full-time jobs. They are concerned with long-term goals of saving money, getting their full American citizenship, and financially caring for their extended family. Finally, “new immigrants” are less likely to complain about unfair working conditions.³⁵

Adler and Adler found that the segregation among workers at the Hawaiian resorts is not just based on race and ethnicity; age and gender also play a significant role. Most of the workers are young. Employers make many decisions based on appearance, and prefer “young and bouncy”³⁶ employees, especially for women workers. The work is physically demanding, and workers often burn out due to sore backs.³⁷ Female workers are limited in their career prospects and experience sexual harassment from customers and management.³⁸

Canadian sociologist Ester Reiter researches why the restaurant and fast-food industry grew at such a rapid rate in Canada since World War II, and how the growth changed the life of consumers and workers in contemporary society. Reiter divides the development of Canada’s restaurant industry into four eras. In the first era, between 1880 and World War I, people primarily ate at home. The few dining establishments that did exist were solely located in inns along travel routes. More people started to travel when the Canadian Pacific railroad was completed in the 1880s, and Canadian Pacific took advantage of the new market of travellers and developed a dining empire paralleling its railway empire by opening dining establishments on train station property. The dining establishments were divided along class lines, with full-service fine-dining restaurants

³² Adler and Adler, *Paradise Laborers*, 43.

³³ Adler and Adler, *Paradise Laborers*, 44, 208.

³⁴ Adler and Adler, *Paradise Laborers*, 167.

³⁵ Adler and Adler, *Paradise Laborers*, 45, 208.

³⁶ Adler and Adler, *Paradise Laborers*, 197.

³⁷ Adler and Adler, *Paradise Laborers*, 197-200.

³⁸ Adler and Adler, *Paradise Laborers*, 193-197.

serving wealthy travellers, and large dining halls with barely edible food serving working class passengers. In the early 1900s the number of restaurants began to increase along with urbanization. Restaurants opened in cities where there was a population density to support commercial dining. At this time, most of Canada's population was still rural and restaurants had an unsavoury reputation; it was considered more respectable to eat at home or at an inn. The majority of restaurants were staffed and owned by new immigrants. Work was hard, and not very glamorous. Reiter suggests that many new immigrants took restaurant jobs because they could not do anything else and had to accept low-income work.³⁹

The second restaurant industry era according to Reiter occurred during the 1920s and 1930s. By this time urbanization had taken off and cities across Canada were experiencing dramatic growth. More people travelled to cities from the surrounding suburbs to work in factories and offices, more women entered the waged-workforce, and more people started to eat out. Bakeries and department stores started to serve meals, and lunch counters became popular. Production line technologies were introduced so that meal preparation could be standardized and performed by workers with lower-skill levels. Immigrants still made up a large part of the restaurant workforce, and working conditions in restaurants were not good due to long hours and low-wages.⁴⁰

For Reiter, the third restaurant industry era was during World War II. The demand for restaurants went up as more jobs became available, more women entered the waged-workforce to support the war effort, more families shared accommodations due to housing shortages, and kitchen staples like butter, sugar, meat and tea were rationed. While time, space, and groceries to cook at home were more scarce than before, there was more disposable income to spend. These conditions created a boom for the restaurant industry. However, there were also significant labour shortages during the period. Restaurant wages were low and many workers preferred to work in higher-paying jobs in other industries. As one Toronto restaurant proprietor from Reiter's research put it, "in those years, nobody would work in the [restaurant] industry except

³⁹ Ester Reiter, *Making Fast Food: From The Frying Pan Into the Fryer* (Montreal: McGill-Queen's University Press, 1991), 22-26.

⁴⁰ Reiter, *Making Fast Food*, 22-34.

immigrants and of course there weren't any immigrants during the war and for quite a few years after."⁴¹ Restaurants at this time were still dominated by small business owners, and working proprietors.⁴²

The fourth restaurant era Reiter describes stretched from the post-war years of the 50s and 60s until the 1980s (when she completed her research). The number of restaurants in Canada increased dramatically during this period, and three important shifts took place. First, restaurant food began to be marketed to the entire family rather than just individuals who needed to grab a meal on the go. In order to compete with mom's home cooking, restaurant owners started to sell take-out meals and positioned themselves as a helpful alternative for busy parents. Second, restaurant franchises were introduced. Franchises allowed individuals to own and operate a McDonald's or Burger King outlet on their own so long as they agreed to adhere to strict standards set by corporate headquarters about everything from food preparation, to uniforms, to seating design. Franchising allowed corporate franchisors to expand rapidly without investing very much of their own capital.⁴³ In exchange, the owner-operator franchisees benefited from economies of scale, brand recognition, and a corporate team busy developing new food preparation technologies, menu items and marketing campaigns. The final important shift - a shift that is closely tied to the franchise model - was the introduction of standardized production methods and mechanization technology into food preparation to reduce labour costs and overcome chronic labour shortages of skilled kitchen workers. At first, it was simple machines like slicers, mixers, vegetable peelers, and dishwashers.⁴⁴ Over time, more complex machines such as conveyer belt broilers, automatic beverage dispensers, or automatic fry stations were coupled with off-site food preparation so that at most fast-food restaurants today food arrives frozen, pre-cut, and in some instances pre-made so that the least amount of cooking and assembly is required on-site. Low-skilled workers are no longer cooks, but machine operators. As Reiter points out with some

⁴¹ Reiter, *Making Fast Food*, 36.

⁴² Reiter, *Making Fast Food*, 35 -36.

⁴³ Reiter, *Making Fast Food*, 50 – 54.

⁴⁴ Reiter, *Making Fast Food*, 42.

irony, “there are no pots and pans in a Burger King kitchen.”⁴⁵ Reflecting back on her 1980s study of the Canadian fast food industry in the 1990s, Reiter observes that neoliberal reforms in the 1990s spread the standardization of work processes and the de-skilling of workers from the restaurant sector into the public health, education, and public service sectors.⁴⁶

Research about the US restaurant industry is also helpful to understand contemporary stratification of restaurant workers. American food labour researcher Saru Jayaraman takes readers *Behind The Kitchen Door*,⁴⁷ documenting the contemporary working conditions of restaurant staff in the US. In 2002, Jayaraman co-founded the first Restaurant Opportunities Center (“ROC”) in New York City, now a national US organization that assists restaurant workers to organize to improve their wages and working conditions.⁴⁸ Through a series of narrative vignettes into the lives of restaurant workers, Jayaraman exposes rampant wage theft, sexual harassment, sexism and racism within the restaurant industry - from fine dining to fast food.

Based on research surveys conducted by the ROC across the US, Jayaraman demonstrates that workers of colour and new immigrants make up a disproportionate amount of the restaurant workforce and are not paid as well as white workers. Jayaraman argues that restaurant work is divided by skin colour. Restaurant workers of colour find that they are limited to “back of house” positions, such as cooking, bussing tables, running food or washing dishes – positions that do not pay as well as “front of house” positions such as waiter or bartender. The darker the colour of the worker’s skin, the lower down on the restaurant staff hierarchy and pay scale.⁴⁹ Jayaraman also documents how female restaurant workers face discrimination in getting hired or promoted. Women in the restaurant industry make less money than men on average because they are underrepresented in the higher paying positions such as management, chefs, or owners. Female cooks in fine dining establishments are limited to work as

⁴⁵ Reiter, *Making Fast Food*, 97.

⁴⁶ Ester Reiter, *Making Fast Food: From the Frying Pan into the Fryer, Second Edition* (Montreal: McGill-Queen’s University Press, 1996) 175-185.

⁴⁷ Saru Jayaraman, *Behind The Kitchen Door* (Ithaca: Cornell University Press, 2013).

⁴⁸ Jayaraman, *Behind the Kitchen Door*, 4.

⁴⁹ Jayaraman, *Behind the Kitchen Door*, 105-129.

pastry chefs or salad makers, jobs that have no upward trajectory and where the pay is lower. A job as a line cook is key to working up to chef. However, jobs as line cooks or executive chefs are seen as aggressive masculine jobs and usually go to men. Females of colour in the restaurant sector make even less money because they are more likely to be working in fast-food establishments without tips. Finally, female workers often have to tolerate or reciprocate their supervisor's sexual comments or sexual touching in order to secure the best paying shifts or a promotion.⁵⁰

Hotel and restaurant work, like many other sectors of the labour market, tends to be stratified by personal characteristics such as race, gender and age. The critical difference from other sectors is that the hospitality sector is primarily made up of interactions between people, and hospitality workers' personal characteristics such as skin colour, body shape, accent, and age form part of the produce being sold. A worker's race, gender and age take on an even deeper meaning in the hospitality sector because personal attributes can be as important as skill level. In the next section, I expand on how the hospitality sector relies on stereotypes about race, gender and age when creating an "authentic" experience for customers.

ii) Workers in the Hospitality Sector are Part of Creating "Authenticity"

The second important consequence of mixing a worker's appearance and how the worker performs with the product being sold is that workers in the hospitality sector are part of creating an "authentic" experience for customers. In this section I argue that hospitality workers are part of creating authenticity in two ways. The first is cultural authenticity. Hospitality workers need to ensure that tourists feel like they are experiencing authentic local culture, or that restaurant patrons are eating authentic food prepared with authentic ingredients or in an authentic cultural tradition. The second is emotional authenticity. Hospitality workers need to convey authentic and genuine positive emotions to show a customer that they truly care.

Cultural Authenticity

The first way hospitality workers are part of creating "authenticity" is by creating authentic cultural experiences for customers. Canadian historian Michael Dawson draws

⁵⁰ Jayaraman, *Behind the Kitchen Door*, 131-138.

attention to the importance of authenticity in his research on the history of tourism in BC. Dawson suggests that no one likes to think of themselves as a tourist, people would rather be travellers instead: “tourists, we tell ourselves, are content to accept inauthentic experiences; we, however, insist on authenticity.”⁵¹ Dawson links the growth of BC’s tourism industry to the growth of consumer culture in North America more generally. Dawson explains that after the Second World War, the BC provincial government began viewing tourism as an industry that would bring economic development to the province. The government therefore became an active player in subsidizing and boosting tourism. For example, the provincial government constructed more highways to make travel across the province easier, developed advertising campaigns, created tourism boards, and educated residents in the hospitality business. Dawson explains that the BC government views tourists as a commodity, with every dollar spent on food, lodgings and souvenirs a vital part of the province’s economic strategy.⁵² Consequently, since the 1950s almost every part of BC’s unique attributes have become commercialized for tourists in order to create an “authentic” BC experience, from hiking on a well-groomed trail among huge 500-year-old Douglas Fir trees in Cathedral Grove on Vancouver Island, to viewing the totem poles carved by Indigenous peoples in Vancouver’s Stanley Park.

The search for authentic cultural experiences also extends to consumer tastes and preferences in food, as demonstrated by Canadian sociologists Josee Johnston and Shyon Baumann in their study of contemporary food culture in North America.⁵³ They describe how former categories of high-, mid- and low-brow cuisine have collapsed, and how contemporary food culture now instead features three main trends: 1) a preoccupation with authentic and ethical foods such as local, organic and seasonal; 2) an increased popularity of exotic or ethnic cuisines defined regionally rather than nationally (for instance, “Szechuan” rather than “Chinese”); and 3) an increased consumption of gourmet and specialty ingredients.⁵⁴ With equal enthusiasm, consumers now seek out

⁵¹ Michael Dawson, *Selling British Columbia: Tourism and Consumer Culture, 1890 – 1970* (Vancouver: University of British Columbia Press, 2004), 1.

⁵² Dawson, *Selling British Columbia*, 215.

⁵³ Josee Johnston and Shyon Baumann, *Foodies: Democracy and Distinction in the Gourmet Foodscape* (Routledge: New York, 2010), 8.

⁵⁴ Johnston and Baumann, *Foodies*, 20.

farmers markets, community supported agriculture programs, low-cost hole in the wall dumpling restaurants where the servers are not fluent English speakers, or hip new restaurants selling grilled-cheese sandwiches made with organic chevre and field mushrooms.

Johnston and Baumann trace the origin of contemporary food culture back to Julia Childs' 1960s television program *The French Chef*. By making high-class French cuisine accessible to middle-class cooks, the show marked a turning point when gourmet food began to enter the mainstream. In the 1960s *The New York Times* hired its first food-editor. In the 1970s "California cuisine" (a relaxed, fusion-based cooking style with a political awareness of ethical, seasonal and local ingredients) emerged in Berkeley, California's countercultural scene, and new types of "ethnic" restaurants serving South Asian or Middle Eastern food were opening after changes to the US and Canadian immigration laws opened up immigration to foreign nationals outside of Britain and Europe. In the 1980s the first Whole Foods Market (a large upscale grocery chain selling organic and health products) opened in Austin, Texas. In the 1990s organic food standards were codified by the United States Department of Agriculture and *The Food Network* television station was launched.⁵⁵ By the 2000s, food choices had transformed into lifestyle choices and fused with an increasingly consumer-based culture where individuals forge an identity through consumption habits rather than personal attributes, particularly in urban centres.⁵⁶ Today, in Vancouver, Montreal, or Toronto it is not uncommon to see hour-long line-ups outside a new restaurant in a gentrifying neighbourhood that has set local food critics abuzz – be they paid critics from the *Globe and Mail* or self-proclaimed foodies on yelp or twitter.⁵⁷

⁵⁵ Johnston and Baumann note that the trends in contemporary food culture raise a tension between the democratization of gourmet food, on the one hand, where everyone regardless of social position is seen as able to participate. On the other hand, however, the trends also reinforce elitism, class divides and problematic ideas about race and culture. Consumers continue to use food to distinguish themselves from others as more refined, cultured, or tasteful. Eating out, eating local, or eating organic is not affordable for everyone. Finally, exoticising foreign cuisine as an adventurous food experiences privileges western cultural norms, and bears an unsettling resemblance to the colonial practices of cultural commodification and conquest.

⁵⁶ Sharon Zukin, *Point of Purchase: How Shopping Changed American Culture* (Routledge: New York, 2004).

⁵⁷ Zachary Hyde, "Omnivorous Gentrification: Restaurants Reviews and Neighbourhood Change in the Downtown Eastside of Vancouver," *City & Community* 13 (2014): 341-359.

Consumer taste and the search for authenticity is not lost on hospitality businesses. Dawson's observation on the tourist quest for "authentic" experiences, and Johnston and Baumann's observation about contemporary food culture's preoccupation with "authentic" and "exotic" food is reflected in how hospitality workers are expected to act, and what traits hospitality workers are hired for. A hospitality worker's behaviour, skin colour, and accent are part of creating an authentic cultural experience for customers, be they traveller, tourist, or local out for a night on the town.⁵⁸

For tourist destinations, creating cultural authenticity means placing well-spoken locals who reflect the racial and ethnic background of the location as point persons for guests. As observed in Adler and Adler's research on Hawaiian resorts, resort employers hire workers with a local accent and brown skin (reflecting the mixed racial and ethnic background of Hawaii) to greet and interact with guests in order to lend an atmosphere of authentic Hawaiian culture.⁵⁹

For restaurants, creating cultural authenticity means hiring cooks and servers who can prepare food in accordance with the cultural traditions of the cuisine, or appear like they are culturally connected to the food by having a matching skin colour, clothing, or accent. In their study of Chinese restaurants in the US, American sociologists Shun Lu and Gary Fine explore how Chinese food is marketed by restaurateurs to American consumers. Lu and Fine discuss how Chinese restaurant owners modify Chinese cuisine to appeal to local palates. Chinese restaurants in downtown Chinatowns can remain more traditional by, for example, serving inner organs or extremities such as ox's tail, ducks feet, or pig's tongue.⁶⁰ In contrast, Chinese restaurants in the suburbs and working class neighbourhoods have to Americanize their food by, for example, using American

⁵⁸ Jayaraman criticises the hypocrisy of the 'slow food' or 'sustainable food' movement within contemporary foodie culture, where consumers are preoccupied with purchasing local, organic, or ethical food but remain unconcerned about the working conditions of the workers who serve and prepare food. She argues that truly sustainable food includes ensuring restaurant workers earn a living wage, receive benefits, and have a fair chance at being hired and promoted regardless of gender, skin colour or ethnicity. In a subtle subversion of the rise of consumer culture, Jayaraman emphasises the power consumers have in demanding good working conditions from the restaurants they frequent. Jayaraman, *Behind the Kitchen Door*, 19 - 42.

⁵⁹ Adler and Adler, *Paradise Laborers*, 49.

⁶⁰ Shun Lu and Gary Alan Fine, "The Presentation of Ethnic Authenticity: Chinese Food as a Social Accomplishment," *The Sociological Quarterly* 36 (1995): 535-553 at 540-541.

vegetables or serving fish with the heads and tails removed.⁶¹ Lu and Fine argue that authenticity is socially constructed and “bounded by social, cultural, and economic constraints.”⁶² The experience of ethnic food is a negotiation and dialogue between the expectations of the local consumer and the adaptations of the foreign cook.⁶³

Emotional Authenticity

The second way hospitality workers are part of creating “authenticity” is by creating authentic emotional experiences for customers. Hospitality workers must keep their own emotions in check in order to present the kinds of sincerity and positive emotions to customers that are required for the job. It can be as simple as smiling even if a worker is tired, sad or angry. It can also be more complex and embedded, where employers recruit and train workers to adopt certain attitudes and thought processes.

American sociologist Arlie Russell Hochschild coined the term “emotional labour” in her 1983 study on how employers train workers to manage their own emotions to influence customer behaviour. Emotional labour is where a worker inwardly manages their own emotions, and outwardly presents the facial and body language of emotions they are instructed to perform by management in order to elicit certain feelings in customers or clients. Emotional labour can mean appearing friendly, warm, and welcoming in the case of flight attendants who want to put passengers at ease. Emotional labour can also mean appearing angry or frustrated in the case of bill collectors who are trying to frighten debtors into paying. Hochschild argues that emotional labour, like others kinds of labour, has been commodified and is sold for a wage. Emotional labour therefore has its own exchange value. Workers in the service sector increasingly are expected to perform emotional labour, and are increasingly alienated from their own true feelings and sense of self.⁶⁴ In response to the commercialization of feelings, society has started to place a higher value on displaying authentic and sincere feelings.⁶⁵

⁶¹ Lu and Fine, “Ethnic Authenticity,” 540-541.

⁶² Lu and Fine, “Ethnic Authenticity,” 547.

⁶³ Lu and Fine, “Ethnic Authenticity,” 547.

⁶⁴ Arlie Russell Hochschild, *The Managed Heart: Commercialization of Human Feeling* (Berkeley: University of California Press, 1983), 6-7.

⁶⁵ Hochschild, *The Managed Heart*, 190.

American sociologists Cameron Lynn MacDonald and Carmen Sirianni build on the idea of “emotional labour” from Hochschild’s research, and argue that service workers intentionally manipulate their personal appearance and presentation to either project a certain emotion or to create an emotional feeling in others. While emotional work may be nothing new for professionals who have provided one-on-one service for decades, the difference for low-paid service workers in the expanded service economy is that they must follow very strict guidelines on how to look, act, and display feelings that are mandated from the top of an organization down. MacDonald and Sirianni suggest that personal traits of the worker set the tone of the interaction with customers. Service workers are therefore stratified by race, ethnicity, gender, sexuality, age, and class background as part of the final product presented to the consumer: “worker characteristics such as race and gender determine not only who is considered desirable or even eligible to fill certain jobs, but also who will want to fill certain jobs and how the job itself is performed.”⁶⁶

British geographers Linda McDowell and Sarah Dyer, and American sociologist Adina Batnitzky show how workers’ identities on the job are formed in dialogue with pre-conceived stereotypes by management, co-workers, and clients based on gender, skin colour, and nationality. In a detailed study of a London hotel serving affluent clients, McDowell *et. al.* observe that hotel employers prefer foreign workers because their willingness to work longer hours for lower pay than locals.⁶⁷ Hotel employers view young male workers from India and Bangladesh as “ambitious yet deferential,”⁶⁸ whereas recruits from Eastern Europe lack people skills and presented as unfriendly. Management positions go to people with white skin. Front counter staff are purposely multi-ethnic to reflect the multinational clientele, have superb people skills, and are mostly women who are considered adept at being deferential. Food and beverage jobs are also gendered, with men in management positions. Housekeeping is dominated by female staff from Poland

⁶⁶ Cameron MacDonald and Carmen Sirianni, “The Service Society and the Changing Experience of Work,” in *Working in the Service Society*, ed. Cameron Lynn MacDonald and Carmen Sirianni (Philadelphia: Temple University Press, 1996), 3-6.

⁶⁷ Linda McDowell, Adina Batnitzky and Sarah Dyer, “Division, Segmentation, and Interpellation: The Embodied Labors of Migrant Workers in a Greater London Hotel,” *Economic Geography* 83 (2007): 8 - 9.

⁶⁸ McDowell *et. al.* “Division, Segmentation, and Interpellation,” 9.

who are seen as headstrong and hardworking.⁶⁹ McDowell *et. al.*'s research suggests that creating emotional authenticity is a performance. Each staff member develops their own style, drawing on stereotypes and myths about their personal attributes like age, gender, race, physical appearance, accents, or language skills to project a certain identity that will help them be more effective at their work and keep their job.

Similar to McDowell *et. al.*'s work, Adler and Adler show the mutually enforcing role both management and workers play in stratifying workers by race and ethnicity into a hierarchy. They found that management will make hiring and promotion decisions based on stereotypes about race and ethnicity: white workers from the mainland are directed into jobs where they can interact with guests (who are also mostly white and from the mainland) such as servers or pool staff, whereas new immigrants are directed to back of house jobs.⁷⁰ They also found that workers internalize the pervasive institutional racism and legitimate it through creative explanations about cultural preferences or strengths that made grossly unfair working conditions easier to accept.⁷¹ For instance, new immigrant Filipino and Tongan workers pride themselves in how hard working their ethnic group is and suggest that they are better at heavy physical labour than other ethnic groups.⁷² White waiters from the mainland legitimize their higher wages because they have to interact with guests and have superior language skills.⁷³ Locals perceive themselves as lacking in ambition and happy to stay in the middle of the hierarchy.⁷⁴

Building on Hochschild's idea of emotional labour, American sociologist Robin Leidner documents how management explicitly and implicitly routinizes the human interactions between their workers and customers in a 1990s study of two different service oriented organizations: McDonald's and Combined Insurance. Leidner argues that fordist production techniques in manual labour work have been adapted and expanded to apply in service sector work. Service sector jobs have been routinized so

⁶⁹ McDowell *et. al.* "Division, Segmentation, and Interpellation," 10-16.

⁷⁰ Adler and Adler, *Paradise Laborers*, 146.

⁷¹ Adler and Adler, *Paradise Laborers*, 168.

⁷² Adler and Adler, *Paradise Laborers*, 44, 158.

⁷³ Adler and Adler, *Paradise Laborers*, 166.

⁷⁴ Adler and Adler, *Paradise Laborers*, 163.

that each worker performs a small task behaving within well-defined guidelines, allowing management to increase efficiency, reduce labour costs, create uniformity of service, and have increased levels of control over their organization. However, unlike Fordist production in manual labour, the human interaction workers have with customers is more difficult to routinize. In order to succeed, employers must routinize the behavioural expectations of not only their employees, but also their customers.⁷⁵

With workers, management may explicitly train their staff on guidelines or techniques of how to act, how to dress, what to say, or what body language to use. But many employers go deeper than just guidelines by implicitly trying to shape an employee's style, attitude, and personality.⁷⁶ Management will look to hire workers based on whether they look like they can play the part, are a certain gender, or social class.

According to Leidner, one of the main challenges employers in the service sector face is how to strike a balance between ensuring workers follow company guidelines on how to act while still appearing authentic and genuine to customers. She outlines three strategies employers use to overcome the limits of routinization on human interaction. The first is to reduce the chances that customers will behave in unpredictable ways. Employers may direct customers in a straightforward way by postings signs such as “no substitutions” or “employees only.” Employers may also be more subtle, such as making their seating hard and uncomfortable so that patrons do not linger. Workers are trained to encourage or discourage certain kinds of client behaviour. The second strategy is to conceal the routinization of a customer's service so that it appears authentic and personalized. Employers will train workers to appear sincere by adding personal touches to a customer's experience. For example, a worker may be trained to comment on a customer's fine taste in clothing or pretend to bend the rules in the customer's favour. The third strategy employers use to routinize human interaction in the service sector is transforming the worker themselves. Leidner argues that this strategy is used more frequently when it is impossible to fully routinize every decision a worker makes, and in situations where workers still need to exercise a degree of discretion. Instead of

⁷⁵ Robin Leidner, *Fast Food, Fast Talk: Service Work and the Routinization of Everyday Life* (Berkeley: University of California Press, 1993), 1-25.

⁷⁶ Leidner, *Fast Food*, 27.

managing the client's behaviour and experience, employers instead put more effort into recruiting and training a workforce that shares the same personality traits, thought processes and character. The transformation extends beyond the workplace into a worker's personal life, and creates both a flexible and loyal worker. Leidner points out that the more discretion workers have, the higher degree of worker transformation will be needed.⁷⁷

iii) Hospitality Sector Employers Strive to Keep Wages Low and Reduce Worker Turnover

The third important consequence of mixing how a worker looks and how the worker performs with the product being sold is that hospitality work is labour intensive, and therefore one of the largest production costs is wages. In order to remain competitive employers are constantly seeking ways to keep hospitality wages low while reducing voluntary employee turnover.⁷⁸ Voluntary turnover is when workers quit their job, rather than being terminated or laid-off. Go2hr, BC's tourism and hospitality industry's human resources association, estimates that voluntary turnover in the BC hospitality sector is 24% compared to 8.6% in other sectors. Voluntary turnover is higher for part-time and seasonal employees compared to full-time. The top two reasons workers voluntarily quit is because they have found another job with higher pay, or are returning to school. Go2hr estimates that the cost of training a new hourly-waged employee is between four and 12 months pay.⁷⁹

In order to keep wages low and reduce voluntary turnover, hospitality employers have used three main strategies. First, hospitality employers specifically recruit types of workers who do not have a lot of other job options: immigrants who lack language skills or education from locally recognized institutions; seniors who need to continue to work past retirement age in order to make ends meet; students who are juggling work with full-time school; and parents who need to be able to care for young children outside of school

⁷⁷ Leidner, *Fast Food*, 29-39.

⁷⁸ Urry, *The Tourist Gaze*, 38 and 60.

⁷⁹“Infographic: Turnover in BC's Tourism Industry,” Go2hr, accessed May 24, 2017, <https://www.go2hr.ca/research/turnover-bc-tourism>.

hours.⁸⁰ In other words, hospitality employers traditionally recruit from the secondary labour market.

Second, hospitality employers offer perquisites instead of higher pay. For example, in lieu of increasing wages, employers in BC resort communities offer their employees discounts, free food, free sports gear, season's passes, training, certification, or career advancement opportunities. Resort employers have also worked hard at creating a positive and caring work environment to build employee/employer relationships, loyalty and trust.⁸¹ Similarly, fast-food restaurant owners use a variety of psychological strategies to keep workers motivated, productive, and loyal. Managers are trained on how to ensure their workers feel appreciated, feel like they know what is going on at work, and feel supported if they are facing personal problems. Events to boost moral, such as friendly competitions on who can make a burger the fastest, or company picnics are common.⁸² The importance of loyalty was also found in Adler and Adler's research in Hawaii. They found that, regardless of whether the resort was unionized or not, workers who worked at the resort longer were given better shifts. For instance, front desk clerks felt they needed to put in their time on the graveyard shift (10pm – 6am) before they could get better daytime shifts.⁸³ In a 1970s study on waiters, British anthropologists Gerald Mars and Michael Nicod suggest that the total compensation package for a restaurant worker needs to include basic pay, plus subsidized lodging, subsidized or free food, tips, and anything that staff can get away with pilfering - be it paid time spent idle on the job or material goods.⁸⁴

Finally, hospitality employers use subtle forms of wage theft. In *Behind the Kitchen Door* Jayamaraman found that restaurant workers routinely experience wage theft. Wage theft can occur in a number of different ways: workers may not be paid the statutory premium for overtime hours; they may be forced to clock-out before they finish their

⁸⁰ Reiter, *Making Fast Food*, 131-161.

⁸¹ Nicole Vaugois *et al.*, *BC Resort Community Labour Market Strategy Analysis Final Report* (Vancouver, Go2hr, 2013), accessed May 24, 2017, <https://www.go2hr.ca/sites/default/files/legacy/reports/go2-BC-Resort-Community-Labour-Market-Strategic-Analysis.pdf> at 26 - 27.

⁸² Reiter, *Making Fast Food*, 131-161.

⁸³ Adler and Adler, *Paradise Laborers*, 130.

⁸⁴ Gerald Mars and Michael Nicod, *The World of Waiters* (Boston: George Allen & Unwin, 1984), 8.

shift; workers may be forced to pay for broken glassware or customers who skipped out on the bill; or, they may be forced to give tip money to management when management controls how tips are pooled and distributed among staff.⁸⁵

Hospitality sector employers are not alone in using strategies to keep wages low and reduce worker turnover; employers in other sectors use similar strategies. However, for hospitality sector employers the stakes are higher because of the place-based and time specific nature of the industry, which I discuss next.

B. Place and Time: Hospitality Work is Place-Based and Time Specific

Since hospitality work is place-based and time specific, hospitality sector employers are extremely sensitive to the ebbs and flows of the local labour supply and actively recruit from national and international labour pools. As described above, early hotel employers recruited males for the top supervisory jobs from national and regional labour markets, males for the semi-skilled jobs in the back of house like cooks from Europe, and females for the low-skilled dirty jobs such as laundry and housekeeping from the local labour market.⁸⁶ In Adler and Adler's study of Hawaiian resorts, at the top of the workplace hierarchy were "managers" and "seekers" recruited from national and international labour markets. In contrast, "locals" and "new immigrants" were at the bottom of the hierarchy and tied to the local labour market due to family, low education levels, and lack of language skills.⁸⁷

Go2hr, BC's tourism and hospitality industry's human resources association, published a labour market strategy plan in 2012 to address challenges hospitality employers would face over the next decade. One of the top challenges for BC hospitality sector employers is a shortage of workers. The labour shortage is attributed to an increase in overall hospitality jobs, an increase in competition for skilled workers in all industries, and changing demographics where the youth population has declined and the baby boomers are retiring. Hospitality employers have difficulty in offering full-time, year-round employment and shedding the perception of the industry as a good place for a short-term summer or part-time job but not a long-term career. Hospitality employers located in

⁸⁵ Jayaraman, *Behind the Kitchen Door*, 69-102.

⁸⁶ Sandoval-Strausz, *Hotel: An American History*, 179-180.

⁸⁷ Adler and Adler, *Paradise Laborers*, 41-64.

rural and more remote locations in BC have particular difficulty filling entry-level positions due to an aging population, lack of affordable housing, lack of a public transit system, and lack of training opportunities nearby.⁸⁸ Research into hospitality work in BC resort communities suggests that many seasonal Canadian employees only move to places like Whistler or Tofino for the “surf bum” or “ski bum” lifestyle, where workers agree to take on low-wage part-time and seasonal work in exchange for the ability to ski or surf every day. In other words, resort community employers have to contend with local workers whose “loyalty [is] to their leisure and not to their employment...especially on great powder days.”⁸⁹

Employers in the hospitality sector face a constant struggle to find hard-working and loyal workers who are willing to commit to a job where the hours are unpredictable, the work is physically and emotionally demanding, the pay is low or fluctuates based on gratuities, and the benefits are sparse. Employers in the hospitality sector have tried to overcome the struggle with different strategies. Some are willing to make small commitments to workers who will stay or offer perquisites in lieu of additional pay, while others intentionally recruit from a labour pool of workers who do not have many other options to find work. Jobs in the hospitality sector, therefore, have a duplicitous mix of both commitment and precarity: commitment, because most employers desire workers who are loyal and willing to stay; precarity, because the hours, benefits and pay are unpredictable and unstable.

In this chapter, I introduced the three themes I use in my thesis to explore what happens when workplace law and immigration law meet: people, place and time. I summarized research from Canada, the US and the UK to highlight features of hotel and restaurant work that are relevant for my research. First, the hospitality sector is made up of interactions between people. As a consequence, workers in the hospitality sector tend to be stratified based on personal attributes such as race, gender and age; workers in the hospitality sector are part of creating an “authentic” experience for customers; and wages make up a large part of production costs so hospitality employers strive to keep wages

⁸⁸ “BC Tourism Labour Market Strategy 2012,” Go2hr, accessed May 24 2017, <https://www.go2hr.ca/sites/default/files/download/file/go2HR-TLMS-Communications.pdf>, 12.

⁸⁹ Vaugois *et al.*, *BC Resort Community*, 26, brackets omitted.

low and reduce voluntary turnover. Second, work in the hospitality sector is place-based and time-specific. Hospitality employers are sensitive to local labour shortages and often recruit from national and international labour markets. In the next chapter, I argue that the low-skilled TFWP is an example of hospitality employers recruiting highly trained foreign workers from economically poor countries in the global south who are willing to work for low wages and make a long-term commitment in exchange for a chance at Canadian citizenship.

Chapter 2: The Demand and Supply of Hospitality TFWs in BC

1. Introduction

... [A] manager said all of this is happening because the Filipinos — beholden to McDonald's for bringing them to Canada — are better workers. "They told me that they were more reliable because they wouldn't show up late and they work harder"... "They do work hard — I can't argue against that."⁹⁰

-Kalen Christ, Canadian McDonald's Worker in Victoria, BC

Kalen Christ was the young Canadian worker at a Victoria, BC McDonald's restaurant who complained about losing shifts to Filipino TFWs. My findings from the data about the demand and supply of low-skilled hospitality TFWs suggest that Mr. Christ's observations about how hard TFWs work is just one part of a complex story.

In this chapter, I examine the demand and supply of hospitality TFWs in BC. I start by going over the legal requirements of the TFWP, and situate the program within the Canadian migration and immigration system as a whole. I outline two structural features of the TFWP that make it difficult for TFWs to enforce their workplace rights. Next, I explore theories about the demand and supply of migrant workers. I argue that the demand and supply of temporary migrant workers is a dialectical process shaped by social, cultural and economic change at multiple geographic scales. Third, I present my own qualitative research about the demand and supply of low-skilled TFWs in the BC hospitality sector based on information I obtained from ESDC and CIC. I argue that the demand and supply of low-skilled TFWs in the BC hospitality sector is about recruiting workers with the right soft skills and keeping wage rates in the sector low. Finally, I argue that three characteristics of TFWs line-up with the needs of hospitality employers in a way that make TFWs an ideal labour pool for hospitality employers to recruit from.

2. The Temporary Foreign Worker Program

The TFWP can be confusing because it is an umbrella term for four different temporary migration⁹¹ streams to Canada with very different histories and objectives. In this

⁹⁰ Tomlinson, "McDonald's Accused of Favouring Foreign Workers."

⁹¹ I have chosen to use the word "migration" rather than "immigration" to emphasize the temporariness of the TFWP, and contrast the TFWP against Canadian "immigration" programs that allow foreign nationals to come to Canada with a pathway to permanent residency.

section, I give a brief overview of each of the four streams and explain the legal technicalities of how TFWs are hired. I then situate the TFWP within the Canadian immigration and migration system as a whole, and highlight the key features of the TFWP that make it difficult for TFWs to enforce their workplace rights.

A. Four TFWP Migration Streams

The first, most long-standing migration stream under the TFWP umbrella is the Seasonal Agricultural Worker Stream (“SAWP”). The SAWP originated with a 1966 agreement between Canada and Jamaica that permitted Jamaican farm workers to travel to Canada on the seasonal basis to fill labour shortages in the Canadian agricultural sector.⁹² The program subsequently expanded to include a number of other Caribbean countries and Mexico.⁹³ Currently, the SAWP allows agricultural employers to hire foreign workers from Mexico and participating countries in the Caribbean to come to Canada and work on a Canadian farm for less than one year on a seasonal basis. Work permits are closed under this program to a specific employer.⁹⁴ In 2013, 41,700 workers held work permits in Canada under the SAWP stream, accounting for 24% of all TFWs that year.⁹⁵

The second stream is the In-Home Caregiver Program (“IHC”). Formerly known as the “Live-In Caregiver Program,” this stream dates back to 1982 when Canada signed an agreement with Caribbean countries to allow Caribbean nannies to come and work in Canada.⁹⁶ Currently, the ICP allows families to hire a caregiver to care for their relative(s), including children under the age of 18, seniors who are 65 years old or older,

⁹² Irving Andre, “The Genesis and Persistence of the Commonwealth Caribbean Seasonal Agricultural Workers Program in Canada,” *Osgoode Hall Law Journal* 28.2 (1990): 256 – 257.

⁹³ Judy Fudge & Fiona MacPhail, “The Temporary Foreign Worker Program in Canada: Low-Skilled Workers As An Extreme Form of Flexible Labour,” *Comparative Labour Law & Policy Journal* 31.5 (2009): 21.

⁹⁴ “Agricultural Workers,” Citizenship and Immigration Canada, accessed April 19, 2017, <http://www.cic.gc.ca/english/work/permit-agriculture.asp>.

⁹⁵ “Facts and Figures: Temporary Foreign Worker Program Work Permit Holders by Program, 2004-2013,” Citizenship and Immigration Canada, accessed April 19, 2017 <http://www.cic.gc.ca/english/resources/statistics/facts2013/temporary/2-3.asp>.

⁹⁶ Daniel Parrott, “The Role and Regulation of Private, For-Profit Employment Agencies in the British Columbia Labour Market and the Recruitment of Temporary Foreign Workers,” (LLM Thesis, University of Victoria, 2009) at 67.

or a person with a disability or illness.⁹⁷ Closed work permits are issued under the program and the worker can only work for the employer listed on the permit.⁹⁸ A caregiver in the ICP is eligible to apply for permanent residency after working in Canada for two years through the Caring for Children (“CFC”) and Caring for People with High Medical Needs (“CFP”) permanent immigration streams.⁹⁹ Up until November 2014, caregivers had to live on-site in their employer’s home. Critics argued the live-in requirement exposed caregivers to an increased potential for exploitation by their employer, from unpaid overtime, to infringements on autonomy, to substandard accommodation.¹⁰⁰ Legislative changes now allow caregivers to live on-site or off-site, and the name of the program was updated to reflect this change. In 2013, 23,848 TFWs in Canada held work permits under the IHC stream, accounting for 14% of all TFWs that year.¹⁰¹

The third stream is the Higher-Skilled Occupations stream (“HSO”). The HSO is the only stream for “high-skilled” workers under the TFWP umbrella. “High-skilled” is defined by reference to the high-skilled occupations as described in the National Occupational Classification (“NOC”) coding system used by ESDC and Statistics Canada.¹⁰² Classified as “NOC A” or NOC B,” high-skilled jobs require either: a university degree; two to three years of post-secondary education at a community college

⁹⁷ “Hire a Temporary Foreign Worker as an In-Home Caregiver - Overview” Employment and Social Development Canada, accessed April 21, 2017, <https://www.canada.ca/en/employment-social-development/services/foreign-workers/caregiver.html>.

⁹⁸ “Hire a Temporary Foreign Worker as an In-Home Caregiver – Next Steps” Employment and Social Development Canada, accessed April 21, 2017, <https://www.canada.ca/en/employment-social-development/services/foreign-workers/caregiver/after.html>

⁹⁹ “Find Out if You’re Eligible – Caring for Children,” Citizenship and Immigration Canada, accessed April 21, 2017, <http://www.cic.gc.ca/english/immigrate/caring-children/apply-who.asp>; “Find Out if You’re Eligible – Caring For People With High Medical Needs,” Citizenship and Immigration Canada, accessed April 21, 2017, <http://www.cic.gc.ca/english/immigrate/caring-medical/index.asp>.

¹⁰⁰ Fay Faraday, “Made in Canada: How The Law Constructs Migrant Workers’ Insecurity,” Metcalf Foundation, September 2012, <http://metcalffoundation.com/publications-resources/view/made-in-canada/> at 89 – 91; “Canadian Government Ends LCP, Remains Silent About Questions of Permanent Residency For Caregivers,” Migrant BC, accessed April 21, 2017, <http://www.migrantebc.com/2014/11/02/canadian-government-ends-lcp-remains-silent-question-permanent-residency-caregivers/>.

¹⁰¹ “Facts and Figures: Temporary Foreign Worker Program Work Permit Holders by Program, 2004-2013.”

¹⁰² As of October 2016, Employment and Social Development Canada uses the NOC 2011, see “Hire a Skilled Worker and Support Their Permanent Residency – Program Requirements,” Employment and Social Development Canada, accessed April 21, 2017, <https://www.canada.ca/en/employment-social-development/services/foreign-workers/permanent/requirements.html>.

or institute of technology; two to five years of apprenticeship training; or three to five years of secondary education with at least two years of relevant work experience or occupation specific training courses.¹⁰³ In 2013, 76,324 TFWs held work permits in Canada under the HSO stream, accounting for 43% of all TFWs that year.¹⁰⁴

Until 2002, the TFWP consisted of only the HSO stream, the ICP stream and the SAWP stream. Access to low-skilled, low-wage foreign workers was limited to employers in two very specific sectors: agriculture and in-home care. Just prior to 2002, the majority of TFWs coming to Canada were high-skilled workers in the HSO stream.¹⁰⁵ The composition of the TFWP significantly changed in 2002 when the Low-Skilled Occupations stream was introduced, as I discuss next.

The final stream and subject matter of my thesis is the Lower-Skilled Occupations stream (“LSO”). Formerly known as the Low-Skilled Pilot Program, the LSO is the most recent stream under the TFWP umbrella. It was introduced in 2002 by the then Liberal federal government.¹⁰⁶ Like the HSO stream, “low-skilled” is defined by reference to the NOC coding system. Classified as either “NOC C” or “NOC D,” low-skilled jobs are jobs that require either: some high school; up to two years of on-the-job training; a short work demonstration; or no formal education at all.¹⁰⁷ The number of TFWs coming to Canada under the LSO stream increased rapidly in 2007 when the newly elected Conservative Party led by Prime Minister Stephen Harper introduced fast-track approvals for 12 (and later 33) high-demand occupations in Alberta and BC, including occupations in food and hotel services.¹⁰⁸ In figure 1 below, which shows the number of TFWs in Canada on December 1 each year by stream between the years 1988 and 2013, there is a visible bump in the number of workers in the LSO stream starting in 2007. In 2013,

¹⁰³ “NOC 2011 Tutorial,” Employment and Social Development Canada, accessed April 21, 2017, <http://noc.esdc.gc.ca/English/NOC/Tutorial.aspx?ver=11#9>.

¹⁰⁴ “Facts and Figures: Temporary Foreign Worker Program Work Permit Holders by Program, 2004-2013.”

¹⁰⁵ Jason Foster, “Making Temporary Permanent: The Silent Transformation of the Temporary Foreign Worker Program,” *Just Labour: A Canadian Journal of Work and Society* 19 (2012): 25.

¹⁰⁶ Foster, “Making Temporary Permanent,” 25.

¹⁰⁷ “NOC 2011 Tutorial.”

¹⁰⁸ “Backgrounders – Improvements to The Temporary Foreign Worker Program,” Citizenship and Immigration Canada, accessed April 21, 2017, <http://www.cic.gc.ca/english/department/media/backgrounders/2010/2010-08-18.asp>.

38,668 TFWs held work permits in Canada under the LSO stream, accounting for 22% of all TFWs in Canada.¹⁰⁹

Like the SAWP stream and the IHC stream, the LSO stream allows employers to bring in “low-skilled” workers. However, unlike the SAWP stream and the IHC stream, the LSO is not aimed to alleviate local labour shortages in one specific sector, such as agriculture or caregiving. Instead, under the LSO stream an employer in *any* sector who faces a local labour shortage of low-skilled workers can bring a TFW to Canada. TFWs in the LSO stream therefore work for a variety of different kinds of employers, including fish processing plants, meat processing plants, full-service restaurants, retail stores, fast food joints, coffee shops, ski resorts, and hotels.

Despite the diverging objectives of the four migration streams under the TFWP umbrella, each stream has two important elements in common. The first element is that a Canadian employer cannot hire a TFW without first demonstrating that there is a local labour shortage and the employer cannot find a Canadian citizen or permanent resident to fill the job. The TFWP is supposed to be used by employers as a last resort. The second is that workers who travel to Canada as a TFW are issued closed work permits that are tied to one specific employer at one specific location. A TFW may not work for any other employer, or at any other location without first obtaining a new work permit. The legal requirements to hire a TFW are quite technical, and are addressed in the next section.

¹⁰⁹ “Facts and Figures: Temporary Foreign Worker Program Work Permit Holders by Program, 2004-2013.”

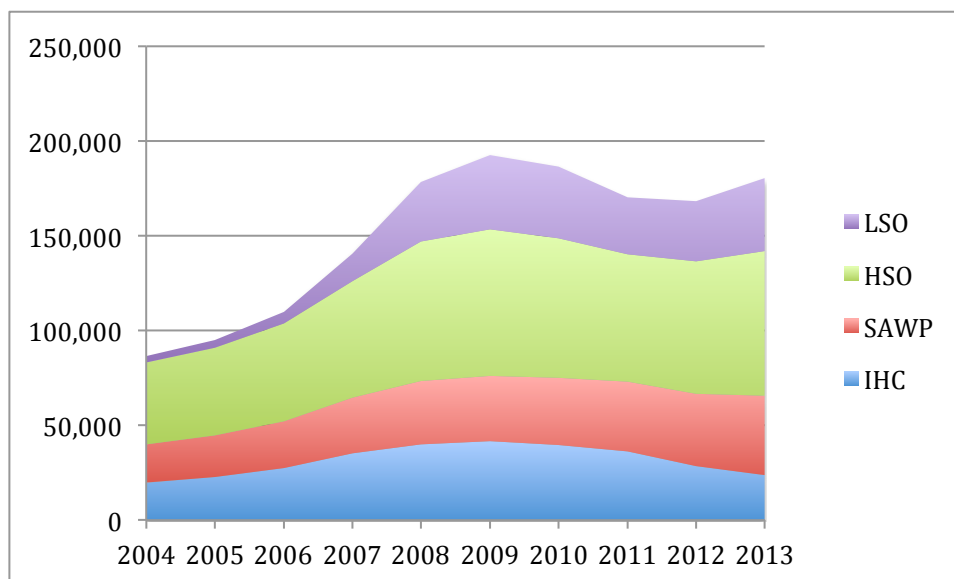


Figure 1: Temporary Foreign Workers in Canada on Dec. 1 by Program, 2004-2013

B. Legal Requirements to Hire a Temporary Foreign Worker

The TFWP is jointly administered by three federal agencies: Employment and Social Development Canada (“ESDC”); Citizenship and Immigration Canada (“CIC”); and Canada Borders Services Agency (“CBSA”). Hiring and bringing a TFW to Canada to work under any of the four streams is a three-step process, and each federal agency is responsible for one step.

First, the Canadian employer must obtain a positive Labour Market Impact Assessment (“LMIA”) from ESDC.¹¹⁰ The LMIA process is designed by ESDC to try and ensure that an employer is only resorting to use the TFWP because there is a local labour shortage and the employer could not find a Canadian citizen or permanent resident to fill the position. Currently, to obtain a positive LMIA the employer must demonstrate it has advertised the job posting in Canada, provide proof of applicable business licences and registrations, pay a \$1000 processing fee, and provide a copy of the employment contract

¹¹⁰ “Hire a Temporary Foreign Worker in a Low-Wage Position,” Employment and Social Development Canada, accessed April 23, 2017, <https://www.canada.ca/en/employment-social-development/services/foreign-workers/median-wage/low.html>.

signed by the employer.¹¹¹ The employment contract must contain certain provisions, including:

- the length of the contract;
- a job description;
- a work schedule;
- wages and deductions;
- the employer's agreement to pay for the worker's transportation costs to and from Canada;
- the employer's agreement to provide the worker with medical insurance until the worker qualifies for provincial health care;
- the employer's agreement to register for workers' compensation insurance;
- notice of termination requirements; and
- the employer's requirement to abide by applicable provincial labour and employment laws, and any applicable collective agreements.¹¹²

Employers who hire low-wage workers, defined as positions that pay lower than the provincial median hourly wage, are subject to a cap on the number of TFWs they can hire. The cap was introduced in 2014 and is currently 10% low-wage TFWs per worksite for employers who did not hire a TFW before June 20, 2014 (20% for employers who hired a TFW prior to June 20, 2014). Employers who hire high-wage workers, defined as at or above the provincial median hourly wage, must provide a "transition plan." A transition plan is where the employer identifies activities it will engage in to train or recruit Canadian citizens or permanent residents to fill the position, or undertake to assist a TFW to obtain permanent residency in order to remain in the position permanently.¹¹³ If the employer receives a positive LMIA from ESDC, the employer then sends a copy of the signed employment contract to the worker it intends to hire.

¹¹¹ "Hire a Temporary Foreign Worker in a Low-Wage Position."

¹¹² "Temporary Foreign Worker Program – Sample Employment Contract," Employment and Social Development Canada, accessed April 23, 2017, https://www.canada.ca/content/dam/esdc-edsc/documents/services/foreign-workers/median-wage/low/employment_contract.pdf.

¹¹³ "Program Requirements For Low-Wage Positions," Employment and Social Development Canada, accessed April 23, 2017, <https://www.canada.ca/en/employment-social-development/services/foreign-workers/median-wage/high/requirements.html#h2.5>.

The second step in the process is administered by CIC. After signing the employment contract, the TFW must then apply to the applicable Canadian Visa Office run by CIC for a work permit. The TFW must include proof of identity, proof of employment in Canada, and disclose any arrests or criminal convictions.¹¹⁴ Depending on the TFW's country of origin and travel history, they may also have to undergo a medical examination before departure.¹¹⁵ The employer must reimburse the worker for the \$155 work permit application fee (and the \$85 biometric information fee for select countries of origin).¹¹⁶ If the CIC approves the work permit, it sends a letter of introduction to the TFW. A letter of introduction does not guarantee a TFW entry into Canada.¹¹⁷ The TFW may then travel to Canada to present the letter of introduction from the CIC and all supporting materials to a CBSA officer at a Canadian port of entry.

The third and final step occurs when the TFW reaches a Canadian port of entry, where a CBSA officer makes a final decision on whether to issue a work permit to the TFW and allow the TFW to enter Canada. The work permit is employer-specific and sets out the exact employer that the TFW may work for, the exact location where the TFW may work, the exact position the TFW may work in, and the duration of the work-permit, thus tying the TFW's immigration status in Canada to their employer.¹¹⁸ Up until December 31, 2016, a TFW could only work in Canada for four consecutive years, and then had to remain outside of Canada for four years before applying for a new work permit. The four-year cap was removed and there is now no limit on how long a TFW can work in Canada.¹¹⁹

¹¹⁴ "Guide 5487 – Applying for a Work Permit Outside Canada," Citizenship and Immigration Canada, accessed April 23, 2017, <http://www.cic.gc.ca/english/information/applications/guides/5487ETOC.asp>.

¹¹⁵ "Medical Exam Requirements For Temporary Residents (Visitors, Students, and Workers)," Citizenship and Immigration Canada, accessed on April 23, 2017, <http://www.cic.gc.ca/english/information/medical/medexams-temp.asp>.

¹¹⁶ "Guide 5487 – Applying for a Work Permit Outside Canada."

¹¹⁷ "Guide 5487 – Applying for a Work Permit Outside Canada."

¹¹⁸ "Types of Work Permits," Citizenship and Immigration Canada, accessed on April 24, 2017, <http://www.cic.gc.ca/english/work/apply-who-permit.asp>.

¹¹⁹ "Temporary Foreign Worker Program: Cumulative Duration," Citizenship and Immigration Canada, accessed on April 24, 2017, <http://www.cic.gc.ca/english/resources/tools/temp/work/cumulative.asp>.

C. Where The TFWP Fits Within The Canadian Immigration/Migration System

There are, of course, other kinds of “temporary foreign workers” in Canada under different migration streams, even if they are not “Temporary Foreign Workers” with a capital “T” “F” and “W” in one of the four migration streams under the TFWP. For the sake of clarity and to give some context, in this section I situate the TFWP within the Canadian immigration and migration system as a whole.

Both the federal and the provincial/territorial levels of government share responsibility for immigration, with federal legislation overriding any conflicting provincial laws.¹²⁰ The Province of Quebec negotiated an agreement with the federal government in 1991 addressing immigration to Quebec,¹²¹ which is beyond the scope of my research and not addressed here. Outside of Quebec, the federal government regulates the majority of immigration programs to Canada.

Governed by the *Immigration and Refugee Protection Act*¹²² (“IRPA”), the Canadian immigration and migration system can be conceptualized in three broad categories: economic-based migration and immigration, family reunification immigration, and humanitarian-based immigration (see Table 3 for a visual representation of all Canadian migration and immigration streams). Under humanitarian-based immigration streams (the blue column of Table 3), there are a number of categories for foreign nationals who are fleeing persecution based on their race, religion, nationality or membership of a particular social group or political opinion in their country of origin who qualify as Convention refugees,¹²³ such as the “In-Canada Asylum Program” or the “Refugee and Humanitarian Resettlement Program.”¹²⁴ The humanitarian-based immigration streams fulfill Canada’s international commitments and humanitarian objectives.¹²⁵ In 2013,

¹²⁰ *The Constitution Act*, 1867 (UK), 30 & 31 Victoria, c.3 at s. 95.

¹²¹ “Canada-Quebec Accord Relating to Immigration and Temporary Admissions of Aliens, February 5, 1991,” Citizenship and Immigration Canada, accessed April 24, 2017 <http://www.cic.gc.ca/english/department/laws-policy/agreements/quebec/can-que.asp>.

¹²² S.C. 2001, c. 27 (“IRPA”).

¹²³ Under section 2(1) and the Schedule of the *IRPA*, which together incorporate UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.

¹²⁴ “How Canada’s Refugee System Works,” Citizenship and Immigration Canada, accessed on April 24, 2017, <http://www.cic.gc.ca/english/refugees/canada.asp>.

¹²⁵ As set out in section 3(2) of the *IRPA*.

24,049 refugees were admitted to Canada as permanent residents, making up 9.3% of total new immigrants admitted.¹²⁶

Under the family-based immigration streams (the green column of Table 3), Canadian citizens or permanent residents over the age of 18 can sponsor foreign nationals who are their spouses, common-law partners, dependent children, parents and grandparents for admission to Canada as a permanent resident.¹²⁷ In 2013, 79,684 family class immigrants were admitted to Canada as permanent residents, making up 31% of total new immigrants admitted.¹²⁸

The economic-based immigration and migration category (refer to the red columns of Table 3) can be further separated into temporary migration and permanent immigration streams. There are currently eight permanent economic-based immigration streams, which make up the majority of permanent new immigrants admitted to Canada. For instance, in 2013 there were 148,181 economic class immigrants admitted to Canada, making up 57.2% of all new immigrants admitted.¹²⁹ The Federal Skilled Worker Program (“FSWP”) and the Federal Skilled Trades Program (“FSTP”) both allow foreign nationals with high levels of education and/or training, work experience in Canada or abroad, and sufficient language proficiency to apply for permanent residency.¹³⁰ The Canadian Experience Class (“CEC”) allows foreign nationals with 12 months of full-time skilled work experience in Canada, usually obtained under one of the temporary migration streams, and sufficient language proficiency to apply for permanent residency.¹³¹ The Self-Employed Person’s Program (“SEPP”) allows foreign nationals who have self-employment experience as farmers, or in cultural activities or athletics and

¹²⁶ “Facts and Figures 2013 – Immigration Overview: Permanent Residents,” Citizenship and Immigration Canada, accessed April 26, 2017, <http://www.cic.gc.ca/ENGLISH/resources/statistics/facts2013/permanent/02.asp>.

¹²⁷ *Immigration and Refugee Protection Regulations*, SOR/2002-227, s.116.

¹²⁸ “Facts and Figures 2013 – Immigration Overview: Permanent Residents.”

¹²⁹ “Facts and Figures 2013 – Immigration Overview: Permanent Residents.”

¹³⁰ “Determine Your Eligibility – Federal Skilled Workers,” Citizenship and Immigration Canada, accessed April 21, 2017, <http://www.cic.gc.ca/english/immigrate/skilled/apply-who.asp>; “Determine Your Eligibility – Skilled Trades,” Citizenship and Immigration Canada, accessed April 21, 2017 <http://www.cic.gc.ca/english/immigrate/trades/apply-who.asp>.

¹³¹ “Who Can Apply – Canadian Experience Class,” Citizenship and Immigration Canada, accessed April 26, 2017, <http://www.cic.gc.ca/english/immigrate/cec/apply-who.asp>.

intend to remain self-employed upon immigration to Canada to apply for permanent residency.¹³² The Start-Up Visa Program (“SVP”) allows foreign entrepreneurs who have received support from a designated Canadian investor to start a business to apply for permanent residency.¹³³ Finally, the Caring for Children stream (“CFC”) and the Caring for People with High Medical Needs stream (“CFP”) were launched in November 2014 to replace pathways for permanent residency under the former Live-in Caregiver Program.¹³⁴ If granted permanent residency, a foreign national can live and work anywhere in Canada.¹³⁵ A permanent resident is eligible to apply for Canadian citizenship after passing a knowledge test about Canada, demonstrating sufficient language skills, and living in Canada for four of the last six years.¹³⁶

The TFWP fits under the temporary migration category of economic-based streams (refer to the far left red column of Table 3). Besides the TFWP, there are four other temporary migration streams in Canada: the International Mobility Program; International Experience Canada Program; the Post-Graduation Work Permit Program; and international student study permits.

The International Mobility Program (“IMP”) allows employers to hire foreign nationals who are high-skilled workers with a university degree and/or professional accreditation *without* obtaining a LMIA. The IMP includes high-skilled workers who enter Canada under free trade agreements such as the North American Free Trade Agreement (“NAFTA”).¹³⁷ The International Experience Canada program (“IEC”) is a youth exchange program that allows young foreign nationals from countries with bilateral

¹³² “Find Out if You’re Eligible – Self-Employed,” Citizenship and Immigration Canada, accessed April 26, 2017, <http://www.cic.gc.ca/english/immigrate/business/self-employed/apply-who.asp>.

¹³³ “Find Out if You’re Eligible – Start-Up Visa Program,” Citizenship and Immigration Canada, accessed April 26, 2017, <http://www.cic.gc.ca/english/immigrate/business/start-up/eligibility.asp>.

¹³⁴ Changes in the program also introduced a cap on the number of caregivers who would be accepted for permanent residency each year, see Debra Black, “New Rules for Federal Live-in Caregivers Program,” *Toronto Star* November 28, 2014, accessed June 29, 2017, https://www.thestar.com/news/canada/2014/11/28/new_rules_for_federal_livein_caregivers_program.html.

¹³⁵ “Understand Permanent Resident Status,” Citizenship and Immigration Canada, accessed April 26, 2017, <http://www.cic.gc.ca/english/newcomers/about-pr.asp>.

¹³⁶ “Determine Your Eligibility – Citizenship,” Citizenship and Immigration Canada, accessed April 26, 2017, <http://www.cic.gc.ca/english/citizenship/become-eligibility.asp>.

¹³⁷ “Glossary,” Citizenship and Immigration Canada, accessed April 26, 2017, http://www.cic.gc.ca/english/helpcentre/glossary.asp?#international_mobility_program.

reciprocal agreements to travel, live and work in Canada. Both closed and open work permits are issued under the program.¹³⁸ International students (study permit holders) who are enrolled as a full-time student at a qualifying Canadian post-secondary institution are permitted to work off campus for up to 20 hours per week during classes and full-time during scheduled academic breaks. Study permit holders have an open work permit and can work for any employer.¹³⁹ The Post-Graduation Work Permit Program (“PGWPP”) allows graduates of certain Canadian post-secondary institutions to work in Canada for up to three years after graduation. Work permits under the PGWPP are open, and the foreign national can work for any employer.¹⁴⁰

¹³⁸ “Find Out If You’re Eligible – International Experience Class,” Citizenship and Immigration Canada, accessed April 27, 2017, <http://www.cic.gc.ca/english/work/iec/eligibility.asp>.

¹³⁹ “Hire International Students,” Citizenship and Immigration Canada, accessed April 27, 2017 <http://www.cic.gc.ca/english/hire/student.asp>.

¹⁴⁰ *Ibid.*

Table 3: Canadian Migration/Immigration Streams as of April 2017¹⁴¹

Economic		Family	Humanitarian
Temporary Migration Streams	Permanent Immigration Streams	Permanent Immigration Streams	Permanent Immigration Streams
International Experience Canada program ("IEC")	Federal Skilled Workers ("FSW")	Family Sponsorship of:	In-Canada Asylum Program
International Students (Study Permit)	Federal Skilled Trades Program ("FSTP")	Spouses, Partners and Children	Refugee and Humanitarian Resettlement Program
Post-Graduation Work Permit Program ("PGWPP")	Canada Experience Class ("CEC")	Parents and Grandparents	
International Mobility Program ("IMP"), which includes: <ul style="list-style-type: none"> Workers admitted under Free Trade Agreements Spouses/Common Law Partners of workers in Canada under the IMP 	Start-Up Visa Program ("SVP")		
Temporary Foreign Worker Program ("TFWP"), which includes: <ul style="list-style-type: none"> Lower-Skilled Occupations stream ("LSO") Higher-Skilled Occupations Stream ("HSO") Seasonal Agricultural Worker Program ("SAWP") In-Home Caregiver Program ("IHC") 	Self-Employed Persons Program ("SEPP")		
	Live-in Caregiver Program ("LCP") (being phased out)		
	Caring for Children stream ("CFC")		
	Caring for People with High Medical Needs stream ("CFP")		

The number of foreign nationals coming to Canada as temporary migrants each year vastly outnumbers the number of foreign nationals coming as permanent immigrants. Figure 2, which compares the number of permanent immigrants to Canada in all classes

¹⁴¹ Table made by the author.

in shades of blue to the number of temporary migrants to Canada in all classes in shades of red between 1998 and 2012, shows just how great the difference in numbers is. Further, Figure 2 shows that while the amount of foreign nationals admitted as permanent immigrants remains roughly the same, the amount of foreign nationals admitted as temporary migrants is on a steady upward trajectory. Finally, it shows that foreign migrant workers make up the majority of temporary migrants to Canada and vastly outnumber the number of foreign nationals admitted as permanent residents in all classes.

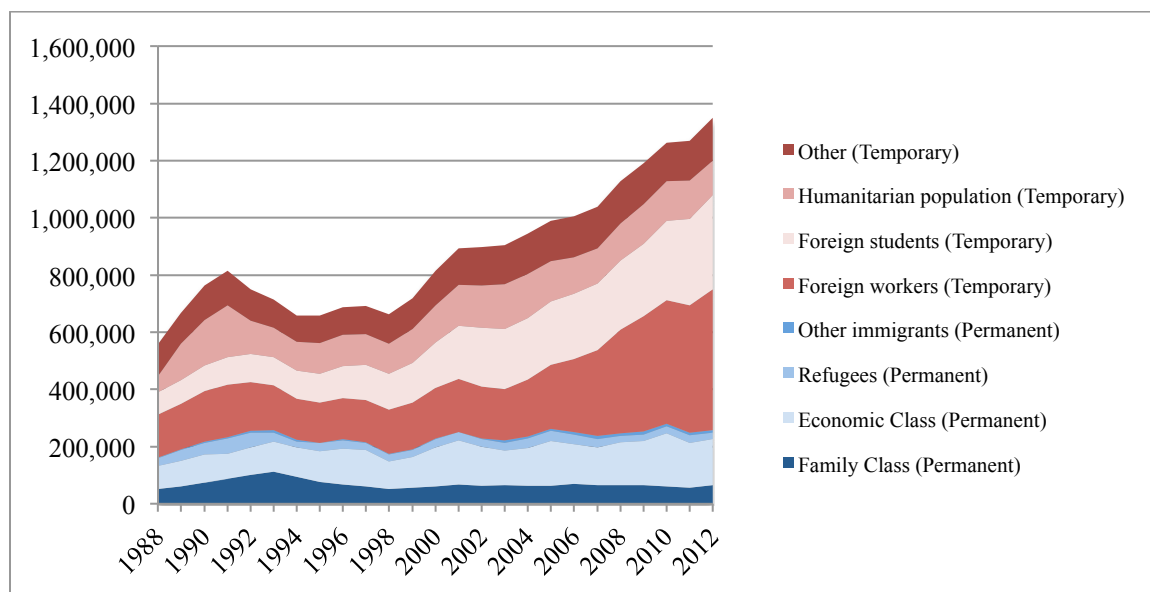


Figure 2: Permanent Immigrants vs. Temporary Migrants in Canada: 1998-2012¹⁴²

In addition to the three main types of federal immigration and migration programs (economic, family, and humanitarian), provinces and territories can also nominate foreign applicants for permanent residency under the Provincial Nominee Program (“PNP”). The PNP permits provinces and territories to enter into an agreement with the federal government in order to create their own permanent immigration streams to suit local needs. Under a PNP agreement, a province or territory has the ability to nominate an applicant for permanent residency based on locally tailored criteria, and the federal government retains the power to make a final call based on medical, criminal record, and

¹⁴² “Facts and Figures 2012 - Immigration Overview: Permanent and Temporary Residents.”

security screenings. The PNP started when the federal government began to devolve immigration powers to the provinces in the late 1990s in response to pressure from the Prairie and Atlantic provinces to shift immigrant settlement away from the three primary immigrant receptor areas of Toronto, Montreal, and Vancouver. Provinces wanted ways to attract immigrants to fill local labour shortages.¹⁴³

The number of permanent residents admitted under PNP immigration streams has grown significantly. In 2006, the then federal Conservative government moved away from putting strict limits on the number of economic immigrants nominated by each province or territory, and the number of PNP immigrants grew from a total of 6,248 in 2004 to 40,899 in 2012. Notably, economic immigrants admitted under the FSWP decreased during this same period, so that the number of overall economic immigrants to Canada was not affected by PNPs. However, PNPs have successfully altered the geographic pattern of immigrant settlement, with larger numbers of immigrants now settling in Alberta, Saskatchewan, and Manitoba.¹⁴⁴

BC signed a PNP agreement in 1998,¹⁴⁵ and developed an immigration stream for low-skilled TFWs. TFWs in the tourism/hospitality, food processing, or long-haul trucking sectors can apply to the BC PNP if they have been employed in a low-skilled tourism/hospitality sector, food processing, or long-haul trucking occupation for nine consecutive months in BC and have a letter offering full-time indeterminate employment from an eligible BC employer. The TFW must be qualified to do the job, and demonstrate that they can economically support themselves and any dependents.¹⁴⁶ If BC approves of an applicant under the PNP, BC will nominate the applicant to the federal government for permanent residency.¹⁴⁷

The number of tourism/hospitality TFW applicants nominated under the BC PNP is small compared to the number of hospitality TFWs who arrive in BC. Table 4, below,

¹⁴³ F. Leslie Seidle, "Canada's Provincial Nominee Immigration Programs," *IRPP Study* 43 (2013): 4-6.

¹⁴⁴ Seidle, "Canada's Provincial Nominee Immigration Programs," 6-7.

¹⁴⁵ Seidle, "Canada's Provincial Nominee Immigration Programs," 11-12.

¹⁴⁶ "Entry Level and Semi-Skilled," WelcomeBC, accessed April 29, 2017, <https://www.welcomebc.ca/Immigrate-to-B-C/BC-PNP-Skills-Immigration/Entre-Level-and-Semi-Skilled>.

¹⁴⁷ "Skills Immigration FAQs," WelcomeBC, accessed April 29, 2017, <https://www.welcomebc.ca/Immigrate-to-B-C/BC-PNP-Skills-Immigration/Skills-Immigration-Frequently-Asked-Questions#anchor4>.

shows the number of applicants each year and number of nominations in the tourism and hospitality stream. The numbers fluctuate and are not consistent. The top four countries of citizenship of tourism/hospitality TFW nominees under the BC PNP between 2009 and 2013 are the Philippines, India, Korea and Japan.¹⁴⁸

Table 4: BC Provincial Nominee Program Applicants in the Hospitality and Tourism Stream, 2009 - 2013¹⁴⁹

Hospitality/Tourism	Applied	Nominated	% of Applicants Nominated
2009	875	462	53%
2010	1,223	1111	91%
2011	399	490	123% ¹⁵⁰
2012	382	301	79%
2013	573	443	77%

By situating the TFWP within the Canadian immigration and migration system as a whole, three important features stand out. First, with the exception of the IHC stream, none of the streams under the TFWP have any federal pathways to Canadian citizenship. This stands in contrast to all of the other temporary migration streams, which can act as a stepping-stone to qualify as a permanent immigrant under the Canadian Experience Class. Instead, only some TFWs in the LSO stream may be able to qualify under a PNP. Second, the four migration streams under the TFWP have the most restrictive labour conditions of all of the temporary migrations streams. Streams under the TFWP are the only migration streams where both a LMIA is required, and the worker is issued a closed work permit tying them to one employer. Finally, the TFWP is the only stream, temporary or permanent, where employers can recruit low-skilled workers.

¹⁴⁸ Data was obtained by the author from WelcomeBC.

¹⁴⁹ Data was obtained by the author from WelcomeBC.

¹⁵⁰ The number admitted in 2011 may have included applications from 2010, which would account for the 123% admission rate.

D. Key Features of the LSO Stream of the TFWP

While low-skilled TFWs have the same workplace rights as Canadians do, rights on paper are not the same as rights in practice. There are two key structural features of the low-skilled TFWP that make it difficult for TFWs to enforce their workplace rights.

First, a low-skilled worker's immigration status is tied to their employer because a low-skilled TFWs work permit is only valid for one specific employer in one specific location. While a low-skilled TFW can legally remain in Canada until their work permit expires regardless of whether they are still employed with the work permit employer, a low-skilled TFW's only legal source of income in Canada is with the work permit employer. In practice, a low-skilled TFW who is terminated from their work permit employer will not likely have enough money to stay in Canada without an income and will return home.

Second, a low-skilled TFW's chances at Canadian citizenship may also be tied to keeping their job. In BC, a low-skilled TFW can apply for permanent residency through the BC PNP program. As discussed above, the BC PNP application is employer driven and an applicant must obtain a written offer of permanent employment from their current employer for the application to succeed. So, unlike Canadian workers, low-skilled TFWs have a lot more at stake at keeping their job: their ability to remain working in Canada, and their ability to obtain Canadian citizenship. These two structural features of the TFWP create a strong disincentive against asserting workplace rights on the job.

3. Demand and Supply of “Low-Skilled” TFWs in BC

The TFWP is envisioned by the federal government as a labour market solution of last resort, only to be used when an employer cannot find a Canadian citizen or permanent resident to fill a position. In other words, the TFWP is supposed to be a short-term solution to local labour shortages. One of the key controversies surrounding the program is whether there are actually any labour shortages at all. As it turns out, there is no source of reliable statistical information about labour supply and demand to say for sure.¹⁵¹

In the second part of the chapter I explore what drives the demand for TFWs in the hospitality sector. I first explore theoretical approaches to the demand for temporary

¹⁵¹ Don Drummond, “Wanted: Good Canadian Labour Market Information,” *IRPP Insight* 6 (2014).

migrant workers. I then analyze the available information about the supply and demand for low-skilled TFWs in BC. On the demand side, I present three findings: there is a high demand for low-skilled hospitality workers in small BC towns; the demand for low-skilled hospitality TFWs is different in large cities in the lower mainland as compared to small BC towns; and, there is a possible link between the demand for foreign workers by restaurants selling foreign cuisine, which calls into question whether “low-skill” adequately applies to some TFWs recruited under the LSO stream. On the supply side, I present three findings. First, the majority of low-skilled TFWs in BC are from low-income countries in the global south, with a vast majority from the Philippines. Second, there are a greater number of male low-skilled TFWs in BC than female. Third, the majority of low-skilled TFWs are between 25 and 34 years old. In light of my findings, I argue that three characteristics of low-skilled TFWs line-up with the needs of hospitality employers in a way that make low-skilled TFWs an ideal labour pool for hospitality employers to recruit from. These three characteristics drive demand for TFWs by hospitality sector employers, and influence the way TFWs adapt in order to find work and keep their jobs. I argue that soft skills, such as dedication, previous experience, maturity, and loyalty, are in high-demand in the hospitality sector. The TFWP allows employers to simultaneously recruit workers with the needed soft skills while keeping wage rates low.

A. The Demand and Supply of Temporary Migrant Workers is a Dialectical Process Shaped by Social, Cultural and Economic Change at Multiple Geographic Scales

For British human geographer David Harvey, the demand for temporary migrant labour boils down to capitalism. A capitalist economy is dependent on capital growth and accumulation. In order to maintain the capitalist economy, the capitalist class is always seeking to overcome geographic and temporal barriers to capital growth and accumulation.¹⁵² In the 1960s, the capitalist class was able to maintain growth by expanding geographically into space in order to create new markets, and bending time to make more money in the present. Businesses expanded into large new developments in the suburbs, and into large new markets in developing countries. Large sums of money

¹⁵² David Harvey, *The Enigma of Capital and the Crises of Capitalism* (New York: Oxford University Press, 2010), 155.

were borrowed in order to invest in infrastructure projects that made a return on investment slowly over time. But, by the 1970s the capitalist classes began to run out of new geographic markets to expand into, and had piled debts up too high. Many workers were unionized, had bargained for better pay, and had political influence. Both the cost and scarcity of labour acted as a barrier to increased wealth accumulation. So, the capitalist class had to seek other ways to extract surplus labour value.¹⁵³

Harvey argues that, starting in the 1970s, employers use five main strategies to overcome the high price and scarcity of labour. First, they rely more heavily on flexible employment relationships, such as temporary, part-time, and sub-contracting arrangements with complex supply-chain networks. Second, employers introduce new labour-saving technology into the workplace. Third, employers lobby the state to undermine labour protections and labour unions.¹⁵⁴ Fourth, employers seek new ways to control labour by putting individual workers in competition with each other for jobs, taking advantage of the way labourers differ from each other by gender, race, ethnicity, language, level of skill, and place of origin.¹⁵⁵ Finally, employers fragment production to take advantage of wage and expertise disparities between different geographic locations. In some industries, employers move all or parts of production off-shore. In other industries where production cannot move, like the service sector, employers encourage immigration programs in order to access “cheaper and more docile”¹⁵⁶ workers from abroad. Labour scarcity is always localized, and in order to effectively regulate or take advantage of the dynamics of local labour shortages, capitalists must either move elsewhere or get labourers to move for them.¹⁵⁷ The result is that real wages have not improved since the 1970s despite increases in productivity. Instead, workers need to work longer hours in order to afford the same standard of living and household debt has

¹⁵³ David Harvey, *The Condition of Postmodernity: An Enquiry into the Origins of Cultural Change*, (Oxford: Wiley-Blackwell, 1991) at 141-172.

¹⁵⁴ Harvey, *Enigma of Capital*, 12-16.

¹⁵⁵ Harvey, *Enigma of Capital*, 61.

¹⁵⁶ Harvey, *Enigma of Capital*, 14.

¹⁵⁷ Harvey, *Enigma of Capital*, 60-61.

skyrocketed in order to make up for the shortfall, facilitated by the introduction of the credit card industry in the 1970s.¹⁵⁸

For British sociologist Michael Burawoy, the demand for temporary migrant labour also boils down to capitalism. Burawoy explores how policy and legal structures create large coercive systems that segregate workers based on nationality and race, and prevent migrant workers from ever permanently integrating.¹⁵⁹ Burawoy is interested in how the costs of worker maintenance and worker renewal are allocated. Worker maintenance are the costs workers face in maintaining themselves, such as buying food, shelter, clothing, education and healthcare. Worker renewal is the cost workers face when raising the next generation of workers; the cost of food, shelter, clothing, childcare, education and healthcare for their children.

Burawoy argues that the renewal and maintenance of migrant labour is separated by space, a stark contrast to the domestic supply of labourers where the pool of workers is renewed and maintained through a single integrated process of day-to-day life and family planning. Migrant workers and their families back home are interdependent; migrant workers depend on family members in their home country to take care of their dependents (young children, elderly parents, or extended family), while the family of migrant workers depend on remittances from migrant workers to pay for their food, shelter, clothing, healthcare, and education.

Burawoy contends that the separation of the maintenance and renewal of migrant labour has two consequences. First, the costs of labour maintenance and renewal are externalized to either another economy or another country. For example, for mine workers in South Africa who are recruited from rural subsistence economies, the costs of labour maintenance and renewal are externalized onto a traditional subsistence economy that runs in parallel with the capitalist economy of waged labour in the resource sector. Second, the separation of the maintenance and renewal of migrant labour creates a reliance on the spatial separation of migrant workers and their families in order to ensure there will be more migrant workers in future. In other words, there needs to be laws and

¹⁵⁸ Harvey, *Enigma of Capital*, 17.

¹⁵⁹ Michael Burawoy, "The Functions and Reproduction of Migrant Labor: Comparative Material from Southern Africa and the United States," *American Journal of Sociology* 81 (1976): 1051.

incentives in place that prevent migrant workers from becoming permanent and bringing their families with them. Migrant workers must never be able to settle down.¹⁶⁰

Burawoy argues that the domination of migrant labour is facilitated by three institutions. The first is the state, which does not give migrant labourers citizenship rights. The second is industry conditions, where either a) domestic workers collude with employers and the state to ensure that local workers get higher wage jobs; or b) local workers are unable to prevent employers from recruiting migrant workers willing to work for lower wages with less rights.¹⁶¹ The third is the labour market, where employers can take advantage of uneven geographical development and wage disparities between local and foreign labour.¹⁶² Burawoy suggests that when migrant workers are given the ability to immigrate permanently with their families, and are given full employment mobility rights in a country, their powerlessness disappears because home and work life (maintenance and renewal) are geographically proximate again.¹⁶³

For Canadian geographer Harold Bauder, the demand for temporary migrant labour boils down to the intersection of economic and cultural forces. Bauder challenges scholars who suggest the regulation of labour markets only flows one way, or is only controlled by employers or the state. Bauder argues there is, instead, a dialectical relationship between labour regulation and labour migration: “migration flows regulate labor markets, and labor markets shape migration flows.”¹⁶⁴ Borrowing the idea of “cultural capital” and “social capital” from French sociologist Pierre Bourdieu (the idea that individuals have social or cultural assets that can give them status in society, such as exclusive forms of knowledge, personal or business connections, or a certain physical appearance), Bauder argues that labour markets are regulated as much by social and cultural status and social institutions as they are by economic factors.¹⁶⁵ The labour market is a central point of exchange where different forms of capital – social, cultural,

¹⁶⁰ Burawoy, “The Functions and Reproduction of Migrant Labor,” 1053-1060.

¹⁶¹ Burawoy, “The Functions and Reproduction of Migrant Labor,” 1071.

¹⁶² Burawoy, “The Functions and Reproduction of Migrant Labor,” 1061-1063.

¹⁶³ Burawoy, “The Functions and Reproduction of Migrant Labor,” 1063-1064.

¹⁶⁴ Harold Bauder, *Labor Movement: How Migration Regulates Labor Markets* (New York: Oxford University Press, 2006) 15.

¹⁶⁵ Bauder, *Labor Movement*, 8, 16.

and economic – combine to create and reproduce social hierarchies and forms of distinction.¹⁶⁶ In particular, Bauder expands Bourdieu’s idea of social and cultural capital to include citizenship and immigration status. He argues that a worker’s citizenship and immigration status interact with other processes of social reproduction and segment the labour market along place of origin and ethnic lines.¹⁶⁷ Lack of institutional cultural capital (such as degrees and certificates from recognizable or locally accredited schools) and lack of embodied cultural capital (such as ways of walking, talking, dressing, or body language that is considered appropriate in local workplaces) act as a significant barrier to new migrants and immigrants in the labour market.¹⁶⁸

Bauder demonstrates his argument using empirical case studies of immigrant and migrant workers in Vancouver, Berlin, and Southwestern Ontario. In Vancouver, Bauder interviewed career counselors and new immigrants about how immigrant and migrant workers navigate the Canadian job market. Bauder notes that different immigrant groups will have different social and cultural barriers in the Canadian labour market, and over time develop different strategies to overcome those barriers. For instance, in the greater Vancouver area new immigrants from the former Yugoslavia relied on ethnic networks to find jobs as building superintendents, whereas South Asians relied on ethnic networks to find jobs as taxi drivers. Bauder argues that while on the surface Canada’s “human capital” style of immigration recruitment favours highly skilled workers, in practice it actually favours workers who are better equipped to navigate the social and cultural codes of conduct in the Canadian labour market.¹⁶⁹ Bauder suggests that “migrant and immigrant workers are valuable because they are vulnerable.”¹⁷⁰ They are not in the same position as local workers to complain about exploitative working conditions due to language barriers, unfamiliarity with workplace customs, or immigration status. Immigrant and migrant workers tend to cluster in specific sectors of the secondary labour

¹⁶⁶ Bauder, *Labor Movement*, 39.

¹⁶⁷ Bauder, *Labor Movement*, 35, 41.

¹⁶⁸ Bauder, *Labor Movement*, 42 - 49.

¹⁶⁹ Bauder, *Labor Movement*, 76.

¹⁷⁰ Bauder, *Labor Movement*, 22.

market (such as agriculture, or personal services), and wages and working conditions can vary significantly between different groups of immigrants.¹⁷¹

British sociologist Bridget Anderson and political economist Martin Ruhs would agree with Bauder. Ruhs and Anderson argue that the demand for migrant workers is a dialectical process; “‘what employers want’ can be critically influenced by what employers think they can get from the various pools of available labour, while at the same time, labour supply often adapts to the requirement of demand.”¹⁷² They point out that too often employers and policymakers look at the demand and supply in a vacuum without acknowledging the context of a wider social system that creates certain kinds of local labour shortages. Importantly, Anderson and Ruhs are critical of how the state and employers define the term “skills” when it comes to migrant labour. When policymakers and employers refer to a “skills shortage” it is not clear what the term “skills” actually means. “Skills” can refer to professional credentialing or work experience, but it can also refer to having desirable personality traits – such as the ability to be friendly or caring, to talk or look the right way, or just simply the “willingness to accept certain wages and employment conditions”¹⁷³ that locals would not accept.¹⁷⁴ Often, employers rely on national stereotypes about workers from a certain country when recruiting migrant workers. Employers assume that workers from a certain region have the right “attitude” or “work ethic,” particularly in low-wage sectors such as hospitality. Usually the right attitude or work ethic simply means that the workers are more agreeable to the employer’s terms than local workers.¹⁷⁵

Taken together, there are two important points about the demand for temporary migrant workers that are important to my research. The first is that demand for temporary

¹⁷¹ Bauder, *Labor Movement*, 20.

¹⁷² Martin Ruhs and Bridget Anderson, “Introduction,” in *Who Needs Migrant Workers? Labour Shortages, Immigration, and Public Policy*, ed. Martin Ruhs and Bridget Anderson (New York: Oxford University Press, 2010), 6.

¹⁷³ Martin Ruhs and Bridget Anderson, “Introduction,” 6.

¹⁷⁴ Martin Ruhs and Bridget Anderson, “Introduction,” 6; Martin Ruhs and Bridget Anderson, “Migrant Workers: Who Needs Them? A Framework for the Analysis of Staff Shortages, Immigration, and Public Policy,” in *Who Needs Migrant Workers? Labour Shortages, Immigration, and Public Policy*, ed. Martin Ruhs and Bridget Anderson (New York: Oxford University Press, 2010), 19-20.

¹⁷⁵ Ruhs and Anderson, “Migrant Workers: Who Needs Them?,” 28-30.

migrant labour is shaped by the intersection of social, cultural and economic capital. The second is that the demand for temporary migrant labour is a dynamic and dialectical process where employers, governments, domestic workers and temporary migrant labourers all have agency. All parties are constantly adapting and seeking new ways to forward their own goals in response to social, cultural and economic change at multiple geographic scales. For employers, it is the struggle to remain competitive and profitable. For governments, it is the struggle to remain in power and maintain the support of their constituents. For domestic and temporary migrant workers, it is the struggle to improve their lived experience of waged labour and day-to-day life.

B. The Demand for Low-Skilled Hospitality TFWs in BC

i) The Data

On the demand side, the only way to get a sense for which hospitality employers in BC hire TFWs, what kinds of restaurants, hotels, or tourist companies need TFWs and where hospitality TFWs are employed is to look at positive LMIA statistics from ESDC. Accordingly, I have relied on information obtained through an access to information request made to ESDC about the number of positive LMIA issued for low-skilled employers in BC.¹⁷⁶ However, there is no way for a researcher to track how many positive LMIA actually result in a TFW obtaining a work permit from CIC and entering Canada. In fact, it is questionable whether the federal government can even track these numbers: the Canadian Federation of Independent Business pointed out that the 2014 TFWP reforms relied significantly on positive LMIA statistics, not CIC information about the actual number of TFWs who entered Canada based on a positive LMIA. In some cases, this meant that the figures the ESDC relied on were grossly inflated because while employers may have applied for a large number of LMIA, the actual number of TFWs the employer ended up recruiting to Canada was significantly lower.¹⁷⁷ So, information on the demand for low-skilled TFWs does not directly link with actual labour shortages. Rather, it is better at pointing towards perceived labour shortages by

¹⁷⁶ Made under the *Access to Information Act*, R.S.C., 1985, c. A-1.

¹⁷⁷ Joe Frieen and Renata D'Aliesio, "Flaws Appear in Research on Foreign Worker Program," *The Globe and Mail*, September 26, 2014, accessed May 1, 2017, <http://www.theglobeandmail.com/news/politics/flaws-appear-in-research-on-temporary-foreign-worker-program/article20818794/>.

employers and how employers have relied on the TFWP to shore up domestic recruitment strategies.

On February 18, 2014 I sent an access to information request to ESDC asking for “the number of positive Labour Market Opinions issued for NOC C and D Temporary Foreign Workers in the Province of British Columbia in the years 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, and 2014 (to date),” broken down each year by: a) country of origin of the workers; b) gender and age range of the workers; c) whether the workers speak English or not; d) employers and locations of the proposed jobs; e) job titles; f) length of the proposed employment contracts in BC; and g) whether the request was made by a third-party agent of the employer, or the employer directly.

On March 26, 2014, ESDC sent me 332 pages of documents on a CD.¹⁷⁸ The data was obtained from ESDC’s “Foreign Worker System.” The pages were in PDF file format. The data did not include the years 2002, 2003, and 2004 because LMIA information is not available in the Foreign Worker System before 2005. In addition, information on whether or not the workers spoke English as a first language was not available.

My subsequent request for the same information in an electronic spreadsheet format was denied. Therefore, I had to hand-type all of the information I needed into an electronic spreadsheet. I printed the pages, and highlighted by hand all hospitality sector jobs from 2005 to 2013. Job titles included:

“food counter attendant”
 “sandwich artist”
 “food and beverage server”
 “waiter” or “waitress”
 “dishwasher”
 “kitchen helper”
 “cook’s helper”
 “hotel front desk clerk”
 “hotel room attendant”
 “housekeeping”
 “tour guide”
 “travel guide”

¹⁷⁸ The access to information file number is A-2013-00810 / HJK. A copy of the information sent to me can be requested from the Government of Canada: <http://open.canada.ca/en/search/ati>.

I excluded “food counter attendants” at grocery stores and gas stations, as these positions are generally included in the retail sector rather than the hospitality sector. I entered the year, employer, city, job title, duration of employment contract in years, whether a third-party assisted with the application, and the number of positive LMIAs issued into an electronic spreadsheet. The number of positive hospitality sector LMIAs in the years 2005, 2006 and 2007 was small (total LMIAs were 24, 28, and 770 respectively), so I limited my analysis to the six-year period between 2008 and 2013.

ii) There is a High Demand for Low-Skilled Hospitality TFWs Outside of the Lower Mainland

My first finding based on the LMIA data is that there is a high demand for low-skilled hospitality TFWs in small BC towns outside the lower mainland. For the years 2008 to 2013, I sorted each year by city and added up the number of positive LMIAs issued for each city. The results show that while there is significant demand for low-skilled hospitality TFWs in the lower mainland, the demand outside the lower mainland is greater. Figures 2-7 map out the number of positive LMIAs for hospitality jobs for each of the years 2008, 2009, 2010, 2011, 2012 and 2013 spatially.¹⁷⁹ The larger the dot size, the larger the number of positive LMIAs issued for jobs in that town during each year. For each year, there are small dots all over the province, from as far north as Fort Nelson to as far south as Fernie. There are also larger dots in many cities outside of the lower mainland such as Fort St. John, Dawson Creek, Prince George, Kelowna, Kamloops, Whistler, Revelstoke, and Victoria.

¹⁷⁹ GIS maps made by Maximilian von Aderkas.

Figure 2: Map of Positive LMIA's for Hospitality and Tourism Jobs in BC by City, 2008

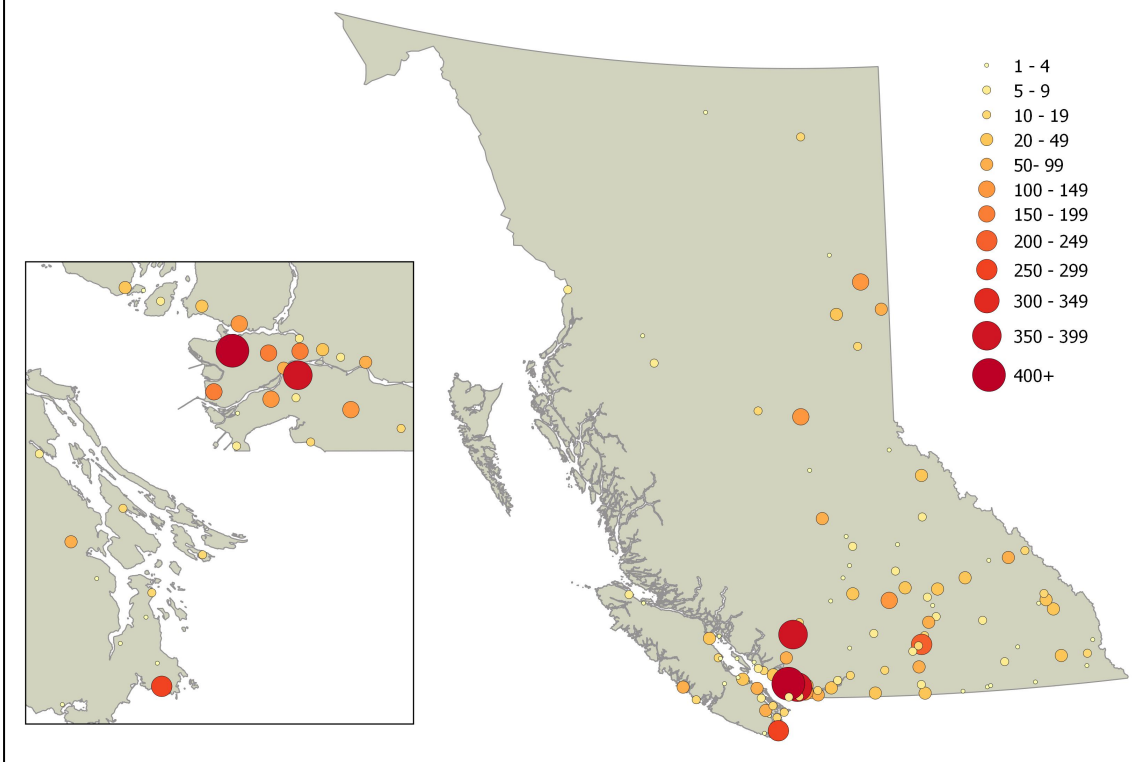


Figure 3: Map of Positive LMIA's for Hospitality and Tourism Jobs in BC by City, 2009

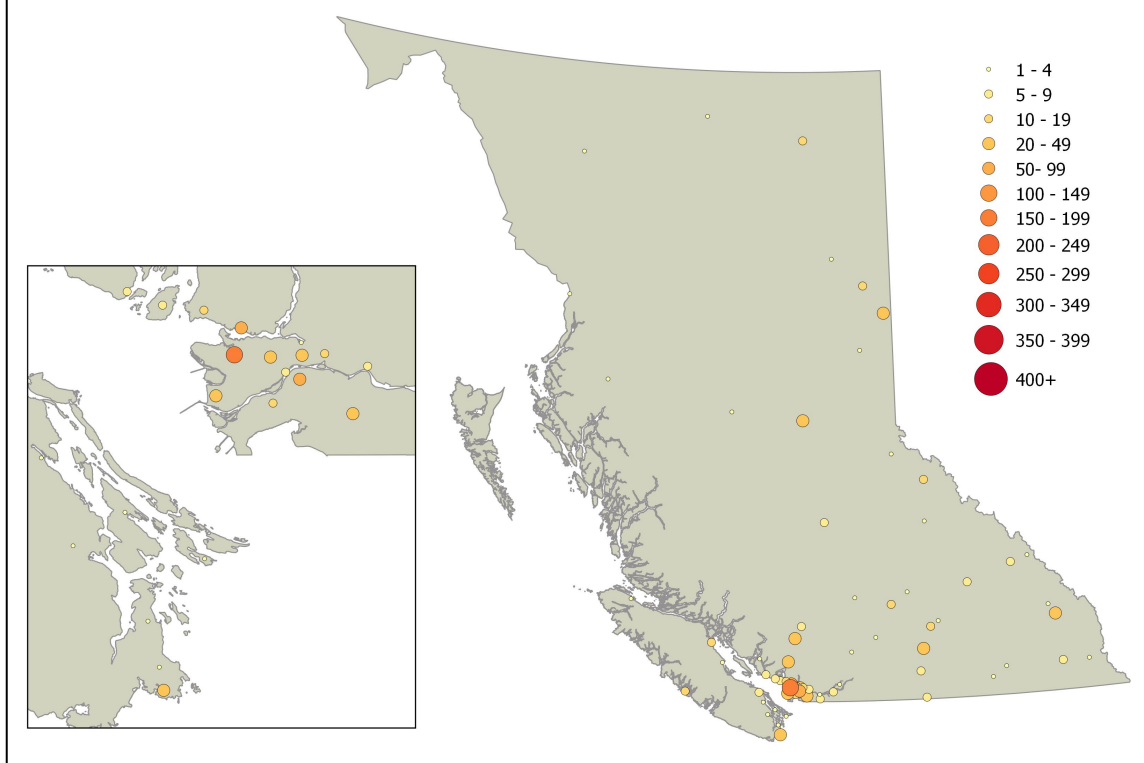


Figure 4: Map of Positive LMIA for Hospitality and Tourism Jobs in BC by City, 2010

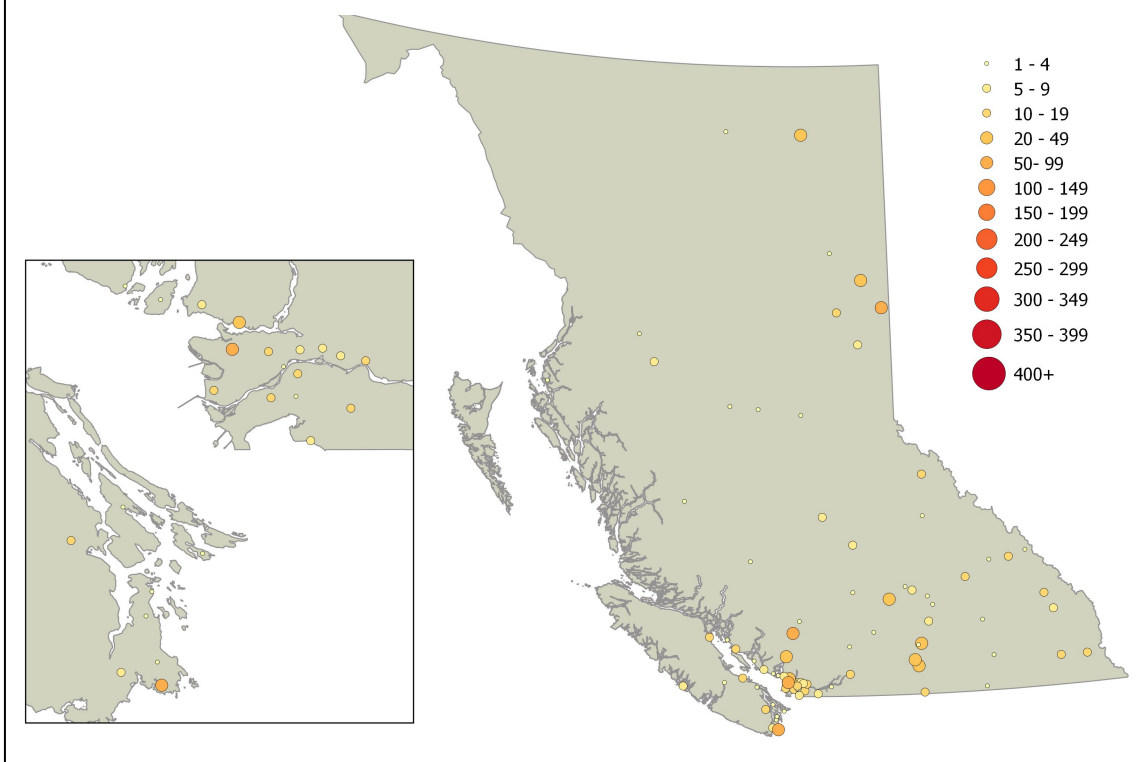


Figure 5: Map of Positive LMIA for Hospitality and Tourism Jobs in BC by City, 2011

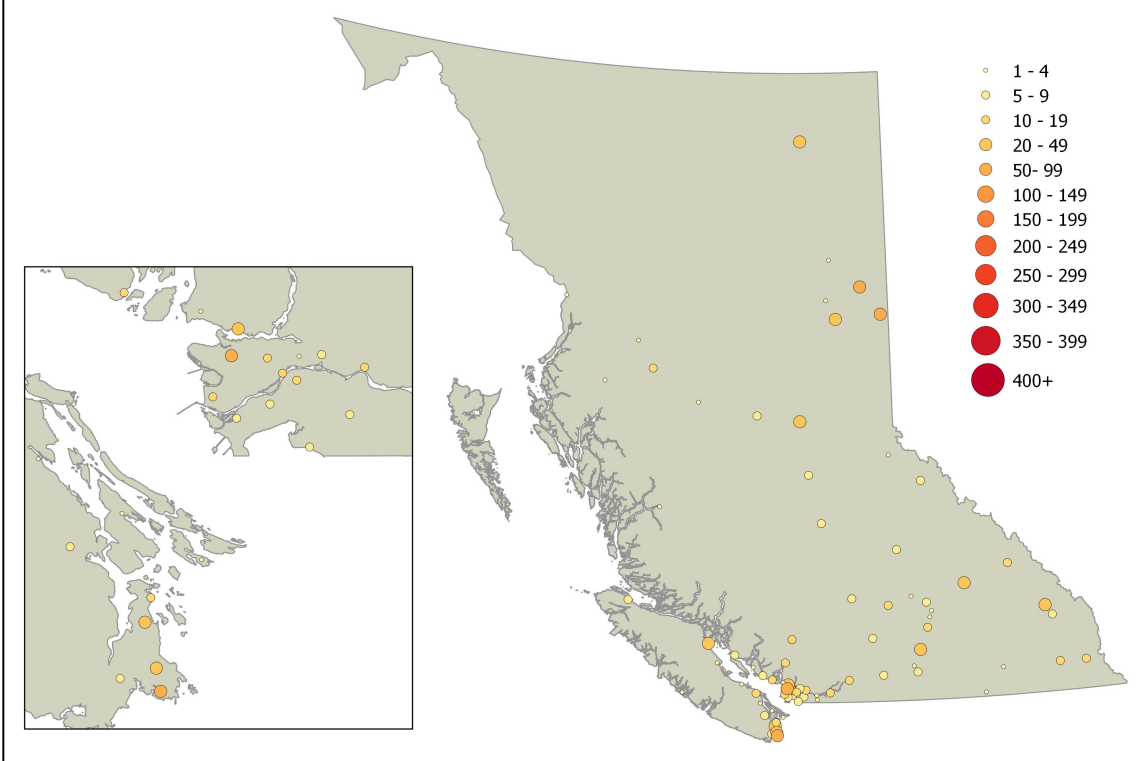


Figure 6: Map of Positive LMIsAs for Hospitality and Tourism Jobs in BC by City, 2012

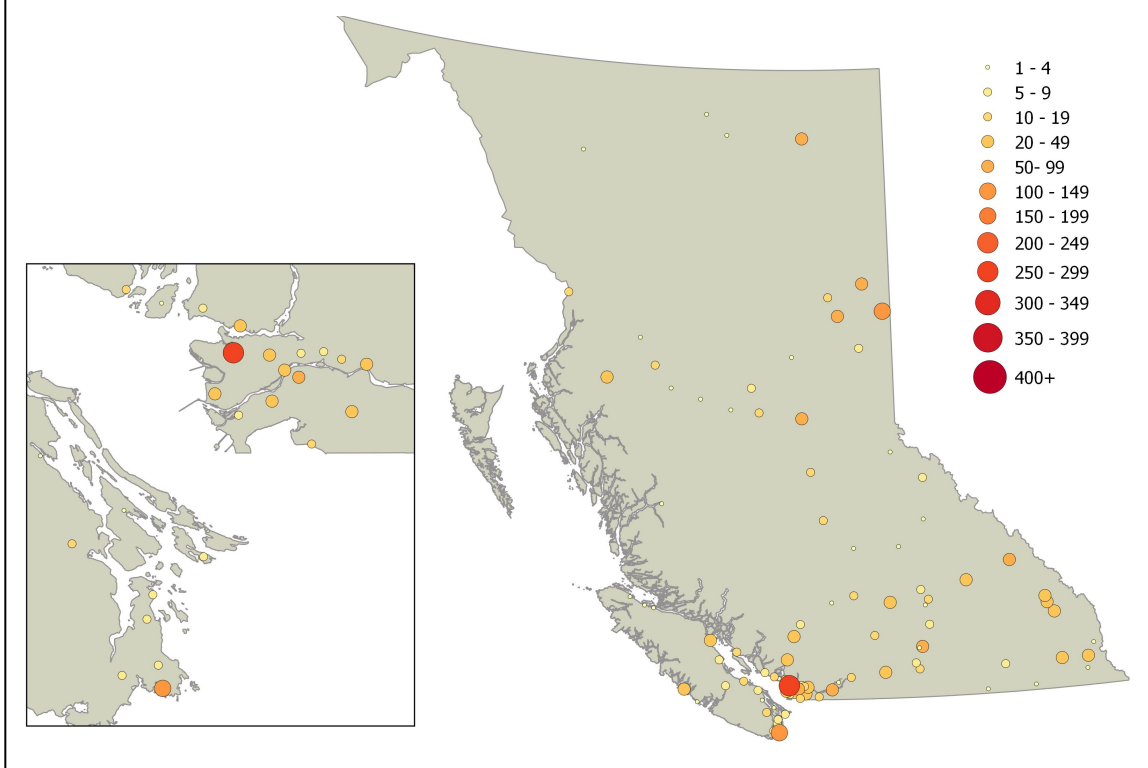


Figure 7: Map of Positive LMIsAs for Hospitality and Tourism Jobs in BC by City, 2013

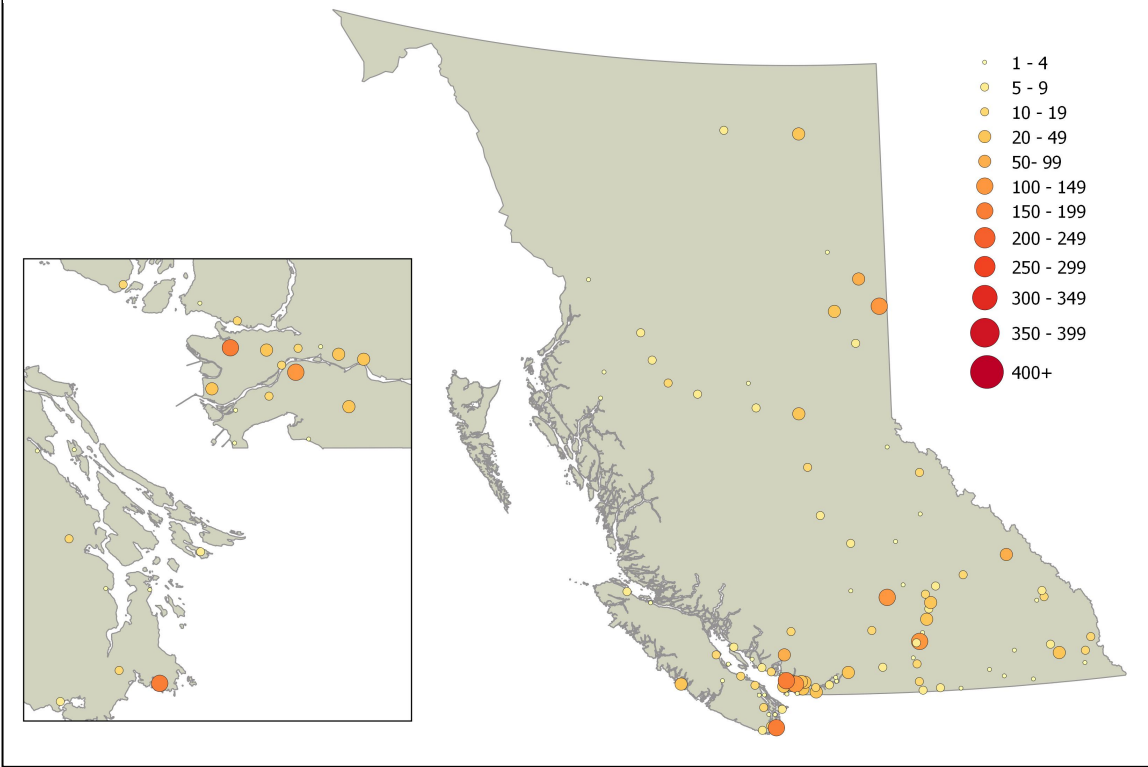


Table 5: Top 15 Cities With the Highest Number of Positive Low-Skilled Hospitality LMIs by Year¹⁸⁰

2008		2009		2010		2011		2012		2013	
Vancouver	1041	Vancouver	188	Vancouver	73	Vancouver	72	Vancouver	282	Vancouver	198
Surrey	386	Surrey	69	Victoria	71	Victoria	68	Dawson Creek	136	Victoria	151
Whistler	383	North Vancouver	61	Dawson Creek	64	Dawson Creek	60	Victoria	105	Surrey	145
Victoria	259	Squamish	42	Whistler	53	Fort St. John	51	Fort St. John	91	Kelowna	136
Kelowna	230	Richmond	35	Fort St. John	45	Fort Nelson	39	Prince George	91	Kamloops	121
Burnaby	182	Whistler	35	Kelowna	39	Prince George	34	Surrey	86	Dawson Creek	101
Richmond	165	Prince George	30	Squamish	38	Invermere	26	Chilliwack	84	Squamish	67
Coquitlam	162	Burnaby	28	Penticton	33	Kelowna	25	Kelowna	78	Fort St. John	64
Fort St. John	149	Victoria	28	Fort Nelson	28	Revelstoke	23	Fort Nelson	77	Golden	52
Kamloops	144	Kelowna	26	Kamloops	25	Chetwynd	22	Chetwynd	67	Richmond	49
North Vancouver	144	Coquitlam	25	Summerland	24	Saanichton	22	Golden	56	Prince George	46
Prince George	129	Fairmont Hot Springs	23	North Vancouver	23	North Vancouver	21	Kamloops	47	Burnaby	43
Langley	127	Langley	23	Surrey	19	Campbell River	20	Richmond	45	Langley	42
Delta	100	Dawson Creek	20	Burnaby	18	Surrey	19	Revelstoke	43	Chetwynd	41
Vernon	79	Fort Nelson	18	Golden	18	Kamloops	18	Whistler	40	Fort Nelson	39

¹⁸⁰ Table made by author. Source of information: Access to Information Request.

Table 6: Cities With a Consistently High Number of Positive LMIA as a Percentage of the Population¹⁸¹

City	Population	2008		2009		2010		2011		2012		2013	
		LMIA's	%	LMIA's	%	LMIA's	%	LMIA's	%	LMIA's	%	LMIA's	%
Vancouver	603,502	1041	0.17%	188	0.03%	73	0.01%	72	0.01%	282	0.05%	198	0.03%
Surrey	468,251	386	0.08%	69	0.01%	19	0.00%	19	0.00%	86	0.02%	145	0.03%
Burnaby	223,218	182	0.08%	28	0.01%	18	0.01%	14	0.01%	27	0.01%	43	0.02%
Richmond	190,473	165	0.09%	35	0.02%	13	0.01%	13	0.01%	45	0.02%	49	0.03%
Kelowna	117,312	230	0.20%	26	0.02%	39	0.03%	25	0.02%	78	0.07%	136	0.12%
Kamloops	85,678	144	0.17%	17	0.02%	25	0.03%	18	0.02%	47	0.05%	121	0.14%
Victoria	80,017	259	0.32%	28	0.03%	71	0.09%	68	0.08%	105	0.13%	151	0.19%
Prince George	71,974	129	0.18%	30	0.04%	2	0.00%	34	0.05%	91	0.13%	46	0.06%
North Vancouver	48,196	144	0.30%	61	0.13%	23	0.05%	21	0.04%	34	0.07%	13	0.03%
Fort St. John	18,609	149	0.80%	15	0.08%	45	0.24%	51	0.27%	91	0.49%	64	0.34%
Dawson Creek	11,583	71	0.61%	20	0.17%	64	0.55%	60	0.52%	136	1.17%	101	0.87%
Whistler	9,824	383	3.90%	35	0.36%	53	0.54%	12	0.12%	40	0.41%	15	0.15%

¹⁸¹ Table made by author. Source of information: Access to Information Request. Population data from the 2011 census obtained from Statistics Canada, <http://www12.statcan.gc.ca/>

Table 7: Cities With a Consistently High Number of Positive Hospitality LMIA's

City	Population ¹⁸²	Region
Vancouver	603,502	Lower mainland, financial center of province
Surrey	468,251	Lower mainland, suburb of Vancouver
Burnaby	223,218	Lower mainland, suburb of Vancouver
Richmond	190,473	Lower mainland, suburb of Vancouver
Kelowna	117,312	Southern interior, regional hub
Kamloops	85,678	Central interior, regional hub
Victoria	80,017	Vancouver Island, provincial capital
Prince George	71,974	Northern interior, largest northern city
North Vancouver	48,196	Lower mainland, suburb of Vancouver
Fort St. John	18,609	Peace River Country, small northwestern resource industry town
Dawson Creek	11,583	Peace River Country, small northwestern resource industry town
Whistler	9,824	Coastal mountains, tourist resort town

The high demand for low-skill hospitality TFWs in small towns outside of the lower mainland becomes even more pronounced when population data is added to this analysis. Table 5 lists cities with the top 15 highest number of positive hospitality LMIA's from 2008 to 2013. There are 12 cities that appear consistently in the top 15 - listed in Table 7 - which represent a balanced cross-section of the types of cities found across the province. There are five cities in the lower mainland (Vancouver, Surrey, Burnaby, Richmond and North Vancouver), one tourist ski resort town (Whistler), two northwestern resource industry towns (Dawson Creek and Fort St. John), the provincial capital on Vancouver Island (Victoria), and three regional centres in the BC interior (Prince George, Kamloops, and Kelowna). I use these "top 12 cities" for the remainder of my analysis.

By comparing the number of positive LMIA's in each of the top 12 cities to the population of each city in Table 6, it becomes clear that demand for low-skilled hospitality TFWs is even greater in cities outside of the lower mainland. The number of hospitality LMIA's approved in cities inside the lower mainland – Vancouver, Richmond, Burnaby, Surrey and North Vancouver - do not equal more than one hundredth of a percentage point of the population for most years. In contrast, with the exception of Prince George, the number of hospitality LMIA's approved in cities outside the lower

¹⁸² Population data from the 2011 census obtained from Statistics Canada, <http://www12.statcan.gc.ca/>.

mainland – Victoria, Whistler, Kamloops, Kelowna, Dawson Creek and Fort. St. John – equal more than a tenth of a percentage point of the population, and in some instances higher than one per cent.

iii) The Mix of Employers That Hire TFWs Inside and Outside of the Lower Mainland is Different

Not only is the demand for low-skilled hospitality TFWs higher outside of the lower mainland, the demand comes from a different mix of hospitality employers. While hand-entering the LMIA data from paper to an electronic spreadsheet, I started to notice that there were a significant number of restaurants selling foreign cuisine applying for a LMIA to hire one or two foreign workers; restaurants like “Kintaro Ramen” in Vancouver, “Krishna’s Dosa Grill” in Surrey, or “Kyung Bok Palace Korean Traditional Restaurant” in Richmond. I also noticed a fair number of small independent restaurants I had not heard of, like “The Lift Coffee Company” in Whistler, “The Galloping Goose Grille” in Victoria, or “Yaletown Gelato” in Vancouver. To test whether this was a trend in the data, for each of the top 12 cities with consistently high numbers of positive LMIA’s in the hospitality sector I coded all of the employers into six categories:¹⁸³

F	Fast Food Chain / Corporate Restaurant A restaurant with 7 or more locations. Includes fast food chains (ex. Subway, Tim Hortons, McDonald’s, Pizza Hut, or Dairy Queen), and full service restaurants (ex. Denny’s or White Spot).
S	Small Independent Restaurant A restaurant with 6 or less locations, not serving foreign food.
C	Small Foreign Cuisine Restaurant A restaurant with 6 or less locations serving foreign food, including: Japanese, Indian, Chinese, Korean, Vietnamese, Taiwanese, Filipino, German, Greek, French and Italian food.
H	Hotel, Motel, Inn, or Lodge
T	Tour Guides / Outdoor Adventure Includes employers providing nature guides, ski instructors, and raft guides.
U	Unknown Information was not available on the employer.

¹⁸³ I obtained information about each employer by conducting a Google search. For restaurants with a website, I visited each website and made note of how many locations there were. For restaurants without a website, I looked at food reviews on www.yelp.com, www.google.com, www.urbanspoon.com for information on the type of food served and how many locations.
































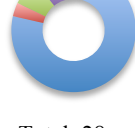


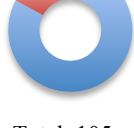

In Figure 8, I present 72 donut graphs showing the mix of types of hospitality employers in each of the top 12 cities for every year between 2008 and 2013. What becomes clear by looking at the donut graphs side-by-side is that the mix of employers is quite different inside the lower mainland than out. In the five cities inside the lower mainland – Vancouver, Burnaby, Richmond, Surrey and North Vancouver – the demand for low-skilled hospitality TFWs by small independent restaurants and small foreign cuisine restaurants is almost on par with demand by fast food chains and corporate restaurants. In addition, there is almost no demand for low-skilled hospitality TFWs by hotels, motels, inns or lodges, or by tour guides and outdoor adventure operators. Indeed, demand is almost exclusively from restaurants.




Demand for low-skilled hospitality TFWs outside the lower mainland is quite different. In Victoria, Prince George, and Kelowna, demand is highest from fast food chains and corporate restaurants, with only a small number of small independent restaurants, small foreign cuisine restaurants, hotels, or tourism employers looking to hire low-skilled TFWs. In Kamloops, Dawson Creek and Fort St. John, demand is also highest from fast food chains and corporate restaurants, however there are also a number of hotels, motels, inns or lodges looking to hire low-skilled TFWs. Whistler, a tourist ski resort town, stands alone with a different mix of all the different types of hospitality employers each year.


Outside of the lower mainland, the data confirms anecdotal media reports that many hospitality TFWs are hired by fast food and hotel employers.¹⁸⁴ But it is not just fast food chains like Tim Hortons, McDonald's, or Denny's that hire TFWs in BC. Particularly inside the lower mainland, it is also small independent restaurants you may have never heard of, or small restaurants selling foreign cuisine like sushi, curry, or pho.



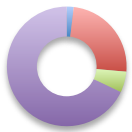

































¹⁸⁴ For instance, see Peter O'Neil and Tara Carman, "Temporary Foreign Workers: Filling Labour Gap or Depressing Wages?," *Vancouver Sun*, January 7 2013, accessed June 28, 2017, <http://www.vancouversun.com/Temporary+foreign+workers+Filling+labour+depressing+wages/7564651/story.html>.

Figure 8: Positive Low-Skilled Hospitality LMIs, by City, Year, and Type of Employer

	2008	2009	2010	2011	2012	2013
Vancouver	 Total: 1041	 Total: 188	 Total: 73	 Total: 72	 Total: 282	 Total: 198
Surrey	 Total: 386	 Total: 69	 Total: 19	 Total: 19	 Total: 86	 Total: 145
Richmond	 Total: 165	 Total: 35	 Total: 13	 Total: 13	 Total: 45	 Total: 49
Burnaby	 Total: 182	 Total: 28	 Total: 18	 Total: 14	 Total: 27	 Total: 43
North Vancouver	 Total: 144	 Total: 61	 Total: 23	 Total: 21	 Total: 34	 Total: 13
Victoria	 Total: 259	 Total: 28	 Total: 71	 Total: 68	 Total: 105	 Total: 151

 Fast food chain / Corporate Restaurant
 Hotel, Motel, Inn or Lodge
 Tour Guides / Outdoor Adventure

 Small Independent Restaurant
 Small Foreign Cuisine Restaurant
 Unknown

	2008	2009	2010	2011	2012	2013
Whistler	 Total: 383	 Total: 35	 Total: 53	 Total: 12	 Total: 40	 Total: 15
Prince George	 Total: 129	 Total: 30	 Total: 2	 Total: 34	 Total: 91	 Total: 46
Kelowna	 Total: 230	 Total: 26	 Total: 39	 Total: 25	 Total: 78	 Total: 136
Kamloops	 Total: 144	 Total: 17	 Total: 25	 Total: 18	 Total: 47	 Total: 15
Fort St. John	 Total: 149	 Total: 15	 Total: 45	 Total: 51	 Total: 91	 Total: 64
Dawson Creek	 Total: 71	 Total: 20	 Total: 64	 Total: 60	 Total: 136	 Total: 101



iv) There is a Possible Link Between Foreign Cuisine Restaurants and Low-Skilled TFWs

My third finding is that there is a possible link between restaurants selling foreign cuisine and the recruitment of so called “low-skilled” foreign workers who may have foreign cooking skills, foreign language skills, or a degree of cultural authenticity that would be an asset to a restaurant selling food from the TFW’s home country. There is only a possible link because the data on employers from ESDC is de-coupled from information about the age, gender, and nationality of the TFW who is the subject of each LMIA application in order to protect the worker’s personal information. There are, however, clues in some of the job titles in the positive LMIA applications, where for instance Noor Investments in Burnaby applied to hire a “Kitchen Helper – Samosa Maker,” or Thai Lemongrass Restaurant in Victoria applied to hire an “Authentic Thai Food Server.” There are also clues based on experience. A customer walking into “Guu,” a Japanese tapas restaurant in Vancouver famous for its authentic Japanese feel, is usually greeted with a loud “Irasshai!” (the Japanese equivalent of “welcome!”) by a chorus of young servers who look and speak Japanese.¹⁸⁵ Guu applied to hire nine food and beverage servers under the LSO stream of the TFWP in 2008, and four in 2009. However, clues are not conclusions and the possible link between foreign food restaurants and foreign workers would need to be confirmed with further research that falls outside the scope of my thesis. It may also be the case that some fast food franchises owned and operated by recent immigrants to Canada may hire TFWs from familiar geographic or language regions. However, information about franchise owners would not be evident in the data at all.

Notwithstanding that I cannot say for sure whether small restaurants selling foreign cuisine would recruit foreign workers from the same region the cuisine originates from, the possible link adds new layers to understanding about why employers might look to hire foreign workers from outside Canada. First, it suggests TFWs might have skills and characteristics that are not reflected in the NOC categories of high and low skill, such as special geographic knowledge, cooking skills, language skills, or even foreign appearance or accents. Second, the link suggests that some TFWs may have skills and

¹⁸⁵ “Guu – Original Thurlow,” Yelp, accessed on January 25, 2015, <http://www.yelp.ca/biz/guu-original-thurlow-vancouver>.

characteristics that are not available in the Canadian labour market. Finally, the link challenges the simplistic assumption that all TFWs are interchangeable forms of low-skilled labour.

C. The Supply of Low-Skilled Hospitality TFWs in BC

i) The Data

On April 9, 2015 I wrote to the External Statistical Reporting Group at CIC and requested “the number of work permits issued under the Low-Skilled Pilot Project of the Temporary Foreign Worker Program (now known as the Lower-Skilled Occupations stream of the Temporary Foreign Worker Program) in the Province of British Columbia for the years 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013 and 2014 broken down each year by: country of origin of the work permit holders, gender and age range of the work permit holders.” I later clarified my request to country of citizenship, rather than country of origin. I received the information in an excel spreadsheet on June 8, 2015, after I agreed to wait for the 2014 data to become available. Specific data on the LSO stream was not available between 2002 and 2007. Instead, CIC gave me numbers from 2002 to 2007 based in all NOC C and D work permits minus the SAWP and LCP work permits. I therefore limited my analysis to the years 2008 to 2013. CIC broke down the number of new work permits granted and work permit extensions granted. I limited my analysis to new work permits granted as I wanted to know about the supply of migrant labourers coming from outside Canada. I processed the data CIC gave me in Excel.

ii) Findings

I made three findings based on the data. First, low-skilled TFWs were mainly from low-income countries in the global south. Table 8 lists the top ten countries of citizenship of applicants destined for BC who were issued new work permits under the LSO stream between 2008 and 2014. There are nine countries that consistently place in the top ten: the Philippines, India, Mexico, Guatemala, Jamaica, Fiji, Nepal, Thailand and Sri Lanka. The overwhelming majority of low-skilled TFWs destined for BC were Filipinos. A staff member from the Consulate General of the Philippines in Vancouver told me that the majority of Filipino TFWs in BC were working in the food services

industry.¹⁸⁶ Second, low-skilled TFWs were mostly male. Figure 9 shows the number of male versus female applicants destined for BC who were issued new work permits under the LSO stream between 2008 and 2014. With the exception of 2011, where there is parity, around 60% of new work permits were issued to males. Third, the majority of low-skilled TFWs were between 25 and 34 years of age. Figure 10 shows that almost all TFWs were between the ages of 25 and 44, with very few under the age of 25 or over 44.

¹⁸⁶ Anonymous staff member from the Consulate General of the Philippines in Vancouver, in discussion with the author, December 11, 2014.

Table 8: Top 10 Countries of Citizenship of Applicants Destined for BC Issued New Work Permits Under the LSO Stream, 2008 - 2014

	2008			2009			2010		
	Total	3,894	%	Total	3,058	%	Total	1,199	%
1	Philippines	2,997	77.0%	Philippines	2,445	80.0%	Philippines	851	71.0%
2	India	244	6.3%	India	137	4.5%	Guatemala	206	17.2%
3	Mexico	135	3.5%	Guatemala	133	4.3%	India	48	4.0%
4	Fiji	71	1.8%	Mexico	75	2.5%	Jamaica	25	2.1%
5	China, People's Republic of	66	1.7%	China, People's Republic of	36	1.2%	Thailand	18	1.5%
6	Vietnam, Socialist Republic of	63	1.6%	Fiji	32	1.0%	Mexico	16	1.3%
7	Jamaica	43	1.1%	Thailand	23	0.8%	Fiji	8	0.7%
8	Romania	25	0.6%	Ghana	16	0.5%	Nicaragua	5	0.4%
9	Indonesia, Republic of	24	0.6%	Romania	16	0.5%	British Citizen	4	0.3%
10	Nepal	21	0.5%	Jamaica	15	0.5%	Sri Lanka	3	0.3%

	2011			2012			2013			2014		
	Total	1,582	%	Total	3,415	%	Total	4,447	%	Total	3,369	%
1	Philippines	1,487	94.0%	Philippines	3,069	89.9%	Philippines	3,549	79.8%	Philippines	2,776	82.4%
2	India	22	1.4%	Mexico	150	4.4%	Guatemala	404	9.1%	Guatemala	306	9.1%
3	Jamaica	18	1.1%	India	75	2.2%	Mexico	120	2.7%	Jamaica	82	2.4%
4	Mexico	16	1.0%	Thailand	35	1.0%	Jamaica	116	2.6%	India	61	1.8%
5	Thailand	16	1.0%	Guatemala	23	0.7%	Thailand	85	1.9%	Nepal	57	1.7%
6	Guatemala	13	0.8%	Jamaica	22	0.6%	India	71	1.6%	Mexico	29	0.9%
7	Fiji	4	0.3%	Fiji	11	0.3%	Nepal	26	0.6%	Bangladesh	11	0.3%
8	Australia	1	0.1%	Nepal	5	0.1%	Fiji	11	0.2%	Sri Lanka	10	0.3%
9	Germany, Federal Republic of	1	0.1%	Serbia, Republic of	5	0.1%	Sri Lanka	10	0.2%	Pakistan	6	0.2%
10	Korea, Republic of	1	0.1%	Sri Lanka	3	0.1%	Bangladesh	9	0.2%	Thailand	6	0.2%

Figure 9: Number of Male Versus Female Applicants Destined for BC Issued New Work Permits Under the LSO Stream, 2008-2014

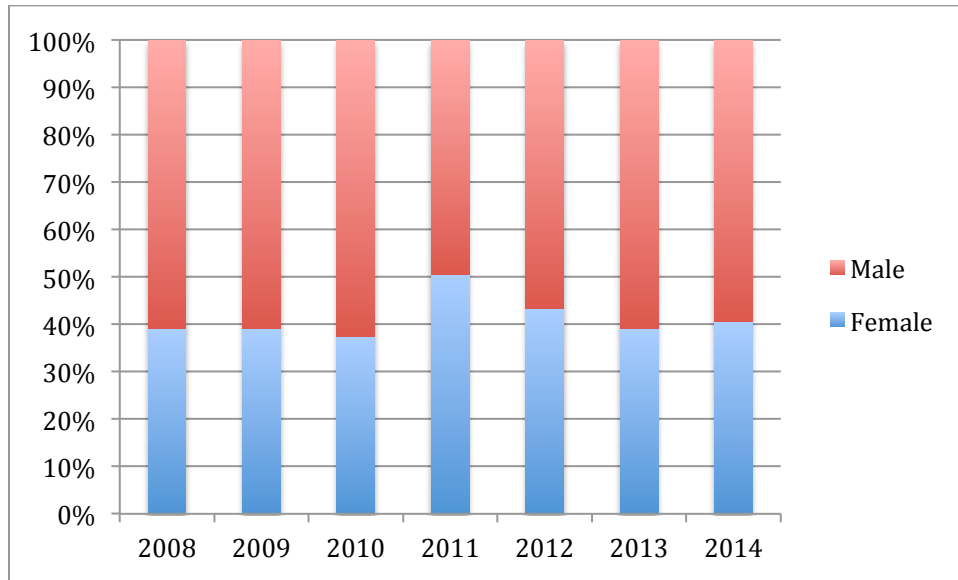
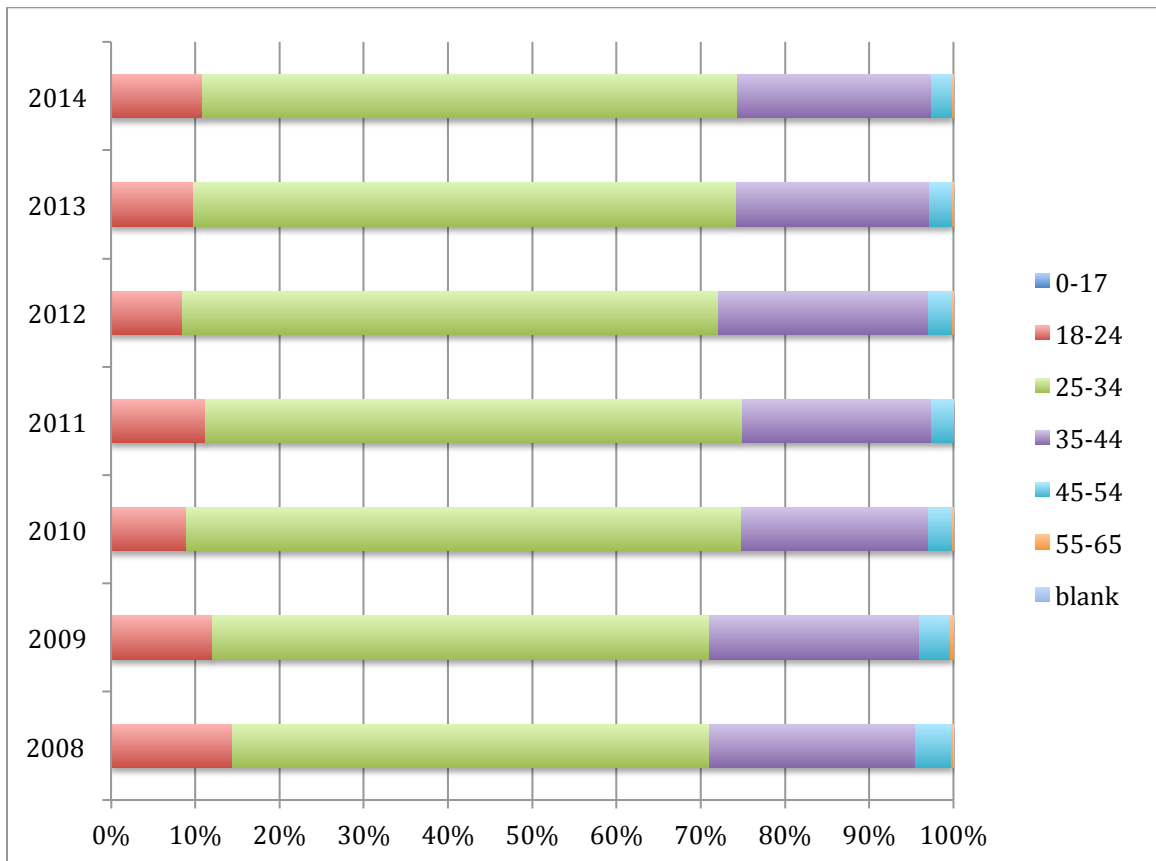


Figure 10: Age Range of Applicants Destined for BC Issued New Work Permits Under the LSO Stream, 2008-2014



4. “Low-Skilled” Workers, or Low-Waged Work?

Restaurant and hotel work is demanding work. Customer service is essential and restaurant workers and hotel staff are on their feet for most of their shift. There is high pressure from customers to work quickly, especially during peak rushes. In the fast food sector, restaurants crews need to know how to do all of the jobs in order to be able to switch in and out of workstations wherever there is need. Yet, restaurant and hotel work does not always pay very well. The median hourly wage of a food counter attendant or kitchen helper in BC is \$11.¹⁸⁷ For a hotel front desk clerk, the median hourly wage is \$14.65.¹⁸⁸ Neither median hourly wage is much higher than the current provincial minimum wage of \$10.85.¹⁸⁹

What the data suggests is that employers may not be facing a labour shortage of low-skilled workers, but rather a shortage of highly dedicated, hard-working workers, some with significant restaurant experience elsewhere, some with university degrees or specialty cooking skills, who are willing to work for a low-wage. So, in addition to structural features of the LSO stream of the TFWP that make it difficult for low-skilled TFWs to enforce their workplace rights, the demand for high-quality and loyal low-wage workers in BC gives employers an incentive to use a TFW’s precarious immigration status as a building block for a better workforce.

Three characteristics of TFWs line-up with the needs of hospitality employers in a way that make TFWs an ideal labour pool for hospitality employers to recruit from. These three qualities drive demand for TFWs by hospitality sector employers and influence the way TFWs adapt in order to find work.

The first characteristic is that employers can surreptitiously recruit TFWs based on race, gender and age through the use of third-party international recruitment agencies. In her interviews with international recruitment agents for Tim Hortons franchise owners, Canadian sociologist Aida Sorto documented how recruiters found Canadian employers

¹⁸⁷ “Career Profile: Food counter attendants, kitchen helpers and related support occupations (NOC 6711),” WorkBC, accessed May 25, 2017, <http://www.workbc.ca/Job-Seekers/Career-Profiles/6711#section-salary>.

¹⁸⁸ “Career Profile: Hotel front desk clerks (NOC 6525),” WorkBC, accessed May 25, 2017, <http://www.workbc.ca/Job-Seekers/Career-Profiles/6525>.

¹⁸⁹ “Minimum Wage Fact Sheet,” Government of British Columbia, accessed June 24, 2017, http://www2.gov.bc.ca/assets/gov/employment-business-and-economic-development/employment-standards-workplace-safety/employment-standards/factsheets-pdfs/pdfs/minimum_wage.pdf.

less direct about what race, gender or age of a worker they were looking for because in Canada it is illegal to discriminate based on race, gender or age. However, recruiters found that in order to please their Canadian clients they would actively discriminate based on race, gender or age to give the Canadian employer the types of workers that met their needs. For example, Sorto documented how some recruiters preferred recruiting Filipino migrant workers over Mexican and Indian because they kept their anger to themselves, were very eager to please, had better English skills, and could more easily adapt to Canadian society without becoming homesick.¹⁹⁰ The data, which shows that the majority of low-skilled TFWs are males between the ages of 25 and 35 from the Philippines, supports the possibility that employers are recruiting TFWs based on race, gender and age.

The second characteristic is that TFWs are dependent on their employer for their migration status, which makes them more loyal and more eager to please than domestic workers. As discussed above, hospitality employers aim to reduce voluntary employee turnover and find loyal workers. Employers find loyalty from TFWs in two paradoxical ways. First, TFWs are dependant on their employer for their ability to make a living, to stay in Canada, and in some cases to permanently immigrate to Canada because they do not have labour mobility within Canada. In my interview with advocates at the West Coast Domestic Workers' Association, I learned that TFWs will not usually show up for a free public legal education workshop unless immigration law is covered. Advocates explained that while their TFW clients may be experiencing unfair treatment at work, their client's primary concern is getting permanent residency in Canada. TFWs would not consider making a complaint about their unfair working conditions until they have permanent residency.¹⁹¹ Second, TFWs are loyal to their employer because their employer brought them to Canada and made their dreams come true. In my interview with a lawyer at the Community Legal Assistance Society (CLAS), I learned that her TFW clients were hesitant to bring a legal action against their employer despite illegal treatment because they had an emotional connection to their employer. The TFWs she

¹⁹⁰ Aida Sorto, "Behind the Counter: Migration, Labour Policy and Temporary Foreign Work in a Global Fast Food Chain" (PhD diss., University of British Columbia, 2013), 82, 83, 84.

¹⁹¹ Natalie Drolet and Darla Tomeldan (Staff Lawyer and Legal Advocate at West Coast Domestic Workers' Association), in discussion with the author, December 3, 2015.

represented genuinely liked their employer, and wanted to maintain a positive relationship.¹⁹² In their study of Hawaiian resorts, Adler and Adler found that new immigrants' reluctance to complain in combination with their high levels of dedication and performance made them ideal bottom rung workers for resort management:¹⁹³ "resorts gladly exploited [new immigrant's] labour and dedicated service at low wages and poor conditions."¹⁹⁴ As Arlie Hochschild comments in her research on emotional labour, "gratitude lays the foundation for loyalty."¹⁹⁵

The third characteristic is that hospitality employers are able to bank on Canada's reputation as a desirable and comparatively high-status place to work in order to recruit highly qualified, sometimes over qualified, TFWs for low-paying, "low-skilled" jobs. A TFW I interviewed described the pride they took in being a manager at an American fast-food chain in the Middle East before they came to BC. The TFW associated working at an American company with the American dream. They were proud to put on their uniform and ensure that their store was run in strict accordance with the corporate rules and regulations that came from the corporate headquarters in the US. For the TFW, taking a job at the same fast-food chain in Canada represented a step-up in their career. While the TFW could make more money in the Middle East than in Canada, they felt that Canadian society is more tolerant and also gave her chance of obtaining Canadian citizenship. The TFW took a job in Canada because they wanted to move to Canada permanently, and bring their family to Canada.¹⁹⁶ Similarly, Aida Sorto documented how international recruitment agents for Tim Hortons can recruit high-skilled workers from the Philippines based on Canada's reputation as a desirable country to work in. Recruiters can hire workers with university degrees and high status office jobs in the Philippines to work in a Tim Hortons in Canada.¹⁹⁷ In addition, the data I obtained demonstrates a possibility that hospitality employers in Canada cannot recruit local

¹⁹² Devyn Cousineau (lawyer at the Community Legal Assistance Society), in discussion with the author, January 16, 2015.

¹⁹³ Adler and Adler, *Paradise Laborers*, 45.

¹⁹⁴ Adler and Adler, *Paradise Laborers*, 167.

¹⁹⁵ Hochschild, *The Managed Heart*, 101.

¹⁹⁶ Anonymous BC Hospitality TFW, in discussion with the author, February 28, 2015.

¹⁹⁷ Sorto, "Behind the Counter," 84.

workers with the same levels of education or experience. In particular, the demand for hospitality TFWs is higher in resource-based industries outside of the lower mainland, where there is a possibility that hospitality employers are in competition for “low-skilled” workers from the resource-based industries that pay a higher wage, such as forestry or oil and gas.¹⁹⁸ There is also some evidence of a demand for TFWs with specialty cooking skills in the lower mainland.

The low-skilled TFWP lines-up with the needs of hospitality employers because it allows employers to recruit experienced, loyal workers based on race, age and gender and pay them a low-wage in exchange for a chance at Canadian citizenship. The needs of hospitality employers dove-tail onto the desires of TFWs because Canada has a reputation as a good place to live, and somewhere where TFWs want to permanently immigrate. A key aspect of the low-skilled TFWP is that the needs of hospitality employers map onto the desires of TFWs.

In this chapter, I gave a technical overview of how the low-skilled TFWP works, and where it fits within Canada’s migration and immigration system. I presented data on the demand for hospitality TFWs in BC, showing that there is a higher demand outside of the lower mainland, and that the types of employers hiring TFWs inside and outside the lower mainland are different. I also presented data on the supply of TFWs who are destined for BC, showing that most TFWs are Filipino, are male, and are between the ages of 25 and 34. I argued that BC hospitality employers may not be facing a labour shortage of low-skilled workers, but rather a shortage of loyal, experienced workers who are willing to work for a low-wage. I suggested that a critical aspect of the low-skilled TFWP is that the needs of hospitality employers map onto the desires of TFWs. In the next two chapters, I argue that the effects of the TFWP go beyond shaping local hospitality workforce demographics and local wage-rates. In Chapters 3 and 4, I discuss fairness and safety at work. I argue that the low-skilled TFWP shifts the negative consequences of unfair working conditions and workplace health and safety risks across people, place and time: from Canadian workers and employers onto TFWs; from Canada to elsewhere; and from the present into the future.

¹⁹⁸ “Resource Sector,” Discover Skills BC, accessed May 25, 2017, <http://discoverskillsbc.ca/resource/>.

Chapter 3: Fairness At Work

The thing with [Filipino TFWs] is the fear. It's hard to break that fear from them. No matter how many times I tell them about their rights, you know, that nobody can send them home except CIC, it's hard to break because what they're thinking is what will happen to their family, what will happen to the money that they owe in the Philippines to come over here, those are the things they are actually worrying about.

-Annette Beech, President of the Victoria Filipino-Canadian Caregivers Association in Victoria¹⁹⁹

Sometimes people say in the community 'oh we should make sure workers are aware of their rights' – they are. They are. A lot of them are aware of their rights... it's that the enforcement and the situation they're in makes it hard for them to fight for their rights.

-Darla Tomeldan, Legal advocate at West Coast Domestic Workers' Association²⁰⁰

Even though they keep on telling me that we have the same rights as Canadians - I've read on the websites that I have the same rights as Canadians - but it's different in the actual workplace.

-Anonymous BC Hospitality TFW²⁰¹

1. Introduction

Whether serving food at a Denny's in Vancouver, or pouring coffee at a Tim Hortons in Dawson Creek, low-skilled TFWs in BC have difficulty addressing unfair working conditions. In a recent class action lawsuit against Denny's, 77 TFWs alleged Denny's breached their employment contract and took advantage of their vulnerable immigration status in Canada. The lawsuit was settled out of court for over one million dollars.²⁰² In a recent human rights complaint against Tim Hortons, four Mexican TFWs allege they

¹⁹⁹ Annette Beech (President of the Victoria Filipino-Canadian Caregivers Association), in discussion with the author, October 17, 2014.

²⁰⁰ Darla Tomeldan (Legal advocate at West Coast Domestic Workers' Association), in discussion with the author, December 3, 2015.

²⁰¹ Anonymous BC Hospitality TFW, in discussion with the author, February 28, 2015.

²⁰² Settlement was approved in *Dominguez v. Northland Property Corporation*, 2013 BCSC 468 (“*Settlement Decision*”).

were called racist names based on their nationality, and subjected to inferior working conditions as compared to Canadian workers.²⁰³ The human rights complaint is ongoing.

In this chapter, I use the Denny's class action and the Tim Hortons human rights complaint as case studies to discuss fairness at work for hospitality TFWs in BC. I first outline the basic legal framework that governs employment relationships in BC, arguing that workplace law in BC creates an obstacle course of competing legal forums with multiple deadlines and inadequate enforcement, even for local workers. I then introduce the two case studies. I argue that the case studies demonstrate how the TFWP creates two additional systemic barriers to achieve fair working conditions for TFWs. The first is the need to address complex legal issues that span well outside the already confusing landscape of workplace law into immigration law, landlord tenant law and agency law. The second is a tremendous power imbalance between TFWs and their employers that creates a disincentive to complain about unfair working conditions. I then argue that the two case studies also demonstrate how the TFWP shifts the negative consequences of unfair working conditions over people, place and time: from Canadian workers and employers onto TFWs; from Canada to elsewhere; and from the present into the future.

2. Workplace Law in British Columbia: An Obstacle Course of Competing Legal Forums

Workplace law in British Columbia is confusing. It is made up of a patchwork of laws, industry practices,²⁰⁴ and institutions that are siloed off from one another and have different mandates. Instead of providing workers with an easy to navigate system to ensure a fair workplace, workplace law in BC creates an obstacle course of competing legal forums with multiple deadlines and inadequate enforcement.

Employment law in BC relies on a complaint-based system, where the onus is on a worker to come forward with any concerns they have about their working conditions. A worker in BC who faces unfair working conditions has a choice of three different forums to bring a complaint. Each forum has a different deadline, mandate, and the ability to compensate a worker or enforce the law. I focus on provincial employment laws because

²⁰³ For the most recent interim decision, see *Chein and others v. Tim Hortons and others (No. 2)*, 2015 BCHRT 169 (CanLII) ("*Chein*").

²⁰⁴ David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Cambridge, MA: Harvard University Press, 2014).

provincial laws apply to the majority of low-skilled hospitality TFWs.²⁰⁵ I do not address rights for unionized workers as only about 6.7% of hospitality sector workers in Canada are members of a labour union.²⁰⁶

The first forum is the BC Employment Standards Branch, which administers the *Employment Standards Act*²⁰⁷ (the “*ESA*”).²⁰⁸ The *ESA* sets out the basic conditions of employment such as the provincial minimum wage,²⁰⁹ when overtime pay should be paid,²¹⁰ vacation entitlements,²¹¹ minimum notice of termination when a worker is terminated without cause,²¹² and leaves of absences to care for family or due to illness.²¹³ An employment contract clause that violates the minimum standards set by the *ESA* is void.²¹⁴ Most workers cannot file a complaint to the Employment Standards Branch without first completing a six-page “Self-Help Kit,” which requires a worker to determine whether the *ESA* applies to them, calculate how much money they are owed, and give their employer written notice and a chance to pay before the worker files a complaint.²¹⁵ In essence, the Self-Help Kit compels a worker to send their employer what lawyers would call a “demand letter,” usually the first step before formal legal action is taken. There are some types of workers who are exempt from the Self-Help Kit,

²⁰⁵ The power to make laws that govern employment relationships in BC is divided between the federal and provincial government. The federal government has authority over employment relationships in federally regulated industries (such as banking, marine shipping, telephones, radio and television broadcasting, and air transportation), see *The Constitution Act, 1867* (UK), 30 & 31 Vict., c.3 at s. 91, reprinted in R.S.C. 1985, App II, No. 5. Employment relationships in all other industries are governed by provincial laws.

²⁰⁶ Union membership in Canada has been in steady decline since the 1980s. As of 2012, only about 30% of workers in Canada were unionized. See Diane Galarneau and Thao Sohn, “Long Term Trends in Unionization,” Statistics Canada, accessed August 27, 2016, <http://www.statcan.gc.ca/pub/75-006-x/2013001/article/11878-eng.htm>.

²⁰⁷ *Employment Standards Act*, RSBC 1996, c.113 s.4 (“*ESA*”).

²⁰⁸ Some professional employees are not covered by the *ESA*, such as architects, accountants, lawyers, engineers or doctors. See *Employment Standards Regulation*, BC Reg 396/95, s.31.

²⁰⁹ *ESA* s.16.

²¹⁰ *ESA* ss.34-42.

²¹¹ *ESA* ss. 57-60.

²¹² *ESA* ss. 63-71.

²¹³ *ESA* ss. 50-54.

²¹⁴ *ESA*.

²¹⁵ “Self-Help Kit,” Government of British Columbia, accessed on August 27, 2016, <http://www2.gov.bc.ca/gov/content/employment-business/employment-standards-advice/employment-standards/info-forms/self-help-kit>.

such as workers under the age of 19, domestic workers, and workers who are not fluent in English.²¹⁶

A worker only has six months from the date of an *ESA* violation to complete the Self-Help Kit (if necessary) and file a complaint.²¹⁷ The complaint can only cover damages, such as lost wages or overtime pay, retroactive to a maximum of six months.²¹⁸ Once a complaint is filed, it is assigned to an Employment Standards Officer on the first-come, first-serve basis.²¹⁹ Employment Standards Officers have investigative powers, which mean they have the ability to compel witnesses to testify or give them relevant records²²⁰ and conduct inspections of places where work is done.²²¹ The first step is “education,” where an Employment Standards Officer tries to resolve the complaint by educating an employer about their obligations under the *ESA*. If the education process does not resolve the complaint, the officer will schedule a mediation. Both the worker and the employer must attend the mediation, which can take place by telephone or in person. If the mediation process does not resolve the complaint, the complaint will be sent for “adjudication.” During the adjudication process, the worker and employer attend an in-person or telephone hearing before an adjudicator. The adjudicator will make a decision about the alleged violation, called a “determination.”²²² If the adjudicator finds any violations of the *ESA*, they must order an employer to pay the worker what is owed and administrative penalties in accordance with the *ESA*.²²³ Any party to the determination

²¹⁶ “Employment Standards Self-Help: Solving Workplace Problems,” Government of British Columbia, accessed August 27, 2016, <http://www2.gov.bc.ca/gov/content/employment-business/employment-standards-advice/employment-standards/info-forms/self-help-kit/employment-standards-self-help-solving-workplace-problems-exceptions>.

²¹⁷ *ESA* s.74. A worker can file a complaint and complete the Self-Help Kit at the same time if there are only 30 days left before the deadline, “Self-Help Kit.”

²¹⁸ *ESA* s. 80(1).

²¹⁹ Anonymous Government Policy Advisor, in discussion with the author, September 30, 2014.

²²⁰ *ESA* s.84.

²²¹ *ESA* s.85.

²²² “Complaint Resolution Factsheet,” Government of British Columbia, accessed August 27, 2016, <http://www2.gov.bc.ca/gov/content/employment-business/employment-standards-advice/employment-standards/factsheets/complaint-resolution>.

²²³ *ESA* s.98.

can appeal to the Employment Standards Tribunal.²²⁴ The “Self-Help Kit” and education-mediation-adjudication model was introduced in sweeping legislative changes brought by the then newly elected BC Liberal government between 2002 and 2004. At the time of the changes, there was a large backlog of *ESA* complaints.²²⁵ In conjunction with the changes, the number of staff at the Employment Standards Branch was cut by one third, and almost half of the Employment Standards Branch offices were closed.²²⁶

As an anonymous government policy advisor I interviewed described it, the Employment Standards Branch mainly assists “the working poor.”²²⁷ The Employment Standards Branch provides a process for workers who cannot afford to pay for legal advice, or where the amount of money at stake is too small for a lawyer to consider representing a worker on a contingency fee basis. The Branch awards smaller damage awards, has the shortest time-limit to file a complaint at six months, and no jurisdiction to apply human rights legislation.²²⁸ While the Employment Standards Branch has the power to investigate widespread unfair working conditions in a specific place of employment after only a single complaint,²²⁹ in reality they have limited resources available to do so.²³⁰

The second forum is the courts, which can determine whether there was a breach of a worker’s employment contract. The Supreme Court of Canada has recognized that work is a fundamental part of a person’s life, and is tied to a person’s financial security, self-identify, sense of self-worth, and emotional well-being.²³¹ The courts therefore treat employment contracts differently than commercial contracts in recognition of the unequal bargaining power an employer has over an individual worker.²³² An employment

²²⁴ *ESA* s.112.

²²⁵ Anonymous Government Policy Advisor, in discussion with the author, September 30, 2014.

²²⁶ David Fairey, “New ‘Flexible’ Employment Standards Regulation in British Columbia,” *Journal of Law and Social Policy* 21 (2007): 110.

²²⁷ Anonymous Government Policy Advisor, in discussion with the author, September 30, 2014.

²²⁸ *ESA* s.86.2

²²⁹ Anonymous Government Policy Advisor, in discussion with the author, September 30, 2014.

²³⁰ Fairey, “New Flexible,” 110.

²³¹ *Reference Re Public Service Employee Relations Act (Alta.)*, 1987 CanLII 88 (SCC), [1987] 1 S.C.R. 313, at pg. 368.

²³² *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 at pg. 1003 (“*Machtinger*”).

contract does not need to be in writing or signed by the parties; a verbal agreement is sufficient.²³³ A written employment contract only forms part of the agreement. Conditions of employment that have been discussed verbally and how the parties have conducted themselves over time also form part of the employment contract.²³⁴ The courts have read in a number of common law principles into employment relationships that modify the terms of an employment contract a worker and employer may have agreed on. The terms a court reads in are called implied contract terms, or common law entitlements. The common law entitlements read into an employment contract tend to be more generous to workers than minimum amounts set out in the *ESA*. However, a worker can agree to incorporate *ESA* minimum terms into their employment contract and thus waive their right to common law entitlements. A written employment contract cannot violate the minimum standards set by the *ESA*, and any contract term that violates the *ESA* is void.²³⁵ For example, a term in an employment contract where a worker agrees to be paid less than minimum wage has no effect. If a term of the employment contract is void because it violates the *ESA*, the contract will be read as if it does not contain the term.²³⁶

To enforce an employment contract, a worker or their legal representative will usually talk to the employer or send a demand letter. If the worker and the employer disagree about the worker's demands, the worker can sue the employer in court. Workers employed in provincially regulated industries must bring a claim to Small Claims Court for claims worth \$25 000 or less, or start a civil action in the BC Supreme Court for claims worth over \$25 000.²³⁷ The deadline to sue an employer is two years.²³⁸ The employer and the worker can settle the dispute without going to court through negotiation, mediation, or private arbitration.

In contrast to an employment standards complaint, enforcing employment contracts in the courts is mainly for workers who earn higher incomes with enough money at stake to

²³³ *Kirby v. Amalgamated Income Limited Partnership*, 2009 BCSC 1044 (CanLII)(“*Kirby*”) at paras 51-67.

²³⁴ *Kirby* at paras 51-67.

²³⁵ *ESA* s. 4.

²³⁶ *Machtinger* at pg. 1004.

²³⁷ *Small Claims Rules*, BC Reg 261/93, rule 1(4).

²³⁸ *Limitation Act*, RSBC 2012 c.13, s. 6(1).

warrant paying the significant costs involved. While the deadline to bring a civil action is more generous at two years, courts do not have investigative powers like administrative boards and tribunals. The courts are an adversarial model of adjudication where each party is responsible to bring their own evidence and make their case. There are legal fees involved, including lawyer fees and court fees. Going to court exposes workers to significant liability if they lose because the court can order a losing party to pay part of the winning party's legal costs. Lawyers will sometimes work on a contingency fee basis where they can charge a percentage of the award a worker receives if the worker's case is successful.

The courts have no jurisdiction to apply human rights legislation. However, workers can bring a civil action for violations under the *ESA* in very narrow circumstances in accordance with the holding in *Macaraeg v E Care Contact Centers Ltd.*²³⁹ Ms. Macaraeg (the plaintiff) was one of approximately 100 employees who routinely worked overtime hours but was not paid overtime pay at a payday loan business called E Care Contact Centers Ltd. ("E Care"). Ms. Macaraeg was terminated without cause with only two-weeks pay in lieu of notice. She brought a civil action for wrongful dismissal, and also asked the court to certify her as the representative plaintiff for a class action against the employer for unpaid overtime wages. E Care's employment contracts were silent on overtime pay, therefore the only legal authority for overtime pay Ms. Macaraeg could rely on were overtime provisions in the *ESA*. The two issues before the Court were a) whether overtime pay provisions in the *ESA* are implied terms of an employment contract that is silent on overtime pay; and b) whether a worker could bring a civil action to enforce a statutory right to overtime pay in the courts.

At first instance, Justice Wedge of the Supreme Court of BC found that overtime pay provisions in the *ESA* are implied terms of an employment contract because the *ESA* is a minimum benefit-conferring piece of legislation that sets out minimum protections in an employment relationship that cannot be waived by either party.²⁴⁰ Justice Wedge also concluded that a worker could bring a civil action to enforce a statutory right in the *ESA*

²³⁹ *Macaraeg v E Care Contact Centers Ltd.*, 2008 BCCA 182 (CanLII), leave to appeal refused [2008] SCCA No 293 ("Macaraeg").

²⁴⁰ *Macaraeg* at paras 60-63.

because the *ESA* is a benefit-conferring piece of legislation that should be interpreted broadly,²⁴¹ and there was nothing in the *ESA* that precluded a civil action based on a breach of the *ESA*.²⁴²

Justice Chiasson writing for the BC Court of Appeal overturned Justice Wedge on both questions. First, he found that rights granted by employment standards legislation are not implied terms of employment contracts.²⁴³ Second, he found that the legislative intent of how the *ESA* should be enforced is better understood by looking at the enforcement provisions in the *ESA* itself.²⁴⁴ Since the *ESA* did not explicitly allow a civil action, then the only time a worker should be able to bring a civil action based on a violation of the *ESA* is when the *ESA* does not provide an adequate remedy.²⁴⁵ As a result of *Macaraeg*, in order to bring a civil action in BC based on a breach of the *ESA*, the mechanism of enforcement under the *ESA* must be inadequate.²⁴⁶

The third forum is the BC Human Rights Tribunal, which administers the *Human Rights Code*.²⁴⁷ The *Human Rights Code* prevents employers from discriminating against workers on certain grounds (such as age, sex, race, family status, place of origin and disability)²⁴⁸ when making hiring and firing decisions or determining the conditions of employment, unless the discrimination is a bona fide occupational requirement.²⁴⁹ For example, an employer cannot decline to hire a worker because the worker has a vision impairment unless there is a real and justifiable occupational requirement for the job to be filled by a person with perfect vision. In determining whether a worker has been discriminated against at work, the legal test is whether a prohibited ground (such as sex,

²⁴¹ *Macaraeg* at paras 114 and 115.

²⁴² *Macaraeg* at paras 78 and 90.

²⁴³ *Macaraeg* at paras 77-78.

²⁴⁴ *Macaraeg* at para 45.

²⁴⁵ *Macaraeg* at para 74.

²⁴⁶ In contrast, section 8 of the Ontario *Employment Standards Act, 2000*, R.S.O. 2000, c.41 allows workers to bring a civil action against an employer for a breach of the act, provided the worker has not already commenced an employment standards complaint and that they give notice to the Director of the Employment Standards.

²⁴⁷ *Human Rights Code*, R.S.B.C. 1996, c. 210.

²⁴⁸ *Human Rights Code* at ss. 11, 12, and 13.

²⁴⁹ *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3.

race, or disability) was a factor in the employer's decision.²⁵⁰ Whether or not the employer intended to act in a discriminatory fashion is not determinative.²⁵¹ Employers also have a duty to accommodate workers with disabilities to the point of undue hardship.²⁵² Undue hardship is a high bar to meet, and will depend on the facts of each case.²⁵³ Generally, an employer has a duty to modify a job if it will not cause them significant expense.

A worker has six months from the date of the alleged discrimination to file a complaint at the BC Human Rights Tribunal.²⁵⁴ A worker and employer can settle a complaint by agreement, and the BC Human Rights Tribunal has an optional settlement meeting process.²⁵⁵ For complaints that proceed to a hearing, the BC Human Rights Tribunal has investigatory powers and can compel witnesses to testify or parties to provide documents.²⁵⁶ The remedies that the BC Human Rights Tribunal can award are unique. The Tribunal can order systemic remedies that compel an employer who has discriminated against a worker to take steps to ameliorate the effects of the discriminatory practice in their workplace, including implementing training or employment equity programs.²⁵⁷ It can order an employer to reinstate a worker, and/or pay a worker for their lost wages due to the discrimination.²⁵⁸ Finally, the Tribunal can also award a worker monetary damages for injury to their dignity, feelings or self-respect.²⁵⁹ The potential for an adverse cost award is much lower than a civil action; the

²⁵⁰ *Lee v. British Columbia Hydro and Power Authority*, 2004 BCCA 457 (CanLII) at para 24.

²⁵¹ *Vancouver Area Network of Drug Users v. British Columbia Human Rights Tribunal*, 2015 BCSC 534 (CanLII) at para 122.

²⁵² *Theresa O'Malley v. Simpson-Sears Ltd.*, [1985] 2 SCR 536, (1985) 23 D.L.R (4th) 321 (S.C.C.).

²⁵³ *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 SCR 970 at pg 984-5.

²⁵⁴ *Human Rights Code* s.22.

²⁵⁵ "Settlement Meeting Policy and Procedure," British Columbia Human Rights Tribunal, accessed August 27, 2016, http://www.bchrt.bc.ca/shareddocs/policies/Settlement_Meeting_Policy.pdf

²⁵⁶ *Human Rights Code* s.32.

²⁵⁷ *Human Rights Code* s. 37(2)(c).

²⁵⁸ *Human Rights Code* s. 37(2)(d).

²⁵⁹ *Human Rights Code* s. 37(2)(d).

Tribunal may only award costs against a party who engages in improper conduct during the course of the complaint.²⁶⁰

The benefits of a human rights complaint are that the Tribunal can award systemic remedies or reinstatement, and the process is accessible for self-represented litigants. The drawbacks of a human rights complaint are that a complaint cannot be lumped onto a civil action,²⁶¹ the deadline to file a complaint is short, and the damage awards are usually too low to warrant hiring a lawyer unless there is a possibility of being awarded lost wages.

With competing legal forums, multiple deadlines and different kinds of remedies, a worker in BC needs to be strategic about when and where to bring a complaint about unfair working conditions. In addition, each of the three legal forums are hived off from each other and cannot coordinate proceedings leading to multiple complaints in more than one forum. For instance, if a worker has been given less desirable shifts based on their race and not been paid for overtime hours, they would have to make a complaint at both the BC Human Rights Tribunal and the Employment Standards Branch to address discrimination in the workplace and missing wages. The ability to be strategic is a tall order for most workers in BC, let alone workers who are new to Canada and unfamiliar with BC laws like TFWs. Unfortunately, for TFWs the obstacles to achieving fair working conditions in BC do not stop at competing legal forums with multiple deadlines. As the next two case studies show, TFWs face additional systemic barriers and disincentives to enforce their workplace rights.

3. How the Low-Skilled TFWP Creates Additional Barriers to Fair Working Conditions

In this section I introduce two case studies; the Denny's class action and the Tim Hortons human rights complaint. Not only are the case studies excellent examples of how workplace law in BC creates an obstacle course of competing legal forums with multiple deadlines, they also demonstrate what happens when international migrant

²⁶⁰ See *Kerr v. Boehringer Ingelheim (Canada) (No. 5)*, 2010 BCHRT 62 (CanLII) and *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2011] 3 S.C.R. 471, which hold that the BCHRT can only award the legal costs of a proceeding with express statutory authority.

²⁶¹ It is possible to also ask for human rights damages for discrimination under the human rights code on top of another cause of action in other jurisdictions, such as Ontario. See *Human Rights Code*, RSO 1990, c.H.19, s. 46.1.

worker programs like the low-skilled TFWP are mapped onto workplace laws designed to address employment relationships between local workers and local employers. I argue that the low-skilled TFWP creates two additional systemic barriers for low-skilled TFWs to achieve fair working conditions: the need to address complex legal issues that span beyond workplace law; and a power imbalance between low-skilled TFWs and their employers that creates a disincentive to make a complaint.

A. The Denny's Class Action

Ms. Herminia Vergera Dominguez was a TFW who travelled to Canada from the Philippines to work at a Denny's restaurant in Vancouver as a food and beverage server for \$9.80 an hour (minimum wage at the time). She arrived in Canada in January 2009, and was given a 24-month employment contract. Ms. Dominguez became the representative plaintiff of 70 to 75 TFWs employed by Denny's between December 1, 2006 and March 5, 2012 in *Dominguez v. Northland Property Corporation*²⁶² ("*Dominguez*").

Ms. Dominguez's recruitment process started four months before her arrival, in August 2008. Her husband, who was already in Canada working as a TFW at Denny's, dropped off Ms. Dominguez's resume at an employment agency located in Richmond, BC called the International Caregiver Employment Agency ("ICEA"). ICEA was authorized in writing by Denny's to recruit TFWs, and to obtain the necessary work permits and approvals. ICEA worked with a counterpart employment agency located in the Filipino capital of Manila called Luzern International Manpower Services Corporation ("Luzern") to recruit Filipino workers. At ICEA's request, Ms. Dominguez's husband paid ICEA an initial \$3000 recruitment fee.²⁶³ Requiring a worker to pay a recruitment fee is not permitted by the *ESA*²⁶⁴ or the TFWP.²⁶⁵

²⁶² *Dominguez v. Northland Property Corporation*, 2012 BCSC 328 ("*Dominguez*").

²⁶³ *Dominguez*, at paras 13-16.

²⁶⁴ Employment agencies who recruit workers for employers are also regulated by the *ESA*. An employment agency must have a licence (s.12). An employment agency can only charge an employer a fee for finding qualified workers, and are prohibited from charging workers any form of payment in exchange for assistance finding a job (s.11). However, a major loophole in the legislation is that immigration consultants who act as employment agents can charge a worker money for any immigration services they provide in addition to assistance finding a job in Canada, such as assistance filling out immigration forms or finding housing. See *R. Serion and Josefina Serion o/a Terrens Nannies v. British Columbia (Employment Standards Tribunal)* 2001

By October 2008, ICEA had obtained approval from Human Resources and Skills Development Canada (“HRSDC”) (now called Employment and Social Development Canada) for Ms. Dominguez to work in Canada as a TFW. Luzern contacted Ms. Dominguez and asked her to come to their offices in Manila and sign an employment contract with Denny’s. The employment contract was executed on October 8, 2008. It was a standard form employment contract copied verbatim from the HRSDC sample contract. The contract provided four conditions of relevance to the class action:

1. Ms. Dominguez “shall” work 40 hours per week and receive time-and-a-half for any hours over 40 hours per week;
2. Denny’s would not recoup any costs incurred in the recruitment of Ms. Dominguez, including costs paid to a third-party recruiter;
3. Denny’s would pay for the cost of Ms. Dominguez’s airfare and transportation to and from her home in the Philippines to Vancouver; and
4. Denny’s would abide by the applicable provincial labour standards, including standards set about wages, overtime calculations, meal periods, statutory holidays, annual leave, and family leave.

Ms. Dominguez’s employment contract was exactly or virtually the same as all other proposed class members. Interestingly, Denny’s amended contracts executed after the class action application to provide that employees “shall work *up to* 40 hours” per week.²⁶⁶

Ms. Dominguez’s work permit was approved. However, before she could depart she had to pay another \$2750 to Luzern to continue with the hiring process. Ms. Dominguez paid a total of \$5750 in recruitment fees to ICEA and Luzern. Other class members paid in the range of \$6000 - \$7000 depending on currency rates. In addition, Ms. Dominguez was told she must purchase her airfare to Vancouver through Luzern for \$1000. Luzern refused to issue a receipt for the airfare. Ms. Dominguez was not reimbursed by Denny’s for the recruitment fees or travel expenses.²⁶⁷

BCEST #D378/01; and Parrott, “The Role and Regulation of Private, For-Profit Employment Agencies,” 89-90.

²⁶⁵ “Temporary Foreign Worker Program – Sample Employment Contract.”

²⁶⁶ *Dominguez*, at paras 17-21.

²⁶⁷ *Dominguez*, at paras 22-24.

Ms. Dominguez was issued a 24-month work permit upon arrival in Canada in January 2009. Ms. Dominguez could not work in any other occupation, for any other employer, or at any work location other than what was stated on the work permit. Ms. Dominguez's immigration status in Canada was therefore tied to her employment at Denny's.²⁶⁸

Once Ms. Dominguez started her employment she was not scheduled for 40 hours a week as promised, even though she was available to work. As with many other class members, working 40 hours per week was important to Ms. Dominguez so she could save enough money to apply for permanent residency in Canada. When Ms. Dominguez complained about the lack of hours, management cut her hours further. Ms. Dominguez heard about a fellow employee, Mr. Alfredo Sales, who made a complaint to the Employment Standards Branch about not being paid overtime nor reimbursed for his airfare and was fired a week later. Ms. Dominguez also had not received some of her overtime pay, and had not been reimbursed for her flight. However, she did not want to complain to management again or make a complaint to the Employment Standards Branch for fear of further reprisal. During the court proceedings the President of Denny's stated that it was company policy to cut the hours of TFWs first when business was slow, before cutting the hours of workers who were citizens or permanent residents of Canada. Ms. Dominguez gave evidence that she did not fully understand her employment rights until at least after six months from her arrival in Canada. Ms. Dominguez also testified that she did not have sufficient resources to bring a Small Claims Court action.²⁶⁹

Ms. Dominguez became the representative plaintiff through a referral from Mr. Alfredo Sales. Mr. Sales initially received assistance with his employment standards complaint from Charles Gordon, one of the Vancouver lawyers representing the TFWs in the Denny's class action, who he found through an Access Pro Bono legal clinic. Mr. Gordon learned from Mr. Sales that a number of other Denny's workers had similar issues, and suggested a class action.²⁷⁰

²⁶⁸ *Dominguez*, at para 25.

²⁶⁹ *Dominguez* at paras 27-42.

²⁷⁰ Charles Gordon (co-counsel for Ms. Dominguez), in conversation with the author, May 8, 2017.

Ms. Dominguez filed for certification of a class action against Denny's in January 2011. Ms. Dominguez alleged that Denny's, acting with ICEA and Luzern as its agents, 1) failed to provide as much work as promised in the employment contract; 2) failed to pay overtime hours; and 3) failed to reimburse her for travel expenses and recruitment fees.²⁷¹ Ms. Dominguez brought the civil action under three main heads of damages:

1. Breach of contract, including breach of the duty of good faith and fair dealing;
2. Breach of fiduciary duty; and
3. Unjust enrichment.

In addition, Ms. Dominguez stressed that these breaches were systemic in nature, where the employer took advantage of the class's vulnerable status in Canada as TFWs seeking citizenship.²⁷²

At issue in the *Dominguez* decision was whether or not the Court should certify Ms. Dominguez's civil action against Denny's as a class action under the *Class Proceedings Act*.²⁷³ However, as any class action lawyer will tell you, certification decisions are about more than just certification. If a court grants an application for certification, it sends a strong signal to defendants that they will lose the case, and defendants are significantly more likely to settle.²⁷⁴

For a class proceeding to be certified it must meet the requirement of being a "preferable procedure for the fair and efficient resolution of the common issues"²⁷⁵ between the class members. To meet this requirement, other means of resolving the claim must be "less practical or less efficient."²⁷⁶ The main hurdle for Ms. Dominguez was that an employment standards complaint was arguably a more efficient procedure for some of the allegations.

Counsel for Ms. Dominguez argued that Ms. Dominguez's claim should be able to proceed because there was a separate cause of action outside of the *ESA* (breach of

²⁷¹ *Dominguez* at para 139.

²⁷² *Dominguez* at para 143.

²⁷³ *Class Proceedings Act*, RSBC 1996, c.50 ("CPA").

²⁷⁴ "Class Actions in British Columbia," The Canadian Bar Association, accessed August 27, 2016, <http://www.cbabc.org/for-the-public/dial-a-law/scripts/credit-debt-and-consumer/233>.

²⁷⁵ CPA s. 4(1)(d).

²⁷⁶ CPA s. 4(2)(d).

contract, breach of fiduciary duty and unjust enrichment), and the *ESA* did not provide effective redress for the members of the class to collect retroactive overtime pay.²⁷⁷ Ms. Dominguez's counsel started to assist Denny's workers in 2010, after Mr. Alfredo Sales was fired for bringing an *ESA* complaint.²⁷⁸ By this time TFWs had already been employed by Denny's for over four years, since 2006. The six-month time limit to make an *ESA* complaint had long past, and the six-month time limit on the recovery of retroactive overtime pay meant that the class members could never recover all of their missing overtime through an *ESA* complaint process. A civil action was the only avenue of redress available for most of the class members.

Justice Fitzpatrick concluded that an *ESA* complaint would not have provided adequate relief as compared to a civil action because:

1. An *ESA* complaint would not provide remedies for all of the allegations against Denny's. In particular, there was no provision in the *ESA* that would allow the class members to obtain damages against Denny's for not scheduling them for at least 40 hours of work a week as promised in the employment contract, and it was unclear if the *ESA* could provide relief for the cost of airfare;²⁷⁹
2. The six-month time limit to bring an *ESA* complaint had passed, making it impossible for most class members to recover all of their damages with an *ESA* complaint. In comparison, at the time the class members had six years to bring a civil action.²⁸⁰ Given the reprisal that Denny's took against Mr. Alfredo Sales for filing an *ESA* complaint, it would be unfair to blame class members for their reluctance to bring their own *ESA* complaint;²⁸¹
3. A class action was more judicially efficient as there are no provisions in the *ESA* that permit joint claims. Instead, it is at the discretion of the Director of

²⁷⁷ *Dominguez* at paragraph 223.

²⁷⁸ Sheryl Smolkin, "Denny's Restaurants Settles Foreign Workers' Suit for \$1.4 Million" *Toronto Star*, July 16, 2013, accessed August 27, 2016, https://www.thestar.com/business/personal_finance/2013/07/16/dennys_restaurants_settles_foreign_workers_suit_for_14_million.html.

²⁷⁹ *Dominguez* at para 230.

²⁸⁰ The six-year limitation period was shortened to two years when the new *Limitation Act* came into effect on June 1, 2013.

²⁸¹ *Dominguez* at paras 231 – 233.

- Employment Standards on whether to join *ESA* complaints or not;²⁸² and
4. Permitting a class action would reinforce the policy objective of the *Class Proceedings Act* of behavior modification by encouraging Denny's to start taking real steps to remedy the allegations made by Ms. Dominguez.²⁸³

Justice Fitzpatrick certified the Denny's class action on March 5, 2012.²⁸⁴ After the certification, a year of contentious negotiations followed.²⁸⁵ In the end, the class members and Denny's came to a \$1.425 million settlement agreement that would see all class members recover their unpaid overtime wages, and at least some of their airfare and recruitment fees.²⁸⁶ Denny's also agreed to make \$40,000 donations to Migrante British Columbia (an advocacy organization that assists TFWs) and a children's charity.²⁸⁷

B. The Tim Hortons Human Rights Complaint

In 2012, four Mexican TFWs brought a human rights complaint against a numbered company owned by Tony Van Den Bosch ("Mr. Van Den Bosch"). Mr. Van Den Bosch ran two Tim Hortons franchises located in Dawson Creek. Tim Hortons is the largest quick service restaurant chain in Canada,²⁸⁸ famous for its coffee, donuts, and convenient locations along driving routes that are open late. Dawson Creek is a small town located in Northeast BC at mile 0 of the Alaska Highway, near the border between BC and Alberta.²⁸⁹ With a population of approximately 11,000 people,²⁹⁰ Dawson Creek is primarily a resource town with mining, oil and gas extraction, and forestry/logging

²⁸² *Dominguez* at para 234.

²⁸³ *Dominguez* at paras 235-236.

²⁸⁴ The date of the *Dominguez* decision.

²⁸⁵ *Settlement Decision* at paras 36 - 37.

²⁸⁶ *Settlement Decision* at para 58.

²⁸⁷ *Settlement Decision* at para 17.

²⁸⁸ "Corporate," Tim Hortons, accessed August 27, 2016, <http://www.timhortons.com/ca/en/corporate/index.php>.

²⁸⁹ "Tourism Sector," The City of Dawson Creek, accessed August 27, 2016, <http://www.dawsoncreek.ca/business-community-profile/community-profile-tourism-sector/>.

²⁹⁰ "Population," The City of Dawson Creek, accessed August 21, 2016, <http://www.dawsoncreek.ca/business-community-profile/community-profile-population/>.

playing a major part of the local economy.²⁹¹ The Mexican TFWs also named two related corporations in the complaint: the TDL Group Corp. (“TDL”), who is the Tim Hortons franchisor in Canada; and Tim Hortons Inc. (“THI”), the parent corporation of TDL. I will refer collectively to TDL and THI as the “Tim Hortons corporations.” The Mexican TFWs allege that Mr. Van Den Bosch and the Tim Hortons corporations discriminated against them in their employment and in their tenancy because of their race, colour, ancestry, and place of origin contrary to sections 13 and 10 of the *Human Rights Code*.²⁹²

All four of the Mexican TFWs experiences leading up to their employment at the Dawson Creek Tim Hortons were similar. Each had experience working in the food sector before they came to Canada. Two of the Mexican TFWs worked as food sector managers in the US. Each had interviewed at one or two Tim Hortons franchise locations in Canada before being hired by Mr. Van Den Bosch as food counter attendants, including franchises in other provinces. Each was male between the ages of 23 and 43 years old.²⁹³

The Mexican TFWs made four main allegations of discrimination in their working conditions:

1. Mr. Van Den Bosch treated the Mexican TFWs worse than the Filipino TFWs and Canadians who were also working at the two Dawson Creek Tim Hortons locations. The Mexican TFWs were assigned more menial and less desirable tasks. Mexican TFWs were the first to be assigned to work in the bakery, or to mop the floor.²⁹⁴ Mr. Van Den Bosch allegedly told one Mexican TFW “Canadians aren’t made to work in bakeries. That’s why I spent so much money to bring Mexicans here.”²⁹⁵ The Mexican TFWs were scheduled on less desirable shifts, and given less scheduling flexibility. Only Mexican TFWs would be assigned back-to-back closing and opening shifts, where they would close the

²⁹¹“Workforce,” The City of Dawson Creek, accessed August 27, 2016, <http://www.dawsoncreek.ca/business-community-profile/community-profile-workforce/>.

²⁹² *Chein* at para 1.

²⁹³“Pleadings,” BCPIAC, accessed on August 27, 2016, <http://bcpiac.com/wp-content/uploads/2015/11/05-22-2013-Form-1E-Amending-Section-E1-Final.pdf>, at paras 6-13.

²⁹⁴ “Pleadings,” at paras 41-42.

²⁹⁵ “Pleadings,” at para 57.

store at midnight and open the store at 6am the next morning.²⁹⁶ The Mexican TFWs were not permitted to speak Spanish at work, while the Filipino TFWs were permitted to speak Tagalog.²⁹⁷ Mr. Van Den Bosch would hold onto the Mexican TFWs' passports for periods of time without explanation.²⁹⁸ Mr. Van Den Bosch did not train the Mexican TFWs adequately,²⁹⁹ and did not inform them about their right to make a workers' compensation claim for workplace injuries.³⁰⁰

2. Mr. Van Den Bosch called the Mexican TFWs racist names on the job and made discriminatory remarks about Mexicans. Mr. Van Den Bosch allegedly said things like Mexicans are "drug traffickers" who worked in drug cartels, "idiots," "Indians" and "lazy."³⁰¹
3. Mr. Van Den Bosch threatened to fire the Mexican TFWs and send them back to Mexico if they questioned the way he treated them differently than the other Filipino TFWs and Canadians workers. Mr. Van Den Bosch did fire and send two of the Mexican TFWs home to Mexico.³⁰² Mr. Van Den Bosch also did not reimburse any of the Mexican TFWs for their work visa expenses totalling \$150 each.³⁰³
4. Finally, the Mexican TFWs allege that the Tim Hortons corporations contributed to the discriminatory treatment by promoting and lobbying government for the expansion of the TFWP; by encouraging franchisees to use the TFWP to fill labour shortages; and by not using their significant power over how franchises operate to ensure that policies were in place to protect TFWs while they were in Canada.³⁰⁴

²⁹⁶ "Pleadings," at paras 45-46.

²⁹⁷ "Pleadings," at para 43.

²⁹⁸ "Pleadings," at para 66.

²⁹⁹ "Pleadings," at para 39.

³⁰⁰ "Pleadings," at para 47.

³⁰¹ "Pleadings," at paras 52-61.

³⁰² "Pleadings," at para 64.

³⁰³ "Pleadings," at para 51.

³⁰⁴ "Pleadings," at paras 86-101.

Mr. Van Den Bosch also owned two five-bedroom, two-bathroom homes within a 30 to 40 minute walk of both of his restaurants where he rented rooms to the Mexican TFWs.³⁰⁵ The Mexican TFWs made two main allegations of discrimination in their housing conditions:

1. Mr. Van Den Bosch coerced the Mexican TFWs to rent rooms in one of his overcrowded and over-priced homes, and implicitly threatened to fire them if they chose to live elsewhere.³⁰⁶ Mr. Van Den Bosch rented out the five-bedroom homes to ten Mexican TFWs at a time, with two to a bedroom.³⁰⁷ Mr. Van Den Bosch charged above market prices for the rooms, charging \$200 at the beginning of the month and then another \$200 mid-month that he called a “tip.”³⁰⁸
2. Mr. Van Den Bosch repeatedly invaded the Mexican TFWs’ privacy as tenants. Mr. Bosch would walk into the house without notice using his own set of keys, sometimes accompanied by friends.³⁰⁹ Mr. Van Den Bosch would enter the Mexican TFWs rooms without knocking, sometimes when the workers were naked and getting dressed.³¹⁰ On one occasion, Mr. Van Den Bosch walked into the washroom to talk to one of the Mexican TFWs while the worker was taking a shower.³¹¹ Mr. Van Den Bosch would enter the Mexican TFWs home to speak to them if they called in sick to verify their story.³¹² Mr. Van Den Bosch would frequently enter the Mexican TFWs rooms when they were not home. When the Mexican TFWs asked Mr. Van Den Bosch to stop, he allegedly told them he was entitled to enter their rooms because he owned the house.³¹³

The Mexican TFWs argue that they were forced to tolerate the discriminatory working and housing conditions without complaint because Mr. Van Den Bosch had complete

³⁰⁵ “Pleadings,” at paras 15-18.

³⁰⁶ “Pleadings,” at para at 22.

³⁰⁷ “Pleadings,” at para 15.

³⁰⁸ “Pleadings,” at para 19.

³⁰⁹ “Pleadings,” at paras 27-28.

³¹⁰ “Pleadings,” at para 32.

³¹¹ “Pleadings,” at para 31.

³¹² “Pleadings,” at para 48.

³¹³ “Pleadings,” at para 33.

control over their home and work life. The Mexican TFWs were dependant on Mr. Van Den Bosch for their wages, for their shelter, and for their immigration status in Canada.³¹⁴ Mr. Van Den Bosch allegedly told the Mexican TFWs that he was the owner of their lives, and they should pretend that they were living in a golden cage that he would open after their one-year contract was up.³¹⁵

The human rights complaint is still ongoing. The Tim Hortons corporations made a preliminary application to the BC Human Rights Tribunal to dismiss the complaint against them as respondents on the grounds that they were neither the Mexican TFWs employer nor landlord. As for discrimination in employment, the Tim Hortons corporations argued that control over hiring, training, working conditions, and compliance with applicable workplace laws is the sole responsibility of franchisees like Mr. Van Den Bosch. While TDL conducts compliance audits, it is up to individual franchisees to correct defects or risk losing the right to operate a franchise under the franchise agreement. Further, individual franchisees make their own decisions about whether to recruit TFWs or hire local workers.³¹⁶ As for the discrimination in housing complaint, the Tim Hortons corporations argued that franchisees make their own decision about whether to provide accommodations to TFWs. They acknowledged that it is difficult to find appropriate rental housing in small and rural communities like Dawson Creek, and that some franchisees may have to provide housing as a necessity. However, the Tim Hortons corporations argued they play no part in the decision to provide housing to TFWs.³¹⁷

In November 2015, the BC Human Rights Tribunal dismissed the complaint against the Tim Hortons corporations for the alleged discrimination against the Mexican TFWs in housing, but allowed the complaint of discrimination in employment to proceed against TDL (the Canadian franchisor). The BC Human Rights Tribunal agreed with the Tim Hortons corporations and found the corporations did not have a tenancy relationship with the Mexican TFWs, and even if the discriminatory conduct in housing is proven there is

³¹⁴ “Pleadings,” at para 17.

³¹⁵ “Pleadings,” at para 63.

³¹⁶ *Chein* at paras 12-22.

³¹⁷ *Chein* at paras 23-25.

not enough of a connection with the actions of the Tim Hortons corporations to attract liability.³¹⁸ Where the BC Human Rights Tribunal disagreed with the Tim Hortons corporations is over just how much control TDL exercised over the employment conditions of the TFWs. The Tribunal found that even if the Tim Hortons corporations did not have a direct employment relationship with the Mexican TFWs, it is enough to proceed if either of the Tim Hortons corporations had the ability to interfere or influence the Mexican TFWs employment relationship.³¹⁹ The Tribunal found that the Mexican TFWs have no reasonable prospect of success against THI because it is only the parent corporation of TDL and does not have any power over Canadian Tim Hortons franchises.³²⁰ However, with respect to the Canadian franchisor TDL, the Tribunal found that TDL did have some control over the Dawson Creek franchise's operations: TDL is obliged to provide training and consulting to franchisees and to inspect franchises on the regular basis to ensure that they are meeting applicable laws and TDL business standards.³²¹ As a result of the September 2015 decision, the human rights complaint will proceed against Mr. Van Den Bosch's numbered company for discrimination in both housing and employment, and will proceed against TDL for discrimination in employment only.

C. Competing Legal Forums

The case studies demonstrate how workplace law in BC creates an obstacle course of competing legal forums with multiple deadlines and inadequate enforcement. In the Denny's class action, one of the key barriers for Ms. Dominguez was that she missed the six-month deadline to bring an employment standards complaint and did not have enough money to pursue damages in the courts. In addition, the amount of money at stake was not enough for a lawyer to take her individual case on a contingency fee basis. The main reason Ms. Dominguez was able to proceed with a complaint was because she was able to join her complaint with other workers in a class action in the courts, and retain counsel who was willing to bring a class action on a contingency fee basis. However, the

³¹⁸ *Chein* at paras 88-93.

³¹⁹ *Chein* at paras 73-74.

³²⁰ *Chein* at paras 62-66.

³²¹ *Chein* at paras 81-87.

decision to pursue a class action in the courts was not without significant risk to Ms. Dominguez's counsel. Ms. Dominguez's counsel agreed to pay all disbursement costs upfront,³²² and agreed to indemnify Ms. Dominguez against an adverse cost award should they lose the case.³²³ Whether or not the class action could proceed was not a legal certainty. As Justice Fitzpatrick stated, had Ms. Dominguez's counsel not borne these risks, the class members would not have been able to proceed at all.³²⁴

In the Tim Hortons complaint, the Mexican TFW's counsel also had to wrestle with multiple areas of law, and make a decision about which forum would provide the best avenue for legal address. Assuming the allegations contained in the pleadings are true, the Mexican TFWs could have brought an *ESA* complaint. However, their remedies would have been extremely limited. The Mexican TFWs could have only brought a complaint that a) they were not given at least eight consecutive hours free from work between each shift when they were scheduled to work back-to-back 12pm closing and 6am opening shifts;³²⁵ and b) their employer owed them \$150 reimbursement for the cost of the work visas because a worker cannot be required to pay an employer's business expense.³²⁶ The Mexican TFWs could not bring a complaint for termination notice or payment in lieu of notice because they had under three months of service when they were terminated / and or were forced to resign.³²⁷ Further, the Employment Standards Branch does not have jurisdiction to consider workplace discrimination complaints under the *Human Rights Code*,³²⁸ conduct inside a rental apartment, or systemic remedies against a franchise parent corporation. Finally, under the *ESA* the Mexican TFWs would only have a valid complaint against their employer, not against the Tim Hortons corporations. All in all, the remedies the Mexican TFWs could receive under an *ESA* complaint are trivial.

³²² *Settlement Decision* at para 54.

³²³ *Settlement Decision* at para 57.

³²⁴ *Settlement Decision* at para 59.

³²⁵ *ESA* at s. 36(2).

³²⁶ *ESA* at s.21(2). The likelihood of the success of this complaint is unclear. A similar argument was made by the respondents in the Denny's Class Action. The respondents argued the Denny's TFWs could recover airfare costs by way of an employment standards complaint under section 21(2) of the *ESA*. The Court found that the success of an *ESA* complaint under section 21(2) was uncertain. See *Dominguez* at para 230.

³²⁷ *ESA* at s.63(1).

³²⁸ *ESA* at s.86.2.

In contrast, the remedies the Mexican TFWs could receive with a human rights complaint are more robust. First, the Human Rights Tribunal has jurisdiction to consider discrimination both in the workplace and at the rental unit because the *Human Rights Code* prohibits discrimination in both employment and tenancy.³²⁹ Second, the Mexican TFWs can ask for compensation to address the way the discrimination harmed them, including damages for injury to dignity, self-respect or hurt feelings,³³⁰ and compensation for any lost wages they suffered as a result of the discrimination.³³¹ Finally, the Mexican TFWs can also bring the complaint against the Tim Hortons Corporations for facilitating the conditions where employers could discriminate against TFWs, and ask for systemic remedies such as ordering company-wide training programs.³³²

D. Complex Legal Issues That Span Beyond Workplace Law

The case studies also show how the legal issues low-skilled TFWs face are more complex than just workplace law, and intersect with other areas of law such as immigration law or landlord tenant law. Beyond just having to navigate competing legal forums, TFWs also need to consider how bringing a complaint may affect their current immigration status and housing security.

In the Denny's class action, the TFWs' immigration status played a key role in how their employer treated them and their ability to make a complaint without jeopardizing their long-term goal of Canadian citizenship. The TFWs' unfair working conditions expanded beyond just their relationship with their employer to their relationship with recruitment agencies in Canada and the Philippines who were acting on Denny's instructions. As Justice Fitzpatrick stated in the settlement decision, the application for certification of the class action involved complex areas of law, such as immigration, agency, employment, class actions, and equity, and the outcome was by no means certain.³³³

³²⁹ *Human Rights Code* at s.10 and s.13.

³³⁰ *Human Rights Code* at s.37(2)(d)(iii).

³³¹ *Human Rights Code* at s.37(2)(d)(ii).

³³² *Human Rights Code* at s.37(4).

³³³ *Settlement Decision* at para 55.

In the Tim Hortons human rights complaint, the Mexican TFW's employment issues intersected both with their immigration status and their tenancy relationship. Mr. Van Den Bosch allegedly used his power over the Mexican TFW's employment and immigration status to coerce the Mexican TFWs to rent overcrowded housing from him at above market rates. Having the keys to the TFWs home made it so that Mr. Van Den Bosch could exert a level of surveillance well beyond most employers, including searching workers' rooms and checking in on workers who called in sick to verify their story. The Mexican TFWs legal issues spanned from workplace law into privacy law, landlord tenant law, and immigration law. One of the key challenges for the Mexican TFWs was to find a legal forum that would allow them to address multiple legal issues that went beyond just employment law.

E. A Power Imbalance Between TFWs and Employers

Finally, the case studies demonstrate how the tremendous power imbalance between employers and low-skilled TFWs makes it difficult for low-skilled TFWs to enforce their employment rights. Beyond just having to navigate competing legal forums, low-skilled TFWs also need to consider how bringing a complaint may affect their current immigration status, their ongoing employment relationship, and their chances at Canadian citizenship.

In the Denny's class action, the decision to pursue a class action was not without significant risk to the TFWs. A majority of TFWs had an ongoing employment relationship with Denny's, and depended on Denny's for their continued employment, immigration status in Canada, and for support in permanent residency applications.³³⁴ Several times throughout the proceedings, TFWs alleged that they were approached by members of Denny's management who tried to dissuade them from participating in the class action, or infer that they would risk their employment and/or support for permanent residency should they continue with the litigation.³³⁵ The Court made two consent orders, which set out how the TFWs and Denny's could communicate about the issues under litigation.³³⁶ At the time of the certification decision, Ms. Dominguez had stopped

³³⁴ *Settlement Decision* at para 13.

³³⁵ *Settlement Decision* at para 13.

³³⁶ *Settlement Decision* at para 11.

working at Denny's (just prior to the expiration of her 24-month work permit). She found employment with another employer in Canada and obtained a new work permit.³³⁷ Of the 70 workers who were recruited through ICEA and Luzern, 55 of were still employed at Denny's, five had already left Canada, and ten were presumed to still be in Canada working elsewhere.³³⁸ After the certification decision, class members were permitted to opt-out of the class action up until June 13, 2012.³³⁹ While 19 individuals of the 77 identified class members did submit opt-out notices, these notices were disregarded on settlement because class members submitted affidavit evidence that Denny's management had tried to persuade several employees to opt-out in exchange for support of permanent residency status or a work permit extension. Ms. Dominguez initiated contempt of court proceedings against Denny's since these communications were in violation of the consent orders. Denny's agreed in the terms of settlement to ignore the opt-out notices, and this order was granted by the Court.³⁴⁰

In the Tim Hortons human rights complaint, the four Mexican TFWs began work at the Dawson Creek Tim Hortons in early 2012.³⁴¹ Each only worked at the Dawson Creek Tim Hortons for a period just under three months. Two were fired and sent back to Mexico for asking questions about their working conditions and discriminatory treatment.³⁴² Two called the Mexican consulate, and on the consulate's advice quit their jobs and called the police to investigate once they had left Dawson Creek for Vancouver.³⁴³

The Denny's class action and Tim Hortons human rights complaint case studies are clear examples of how workplace law in BC creates an obstacle course of competing legal forums with multiple deadlines. But the case studies go beyond just demonstrating the difficulty in navigating competing legal forums that all workers in BC face. The case studies also showcase two additional barriers to achieving fair working conditions that

³³⁷ *Dominguez* at para 43.

³³⁸ *Dominguez* at para 66.

³³⁹ *Settlement Decision* at para 14.

³⁴⁰ *Settlement Decision* at paras 62-78.

³⁴¹ "Pleadings," at paras 6-13.

³⁴² "Pleadings," at paras 68-81.

³⁴³ "Pleadings," at paras 82-84.

are unique to low-skilled TFWs: the need to address complex legal issues that span beyond workplace law; and a power imbalance between low-skilled TFWs and their employers that creates a disincentive to make a complaint. The low-skilled TFWP creates additional systemic barriers for low-skilled TFWs to address unfair working conditions.

4. How the Low-Skilled TFWP Shifts the Negative Consequences of Unfair Working Conditions Over People, Place and Time

The systemic barriers to address unfair working conditions created by the low-skilled TFWP have widespread consequences. In this section I argue that the low-skilled TFWP shifts the negative consequences of unfair working conditions over people, place and time: from Canadian workers and employers onto TFWs; from Canada to elsewhere; and from the present into the future.

A. People

In Chapter 1 I explored how hospitality sector workers form part of the product being sold. I argued that work in the hospitality sector is generally stratified by race, gender and age; low-wage hospitality sector workers are expected to act a certain way; and hospitality sector employers need to keep wages low and reduce worker turnover in order to remain competitive because labour costs make up the bulk of the cost of production. In Chapter 2 I suggested that a key element of the low-skilled TFWP is the way the needs of hospitality employers map onto the desires of TFWs. Under the low-skilled TFWP, hospitality employers are able to recruit educated, loyal workers who will accept a low wage job based on race, age and gender. TFWs are able to obtain work experience in Canada at a comparatively higher status and higher wage job with the possibility of permanent immigration. However, the fact that both employers and TFWs get something out of the low-skilled TFWP does not make it an equal exchange. As case studies like the Denny's class action and the Tim Hortons human rights complaint demonstrate, the low-skilled TFWP shifts the negative consequences of unfair working conditions from employers to TFWs, and from Canadian workers to foreign workers. In other words, the low-skilled TFWP shifts the negative consequences of unfair working conditions across people.

First, both case studies highlight how the low-skilled TFWP creates an even deeper stratification of hospitality workers by race, gender and age. In both case studies, Canadian workers were given preferential treatment over TFWs. At Denny's, TFWs' hours were the first to be cut before Canadian workers. At Tim Hortons, TFWs were given the dirtier or more demanding jobs cleaning or working in the bakery. The Tim Hortons case study also showed how the employer discriminated amongst the TFWs themselves, where Filipino TFWs were treated better than Mexican TFWs. At Denny's and Tim Hortons, TFWs bore the negative consequences of unfair working conditions more than local workers.

Second, both case studies demonstrate how acute the power imbalance created by the low-skilled TFWP is and how the negative consequences of unfair working conditions are shifted from employers to TFWs. The TFWs at Denny's and Tim Hortons had a lot riding on a successful employment relationship, and were in a more vulnerable position than local workers. The TFWs arrived at the workplace without any training on Canadian employment rights or workplace customs paired with a keen desire to please their employer. By the time a TFW started their first day at work, they had spent their own money paying a recruiter, made personal sacrifices by being separated from their family and friends, and had a number of dependents relying on remittances. The TFWs knew that their work permit was tied to their job, as were any hopes of obtaining permanent residency in the future. Finally, the TFWs at Denny's and Tim Hortons lacked the financial resources to hire lawyers who were not willing to take on their case on a contingency or pro bono basis. In contrast, Tim Hortons and Denny's as employers had significantly less at stake and the highest degree of power to ensure fair working conditions. The costs of hiring a TFW were comparatively minimal. Employers were required to pay an application fee, recruitment fees, the visa fees, and flight fees. However, in both case studies the employer did not fully reimburse TFWs for these fees, violating both the *ESA* and the TFWP rules. All of the TFWs the employers hired had experience working in the international fast food industry, and likely required less training than local workers. Finally, any upfront costs Tim Hortons or Denny's faced paid off in the long-term because the turnover of TFWs was lower than local workers. At Denny's and Tim Hortons, the employer had absolute power over the working conditions,

and actively punished TFWs who complained if the conditions were unfair. Even when the TFWs eventually brought a legal challenge, Denny's and Tim Hortons had more resources to hire lawyers. The low-skilled TFWP allowed Denny's and Tim Hortons to shift the negative consequences of unfair working conditions onto TFWs.

Finally, both case studies show how low-skilled TFWs are in a uniquely difficult position to enforce their employment rights, and do not have as many avenues of legal recourse as local workers. The legal framework in Canada was not designed to be able to adequately address the intersection of legal issues TFWs face once they get to Canada. TFWs are caught at the junction where immigration law, employment law, and in some cases landlord tenant law collide. Within the legal framework, the employment standards process is designed to be the tool for low-income workers to access workplace fairness. However, as the two case studies demonstrate, the *ESA* was not effective at addressing issues like racial discrimination, overcrowded or overpriced housing that is tied to employment, unscrupulous immigration consultants, and work permits that do not allow a worker to change employers. Further, the six-month time limit to bring a complaint disadvantages workers who want to wait until their immigration status is more stable. By making a complaint, TFWs exposed themselves to reprisal, such as being fired or having their hours cut. Counsel for both the Denny's TFWs and the Tim Hortons TFWs had to figure out alternative legal routes, such as a human rights complaint or a class action. In the end, the Denny's and Tim Hortons TFWs faced a choice between complex litigation that would take years to resolve, or grinning and bearing the unfair working conditions without complaint for years in the hopes of getting permanent residency in Canada. Both choices are a gamble, and demonstrate how the low-skilled TFWP shifts the negative consequences of unfair working conditions from local workers and employers to TFWs.

B. Place and Time

In Chapter 1 I argued that the hospitality sector is different from other sectors because production and consumption occur at the same place and time. Workers need to be on site where the consumer is. Hospitality sector employers are sensitive to the ebbs and flows of local labour supply and actively recruit from national and international labour pools to fill labour gaps. I explained that one of the top challenges for BC hospitality sector employers is a shortage of workers. Some hospitality sector employers address

local labour shortages by making a commitment to workers who will stay or offer perquisites in lieu of additional pay. The low-skilled TFWP, in contrast, is an example where employers intentionally recruit from international labour pools to take advantage of wage disparities between local and foreign labour. Case studies like the Denny's class action and the Tim Hortons human rights complaint show how the low-skilled TFWP shifts the negative consequences of unfair working conditions both from Canada to economically poor countries, and from the present into the future. In other words, the low-skilled TFWP shifts the negative consequences of unfair working conditions across places and over time.

The low-skilled TFWP shifts the negative consequences of unfair working conditions over time in two ways. First, the program allows employers to defer the costs of improving working conditions to compete for and retain local workers into the future. Without the low-skilled TFWP, a Denny's or a Tim Hortons franchise owner who cannot recruit local workers to cover the night shift for minimum wage in a northern resource town because there are better paying daytime jobs available would need to find other ways to compete for workers. The most obvious is by increasing wages. Other options include changing business hours, or offering other perquisites that make the job more attractive such as improving working conditions or making contributions to health plans or education. Instead, the program allows employers like Denny's or Tim Hortons to defer the costs of competing for local workers during labour shortages by improving working conditions into the future. The low-skilled TFWP enables employers to shift the costs of creating more fair working conditions over time. Second, the program compels TFWs to bear a disproportionate amount of the negative consequences of unfair working conditions upfront, the moment they start their job, in exchange for the potential future reward of Canadian citizenship. As discussed in Chapter 2, TFWs need to work for nine months in Canada before they can apply to become a permanent resident. However, the chances of a successful application are not guaranteed and can be thwarted by attempts to ask for fair working conditions. In the Tim Hortons case study, the Mexican TFWs all lost their jobs when they complained about discriminatory working conditions. In the Denny's class action, Mr. Sales lost his job after he made an employment standards complaint. The representative plaintiff Ms. Dominguez left Denny's and was able to find

another job in Canada. However, five members of the class action had already returned home. For TFWs, the low-skilled TFWP prolongs the negative consequences of unfair working conditions because it incentivises tolerance of unfair working conditions now in order not to jeopardize better working conditions and opportunities in the future.

The low-skilled TFWP shifts the economic costs of unfair working conditions across place in one main way: the manner Canadian employers treat TFWs in Canada has ripple effects in TFWs' home countries. If a TFW is not paid fairly, then that will directly affect the amount of remittances they can send home to support their family members who cannot join them in Canada. In the Tim Hortons case study, TFWs were charged above-market rent for housing, were not reimbursed for the cost of their entry visas, and lost their jobs because they complained. In the Denny's case study, TFWs were not paid for overtime, were not reimbursed for the costs of their recruitment or travel to Canada, and had their hours cut first compared to local workers. Each dollar that a TFW is unfairly not paid in Canada is a dollar that is unfairly not paid in the TFWs' place of origin. The negative consequences of unfair working conditions are felt not only in Canada, but in Mexico or the Philippines. The low-skilled TFWP shifts the negative consequences of unfair working conditions across space, from Canada to elsewhere.

5. Conclusion

In this chapter, I explained that workplace law in BC is a complaint-based system that relies on workers to navigate an obstacle course of competing legal forums with multiple deadlines and inadequate enforcement. Using two case studies, I demonstrated how the low-skilled TFWP shifts the negative consequences of unfair working conditions over people, place and time. The negative consequences of unfair working conditions are shifted from employers and Canadian workers to TFWs in three ways: by creating an even deeper stratification of hospitality workers based on race, gender and age; by creating an acute power imbalance between TFWs and their employer that works in an employer's favour; and by adding additional systemic barriers for TFWs to achieve fair working conditions because the legal issues TFWs face span well outside the already confusing landscape of workplace law into immigration law, landlord tenant law and agency law. The low-skilled TFWP shifts the negative consequences of unfair working conditions from Canada to elsewhere because unfair working conditions in Canada cause

ripple effects for the family members who depend on remittances in a TFWs home country. Finally, the low-skilled TFWP shifts the negative consequences of unfair working conditions across time into the future in two ways: by allowing Canadian employers to defer the costs of improving working conditions to compete for and retain local workers, and by compelling TFWs to bear the negative consequences of unfair working conditions upfront in exchange for the possibility of Canadian citizenship.

I build on my argument about how the low-skilled TFWP shifts the negative consequences of unfair working conditions over people, place and time in my next chapter, safety at work. I argue that the low-skilled TFWP also shifts workplace health and safety risks over people, place and time. The difference is that exposure to health and safety risks at work are not as easy to correct as wage theft or discrimination, where apologies and monetary damages can go a lot further. In comparison, an injury at work can leave a worker with permanent disabilities that no amount of compensation can heal and dramatically alter a TFWs future.

Chapter 4: Safety at Work

1. Introduction

In April 2013, over 1,000 garment workers were killed, and over 2,000 workers were injured when Rana Plaza collapsed in Bangladesh. The tragedy was attributed to building code violations, corrupt enforcement, and disregard of evidence the building was unsafe. Garment workers employed in Rana Plaza manufactured clothing for many western clothing lines, including the Canadian company “Joe Fresh.”³⁴⁴ The tragedy is a textbook example of how western clothing companies use outsourcing, complex global supply-chains and low-cost labour in economically poor countries where health and safety standards are lower or under-enforced to keep production costs low and remain competitive in a global economy. The tragedy is also an obvious example of the way health and safety risks are transferred across borders from economically rich countries like Canada, to economically poor countries like Bangladesh. Yet, despite the number of fatalities and injuries at Rana Plaza, there is a pervasive sense that there is not much Canadian legislators can do about it. Foreign health and safety laws are beyond the jurisdiction of Canadian domestic legal regimes and exist in the realms of international law, or soft law, where private parties may or may not agree to corporate social responsibility agreements or provide compensation for injury.

Contrast the Rana Plaza example with the occupational health and safety challenges faced by TFWs who travel to Canada from low-income countries to work in the BC hospitality sector - folding laundry at a hotel in Whistler or serving breakfast at a Denny's in Vancouver. Many hospitality TFWs do not raise workplace health and safety issues, or report a workplace injury in Canada because their immigration status in Canada is tied to their employer and they fear being fired or repatriated to their home country. Yet, as I argue in this chapter, TFWs are likely assigned more dangerous work, and have a higher chance of being injured on the job. Once injured, a hospitality TFW may face lower compensation rates due to currency conversion, and worse long-term health outcomes due to disparities in access to health care compared to a Canadian worker.

³⁴⁴Amber Hildebrandt, "Bangladesh's Rana Plaza Factory Collapse Spurs Change, Finger-Pointing," *CBC News Online*, April 24, 2014, accessed May 21, 2017, <http://www.cbc.ca/news/canada/bangladesh-s-rana-plaza-factory-collapse-spurs-change-finger-pointing-1.2619524>.

While there are significantly less fatalities among hospitality TFWs in the Canadian hospitality sector compared to the Rana Plaza tragedy, Canada's low-skilled TFWP also allows the transfer of workplace health and safety risks across borders from Canada to economically poor countries in the global south. The key difference is that low-skilled TFWs travel to Canada to work on Canadian soil, and their health and safety while in Canada is well within the purview of Canadian law.

The comparison between the Rana Plaza tragedy and the low-skilled TFWP is troubling, and likely not obvious at first glance. In this chapter I argue that the low-skilled TFWP allows the transfer of workplace health and safety risks across borders from Canada to economically poor countries in much more subtle ways. This chapter is broken down into two main parts. First, I set out what I mean when I use the term risk. Second, I argue that the low-skilled TFWP allows the transfer of workplace health and safety risks in three main ways: across people, across space, and across time. For each category, I give concrete examples of how law has created technicalities and asymmetrical power imbalances that facilitate the transfer of risk.

2. What is Risk?

German sociologist Ulrich Beck coined the term “risk society” in 1986 with a now famous book of the same name.³⁴⁵ His work is regarded as the origin of the explosion in scholarly research on risk in many different disciplines over the past 25 years.³⁴⁶ It is helpful to review how the term “risk” has been used, and explain what I mean when I use the term.

A. The Risk Society

Beck's thesis is that conflicts in modern society over scarcity and the redistribution of wealth have been overshadowed by conflicts over the redistribution of risks, and who bears the detrimental side-effects of industrial modernization.³⁴⁷ Interventions by the welfare state are no longer relevant because the welfare state is only interested in the

³⁴⁵ For the English translation see Ulrich Beck, *Risk Society: Towards a New Modernity* (London: Sage, 1992).

³⁴⁶ Gabe Mythen & Sandra Walklate, “Introduction: Thinking Beyond the Risk Society” in *Beyond the Risk Society: Critical Reflections on Risk and Human Security*, ed. Gabe Mythen & Sandra Walklate (Berkshire: Open University Press, 2006), 2.

³⁴⁷ Beck, *Risk Society*, 20.

distribution and redistribution of goods, “whereas the contemporary task for government is the management of ‘bads.’”³⁴⁸

Beck suggests that risk in late modern society is different than pre-modern society. Risk is no longer a personal decision, like a decision to pack-up and immigrate to a new country. Instead, risk in modern society is a shared risk that results from global human patterns or behaviours; regardless of whether you live Canada or Colombia, we will all be affected by climate change. Risk is no longer about scarcity, but instead about managing the side-effects of over production, such as obesity or air pollution. Finally, risk is no longer local or easily perceived, like sewage problems from overcrowding. Instead, risks are global and harder to imagine such as nuclear threat or melting ice caps. In *Risk Society*, Beck focuses on high-tech and ecological risks because they are global, intangible and catastrophic risks that cannot be addressed by traditional legal and political institutions. Insurance and social welfare schemes, or political institutions premised on national borders may work well for calculable local risks such as industrial or motor vehicle accidents, but not for incalculable worldwide catastrophes such as climate change or epidemics.³⁴⁹

In his 1999 book *The Brave New World of Work*, Beck describes a process he calls the “Brazilianization of the West.”³⁵⁰ The process is characterised by a transition from a “work society” of full employment, job security, rising living standards, Keynesian economics that encouraged state spending and Fordist modes of standardized production and consumption³⁵¹ to a “risk society” where there is increased job insecurity, “digitization” (increased use of computers), a shift to a knowledge-based economy, blurred boundaries between home and work, increased worker mobility, and the introduction of globalized production processes and supply chains. In the “risk society” workers are expected to be entrepreneurial about their career path, geographically mobile, and flexible about the boundaries between home life and work life or paid and unpaid work. Work and consumption patterns are no longer standardized but individualized.

³⁴⁸ Pat O’Malley, *Risk, Uncertainty and Government* (Portland, OR: Glasshouse Press, 2004), 5.

³⁴⁹ Beck, *Risk Society*, 22.

³⁵⁰ Ulrich Beck, *The Brave New World of Work* (Cambridge, MA: Polity Press, 2000), 1.

³⁵¹ Beck, *Brave New World*, 2.

Borders and local labour laws become weak as capital becomes more mobile,³⁵² and risk is transferred away from the economy and the state to individuals.³⁵³

Using the concept of “risk” as an analytical tool grew rapidly in scholarship and government policy on regulation from the 1980s onward. Think tanks and international institutions continue to publish reports with titles such as *Risk and Regulatory Policy: Improving the Governance of Risk* (published by the OECD);³⁵⁴ *Risk Matters: Why and How Corporate Boards Should Become Involved* (published by the Conference Board of Canada);³⁵⁵ or *Risk and Opportunity – Managing Risk for Development* (published by the World Bank).³⁵⁶ Scholars continue to publish books with titles such as *Risk Versus Risk: Tradeoffs in Protecting Health and The Environment*;³⁵⁷ *Risk and Reason: Safety, Law, and the Environment*;³⁵⁸ *The Great Risk Shift: The New Economic Insecurity and the Decline of the American Dream*,³⁵⁹ and just plain *Risk*.³⁶⁰ Among these publications, risk can refer to anything from risk of ecological disaster, risk of economic loss, risk of reputational loss, cyber security risks, epidemiological risks, and consumer safety risks.

Yet, the popularity of the term risk, or the concept of a “risk society” seems to be a description of concepts already familiar to political scientists, historians, or sociologists alike no matter the era of study. Risk is just another word for uncertainty, danger, vulnerability, opportunity, resiliency and the unknown. Indeed, the broadness of the term is just what critics of the popularity of risk-based analysis point out.

³⁵² Beck, *Brave New World*, 67-91.

³⁵³ Beck, *Brave New World*, 3.

³⁵⁴ OECD, *Risk and Regulatory Policy: Improving the Governance of Risk*, (OECD, 2010).

³⁵⁵ Melissa Aguilar, ed., *Risk Matters: Why and How Corporate Boards Should Become Involved* (New York: The Conference Board of Canada, 2013).

³⁵⁶ World Bank, *Risk and Opportunity: Managing Risk for Development* (World Bank, 2014).

³⁵⁷ John D. Graham & Jonathan Wiener, *Risk Versus Risk: Tradeoffs in Protecting Health and The Environment* (Cambridge, Mass.: Harvard University Press, 1997).

³⁵⁸ Cass Sunstein, *Risk and Reason: Safety, Law, and the Environment* (Cambridge: Cambridge University Press, 2004).

³⁵⁹ Jacob S. Hacker, *The Great Risk Shift: The New Economic Insecurity and the Decline of the American Dream* (New York: Oxford University Press, 2008).

³⁶⁰ Layla Skinns, Micheal Scott, & Tony Cox, ed., *Risk* (New York: Cambridge University Press, 2011).

German sociologist Niklas Luhmann is critical of the way sociologists, including Beck, adopted the concept of risk from economic and finance fields.³⁶¹ He points out that the term is used with little clarity or definition. Luhmann suggests sociologists differentiate between what is risk, and what is danger. Danger is about encountering unknown losses, damages, or injury caused by one's environment. "One is exposed to dangers"³⁶² in the world around them, such as earthquakes, carcinogens, or economic downturn. Risk, on the other hand, is about making informed decisions about whether to expose oneself to a known danger or not. The more knowledge one gains from practical experience or research, the more risk aware one becomes. To this end Luhmann remarks that "it is no accident that the risk perspective has developed parallel to the growth in scientific specialization."³⁶³ For legal jurisprudence, Luhmann observes that risk and danger are helpful to assigning attribution – that is, who is responsible for or what is the cause of a loss, damage, or injury. Importantly, Luhmann connects the concepts of risk and danger with the role of human agency, decision-making, and politics. Risk implies that actors have a choice and the appropriate level of knowledge of whether to expose themselves to a danger, or can make a decision about taking preventative action. However, choice has become more complex when modern technology has created dangers that cannot be attributed to one person's behaviour, such as the danger of climate change caused by burning fossil fuels, or the danger of industrial accidents with the introduction of mass production methods. In cases where collective uses of modern technology create new dangers, it is the political decisions and choices about how much danger is too much that come to the fore because we do not have a choice as an individual. For collective dangerous behaviour, such as the use of modern technology, there is no way to attribute blame or hold individuals accountable when we are all the cause of the problem. Luhmann points out that not making a choice is also a choice, and deciding on what risk prevention strategy is the best to use is also a risk-based decision.³⁶⁴

³⁶¹ Niklas Luhmann, *Risk: A Sociological Theory*, trans. Rhodes Barrett (New York: Aldine de Gruyter, 1993).

³⁶² Luhmann, *Risk*, 23.

³⁶³ Luhmann, *Risk*, 28.

³⁶⁴ Luhmann, *Risk*, 30.

Australian criminologist Pat O'Malley suggests that adopting a risk-based analysis of contemporary governance patterns does not identify anything new. Rather, it is another way to describe neo-liberal governance strategies where individual risks, such as unemployment or health care, are considered better guarded against by private, market-based regimes rather than the risk-pooling social insurance schemes of the welfare state.³⁶⁵ In other words, Beck's observation of the shift of risk onto individuals in the "risk society" is just a symptom of neo-liberal politics.³⁶⁶ O'Malley suggests that when scholars write about risk, they are often writing about several different concepts altogether. For example, some scholars write about "insurance risk," which he describes as legal mechanisms to pool-risk and mitigate the impact of harms across populations and time. Risk of harm is translated into capital based on actuarial calculations, and effected through insurance premiums and financial compensation. In contrast, other scholars may write about "clinical risk," where individual health risks are reduced through changes to diet or preventative surgery, or "epidemiological risk," where risks to public health are reduced through quarantine or inoculation.³⁶⁷ O'Malley distinguishes between risk and uncertainty, where risk is quantifiable and governed by calculable statistics and probabilities, and uncertainty is non-quantifiable and governed by experienced judgement and guesswork.³⁶⁸ Following Foucault's lead, O'Malley suggests that instead of focusing on the term risk, theorists should take a genealogical approach and analyze the diverse techniques different governments have employed to manage risk and uncertainty over time.³⁶⁹

British sociologist Bridget Hutter argues that the popularity of using a risk-based analysis among government policymakers since the 1980s is an effort to legitimise the work of government in a time when the costs of government and regulatory schemes are routinely under significant scrutiny. Hutter suggests policymakers adopted risk-based tools developed in business and finance circles, such as cost-benefit analysis and

³⁶⁵O'Malley, *Risk Uncertainty and Government*, 11-12

³⁶⁶O'Malley, *Risk Uncertainty and Government*, 11-12.

³⁶⁷ O'Malley, *Risk Uncertainty and Government*, 21-22.

³⁶⁸ O'Malley, *Risk Uncertainty and Government*, 13.

³⁶⁹ O'Malley, *Risk Uncertainty and Government*, 6.

performance indicators, as a way to make their decision-making more transparent and palatable to combat waves of privatisation of formerly public enterprises, and de-regulation.³⁷⁰

While I certainly cannot ignore the popularity of Beck's "risk society" or the explosion of risk as a concept of analysis in many different literatures from 1980s onward, I do not approach the term in the same way. In the next section, I distinguish my use of the term risk, and set out a more precise definition.

B. Workplace Health and Safety Risks

In contrast to Beck's "risk society," the concept of risk in occupational health and safety literature has a longer tradition and takes on a primarily corporal and actuarial quality. The origins of occupational health and safety protections in Canada date back to approximately the 1880s.³⁷¹ Since then, three broad prevention strategies to identify workplace dangers and prevent workplace accidents have emerged: "regulatory and enforcement process[es], incentive mechanisms, and the internal responsibility system."³⁷² Risk in occupational health and safety literature better matches Luhmann's idea of risk, where workers are made aware of their exposure to dangers in the workplace (for example, through systems like the Workplace Hazardous Materials Information System, WHIMS), and collective decision-making over risk is spread through politics, standard setting agencies, and mandatory internal responsibility systems (such as joint health and safety committees).

For workers' compensation in Canada, the term risk dates back to the Meredith Report in 1913.³⁷³ The Meredith Report was written at a time of serious labour unrest due to inadequate compensation for workers injured on the job in the courts. Inadequate

³⁷⁰ Bridget Hutter, *The Attractions of Risk-based Regulation: Accounting for the Emergence of Risk Ideas in Regulation*, ESRC Centre for Analysis of Risk and Regulation 33 (London: London School of Economics and Political Science, 2005).

³⁷¹ Katherine Lippel, "Droit des Travailleurs Québécois en Matière de Santé (1885-1981)," *Revue Juridique Themis* 16 (1981-1982): 329-382.

³⁷² Terrance Sullivan & John Frank, "Restating Disability or Disabling the State: Four Challenges" in *Injury and the New World of Work*, ed. Terrance Sullivan (Vancouver: University of British Columbia Press, 2000) at 10.

³⁷³ William R. Meredith, *Final Report on Laws Relating to the Liability of Employers to Make Compensation to Their Employees for Injuries Received in the Course of Their Employment Which are in Force in Other Countries, and as to how far Such Laws are Found to Work Satisfactorily* (Toronto: L.K. Cameron, 1913).

compensation was mainly due to legal doctrines such as worker assumption of risk, or worker contributory negligence, which made it almost impossible for workers to collect damages from employers. Sir William Meredith was commissioned to research workers' compensation systems in other jurisdictions and recommend a system for Ontario. Meredith recommended the German system, where the state manages a compulsory mutual insurance system and employers are divided into industry groups with similar workplace risks, and held collectively liable for workplace injury claims.³⁷⁴ Employers and workers entered into a "historic compromise," where workers gave up their right to sue their employer in court in exchange for no-fault accident insurance. The Ontario system was replicated across Canada.

Workers' compensation in Canada is entirely employer-funded and state-run. It includes the costs of healthcare in otherwise public healthcare facilities, where hospitals bill workers' compensation boards directly for healthcare related to a workplace accident. Employers are divided into different industry classifications based on the historic levels of risk of a workplace accident and associated workers' compensation costs. Employer insurance premium rates are based on industry classification. For instance, in 2017 businesses classified as window cleaners pay an insurance rate in BC of \$12.32 per \$100 of payroll, compared to accounting at \$0.14 per \$100 of payroll.³⁷⁵ Employers are also offered financial incentives to reduce injury at work and accommodate injured workers back into the workplace, and can face monetary penalties for high levels of injury based on experience rating programs.³⁷⁶ The costs of workplace health and safety risks are therefore translated into financial costs through actuarial calculations, pooled and spread over time.

Interestingly, workers' compensation predates the types of welfare state redistributive interventions such as unemployment insurance by 25 years or so. Workers'

³⁷⁴ Meredith, *Final Report*.

³⁷⁵ "Classification and Rate List, Effective January 1, 2017" WorkSafeBC, Accessed May 26, 2017, <https://www.worksafebc.com/en/resources/law-policy/classification-and-rate-lists/2017-classification-and-rate-list?lang=en>.

³⁷⁶ Experience rating is a controversial subject in Canada. The main argument against experience rating in Ontario, for example, is that it creates an incentive for employers to repress workers' compensation claims, and that it is not actually permitted by statute. For more, see the proceedings of the "International Symposium on the Challenges of Workplace Injury Prevention Through Financial Incentives," Institute for Work and Health, accessed May 26, 2017, <http://www.iwh.on.ca/prevention-incentives-2012>.

compensation was introduced at a time that more closely resembles the individualization of risk, danger, uncertainty, and vulnerability that we also find today in neo-liberal policies, where workers must rely on personal resources and family during times of sickness or unemployment, predating Beck's shift from conflicts over the redistribution of wealth to conflicts over the redistribution of risks altogether. Risk in workers compensation literature better matches O'Malley's description of "insurance risk," where risks are pooled, financialized, and spread over time.

My use of the term risk is more closely linked with how risks have traditionally been evaluated in occupational health and safety, and workers' compensation literature. For the purposes of my thesis, workplace health and safety risk means a worker's exposure to workplace hazards, dangerous working conditions, workplace injuries, or reprisal for raising a workplace health and safety issue. It includes exposure to the detrimental physical, mental, or financial consequences a worker may face due to a) a workplace injury and its sequelae; or b) reprisal for enforcing workplace health and safety rights.

C. Occupational Health and Safety vs. Workers' Health and Well-Being

One of the difficulties of researching the relationship between health and work is that there is a blurry boundary between the relationship of overall health and working conditions in most individuals' lives. For instance, researchers have looked at the role precarious and temporary work has played in lowering long-term health outcomes both for migrant workers,³⁷⁷ and for Canadian workers³⁷⁸ due to economic insecurity. In life, we intuitively know that the boundary between work-life and home-life is tenuous, especially when it comes to health. However, in law, there is a sharp divide between legal entitlements for injuries caused by workplace accidents governed by respective workers' compensation legislation, such as the *Workers' Compensation Act*³⁷⁹ in BC, and legal entitlements to universal healthcare for illnesses governed by respective

³⁷⁷ Jenna L. Hennebry and Janet McLaughlin, "The Exception That Proves the Rule': Structural Vulnerability, Health Risks, and Consequences for Temporary Migrant Farm Workers in Canada" in *Legislated Inequality: Temporary Labour Migration in Canada*, Patti Tamara & Christine Strehle, eds. (Montreal: McGill-Queens University Press, 2012) 117; Janet McLaughlin, "Trouble in our Fields: Health and Human Rights among Mexican and Caribbean Migrant Farm Workers in Canada" (PhD. diss, University of Toronto, 2009).

³⁷⁸ Wayne Lewchuk, Marlea Clarke, & Alice de Wolff, *Working Without Commitments: Precarious Employment and Health* (Montreal: McGill-Queens University Press, 2010).

³⁷⁹ R.S.B.C. 1996, c. 492.

provincial/territorial healthcare legislation. In law, there must be evidence of a causal connection between an injury and the workplace for entitlement benefits to flow. Poor health due to the overall economic insecurity of temporary work is not something workers' compensation legislation covers.

In order to best demonstrate how legal technicalities in domestic Canadian law transfer workplace health and safety risks across borders from Canadian workers to low-wage TFWs workers from economically poor countries in the global south, I take a black-letter law approach to what constitutes a workplace and a workplace injury. While I do not think the legal definitions recognize all of the important links between workplaces and worker health and well-being, particularly in the growing service-based economy where the majority of accidents are not the fatal or acute injuries of the industrial revolution but work-related musculoskeletal strains, sprains, and pains,³⁸⁰ my point is that even under the most conservative reading of current laws, workplace health and safety risks are transferred across borders. My definition of what is a “workplace,” and what constitutes a “workplace injury” is therefore borrowed directly from the *BC Workers' Compensation Act*, which is the statute that covers both occupational health and safety and workers' compensation in BC. A “workplace” “means any place where a worker is or is likely to be engaged in any work and includes any vessel, vehicle or mobile equipment used by a worker in work.”³⁸¹ In order to count as a “workplace injury,” the personal injury must “arise out of and in the course of employment.”³⁸²

3. How the Low-Skilled TFWP Shifts Workplace Health and Safety Risks Across People, Place and Time

In this second section, I demonstrate the concrete yet subtle ways the low-skilled TFWP allows the transfer of workplace health and safety risks across borders from Canada to economically poor countries in the global south.

A. People

There is little quantitative research on the experience immigrant workers have with health and safety at work in Canada, let alone research on migrant or low-skilled TFWs

³⁸⁰ See Sullivan & Frank, “Restating Disability or Disabling the State,” 9.

³⁸¹ *Workers' Compensation Act*, s. 106.

³⁸² *Workers' Compensation Act*, s. 5.

specifically. One study found that male immigrant workers are twice as likely as Canadian-born workers to sustain an injury that requires medical attention in their first five years in Canada.³⁸³ Another study found that immigrant workers in Canada face more occupational health and safety risks than Canadian-born workers, such as language barriers, lack of knowledge of workplace health and safety protections and hazards, increased likelihood of working in a physically demanding job, economic strain of resettlement and power imbalances, where workers are more fearful of losing their job by raising health and safety issues and looking like a trouble maker.³⁸⁴ A study in Montreal found that immigrants and members of visible or linguistic minorities are more likely to work in jobs where there is a higher risk of workplace injury, particularly women in manual jobs.³⁸⁵ All Canadian researchers agree that it is difficult to collect quantitative data about immigrants and workplace health and safety because most national and provincial health and safety agencies do not collect information on immigration status, and that more research needs to be done given the important role immigrants play in the Canadian labour market.

There is a growing body of qualitative research on immigrant and migrant workers' workplace health and safety experiences. A 2010 study surveying 600 seasonal agricultural migrant workers in Ontario found that 59% of workers did not receive training in workplace health and safety; 93% of workers did not know how to make a workers' compensation claim; and 76% of workers who had experienced a workplace accident did not make a workers' compensation claim due to concerns over losing work hours, and fear of being sent home or not being selected to return to Canada in the next farming season.³⁸⁶

³⁸³ Peter M. Smith & Cameron A. Mustard, "Comparing the Risk of Work-Related Injuries Between Immigrants to Canada and Canadian-Born Labour Market Participants" in *Occupational and Environmental Medicine*, no. 66 (2009): 361-367.

³⁸⁴ Peter M. Smith & Cameron A. Mustard, "The Unequal Distribution of Occupational Health and Safety Risks Among Immigrants to Canada Compared to Canadian-Born Labour Market Participants: 1993-2005" in *Safety Science*, no. 48 (2010): 1296-1303.

³⁸⁵ Stephanie Premji, Patrice Duguay, Karen Messing & Katherine Lippel, "Are Immigrants, Ethnic and Linguistic Minorities Over-Represented in Jobs with a High Level of Compensated Risk? Results from a Montréal, Canada Study Using Census and Workers' Compensation Data," *American Journal of Industrial Medicine*, no. 53 (2010): 875-885.

³⁸⁶ Jenna Hennebry, Kerry Preibisch and Janet McLaughlin, *Health Across Borders – Health Status, Risks and Care Among Transnational Migrant Farm Workers in Ontario* (Toronto, CERIS Ontario Metropolis

British legal scholar Malcolm Sargeant and Canadian legal scholar Eric Tucker use a “layers of vulnerability” approach to explore whether current occupational health and safety laws are sufficient to protect the increasing number of migrant workers in Canada. They clarify that a migrant worker is in a different position as compared to an immigrant worker, as a migrant workers does not have permanent status to remain in Canada. Migrant workers may be in Canada with or without a legal work permit. Sargeant and Tucker identify three risk factors for migrant workers. The first is a migrant worker’s immigration status, which may determine a migrant worker’s workplace rights, or may deter a worker from enforcing their workplace rights. The next risk factor is the migrant worker’s personal characteristics; for example, a worker’s lack of formal education, language skills, or job opportunities in a worker’s home country may put up barriers for migrant workers to know or enforce their workplace rights. The third is the working conditions in the receiving country; some occupations and workplaces are more dangerous than others. Sargeant and Tucker argue that a layered approach considering these three risk factors is important when determining exactly how vulnerable a migrant worker may be.³⁸⁷

In 2010, Tony Dean led a comprehensive review of Ontario’s occupational health and safety system by an expert advisory committee.³⁸⁸ In the final report, the committee found a number of problems vulnerable workers, such as TFWs and migrant workers, have enforcing their workplace health and safety rights: lack of knowledge about their right to refuse unsafe work; lack of training about specific workplace hazards; and fear of losing their job or being deported if they raised an occupational health and safety issue.³⁸⁹ The committee made several recommendations, including mandatory occupational health and safety training for all Ontario workers; carrying out more proactive inspections and periodic enforcement campaigns in sectors where vulnerable workers are concentrated;

Centre, 2010) at 21, 27 and 15.

³⁸⁷ Malcolm Sargeant & Eric Tucker, *Layers of Vulnerability in Occupational Health and Safety for Migrant Workers: Case Studies from Canada and the United Kingdom*, SSRN Scholarly Paper ID 1415371 (Rochester, NY: Social Science Research Network, 2009).

³⁸⁸ Tony Dean, *Expert Advisory Panel on Occupational Health and Safety: Report and Recommendations to the Minister of Labour* (Toronto: Ministry of Labour, December 2010).

³⁸⁹ Dean, *Expert Advisory Panel*, 46.

developing more multi-lingual information products and distributing the products through private and public organizations which have connections with vulnerable workers; and changing the way reprisal complaints are investigated, including expediting the resolution of reprisal complaints.³⁹⁰

Terrance J. Bogyo at WorkSafeBC in 2009 narrowed down workplace accident statistics about TFWs using Canadian Social Insurance Numbers (“SIN”). All workers and employers who report a workplace injury to WorkSafeBC must also include the worker’s SIN for income tax purposes. Since all temporary workers in Canada are given a SIN that starts with the number nine,³⁹¹ it is possible to isolate temporary workers who report a workplace injury. While the category of temporary workers is over inclusive because it includes refugee claimants and foreign students with work permits, and all temporary foreign workers (including high-skilled foreign workers admitted under international agreements), it is nonetheless helpful. After comparing the rate of injury of TFWs and all other workers based on statistics collected by WorkSafeBC, Bogyo found that the reported injury rate of TFWs is a third lower than all other workers.³⁹² He offered four possible reasons for his finding: TFWs work more safely; TFWs have a lack of knowledge about workplace rights; TFWs leave the country once injured for treatment; and work-related injuries are under reported and suppressed.

Data I obtained from WorkSafeBC through a freedom of information request about the BC hospitality sector had similar results. I wrote to WorkSafeBC on March 26, 2014 and requested the number of claims by temporary residents and permanent residents based on SIN number for the years 2002 to 2013 for a handful of classification units in the accommodation, food and leisure services sub-sector. I asked for the data to be broken down by age range, gender, region, type of injury, and whether or not the claim was for health care only, short-term disability benefits, long-term disability benefits or fatality claims. I processed the data in Microsoft Excel. First, I isolated the data from four WorkSafeBC classification units: 1) Coffee Shops, Ice Cream Parlours, or Other Food

³⁹⁰ Dean, *Expert Advisory Panel*, 46-50.

³⁹¹ *Social Insurance Number Regulations*, SOR/2013-82 at s. 8.

³⁹² Terrance J. Bogyo, “WorkSafeBC’s Policy, Legislation and Responses to OHS and Newcomer Workers,” Institute for Work & Health, accessed May 26, 2017, https://www.iwh.on.ca/system/files/documents/iw-forum-2009/bogyo_worksafebc_ohs_newcomer_policy_2009.pdf.

Concessions; 2) Overnight and Short-term Accommodation; 3) Pub, Bar, Night Club, or Lounge; and 4) Restaurant or Other Dining Establishment. I then sorted the data by year, whether the worker's SIN started with nine, and by type of claim benefits. Table 9 shows the results. Like Bogyo's data, the number of foreign hospitality workers who reported workplace injuries is very low, making up just 0.5% to 4% of total claims. However, it is not certain how accurate the final numbers are, as the data WorkSafeBC sent had a high number of entries where it appears the SIN was unknown. An additional finding from the data is that the ratio of healthcare benefits claims to wage loss benefits claims was different for foreign workers compared to all workers. Healthcare only claims are claims where the worker reported the injury, but did not lose any wages due to the injury. In other words, the worker was able to return to work in their normal or an accommodated position without losing time from work. In healthcare only claims, the worker only received health benefits, such as physiotherapy or chiropractic treatment. For all workers, the ratio of healthcare only versus wage loss benefits claims, the number of healthcare only claims is higher. For foreign workers, the number of wage loss benefits claims is higher. The difference in ratios suggests that it may be that foreign workers are not willing to potentially jeopardize their immigration status by making a workers' compensation claim unless there are lost wages at stake.

Table 9: Reported Injuries to WorkSafeBC for the Classification Units: Coffee Shops, Ice Cream Parlours, or Other Food Concessions; Overnight and Short-term Accommodation; Pub, Bar, Night Club, or Lounge; and Restaurant or Other Dining Establishment, Broken Down by SIN Number and Type of Claim, 2002 - 2013

	2002		2003		2004		2005	
	#	%	#	%	#	%	#	%
Total Reported Injuries	6099		5969		6229		6332	
Health Care Only	3095	51%	3116	52%	3219	52%	3419	54%
Wage Loss	3004	49%	2853	48%	3010	48%	2913	46%
Total with SIN starting with 9	45	0.74%	52	0.87%	62	1.00%	51	0.81%
Health Care Only	14	31%	25	48%	28	45%	28	55%
Wage Loss	31	69%	27	52%	34	55%	23	45%
Total with Unknown SIN	763	13%	821	14%	864	14%	944	15%
	2006		2007		2008		2009	
	#	%	#	%	#	%	#	%
Total Reported Injuries	6706		6743		6686		4953	
Health Care Only	3525	53%	3686	55%	3413	51%	2320	47%
Wage Loss	3181	47%	3057	45%	3273	49%	2633	53%
Total with SIN starting with 9	72	1.07%	57	0.85%	95	1.42%	157	3.17%
Health Care Only	33	46%	24	42%	42	44%	67	43%
Wage Loss	39	54%	33	58%	53	56%	90	57%
Total with Unknown SIN	1058	16%	1332	20%	1285	19%	531	11%
	2010		2011		2012		2013	
	#	%	#	%	#	%	#	%
Total Reported Injuries	5220		5875		7603		7176	
Health Care Only	2752	53%	3234	55%	4013	53%	3819	53%
Wage Loss	2468	47%	2641	45%	3590	47%	3357	47%
Total with SIN starting with 9	166	3.18%	170	2.89%	269	3.54%	284	3.96%
Health Care Only	73	44%	75	44%	123	46%	137	48%
Wage Loss	93	56%	95	56%	146	54%	147	52%
Total with Unknown SIN	691	13%	850	14%	998	13%	1044	15%

In a 2009 stakeholder conference funded by WorkSafeBC and hosted by the Institute for Work & Health, researchers identified several factors that negatively affect immigrant workers' health and safety on the job: "immigrants may come from a country where health and safety is not a priority and believe the same to be true in Canada;" "immigrants may be unfamiliar with existing Canadian social programs, workplace rules,

their entitlements and responsibilities;” “immigrants may be reluctant to report workplace injuries, particularly if they feel that doing so may jeopardize their jobs and financial security;” “problems new immigrants have with the health care system point to possible problems they may have with the compensation system;” “immigrant workers may face challenges going through the workers’ compensation system;” “the consequences of work injury on immigrant workers and their families may be particularly difficult.”³⁹³ The researchers noted that “these issues are often magnified for temporary foreign workers.”³⁹⁴

In a study of workers employed by temporary agencies in mostly low-skilled jobs, Australian legal scholars Elsa Underhill and Michael Quinlan found three risk factors that make precarious employment more dangerous: a) economic and reward pressures for cutting corners, taking on too much work, accepting hazardous tasks, or working through injury; b) disorganization within the workforce, where there are unstable rules and policies, poor communication, and lack of training; and c) increased likelihood of regulatory failure due to a combination of gaps in law, lack of education and knowledge about workplace rights and duties, and lack of enforcement of workplace rights.³⁹⁵

Suffice to say, the literature suggests that low-skilled TFWs are likely given more dangerous work, more likely to be injured on the job, have little health and safety training, and are less likely to make a health and safety complaint or workers’ compensation claim as compared to Canadian workers. The literature suggests workplace health and safety risks are transferred from Canadian workers to low-skilled TFWs.

The structure of the low-skilled TFWP facilitates the transfer of workplace health and safety risks from Canadian workers to workers from economically poor countries in two main ways. The first is through immigration laws that tie low-skilled TFWs’ immigration status in Canada and chances of gaining citizenship to their employer. As described in Chapter 2, the work permits issued to TFWs at a Canadian port of entry

³⁹³ Agnieszka Kosny, *Immigrant Workers' Experiences After Work-related Injury in British Columbia: Identifying Key Questions and Building Research Capacity* (Richmond, BC: WorksafeBC, 2011) pages not listed.

³⁹⁴ Kosny, *Immigrant Workers' Experiences*.

³⁹⁵ Elsa Underhill & Michael Quinlan, “How Precarious Employment Affects Health and Safety at Work: The Case of Temporary Agency Workers” (2011) 66 *Relations Industrielles* 397.

specify the exact employer, position, and location of employment. While a TFW may stay in Canada for the remainder of their work permit if they are terminated from their employment or quit, they cannot legally find another job without another employer completing a new successful LMIA application. During the time it takes for a new LMIA to be processed, a TFW who has lost their job must therefore financially support themselves in Canada without any legal way to earn an income. Also described in Chapter 2, the only pathway for Canadian citizenship open to low-skilled TFWs is through a PNP nomination. In order to qualify for as a provincial nominee in BC, a low-skilled TFW must have their employer's support through an offer of permanent full-time employment.

Low-skilled TFWs come to Canada to earn money, often at great personal and economic expense. Due to the tremendous power asymmetry between low-skilled TFWs and employers, TFWs do not raise health and safety issues or make a workers' compensation claim for fear of losing their job, being sent home, or losing their chances at Canadian citizenship. Employers will often "offer" to send a worker home once they have been injured, or simply tell the worker to go home once the worker makes a health and safety complaint.³⁹⁶ For low-skilled TFWs who make a formal complaint about unsafe working conditions, the effect of repatriation means that a WorkSafeBC inspector cannot evaluate their claim as to what happened. The way the low-skilled TFWP is structured effectively gives employers the power to arbitrarily fire and deport a worker, and take away a worker's chances at citizenship.

The second way the low-skilled TFWP facilitates the transfer of workplace health and safety risks from Canadian workers to TFWs is through the absence of mandatory training in local workplace health and safety rights, and specific hazards on the job. One of the key elements of workplace accident prevention is training. Workers need knowledge about the hazards in their workplace, and agency to participate in the reduction of workplace dangers. The curious thing about workplace safety is that it takes cooperation not only between a worker and their employer, but also between a worker and their coworkers to be effective. It is not uncommon for a workplace injury to be caused by a co-worker's carelessness.

³⁹⁶ Kosny, *Immigrant Workers' Experiences*.

There is no question that low-skilled TFWs will not be familiar with their workplace health and safety rights, or the particular hazards of a job when they arrive in Canada. One of the interesting elements of the TFW program is that ESDC provides employers with mandatory provisions of the TFWP employment contract (such as paying for recruitment fees and travel expenses). While health and safety and labour standards are under each individual province's jurisdiction, there is nothing preventing a mandatory provision in the TFWP employment contract where the employer must provide health and safety training to TFWs in accordance with applicable provincial laws on the first day of work. In Ontario, for example, as of July 1, 2014 all employers must provide mandatory health and safety training to all workers and supervisors,³⁹⁷ and the Ontario government has rolled out free online training to assist employers in the process.³⁹⁸

WorkSafeBC has training material on health and safety in the accommodation and food services sector readily available online. For workers employed in the hospitality sector, the top five most common injuries are being struck by an object, overexertion, falling from the same level, exposure to heat or cold, and being struck against an object.³⁹⁹ In a focus report titled *Preventing Injuries to Hotel and Restaurant Workers*, WorkSafeBC has a host of safety preventions tips, including adequate training, protective footwear and clothing, proper use of tools, using proper handling technique when lifting objects, removing hazards like wet floors or loose carpeting, and proper storage.⁴⁰⁰

B. Place

The low-skilled TFWP also allows the transfer of workplace health and safety risks across space from Canada to economically poor countries. As discussed next, risk is transferred across space in three main ways: through time-restrictive work permits, lower workers' compensation rates as compared to Canadian workers, and lower access to and standards of healthcare in economically poor countries.

³⁹⁷ *Occupational Health and Safety Awareness Training*, O Reg. 297/13

³⁹⁸ The online training module is available online, see "Health and Safety Awareness Training for Workers and Supervisors," Ontario Ministry of Labour, accessed May 26, 2017
<http://www.labour.gov.on.ca/english/hs/training/>.

³⁹⁹ "Statistics: Tourism & Hospitality," WorkSafeBC, accessed May 26, 2017,
<https://www.worksafebc.com/en/health-safety/industries/tourism-hospitality/statistics>.

⁴⁰⁰ Workers' Compensation Board of British Columbia, *Preventing Injuries to Hotel and Restaurant Workers Focus Report* (Vancouver: Workers' Compensation Board of British Columbia, 1998).

i) Time Restrictive Work Permits

Workers' compensation claims can take a long time to process. The delay is partly due to the nature of workplace injuries, where the recovery process takes time. For instance, it is not uncommon for the permanent damage caused by an injury or the degree to which a worker will be able to recover to remain unknown until months after the injury. The delay is also partly due to the lengthy appeal process in workers' compensation claims, which can take years. Due to the time restrictions placed on a TFW's work permit, it is likely that a TFW will have returned to their home country before their workers' compensation claim has been fully processed. Being outside of Canada undermines a TFW's ability to make a workers' compensation claim in three ways.

First, a TFW cannot give in-person testimony. If a TFW testifies over the telephone, he or she may face poor connection problems depending on the quality of communications infrastructure in their home country. Without in-person testimony, adjudicators cannot fairly evaluate a TFW's credibility.

Second, TFWs who have returned home have significant difficulty in obtaining medical reports that are required as objective evidence to demonstrate the degree of a permanent impairment or ongoing disability. WorkSafeBC has service contracts with healthcare providers in BC, and some providers outside of BC, who have agreed to invoice WorkSafeBC after treatment so that injured workers do not need to pay for healthcare services upfront.⁴⁰¹ If an injured TFW returns to their home country where healthcare providers do not have an agreement with WorkSafeBC, the worker must pay for treatment, medical evaluations or medical records and ask for reimbursement from WorkSafeBC afterwards. For injured workers not able to earn any money, this requirement presents a difficult challenge. Medical services may not be as readily available in the TFW's home country, and the TFW may have to travel to a large city far from their residence for treatment. Finally, the medical professional culture in other countries may be different than in Canada, and it can be hard to get doctors' offices to return phone calls or forward medical reports in a timely manner.⁴⁰²

⁴⁰¹ Anonymous Government Policy Advisor, Email to author, March 13, 2015.

⁴⁰² Speaking from experience representing injured migrant workers.

Third, TFWs who return home face countless practical impediments to making an effective workers' compensation claim. It is quite difficult to find legal representation or navigate complaint processes as a self-represented litigant from outside Canada. Long-distance telephone calls are expensive. Telephone and cell-phone service in a TFW's home community may be spotty. Different time zones may mean that a TFW is asleep or unreachable during the majority of Canadian business hours. Mail may take a long time to arrive.

All of the above difficulties faced by TFWs who must return home due to the time restrictions imposed by work permits add up, and undermine a TFW's ability to make an effective workers' compensation claim from outside of Canada.

ii) Lower Workers' Compensation Rates

If a TFW's workers' compensation claim is successful, a TFW may have a lower workers' compensation rate than a Canadian worker. Lower workers' compensation rates occur in three main ways.

First, TFWs are more likely to work through their injury. As discussed above, many migrant workers do not want to report injuries for fear of losing their job. This fear leads injured migrant workers to work through their injury, sometimes aggravating their condition and making their injury worse. If a TFW does eventually make a workers' compensation claim, working through an injury can have two negative effects on the claim. First, it may make it difficult to establish proof of accident or causation when there is evidence that a worker continued to work their regular duties for a time-period after the injury. Second, even if the worker is able to establish a valid workers' compensation claim, they will only be entitled to healthcare benefits⁴⁰³ as there was no wage-loss while the worker continued to work through their injury.⁴⁰⁴

Second, injured TFWs may have a lower quantum of workers' compensation wage-loss benefits if they are off work due to injury for more than a five-week period and have not been employed in Canada for more than 12-months. WorkSafeBC policy stipulates that the calculation of a worker's long-term average earnings after five weeks of injury are

⁴⁰³ *Workers' Compensation Act*, s. 21.

⁴⁰⁴ *Workers' Compensation Act*, s. 30.

retrospective, and based on the workers average earnings in the past 12-months before the date of injury.⁴⁰⁵ There are exceptions to this calculation for workers employed for less than 12-months with their employer where a worker's long-term average earnings are calculated based on the earnings of a worker of similar status employed in the same type and classification of employment.⁴⁰⁶ This exception allows permanently employed workers to recover the amount of money they would have earned had they not been injured. However, this exception does not apply to “casual or temporary” workers, such as TFWs. For example, a 2012 Workers’ Compensation Appeal Tribunal decision considering the quantum of long-term earnings for a migrant farm worker who severely injured his back at work two months into an eight-month contract was compensated at a rate of \$102 per week, rather than the \$355 per week he would have earned if he remained in Canada for the full length of his eight-month contract.⁴⁰⁷

Third, when a migrant worker has a permanent injury, but is still able to work, “deeming” provisions⁴⁰⁸ and disparities between minimum wage rates in Canada versus a migrant worker’s home country can mean that a TFW who has returned home will not receive any further wage-loss benefits. “Deeming” is when WorkSafeBC makes a judgment on an injured worker’s post-accident “employability,” and determines the amount of wages a worker should be able to earn given their permanent disability and training.⁴⁰⁹ WorkSafeBC will only pay ongoing wage-loss benefits that equal the difference between what a worker is deemed to be able to earn post-injury and what the worker was earning pre-injury. TFWs are deemed at a Canadian wage rate, even if this rate is well above what even a fully able-bodied worker could earn in their home country given wage disparities and currency conversions. Further, for TFWs earning minimum wage pre-injury, deeming at a minimum wage job will result in a wage-loss calculation of zero. As an anonymous government policy advisor told me in an email, “the temporary

⁴⁰⁵ See Rehabilitation Services and Claims Manual, Volume II, Policy Item #66.00 – General Rule for Determining Long-Term Earnings.

⁴⁰⁶ See Rehabilitation Services and Claims Manual, Volume II Policy Item #67.50 – Workers Employed with their Employer for Less than 12 months.

⁴⁰⁷ *WCAT-2012-00733*.

⁴⁰⁸ *Workers’ Compensation Act*, s. 23

⁴⁰⁹ *Ibid.* at s. 23(3)(d).

foreign worker's inability to work in BC would be considered a non-compensable barrier.⁴¹⁰

Lower workers' compensation rates mean that TFWs are not compensated as much as Canadian workers. Lower workers' compensation rates effectively transfer the economic risks of workplace accidents across space from Canada to economically poor countries in the global south.⁴¹¹

iii) Healthcare Disparities

Healthcare disparities between Canada and a TFW's home country also transfer workplace health and safety risks across space. WorkSafeBC provides a number of specialty medical services to injured workers (such as a hand-therapy program, community occupational therapy services or home care services) through contracts with local healthcare providers in BC.⁴¹² With WorkSafeBC's approval, an injured worker living in Canada can be referred to receive these specialty services. TFWs from low-income countries who have returned home may not have the same access to healthcare, or the same quality of healthcare as in Canada.⁴¹³ Many low-skilled TFWs come from countries without universal healthcare systems or equal distribution of access to healthcare for all residents. As explained in the preceding section, TFWs may live far away from clinics, or not be able to afford to pay for healthcare upfront.

In summary, once a low-skilled TFW returns to their country of origin they cannot obtain the same level of advocacy, medical reports, quantum of wage-loss benefits, or healthcare (including rehabilitation) as they could in Canada. The economic and health costs of workplace injury are transferred not only onto the low-skilled TFW, but also across space onto the TFW's country of origin – to family members who may need to

⁴¹⁰ Anonymous Government Policy Advisor, Email to author, March 13, 2015.

⁴¹¹ One of the workarounds advocates are using to overcome the low workers' compensation benefit levels is to bring a human rights complaint instead. Under the BC *Human Rights Code* and applicable caselaw, an employer cannot terminate a worker because of a workplace injury. The damage awards in a human rights complaint may be higher than what a low-skilled TFW can obtain through workers' compensation (this will depend on the case) because the *Human Rights Code* allows for damages due to injury to dignity and hurt feelings [section 37(d)(iii)].

⁴¹² Anonymous Government Policy Advisor, Email to author, March 13, 2015.

⁴¹³ Anne Mills, "Health Care Systems in Low- and Middle-Income Countries," *New England Journal of Medicine*, no. 370 (2014): 552-557.

care for an injured low-skilled TFW, to local communities who depend on foreign worker remittances, and to regions where the resources for healthcare are already scarce.

C. Time

The low-skilled TFWP also allows the transfer of workplace health and safety risks across time, where a TFW's future may be detrimentally affected. For a TFW, an injury at work in Canada will significantly reduce future job opportunities both in Canada and in their home country, their ability to support future generations (such as children), and their ability to save money for old age. The low-skilled TFWP transfers workplace health and safety risks across time to the future in two main ways.

First, time restrictive work permits mean that an injured TFW who must return home will not have the same access to rehabilitation and retraining services as a Canadian worker. Health disparities between Canada and low-income countries mean that a TFW who returns home will not receive the same level of and access to healthcare. Lower access to healthcare, and lower standards of healthcare will detrimentally affect a TFWs long-term health outcomes as compared to Canadian workers. In addition, TFWs who are permanently injured cannot access vocational rehabilitation services offered by WorkSafeBC. Vocational rehabilitation services include work assessments, job modifications such as ergonomic aids, and job search assistance.⁴¹⁴ An anonymous government advisor informed me that WorkSafeBC will try to find creative solutions in order to provide similar services outside of Canada, including paying for equivalent benefits, but that it is a significant logistical hurdle.⁴¹⁵ Nevertheless, lack of access to vocational rehabilitation can be detrimental to an injured TFW's long-term earning potential as compared to an injured Canadian worker.

Second, time restrictive work permits mean that an injured TFW may not be able to enforce his or her right to be accommodated back to work. As discussed in Chapter 3, under the BC *Human Rights Code*, and Supreme Court of Canada caselaw,⁴¹⁶ an employer must accommodate an injured worker back to work unless the employer can

⁴¹⁴ *Workers' Compensation Act*, s.16.

⁴¹⁵ Anonymous Government Policy Advisor, Email to author, March 13, 2015.

⁴¹⁶ *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, [2008] 2 S.C.R. 561, 2008 SCC 43.

show the level of accommodation would cause undue hardship – a very high threshold to meet. An employer's duty to accommodate is critical because it prohibits employers from terminating injured workers based on their injury, and facilitates an injured worker's ability to return to their employment and continue to earn an income after a workplace accident. If a TFW's work permit expires and they return home, the TFW cannot request to return to work with accommodation after a workplace injury. Further, TFWs may not have the same human rights protections in their home countries, and may face difficulty finding accommodation in employment.

Through time restrictive work permits, the low-skilled TFWP transfers the physical, mental, and financial consequences a TFW may face due to a workplace injury in Canada and its sequelae across time by detrimentally affecting a TFW's long-term health outcomes, and their ability to earn money, provide for their children and save for old age.

4. Conclusion

Canadians like to think of Canada as a safe place to work compared to low-income countries in the global south. Canadians like to think that we have domestic occupational health and safety standards that do not discriminate between workers on the grounds of race, citizenship, or place of origin. When a tragedy like the Rana Plaza collapse in Bangladesh occurs, few Canadians feel a sense of responsibility as they believe that there is little Canadian legislators can do to prevent future tragedies, as we cannot extend our laws across borders to protect workers in faraway places. In contrast, in this chapter I have demonstrated that domestic Canadian laws are, in fact, heavily implicated in the transfer of detrimental workplace health and safety risks across borders from Canada to low-income countries. This transfer occurs in more subtle, technical ways when migrant workers like low-skilled TFWs travel from economically poor countries to Canada to work on the temporary basis. I argued that the low-skilled TFWP transfers workplace health and safety risks across people from Canadian workers onto TFWs, across space from Canada onto economically poor countries, and across time by taking away future opportunities and lowering long-term health outcomes. Therefore, unlike overseas factories in faraway places, in the case of low-skilled TFWs Canadian legislators have the power to actually stop the transfer of workplace health and safety risks across borders from Canada to economically poor countries.

Chapter 5: Conclusion

1. People, Place and Time

The 2014 TFWP scandal started when a Canadian McDonald's worker in Victoria complained to the CBC that TFWs were getting higher pay and more hours than Canadian workers, and were taking away jobs from Canadians. The scandal exposed the fact that Canadian hospitality employers were treating workers differently based on their citizenship status. Public outrage about the low-skilled TFWP took a distinctly nativist flavour, leading the then federal Conservative government to call the program an unfair subsidy to hospitality employers and make changes that would "put Canadian workers first." In my thesis, I have demonstrated that the low-skilled TFWP has done more than create a source of unfair competition for Canadian workers. The low-skilled TFWP shifts the negative consequences of unfair working conditions and workplace health and safety risks across people, place and time: from Canadian workers and employers onto TFWs; from Canada to elsewhere; and from the present into the future.

In Chapter 1, I argued that people play a key role in the hospitality sector because the people performing the work form part of the product being sold: restaurant diners expect servers to be friendly and gracious; hotel guests expect room attendants to be discreet and efficient; foodies follow the career trajectories of local celebrity chefs, bakers, and bartenders from one establishment to another. As a consequence of people forming part of the product, hospitality workers are generally stratified based on personal attributes such as race, gender and age as much as skill level. The exact hierarchy based on race gender and age is complex in each workplace because hospitality employers also recruit workers who can create an "authentic" experience for customers. In some circumstances being authentic means expressing the right level of emotional sincerity, in other circumstances it means looking and sounding a certain way to lend an air of cultural authenticity to an establishment's atmosphere. The process of looking right, sounding right, and acting right is dialectical: employers recruit for a certain type of worker based on stereotypes about race, gender and age, and workers construct their workplace identities building on stereotypes about race, gender and age. The fact that people form

part of the product being sold has significant effects on hospitality workforce demographics, as hospitality employers recruit for a mix of hard and soft skills.

Place and time also play key roles in the hospitality sector because the hospitality industry is place-based and time-specific. Location matters; hospitality work cannot be transferred offshore and workers need to be present and paid local wages. Hospitality sector employers are, therefore, sensitive to the ebbs and flows of local wages and labour supply because local wage rates make up the majority of their production costs. Hospitality sector employers use a variety of strategies to keep local wages low while recruiting a workforce with the right “soft skills” and reducing worker turnover.

The low-skilled TFWP is an example of one strategy hospitality employers use to recruit experienced loyal workers willing to accept a low-wage. In Chapter 2, I argued that the needs of TFWs line-up with the needs of BC hospitality employers in a way that make TFWs an ideal labour pool for hospitality employers to recruit from. First, the TFWP allows employers to surreptitiously recruit TFWs based on race, gender and age through the use of third-party international recruitment agencies. The stratification of hospitality TFWs based on stereotypes about race, gender and age is supported by data on the demographics of hospitality TFWs in BC. I presented data from CIC about TFWs entering Canada destined for BC. The data showed that more male TFWs were hired than female; on average, 60% of TFWs were male. The data also showed the top ten source countries for TFWs destined for BC were all in the global south: the Philippines, India, Mexico, Guatemala, Jamaica, Fiji, Nepal, Thailand and Sri Lanka. TFWs from these countries are stereotypically racialized in Canada. In addition, the majority of TFWs destined for BC were between the ages of 25 and 44, an age range where workers are stereotypically mentally mature enough to take their job seriously, and able to perform physically demanding work such as cleaning, serving, or bussing tables. Second, TFWs are more eager to please and loyal to their employer than local workers because they are dependent on their employer for their immigration status. Third, hospitality employers are able to rely on Canada’s reputation as a desirable place to work in order to recruit highly qualified TFWs for low-wage jobs.

But the effect of the low-skilled TFWP on people, places and time goes well beyond local hospitality workforce demographics and local wage-rates. In Chapters 3 and 4, I

demonstrated how the low-skilled TFWP shifts the negative consequences of unfair working conditions and workplace health and safety risks across people, place and time.

In Chapter 3, fairness at work, I used the Denny's class action and the Tim Hortons human rights complaint as case studies to show how the low-skilled TFWP shifts the negative consequences of unfair working conditions over people, place and time. The low-skilled TFWP shifts the negative consequences from employers and Canadian workers onto TFWs in three main ways. First, the TFWP creates an even deeper stratification of hospitality workers by race, gender and age. In both case studies, TFWs were treated worse than Canadian workers. They were given less desirable schedules and low status tasks. In the Tim Hortons case study, the stratification went even deeper as there was a hierarchy among TFWs, with Filipino TFWs treated better than Mexican. Second, the low-skilled TFWP also creates an acute power imbalance between TFWs and their employer that works in an employers favour. In both case studies, TFWs had less training, agency, or resources to address unfair working conditions, and more at stake in keeping their jobs. Third, the low-skilled TFWP puts hospitality TFWs in a uniquely difficult position to enforce their workplace rights. Both case studies showed how workplace law in BC creates an obstacle course of competing legal forums with multiple deadlines and was not designed to adequately address the intersection of immigration law, employment law, and in some cases landlord tenant law. The low-skilled TFWP shifts the negative consequences of unfair working conditions across place, from Canada to elsewhere, because family members in a TFWs home country who depend on remittances feel the effects of unfair working conditions in Canada. In both case studies, TFWs lost their jobs and the ability to send money home because they complained about unfair working conditions. Finally, the low-skilled TFWP shifts the negative consequences of unfair working conditions across time by allowing Canadian employers to defer the costs of improving working conditions to compete for and retain local workers into the future, and compelling TFWs to bear the negative consequences of unfair working conditions upfront in exchange for the potential future reward of Canadian citizenship.

In Chapter 4, safety at work, I argued that the structure of the low-skilled TFWP facilitates the transfer of workplace health and safety risks over people, place and time. I

distinguished my use of the term “risk” from its popular but ultimately imprecise use in scholarship from the 1980s onward. I defined workplace health and safety risk to mean a worker’s exposure to workplace danger, injury, or reprisal for raising a workplace health and safety issue. I argued that the low-skilled TFWP shifts workplace health and safety risks from Canadian workers to workers from economically poor countries in the global south. TFWs are more likely to be given dangerous work and to be injured on the job than Canadian workers. TFWs also have less health and safety training, and are less likely to make a health and safety complaint or workers’ compensation claim as compared to Canadian workers. The low-skilled TFWP also shifts workplace health and safety risks across places from Canada to economically poor countries. Time-restrictive work permits can result in injured TFWs who return home receiving lower compensation compared to Canadian workers because the way lost wages are calculated do not take into consideration wage differences between Canada and a TFWs home country. TFWs who are sent home after a workplace injury to an economically poor country may have lower access to healthcare, which will affect a TFWs ability to recover and to obtain adequate evidence to substantiate any permanent disabilities. Finally, the low-skilled TFWP shifts workplace health and safety risks across time because a workplace injury will jeopardize a TFW’s future earning potential more than a Canadian worker’s. Time restrictive work permits mean that an injured TFW who must return home will not have the same access to rehabilitation and retraining services as a Canadian worker, nor the ability to enforce his or her right to be accommodated back to work under the *Human Rights Code*. A TFW injured in Canada is robbed of future job opportunities, their ability to support future generations, and their ability to save money for old age.

2. Workplace Rights are Not Enough

My main research question was why do TFWs in the BC hospitality sector have difficulty enforcing their workplace rights? My thesis research suggests that while low-skilled hospitality TFWs may have formal equality with Canadian workers under the applicable provincial workplace laws, their ability to enforce their workplace rights is simply not the same. Under complaint-driven systems such as employment standards, human rights, common law actions, occupational health and safety, and workers’ compensation, it is imperative on an employee to stand up and say something that may

not please their employer. A low-skilled TFW is not on the same footing as a Canadian worker to stand up for themselves and request overtime pay or report a workplace injury. A low-skilled TFW has a lot more riding on remaining employed: their immigration status and their chance at Canadian citizenship.

As I have demonstrated in my thesis, the consequences of hospitality TFWs not being able to enforce their workplace rights are far reaching. The TFWP shifts the negative consequences of unfair working conditions, and workplace health and safety risks across people from employers and Canadian workers to TFWs, across space from Canada to economically poor countries in the global south, and through time from the present and into the future.

The good news is that Canadian lawmakers have the ability to make it easier for TFWs to enforce their workplace rights. The federal government can disconnect an individual employer's ability to affect a TFW's immigration status and chances of gaining Canadian citizenship by issuing open work permits or industry specific work permits. Provincial agencies like the Employment Standards Branch or WorkSafeBC can create procedures that recognize that not all workers have the same ability to enforce their rights, and that formal equality does not mean substantive equality. Provincial governments can direct more funding to all workplace regulatory agencies to conduct proactive inspections and ensure compliance with existing laws so that vulnerable workers do not have to risk their job by complaining. Provincial legislators can create more legal avenues for worker empowerment in the workplace beyond just union certification. Legislators can also create legal mechanisms to coordinate the resolution and adjudication of all types of workplace disputes, including employment standards, workplace safety, human rights, labour relations, employment contracts and common law employment issues, in one proceeding. Limitation periods and timelines can be harmonized, and similar complaints from one workplace can be joined.

Strategies that make it easier for TFWs to enforce their workplace rights in BC have important broader application. The challenges hospitality TFWs have enforcing their workplace rights due to their immigration status is only one example of hospitality workers who face disincentives from enforcing their workplace rights. But it is not just hospitality TFWs in the hospitality sector who have difficulty. Local hospitality workers,

like hospitality TFWs, also adapt based on stereotypes about their race, gender and age in order to be successful in the local labour market. Local hospitality workers, like hospitality TFWs, also do not enforce their workplace rights for fear of reprisal or losing their job. The low-skilled TFWP simply deepens inequalities in hospitality workplaces that were already there. Tools that assist hospitality TFWs to enforce their workplace rights can go a long way in making workplaces more fair and more safe for foreign and Canadian hospitality workers alike.

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