

Assessing the Regulation of Temporary Foreign Workers in Canada

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There has been an increase in the number of incoming temporary migrant workers to Canada over the past decade. In this article, I critically assess recent changes in the law governing temporary migration to Canada by using theoretical tools from the fields of sociology, geography, and legal geography. A multidisciplinary framework to understand Canada's labour migration policies is provided. Within the socio-historical context of migrant labour regulation in Canada, I argue that political and regulatory developments function to further entrench segregation and exclusion of foreign workers by maintaining a subclass of flexible labour. Specifically, I show that Canada's current temporary migration regime retains the country's historical role as an ethnocentric settler state in which the regulation of migrant workers creates inherent boundaries. These boundaries demarcate racially identified space(s) on the basis of the economic and political logic underlying temporary migration.

Au cours de la dernière décennie, il y a eu une augmentation du nombre de travailleurs migrants temporaires entrant au Canada. Dans cet article, j'évalue de manière critique les récentes modifications qui ont été apportées à la législation régissant la migration temporaire au Canada par le biais d'outils théoriques des domaines de la sociologie, de la géographie et de la géographie légale. Un cadre multidisciplinaire pour comprendre les politiques canadiennes en matière de migration de travail est fourni. Dans le contexte socio-historique de la réglementation relative à la main d'œuvre migrante au Canada, je fais valoir que les développements politiques et réglementaires fonctionnent en vue d'enchâsser encore davantage la ségrégation et l'exclusion des travailleurs étrangers en maintenant une sous-classe de main d'œuvre souple. Plus exactement, je montre que le régime de migration temporaire actuel du Canada conserve le rôle historique du pays en tant qu'état colonisateur ethnocratique au sein duquel la réglementation des travailleurs migrants crée des frontières inhérentes. Ces frontières délimitent un espace ou des espaces déterminés selon la race, en fonction de la logique économique et politique sous-jacente à la migration temporaire.

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CANADA HAS WITNESSED AN INCREASE in the entry of temporary migrant workers, which in 2008 exceeded the number of permanent economic migrants for the first time in at least a decade.¹ With a greater number of temporary migrant workers, there has been increasing concern over their living and working conditions and their potential exploitation by employers. Legal and policy responses to these concerns have been articulated through three major sources: the recent House of Commons Report on *Temporary Foreign Workers and Non-Status Workers*;² changes to the *Immigration and Refugee Protection Regulations*³ concerning foreign workers, which took effect in August 2010; and a new enforcement program administered through Human Resources and Skills Development Canada (HRSDC), aimed at employers who do not comply with the requirements of the law vis-à-vis temporary foreign workers.⁴

This article critically assesses these recent and proposed changes within the regulatory regime for temporary migration to Canada. In order to place the changes into context, I first provide an overview of the role of labour migration and the law in Canada from the eighteenth century onward, including the establishment of regulations governing the entry of temporary migrant workers in the mid-1970s. I draw on the work of sociologist Nandita Sharma for its critical and anti-colonial analysis. Next, I offer a description of the current legislative structure governing temporary migrant workers, with a focus on the differentiation

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1. Citizenship and Immigration Canada, "Facts and figures 2009—Immigration overview: Permanent and temporary residents," online: <<http://www.cic.gc.ca/english/resources/statistics/facts2009/index.asp>>.
 2. The Standing Committee on Citizenship and Immigration, *Temporary Foreign Workers and Non-Status Workers* (Ottawa: Communication Canada, 2009) [Report].
 3. SOR/2002-227 [Regulations].
 4. Human Resources and Social Development Canada, "Temporary Foreign Worker Program: Monitoring Initiative Fact Sheet," online: <http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/ercompreview/factsheet.shtml> [HRSDC, "Monitoring Initiative Fact Sheet"].

between high- and low-skilled labour categories and the attendant potential for exploitation and restrictions within remedies. I draw on several theoretical tools from the fields of sociology, geography, and legal geography to offer a multidisciplinary framework in which the regulation of temporary foreign workers may be understood in the economic and political context of Canada not only as a liberal state but also as a settler state with a capitalist economy. I draw from the work of legal geographers Alexandre Kedar and Richard Ford to illustrate Canada as a settler state with a history of racial stratification, using examples from both the history of Canada's development as a state and the current regulation of migration. I also offer an application of geographer David Harvey's idea of the logic of territory and the logic of capital in order to provide a basis for understanding the manner in which a capitalist economic system may interact with political and territorial influences on migration governance, with a specific focus on the development of temporary migration since the late 1960s and early 1970s. Based on the analysis provided by this combined approach, I conclude that recent policy and regulatory developments, which purport to equalize treatment of different worker groups and offer protection for foreign workers, actually further entrench the segregation and exclusion of these groups. This occurs through the creation and maintenance of a subclass of flexible labour, which primarily supports the interests of employers. Specifically, I show that Canada's current temporary migration regime is part of a continuing history of Canada as an ethnocratic settler state in which the regulation of migrant workers creates boundaries that demarcate racially identified space(s) based on the economic and political logic underlying temporary migration.

I. CANADA'S LABOUR MIGRATION HISTORY AND THE SHIFT TOWARD TEMPORARY MIGRATION

Originally inhabited by various groups of indigenous people, Canada was settled primarily by French and British immigrants in the seventeenth to nineteenth centuries. During this period, France and England both made multiple claims to sovereignty over the territory as part of their respective colonial and imperial projects.⁵ Immigration was encouraged by the colonial powers as an aspect of industrial and agricultural development and colonial expansion in the territory of Canada. At the outset of settler migration, many immigrants came from France, England, and neighbouring countries. Over time, major populations

5. For further reading on the pre-confederation history of what is now Canada, see generally Cole Harris, *The Reluctant Land* (Vancouver: UBC Press, 2008).

of immigrants arrived from southern and eastern Europe, China, South Asia, and the United States.⁶ Early Canadian legislation made explicit or thinly veiled racial distinctions between groups of migrants on the basis of perceived ethnic desirability. Such measures included the 1885 *Chinese Immigration Act*, which imposed a head tax on immigrants of Chinese origin,⁷ and the 1908 *Act to Amend the Immigration Act*, which entrenched the “continuous journey” rule restricting South Asian migration to Canada.⁸ The 1910 *Immigration Act* specifically gave the Canadian government the power to categorically reject “immigrants belonging to any race deemed unsuited to the climate or requirements of Canada, or immigrants of any specified class, occupation or character.”⁹ In 1923, an Order in Council was passed to prohibit immigration by any persons of “asiatic” race,¹⁰ and by 1952 the *Immigration Act* included discretion to restrict migration on the basis of nationality, ethnicity, culture, and place of origin.¹¹ Although the latter statute did not provide any specific category of governance for foreign workers per se,¹² the correlation between place of origin and labour utility became explicit in an immigration policy that listed preferred source countries (western Europe), from which immigration was openly permitted, and non-preferred source countries (eastern Europe), from which immigrants were admitted only if they worked within agricultural or domestic labour.¹³

By 1962 the explicit references to place of origin and ethnicity in the 1952 *Immigration Act* were removed,¹⁴ and in 1971 Canada announced its new policy

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6. Valerie Knowles, *Strangers at Our Gates: Canadian Immigration and Immigration Policy, 1549-2006*, revised ed (Toronto: Dundurn Press, 2007).
 7. *Ibid* at 136, referring to the *Chinese Immigration Act*, SC 1885, c 67.
 8. SC 1908, c 33, s 1. This rule stipulated that any person coming to Canada could enter only if they came by way of direct journey from their nation of birth or citizenship. In practice it primarily affected ships from the Indian subcontinent, since the long journey required a stop on the way to Canada.
 9. SC 1910, c 27, s 38(c).
 10. *Landing of Immigrants of Asiatic Race: New Regulations Established*, PC 1923-182, (1923) C Gaz, 4106.
 11. SC 1952, c 42, s 61(g).
 12. Foreign labourers entering Canada were theoretically barred from temporary contractual labour by the *Alien Labour Act*, SC 1897, c 11, which was a government concession to unions of the day that was rarely enforced against employers. See Knowles, *supra* note 6 at 86.
 13. Abigail B Bakan & Daiva Stasiulis, *Not One of the Family: Foreign Domestic Workers in Canada* (Toronto: University of Toronto Press, 1997) at 55.
 14. *Immigration Regulations, Part I*, SOR/62-36.

of multiculturalism.¹⁵ The 1976 *Immigration Act*¹⁶ departed significantly from previous versions of the *Act* insofar as it no longer contained references to exclusion or distinction on the basis of origin, ethnicity, suitability, or similar descriptors that had existed previously. For the first time, immigration to Canada—outside of family class sponsorships—was determined by a points system. This system measured the immigrant’s capacity to assimilate and, specifically, to contribute to the economy by way of age, language capacity in English and French, and previous work experience in areas deemed desirable for the Canadian labour market.¹⁷ The combination of removing explicit racial and ethnic preferences and introducing skills-based requirements represented a shift towards a migration policy that was more economically based. The likelihood of assimilation was still a focus of the legislation, but primarily by way of individualized assessments of potential labour market contribution without explicit references to race or place of origin. The 1966 *White Paper on Immigration* advocated a reduction of family class immigrants who “were frequently unskilled and uneducated” in favour of economic class immigrants who “possessed education, training, and skills.”¹⁸ Furthermore, categorical exclusion of certain classes of person on the basis of undesirability (*i.e.*, the disabled or ill) was eliminated in favour of a standard of “inadmissibility” for those who were deemed likely to rely heavily on public social or medical services in Canada.¹⁹ This last amendment demonstrates how regulating migration can have a direct economic consequence.

Although a thorough analysis of the economic and political reasons underlying this policy shift is beyond the scope of this article, some local and global context is important to note. On a domestic level, multiculturalism was introduced as a national policy in 1971, almost simultaneously with the removal of explicit racism in immigration laws. While this was arguably beneficial in terms of the symbolic inclusion of underrepresented cultural groups in the policy process, it has been critiqued as “an artificial creation taking the form of a broad government-supported and financed interest group or coalition of ethnic

15. Freda Hawkins, *Critical Years in Immigration: Canada and Australia Compared* (Montreal: McGill-Queen’s University Press, 1989) at 217.

16. SC 1976-77, c 52 [1976 *Immigration Act*].

17. Alan G Green & David A Green, “Canadian Immigration Policy: The Effectiveness of the Point System and Other Instruments” (1995) 28 *Can J of Econ* 1006 at 1009.

18. Ninette Kelley & Michael Trebilcock, *The Making of the Mosaic: A History of Canadian Immigration Policy* (Toronto: University of Toronto Press, 1998) at 354, citing Canadian Department of Manpower and Immigration, *White Paper on Immigration* (Ottawa: Queen’s Printer, 1966) at 8.

19. 1976 *Immigration Act*, *supra* note 16, s 19(1)(a)(ii).

communities... .²⁰ As described by Lance W Roberts and Rodney A Clifton, cultural assimilation was discouraged in favour of the maintenance of multiple cultural identities within the Canadian polity, but structural assimilation remained unchallenged by multiculturalism.²¹ Changes to immigration law and policy can thus be seen as part of a larger liberalizing shift at the national level. This time period also saw a global economic recession, which was compounded by the oil crisis of 1973, and the retrenchment of social programs in Canada and elsewhere. In terms of economic policy, the early 1970s are widely noted as the beginning of the neoliberal era.²² This time period is identified by migration sociologist Stephen Castles as the “second phase” of neoliberal globalization, where capital was used to fund cheaper offshore wage labour, migration was restricted in receiving countries, and migrant workers who had contributed to the economic growth of previous decades made claims for social and membership entitlements.²³ Concurrently, the struggles of civil rights, indigenous, and feminist movements, along with widespread national independence from colonialism in the global South throughout the 1950s and 1960s, had significantly reshaped the global political and ideological landscape. Thus, the impetus existed within Canada to maximize the economic benefits of migration and, encouraged by internal and external political pressures, to create formally multicultural and non-racist policies. It was from these cumulative circumstances that the first detailed governance structure for migrant workers entering Canada emerged.

Contemporaneous to the policy and legislative shift away from discriminatory immigration policies and towards the new focus of individual labour market participation was the introduction of a regulatory framework governing the entry of temporary workers to Canada, which was expressly based on economic need. The Non-Immigrant Employment Authorization Program (NIEAP) was introduced in 1973 and provided for the first time a regulatory scheme to govern foreign workers.²⁴ This regime allowed workers to enter Canada for specified periods during which they were bonded to a particular employer on the basis of demonstrated temporary labour market shortages,²⁵ which could encompass a variety of job types such as agricultural and domestic labour, service, and

20. Hawkins, *supra* note 15 at 215.

21. “Exploring the Ideology of Canadian Multiculturalism” (1982) 8 *Can Public Pol’y* 88.

22. David Harvey, *A Brief History of Neoliberalism* (Oxford: Oxford University Press, 2005) at 13-14 [Harvey, *Neoliberalism*].

23. “Migration, Crisis, and the Global Labour Market” (2011) 8 *Globalizations* 311 at 313.

24. Nandita Sharma, “On Being *Not* Canadian: The Social Organization of ‘Migrant Workers’ in Canada” (2001) 38 *Can Rev of Sociology and Anthropology* 415 at 422-23.

25. *Ibid* at 433.

professional positions. From the outset, however, the vast majority of temporary migrants who entered Canada through this program worked in service, manufacturing, or primary industry positions.²⁶ Thus, immediately alongside the shift to a more explicitly economic migration policy was the division between migrants who were able to enter Canada as immigrants (also called “permanent residents”) and those who entered temporarily.²⁷ The division of migrants into permanent and temporary categories was accompanied by a further division of temporary migrants into high-skilled and low-skilled categories.²⁸ A correlation formed between the type of work undertaken by foreign workers and their likelihood of obtaining permanent residence.²⁹ Under the NIEAP regime and within the immigration legal structure at the time, those whose work was categorized as unskilled or low-skilled comprised the majority of workers admitted on a temporary and employer-specific basis; most had no other option for entering Canada.³⁰ In contrast, those whose labour was classified as skilled were much more likely to have access to permanent residency and the associated benefits.³¹ The distinction between high-skilled and low-skilled workers was also correlated with gender and country of origin so that female workers and workers from less economically developed countries were significantly overrepresented in low-skilled positions. There was also an increasing trend in the proportion of workers migrating from these countries for the duration of the NIEAP.³²

Temporary workers as a class created by law were distinguishable from permanent residents in several important ways: They lacked the right to remain permanently in Canada, had limited access to social and economic benefits, lacked access to direct democratic representation, and had limited labour mobility because their status relied on a specific employer relationship.³³ The existence of this class of worker had a direct impact on economic policy through the concept of “labour shortage” as a justification for temporary workers. In her detailed analysis of the NIEAP, Nandita Sharma highlights the qualitative nature of labour shortages (in relation to certain types and conditions of work that Canadians were not expected to accept, for reasons such as the dangerous nature of the work and low

26. *Ibid* at 423, n 10.

27. *Ibid* at 424.

28. Nandita Sharma, *Home Economics: Nationalism and the Making of 'Migrant Workers' in Canada* (Toronto: University of Toronto Press, 2006) at 123-24 [Sharma, *Home Economics*].

29. *Ibid* at 124.

30. *Ibid* at 123-24.

31. *Ibid* at 124.

32. *Ibid* at 126-28.

33. *Ibid* at 132-36.

wages).³⁴ In Sharma's analysis, the notion of labour shortage is connected in a broader sense to types of labour supply that inhibit or encourage the accumulation of capital,³⁵ which is often expressed as the demand of employers within a market economy. She notes that the demand for foreign workers has remained constant through periods of unemployment and through periods of high and low permanent migration quotas.³⁶ Furthermore, she argues that the racial distinctions endemic in previous legislative regimes continued to operate through the temporary foreign worker program. In essence, the program preserved racial discrimination within a legal framework where racially undesirable groups were no longer explicitly excluded.³⁷

II. THE DIFFERENTIATION OF MIGRANT LABOUR IN CANADA

The current legislative scheme governing the admission of temporary foreign workers is substantially similar to the NIEAP but now operates under the rubric of the Temporary Foreign Worker Program and various subsidiaries, including the Pilot Project for Occupations Requiring Lower Levels of Formal Training.³⁸ Within the current *Immigration and Refugee Protection Act*,³⁹ many features of the previous foreign worker regime are maintained. For example, work permits are issued on a temporary basis to foreign workers for whom employers have demonstrated a temporary labour market need that ostensibly cannot be filled by Canadian workers, and these work permits are generally bonded to a specific employer.⁴⁰ One hallmark of recent foreign worker regulation is the increasingly formalized distinction between high-skilled and low-skilled work. This distinction is in accordance with the National Occupational Classification (NOC), a classification scheme produced by Service Canada that provides comprehensive categorization for various types of work in the Canadian labour market.⁴¹ For the purposes of immigration law, certain categories of work are designated as

34. *Ibid* at 97.

35. *Ibid* at 108. See also Saskia Sassen, *The Mobility of Labor and Capital: A Study in International Investment and Labor Flow* (Cambridge, UK: Cambridge University Press, 1988).

36. Sharma, *Home Economics*, *supra* note 28 at 123.

37. *Ibid* at 133-36.

38. Human Resources and Skills Development Canada, "Pilot Project for Occupations Requiring Lower Levels of Formal Training (NOC C and D)," online: <http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/lowskill.shtml>.

39. SC 2001, c 27 [IRPA].

40. *Regulations*, *supra* note 3, ss 185(b)(ii), 203(1), (3)(e).

41. Human Resources and Skills Development Canada, "Tutorial: Introduction," online: <<http://www5.hrsdc.gc.ca/noc/english/noc/2006/Tutorial.aspx#3>>.

high-skilled: management-level positions (category 0), positions generally requiring a university education (category A), and positions generally requiring a college-level education or trade apprenticeship (category B). The remaining two categories are classified as low-skilled: positions that generally require a secondary school certificate and on-the-job training (category C) and positions that only require on-the-job training (category D).⁴²

Several significant consequences arise for the worker and the employment relationship from this differentiation of labour flows. These consequences can roughly be divided into two categories: differences of entitlement for workers and differences in recruitment and hiring requirements for employers. In terms of worker entitlements, the *IRPA* and associated *Regulations* treat high-skilled and low-skilled workers differently. For example, high-skilled workers are legally entitled to be accompanied by their spouses and children for the duration of their time in Canada by way of an open work permit for the spouse and study permits for the children. In contrast, low-skilled workers are categorically excluded from this possibility.⁴³ Like Chinese workers of the late nineteenth and early twentieth centuries, many low-skilled workers in Canada spend seasons or years living apart from their families, who remain in their country of origin. High-skilled workers have generally been legally entitled to extend their status from within Canada without limitation, assuming their employer obtains the requisite documentation.⁴⁴ Low-skilled workers have been subject to restrictions on extending their work permits beyond a two-year period. Until recently, all workers in this category were unable to renew their work permits from within Canada beyond twenty-four continuous months. They were required to leave Canada for a minimum period of four months before returning, even if the need for those workers could be documented by the employer.⁴⁵ In May 2009, this requirement was removed for some low-skilled workers, while others—notably agricultural workers—are still limited to an eight-month time period of work authorization

42. Human Resources and Skills Development Canada, "Tutorial: Skill Level," online: <<http://www5.hrsdc.gc.ca/noc/english/noc/2006/Tutorial.aspx#8>>.

43. *Regulations*, *supra* note 3, s 80(2).

44. Until the recent regulatory changes, workers were generally able to stay in Canada and obtain new work permits continually as long as their employers were able and willing to obtain a labour market opinion for them. See Human Resources and Skills Development Canada, "Hiring Foreign Workers in Canada," online: <http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/pamphlet/tfwp_pamphlet.shtml>.

45. Kerry L Preibisch, "Local Produce, Foreign Labor: Labor Mobility Programs and Global Trade Competitiveness in Canada" (2007) 72 *Rural Sociology* 418 at 443.

in Canada,⁴⁶ although workers may return to the same workplace for many consecutive agricultural seasons.⁴⁷ Thus, despite long-term and growing demand for the specific types of work they undertake, low-skilled workers have been subject to differential restrictions in their capacity to remain legally in Canada with temporary work permits.

Access to permanent residence is also determined to a large extent by the distinction between high-skilled and low-skilled labour. Under the current federal immigration regime, workers who have been admitted to Canada on a temporary basis and whose work is classified as high-skilled are entitled to permanent residence through a new program, the Canada Experience Class.⁴⁸ Pursuant to this program, any foreign worker with two years of high-skilled full-time work experience in the past three years can apply for permanent residence from within Canada.⁴⁹ There is no such entitlement for those whose labour is classified as low-skilled, no matter how long they have worked in Canada.⁵⁰ Live-in caregivers are a federal exception to this, because they begin with low-skilled work permits and become eligible for permanent residence.⁵¹ Since the conditions of work require residence in the employer's home and often pay at minimum wage—and because exploitation within this program is well-documented—the potential cost and risk for these workers render the process quite different than high-skilled pathways to permanent residence.⁵² Furthermore, for eligibility under the Federal Skilled Worker class of permanent residence, at least one year of high-skilled work experience is required before an applicant will even be assessed as a potential permanent resident.⁵³

Permanent residents of Canada are entitled to many of the same social benefits as citizens even before they become eligible for citizenship and are not

46. Human Resources and Skills Development Canada, "Hiring Foreign Agricultural Workers in Canada," online: <http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/sawp.shtml>.

47. Leigh Binford, "From Fields of Power to Fields of Sweat: the Dual Process of Constructing Temporary Migrant Labour in Mexico and Canada" (2009) 30 *Third World Q* 503 at 507-08.

48. Citizenship and Immigration Canada, "Canada Experience Class," online: <<http://www.cic.gc.ca/english/immigrate/cec/>>.

49. *Regulations*, *supra* note 3, s 87.1(2)(a)(ii).

50. *Ibid*, s 87.1(2).

51. Live-in caregivers may apply for permanent residence after 24 months or 3,900 hours of employment. Citizenship and Immigration Canada, "The Live-In Caregiver Program: Requirements to become a permanent resident," online: <<http://www.cic.gc.ca/english/work/caregiver/extend-stay.asp#require>>.

52. Joseph H Carens, "Live-in Domestic, Seasonal Workers, and Others Hard to Locate on the Map of Democracy" (2008) 16 *J of Political Phil* 419 at 433.

53. *Regulations*, *supra* note 3, s 75(2)(a).

subject to the same restriction on labour mobility as temporary foreign workers. The permanent residence applications available to high-skilled workers are based on fixed factors such as past work experience, language skills, and education.⁵⁴ However, there are some provincial nominee programs that provide, to a certain extent, opportunities for permanent residence and are not available exclusively to high-skilled workers.⁵⁵ For example, both Manitoba and British Columbia have pathways to permanent residence specifically for low-skilled workers.⁵⁶ Such programs, however, are not available to all incoming low-skilled workers and rely on discretionary policies of provincial authorities. These programs are often dependent on a job offer and, in the case of British Columbia's program, require a level of income that is higher than the pay expected for the job.⁵⁷ Consequently, even in the minority of cases where permanent residence is an option, it is contingent on the relationship to a specific employer and a level of financial independence that is often unrealistic for low-income workers. The expansion of such programs is desirable from the perspective of low-skilled workers. However, these programs will not provide options analogous to those available to high-skilled workers unless entrenched in the law in the same way as high-skilled worker programs are under the federal regime. Their exclusion from the federal migration regime thus remains significantly unfavourable in terms of the stratification of migrant labour.

Regarding employer requirements, the distinction between low-skilled and high-skilled workers also affects the formal requirements that must be met by employers prior to making job offers to foreign workers. The process through which employers obtain legal authorization to hire low-skilled workers is more onerous than the process for hiring high-skilled workers. This is designed to satisfy the policy goal of protecting unemployed Canadians and permanent residents in the job market by ensuring that they have ample knowledge of and access to low-skilled work. Employers seeking to hire temporary foreign workers must

54. *Ibid.*, s 76(2).

55. Citizenship and Immigration Canada, "Provincial Nominees," online: <<http://www.cic.gc.ca/english/immigrate/provincial/>>. In provincial programs and for live-in caregivers, permanent residence applications would rely heavily on employer endorsement and completion of a certain continuous period of bonded labour.

56. See Government of Manitoba, "How to Immigrate: Manitoba Provincial Nominee Program for Skilled Workers," online: <<http://www2.immigratemanitoba.com>>; WelcomeBC, "The British Columbia Provincial Nominee Program," online: <<http://www.welcomebc.ca/wbc/immigration/come/work/about/index.page?>>>.

57. WelcomeBC, "Ability to Become Economically Established in BC," online: <http://www.welcomebc.ca/wbc/immigration/come/work/about/strategic_occupations/information/ability.page?>>.

obtain a labour market opinion (LMO), an authorization issued by HRSDC, prior to the issuance of a work permit.⁵⁸ In most cases, an employer looking to hire a foreign worker must justify the need in terms of a demonstrated labour shortage. The employer must advertise for a specific period of time and through specific methods. Unlike the employer intending to hire high-skilled workers, the employer of prospective low-skilled workers must advertise for a longer period of time on an ongoing basis, use more venues, advertise to specific underemployed communities, and post specific wages.⁵⁹ Furthermore, if employers wish to hire low-skilled workers, they must sign a contract accepting responsibility for the workers' transportation costs to and from Canada as well as their health care costs for the first three months of their contract, they must promise to pay the wage offered, and they must abide by provincial labour standards.⁶⁰ Although these requirements purport to further the objective of protecting foreign workers from abuse and indebtedness to the employer, the available evidence of persistent exploitation of low-skilled workers suggests that these requirements are unlikely to have an ameliorative impact without an effective enforcement mechanism or viable legal remedies for workers.⁶¹

It is clear from the available data that the number of migrant workers in Canada is continuing to increase, both in terms of the objective number of work permits issued on a yearly basis and in terms of the proportion of temporary workers to permanent residents among total numbers of people admitted to Canada annually.⁶² Of the temporary workers authorized to enter Canada, an increasing proportion are categorized as low-skilled compared to high-skilled. Although there are no available data correlating the workers' countries of

58. LMOs must be obtained pursuant to s 203 of the *Regulations*, *supra* note 3. Certain groups of workers are exempt from the requirement to obtain an LMO (such as professionals entering pursuant to NAFTA and religious workers), but the vast majority of foreign workers require an LMO to obtain a work permit (Citizenship and Immigration Canada, "Working temporarily in Canada: Jobs that require a work permit but no labour market opinion," online: <<http://www.cic.gc.ca/ENGLISH/work/apply-who-permit.asp>>).

59. Human Resources and Skills Development Canada, "Temporary Foreign Worker Program: Minimum Advertising Requirements," online: <http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/communications/advertrecruitment.shtml>.

60. Human Resources and Skills Development Canada, "Temporary Foreign Worker Program: Annex 2," online: <http://www.rhdcc-hrsdc.gc.ca/eng/workplaceskills/foreign_workers/contracts-forms/annex2.shtml>.

61. See also *Koo v 5220559 Manitoba Inc* (2010), 254 Man R (2d) 62 (QB). The court decided that an LMO could not be used contractually to enforce wages specified therein.

62. Citizenship and Immigration Canada, "Facts and Figures 2009—Immigration overview," online: <<http://www.cic.gc.ca/english/resources/statistics/facts2009/index.asp>>.

origin and their assigned skill levels, it is clear that, contemporaneously with the increase in proportion of low-skilled foreign workers, there has been a shift in the demographic of the temporary workforce entering Canada, with an increasing proportion of workers from the global South, including Mexico and the Philippines.⁶³

The result of the temporary foreign worker program since its inception has been the creation of a distinct and racialized labour force within Canada in which workers are extremely vulnerable to exploitation and face specific barriers to accessing social benefits.⁶⁴ Researchers have documented that temporary foreign workers face inadequate housing, illegally low wages, withholding of passports, and unsanitary working conditions, particularly in the case of low-skilled workers.⁶⁵ Since work permits depend on an employment relationship with a specific employer, temporary foreign workers rely on their employers not only for wages but also for their continuing legal status in Canada. The bonded nature of the employment relationship severely limits labour mobility. Should a worker seek new employment, he or she would need to secure another LMO from the new employer in order to restart the work permit process with that employer. The best possible outcome would be the issuance of a newly bonded work permit bearing the new employer's name. As a result of these requirements, foreign workers who need LMOs (a majority of foreign workers and almost all low-skilled foreign workers) are prohibited by law from circulating freely in the labour market in the same way that permanent residents or citizens do.

The law provides several avenues for low-skilled workers to enforce adequate pay and working conditions. For example, as described earlier in this

63. Citizenship and Immigration Canada, "Temporary Residents: Canada—Total entries of foreign workers by source country," online: <<http://www.cic.gc.ca/english/resources/statistics/facts2008/temporary/03.asp>>.

64. Malcolm Sargeant & Eric Tucker, "Layers of Vulnerability in Occupational Safety and Health for Migrant Workers: Case Studies from Canada and the UK" (2009) 2 Pol'y & Pract Health & Safety 51.

65. See e.g. Binford, *supra* note 47; Kerry Preibisch, "Pick-Your-Own-Labor: Migrant Workers and Flexibility in Canadian Agriculture" (2010) 44 Int'l Migr Rev 404; Ping-Chun Hsiung & Katherine Nichol, "Policies on and Experiences of Foreign Domestic Workers in Canada" (2010) 4 Sociology Compass 766; Jill Hanley & Eric Shragge, "Organizing for Immigrant Rights: Policy Barriers and Community Campaigns" (2009) 17 J of Community Prac 184; Tanya Basok, *Tortillas and Tomatoes: Transmigrant Mexican Harvesters in Canada* (Montreal: McGill-Queen's University Press, 2002); Justicia for Migrant Workers, *Housing Conditions for Temporary Migrant Agricultural Workers in B.C.*, online: <<http://www.justicia4migrantworkers.org/bc/#housing>>; Alberta Federation of Labour, *Report on Temporary Foreign Workers in Alberta*, online: <<http://www.afl.org/index.php/Reports/2010-dec-report-on-temporary-foreign-workers-in-alberta.html>>.

Part, employers seeking to hire low-skilled workers must sign form-letter contracts guaranteeing basic standards such as minimum wage, transportation, and health care for the first three months. Although this policy is created by HRSDC, the agency specifically indicates that it is not responsible for enforcement of those standards, presumably because they do not fall within federal jurisdiction.⁶⁶ Therefore, while the requirement exists on paper, its utility to workers is questionable because the governmental authority which created it has not actively enforced it, despite stated aims to the contrary.⁶⁷ As will be discussed in detail below in Part IV, even HRSDC's new employer-based enforcement programs have barely been used.

These workers are also covered by provincial employment standards and human rights tribunal procedures, but such remedies are often inaccessible to migrant workers.⁶⁸ Furthermore, where the enforcement mechanism relies on a worker complaint procedure, many workers may be unwilling to submit a complaint owing to a fear of losing their legal status to remain in Canada. Individual contract-based or rights-based avenues may ameliorate conditions for specific workers in ideal circumstances, but these legal remedies will not provide long-term equality so long as the law maintains the distinction between permanent residents and temporary migrant workers with the further subclasses of low-skilled and high-skilled workers.

In light of the increasing potential to marginalize foreign workers and the current lack of viable rights-based remedies, I will now turn to theoretical insights from geography and legal geography scholarship in an attempt to understand the migrant worker phenomenon in a way that depicts Canada not only as a liberal democracy, but also as a settler state with a capitalist economy. I will argue that both of these foundational aspects of Canada as a nation have been deeply influential on the development of labour migration policy and so must be considered

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66. Human Resources and Skills Development Canada, "Just the Facts: Foreign Workers," online: <<http://www.hrsdc.gc.ca/eng/corporate/facts/index.shtml>>. See also Judy Fudge & Fiona MacPhail, "The Temporary Foreign Worker Program in Canada: Low-Skilled Workers as an Extreme Form of Flexible Labour" (2009) 31 *Comp Lab L & Pol'y J* 5.
67. See *e.g.* Treasury Board of Canada Secretariat, "Temporary Foreign Worker Program," online: <<http://www.tbs-sct.gc.ca/hidb-bdih/plan-eng.aspx?Org=0&Hi=39&Pl=289>>.
68. Fudge & MacPhail, *supra* note 66 at 32. See also Delphine Nakache & Paula J Kinoshita, "The Canadian Temporary Foreign Worker Program: Do Short-Term Economic Needs Prevail over Human Rights Concerns?" (2010) IRPP Study 5, online: <http://www.irpp.org/pubs/IRPPstudy/IRPP_Study_no5.pdf>. Recent case law in British Columbia, however, has established the use of human rights tribunals to allow damages to compensate workers for differential treatment on the basis of race and origin. See *Construction and Specialized Workers' Union Local 1611 v SELI Canada Inc*, [2008] BCHRTD No 436.

in the articulation of more responsive advocacy and policy strategies aimed at assisting foreign workers.

III. THEORIZING FOREIGN WORKERS IN CANADA: A MULTIDISCIPLINARY APPROACH

This Part offers several theoretical tools to contextualize foreign worker programs in Canada by incorporating Canada's particular history as a settler state with a capitalist economy into the analysis and will provide a basic framework from which to better understand the "illiberal tendencies"⁶⁹ evident in Canada's labour migration policies. From one perspective, a preferable approach might be to impose a clear demarcation between the racist, sexist, and exploitative policies of the past and the fair, tolerant, and welcoming multicultural regime of the present, as demonstrated by the policy shift of the late sixties and early seventies. However, on closer examination, traces of the ethnocratic stratification are evident in the changes that originated in that period, particularly in the categorization and resulting social organization of migrant workers. Here I will employ the work of legal geographers Alexandre Kedar and Richard Ford to provide a theoretical outline in which Canada's history as a racially stratified settler state can be integrated into an analysis of the laws and policies specific to labour migration. In order to incorporate a critical understanding of Canada's economic structure as a driving aspect of migration, I will also offer an outline of geographer David Harvey's conception of the interplay between the logic of capital and the logic of territory.

A. CANADA AS AN ETHNOCRATIC SETTLER SOCIETY AND THE CREATION OF RACIALLY IDENTIFIED SPACES

Alexandre Kedar's work on the role of law in ethnocratic settler societies provides an avenue to analyze the socio-historical context of the temporary foreign worker program in relation to Canada's identity and development as a state. Kedar describes an ethnocratic settler society as one in which there is a "constant tension between two opposing principles of political organization: the 'ethnos' (community of origin), and the 'demos' (residential community of a given territory). In the heydays of ethnocracies, the 'ethnos' enjoys clear legal and institutional prominence."⁷⁰

69. Daiva K Stasiulis, "International Migration, Rights, and the Decline of 'Actually Existing Liberal Democracy'" (1997) 23 *J of Ethnic and Migr Stud* 197 at 197.

70. "On the Legal Geography of Ethnocratic Settler States: Notes Towards a Research Agenda" in Jane Holder & Carolyn Harrison, eds, *Law and Geography: Current Legal Issues 2002* (New York: Oxford University Press, 2003) 401 at 402-03.

Kedar provides definitions of three major groups he calls “ethno-classes”: (1) the “Founders,” who “achiev[e] dominant status due to the high military, cultural, political, and economic standing established during the state’s formative years”; (2) the “Immigrants,” who come from a “different ethnic background from the founders” and who, although formally “part of the new nation being built in the settler society,” must “undergo a prolonged process of ‘upward’ assimilation into ‘the founding group’”; and (3) the “Indigenous” or “Foreign” People, who Kedar describes as “characterized by long-term marginalization through the processes of nation- and state-building; they are generally isolated in the geographical, economic, and social periphery of the settler society.”⁷¹ For the reasons that follow, I will argue that the increasing class of temporary foreign workers, particularly those characterized as low-skilled, can be understood as playing the role of the foreign ethno-class in Canada’s social and economic structure.

The founders of Canada—according to Canadian history books, laws, and mainstream culture—are the French and British colonists who settled there during the seventeenth to nineteenth centuries. Their laws shaped the nature and flow of migration during Canada’s development as a state, which relied heavily on immigration for both the establishment of territorial sovereignty through land settlement and the development of a strong capitalist economy. For centuries, these laws have defined immigrants as those of a different ethnic origin from the founders. At the outset of Canadian immigration law, ethnic distinctions were drawn between north-western Europe and other places of origin. The admissibility of certain immigrants was thus favoured, controlled, or excluded on the basis of the perceived social desirability of the immigrant group to the existing colonial state. These types of distinctions varied in their scope but remained fundamentally similar in terms of their role in nation building. Permanent residents in Canada fit Kedar’s description of immigrants in terms of their relationship to the national economy and social structure. Although the regulatory scheme governing permanent economic migration to Canada requires a high level of skill, work experience, and education from its applicants, permanent immigrants to Canada have difficulty finding work in their fields and very often end up working in occupations that are of lower skill and educational demand than occupations of similarly qualified Canadian-born workers.⁷² Where indigenous peoples are

71. *Ibid* at 403.

72. See *e.g.* Guida Man, “Gender, Work and Migration: Deskillling Chinese Immigrant Women in Canada” (2004) 27 *Women’s Stud Int’l F* 135; Cheryl Teelucksingh & Grace-Edward Galabuzi, “Working Precariously: The Impact of Race and Immigration Status on Employment Opportunities and Outcomes in Canada” in Tania Das Guptas et al, eds, *Race and Racialization: Essential Readings* (Toronto: Canadian Scholars’ Press, 2007) 202.

concerned, the marginalizing effects of British and French colonization, violence, and assimilation are well documented historically and in the context of ongoing legacies of the colonial relationship.⁷³ Although an analysis of the indigenous experience of colonization in terms of ethnocracy is beyond the scope of this article, framing the early oppression of indigenous peoples alongside that of immigrants certainly holds practical and analytical potential.

Maintaining a steady stream of new labour through permanent immigration is one way in which the founder society is supported in its own development. If permanent immigrant workers occupy lower-paid and lower-skilled occupational strata, despite their presence within the community and even while they gain upward mobility, the founders are able to occupy higher-paid and higher-skilled occupations. For example, by using the services of a live-in caregiver, Canadian parents increase their labour utility by focusing on pursuing professional goals rather than solely taking care of a home and children.⁷⁴ Although the caregiver can eventually obtain permanent residence, she pays with family separation and working conditions while performing necessary labour in direct support of Canadian workers. As already noted, even those whose permanent residence is granted immediately upon arrival may experience deskilling or end up in a lower stratum of the labour market relative to existing permanent residents and citizens with similar occupational qualifications. Furthermore, with the initiation of the Canada Experience Class as a major source of permanent migration and with the reduction of migration through the points system, an increasing proportion of permanent residents have been required to provide one to two years of labour as temporary foreign workers prior to obtaining permanent residence.⁷⁵ As a result, although permanent residents do have access to labour mobility and social entitlements, the classification of incoming permanent residents as immigrants in relation to previous immigrants, who through cultural and territorial domination became founders, is structured through the legal regime and has repercussions that shape the social and economic relations of immigrant groups.

73. See *e.g.* Cole Harris, "How Did Colonialism Dispossess? Comments from an Edge of Empire" (2004) 94 *Ann of the Assoc of Am Geographers* 165; Celia Haig-Brown & David A Nock, eds, *With Good Intentions: Euro-Canadian and Aboriginal Relations in Colonial Canada* (Vancouver: UBC Press, 2006).

74. Geraldine Pratt, *Working Feminism* (Philadelphia: Temple University Press, 2004).

75. Citizenship and Immigration Canada, "Backgrounder: Ministerial Instructions," online: <<http://www.cic.gc.ca/english/department/media/backgrounders/2008/2008-11-28a.asp>>.

In replacing racist and discriminatory policies with a new state-promoted construct of Canada as a multicultural state in the 1960s, and with the subsequent development of temporary foreign worker programs starting in the early 1970s, temporary migrants became a new subclass for governance. Since then, as described in Part II, temporary migrants have comprised a growing proportion of new entrants to Canada. Temporary foreign workers are divided by law on the basis of skill level, with the result that high-skilled workers often have a clear path to permanent residence, which eventually brings them within the ethno-class of immigrant. Most low-skilled workers, however, are precluded by law from exercising labour mobility or accessing social entitlements that are associated with permanent residence. Although the demand for migrant labour appears to be not only a permanent feature of the Canadian economy, but also a rapidly increasing one, the workers themselves are specifically excluded from permanent residence status in Canada. This exclusion is exacerbated by the fact that this group of workers is more likely to experience linguistic or cultural barriers, have lower formal education levels, and, increasingly, be citizens of the global South. For these reasons, they occupy a socially and economically marginal position in Canadian society and do not constitute the nation in the same manner as founders and immigrants. Furthermore, as Kedar explains, the “audiences of the legal legitimation project belong to the two groups constituting the ‘nation’—the ‘founders’ and the ‘immigrants’... ”⁷⁶ Using Kedar’s framework, the temporary foreign worker program therefore effectively created a new ethno-class of foreign people, distinct from both founders and immigrants, which persists in current policy.⁷⁷

Although Kedar’s analysis draws on an example in which the law’s relationship to the socio-spatial arrangements of a particular society is based on the assignment of land, many of his observations apply with equal force to the socio-spatial consequences which flow from the arrangement and conditions of labour and immigration status through legal regulation. Temporary low-skilled migrant workers as a group comprise an increasingly large proportion of the labour economy, but due to legally-sanctioned exclusions on labour mobility and membership entitlements, they do not obtain a fair share of the allocation of economic and social benefits from labour force participation.⁷⁸ A straightforward example is the employment insurance system. By law, all temporary foreign workers must contribute at the same rate as permanent residents in the work force, but

76. Kedar, *supra* note 70 at 423-24.

77. *Ibid* at 403.

78. *Ibid* at 413.

temporary workers—due to their time-limited status and labour mobility barriers—are often unable to obtain benefits from the employment insurance system into which they paid.⁷⁹ As is the case with land arrangements, if this situation is frozen in its present configuration, the segregation of temporary foreign workers into low-skilled positions has the potential to facilitate “the perpetuation over generations of the ethnocentric power structure.”⁸⁰ Although the categories and entitlements used to distinguish classes of working migrants are seemingly neutral in their language and commonsensical in their approach (*i.e.*, higher-skilled immigrants are what Canada’s economy needs), the regulations in fact distinguish between particular social and ethnic groups in a legal landscape which consists “of conceptual boundaries and categorical distinctions ... [and] contrives a system of differentiation,” and the latter functions as a way of conceptualizing power.⁸¹

Kedar goes on to argue that such legitimation can function effectively only if it “makes good on some of its promises to justice and equity.”⁸² In this regard, it is noteworthy that temporary foreign workers in low-skilled categories have access to some protections and benefits and have made gains in the protection of their working conditions and wages.⁸³ Furthermore, there are provincial programs in several jurisdictions designed specifically to provide an opportunity to address foreign worker complaints.⁸⁴ These programs may, however, be of limited effectiveness if their activities are insufficiently coordinated with those of the federal authorities responsible for issuing work permits and LMOs. Furthermore, they may not be accessible to workers who are unwilling to risk their migrant worker status. These developments are certainly ameliorative for the living conditions of workers in specific instances but do not function to challenge—and may even further entrench—the larger regulatory and ideological structure that defines these workers as a subordinate class in the first place. The potential gains are concessionary compared to the benefits that would accrue from the legal capacity to obtain permanent resident status. These developments therefore cannot be viewed as a substitute for the benefits available to members of the “Founder” or “Immigrant” classes in Canada.

79. Fudge & MacPhail, *supra* note 66 at 44.

80. Kedar, *supra* note 70 at 413.

81. *Ibid* at 419.

82. *Ibid* at 423.

83. Fudge & MacPhail, *supra* note 66 at 22.

84. See *e.g.* *Employment Protection for Foreign Nationals Act (Live-in Caregivers and Others)*, 2009, SO 2009, c 32; *The Worker Recruitment and Protection Act*, SM 2008, c 23. Both statutes have enforcement potential but are too new for there to be sufficient data to assess their effectiveness.

In terms of the effects of ethno-class stratification, the distinction between migrant worker groups in conjunction with the different ethnic and class composition of these groups functions to create what geographer Richard Ford calls “racially identified spaces.”⁸⁵ Low-skilled migrant workers are recruited into specific occupations (primarily domestic, food service and preparation, agricultural, and construction positions)⁸⁶ that are practiced in actual places and work sites. The combination of lower-skilled work, irregular and longer hours, lower pay, and relatively less job security, *inter alia*, creates a functional disparity between low- and high-skilled workers. Furthermore, poor working conditions and wages are likely to influence other spatial circumstances in the lives of workers, including the spaces in which they reside and spend leisure time. Ford argues that “racially identified space results from public policy and legal sanctions—in short, from state action—rather than from the unfortunate but irremediable consequence of purely private or individual choices.”⁸⁷ This occurs, he notes, in a social and political context in which race is assumed to be irrelevant or a past issue that has been resolved through liberal rights-based remedies.

Although Ford is referring to conceptions of race in the context of the history of the United States, Canada’s notion of its own “national story”⁸⁸ also tends to assume that a previous, less enlightened era of racially discriminatory policies was replaced by multiculturalism, tolerance, equality, and diversity. This is based on the assumption that “the elimination of public policies designed to promote segregation will eliminate segregation itself, or will at least eliminate any segregation that can be attributed to public policy and leave only the aggregate effects of individual biases”⁸⁹ Ford argues that the elimination of explicitly discriminatory policy does not result in the dissipation of racially identified spaces and segregation because the social and economic benefits of previous discriminatory regimes continue to accrue disproportionately to dominant groups and persist through differential housing, education, and employment opportunities.⁹⁰ He concludes that “race-neutral policy could be expected to entrench segregation and socioeconomic

85. “The Boundaries of Race: Political Geography in Legal Analysis” in Nicholas Blomley, David Delaney & Richard T Ford, eds, *The Legal Geographies Reader* (Oxford: Blackwell, 2001) 87.

86. Human Resources and Skills Development Canada, “Annual LMO statistics: Table 6,” online: <http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/stats/annual/table6a.shtml#CA>.

87. Ford, *supra* note 85 at 88.

88. Sherene H Razack, “Making Canada White: Law and the Policing of Bodies of Colour in the 1990s” (1999) 14 CJLS 159 at 178.

89. Ford, *supra* note 85 at 90.

90. *Ibid.*

stratification in a society with a history of racism.⁹¹ In the Canadian context, the policy and legal changes within the structures governing Canadian migration in the late 1960s and early 1970s replaced older, race-specific structures with policies that were overtly race-neutral.⁹² The continuing development of law and policy, however, segregates migrant groups through differential entitlements justified by presumed economic suitability, regardless of actual economic contribution. The groupings tend to correlate with place of origin, race, and socio-economic class, thus entrenching segregation and socio-economic stratification. Understanding Canada not only as a liberal state but also as a settler state with a particular shape and history, carried out in part through migration law, provides an important step in developing an analysis in which migrant rights can be configured in resistance to a legacy of ethnocracy. An examination of the historical conditions and the role of national policy and legal structures may lead, for example, to the struggle toward inclusion of transnational economic social relations and inequalities as an aspect of domestic rights or the recognition of migration status as a basis for anti-discrimination claims against exclusion from social benefits.

B. THE LOGIC OF TERRITORY AND THE LOGIC OF CAPITAL

In this Part, so as to provide a method for incorporating an understanding of capitalism as a specific economic form into my analysis, I offer a brief explanation of David Harvey's conception of the operation of power through the logic of territory and the logic of capital. I will then provide a preliminary application of these concepts to the regulation of labour migration in Canada.

Harvey distinguishes territorial forms of power, which operate primarily on the basis of maintaining a specified bounded territory or political unit such as the spatial coherence of a state (the logic of territory), from those forms of power predicated primarily on the development of capitalist aims such as increased profit and market expansion (the logic of capital).⁹³ Harvey's conception of the two logics of power is summarized by sociologist Bob Jessop as

the distinction, the intertwining and the potential contradictions between the now familiar *globalizing logic* of mobile individual capitals operating in continuous space and time and the ... *territorializing logic* of states oriented to imagined collective interests defined in terms of residence within relatively fixed boundaries.⁹⁴

91. *Ibid* at 92.

92. Kelley & Trebilcock, *supra* note 18 at 315.

93. *The New Imperialism* (Oxford: Oxford University Press, 2003) at 29 [Harvey, *New Imperialism*].

94. "Spatial Fixes, Temporal Fixes and Spatio-Temporal Fixes" in Noel Castree & Derek Gregory, eds,

In Harvey's analysis, these two logics may be at odds with each other, limit each other, or operate more or less coherently. In any given moment of time, one or the other logic may have primacy, which can be used to describe shifts and contradictions in the history of a particular state.⁹⁵ As explained by Jessop, this theory makes room for the proposition that capitalist motivations are not the sole motivating force in capitalist state action, but rather that "there are potential tensions, disjunctions, contradictions or even antagonisms between these logics. If the territorial logic blocks the logic of capital, there is a risk of economic crisis; if capitalist logic undermines territorial logic, there is a risk of political crisis."⁹⁶ This theory is compelling in its potential application to migration law because it not only allows for an analysis that gives due attention to the role of economic impetus in the migration policy of capitalist states, but also leaves room to account for the territorial basis of the state, including notions of sovereignty, membership, national identity, and border control.

Both the logic of territory and the logic of capital can be seen at play in Canada's migration history. The prevalence of economic concern is evident throughout the nation-building phase of Canada's history. Although a vast majority of those who migrated to Canada became waged labourers, territorial concerns were paramount during this time. Thus, migrants were incorporated permanently into Canadian society to further the territorial project of a state built from "desirable" migrant stock, and territorial boundaries were deployed to limit membership to certain ethnic groups even at the expense of economic maximization: For the most part, the logic of territory was dominant.⁹⁷ However, with the shift in policy that occurred in the late 1960s and early 1970s, a time period described by Harvey as the beginning of the neoliberal era,⁹⁸ the explicit economic basis of migration gained ground. Through the primacy of economic interests and the economic nexus of membership, the logic of capital came to govern both the selection of permanent migrants and the development of an employer-based temporary foreign worker program. The logic of capital remains dominant in current economic policy but not without residual issues within the logic of territory, as demonstrated by the stronger link between

David Harvey: A Critical Reader (Malden: Blackwell, 2006) 142 at 146-47 [emphasis in original].

95. Harvey, *New Imperialism*, *supra* note 93.

96. Jessop, *supra* note 94 at 157.

97. Kelley & Trebilcock, *supra* note 18 at 122-32; Yasmeen Abu-Laban, "Keeping 'em Out: Gender, Race, and Class Biases in Canadian Immigration Policy" in Veronica Strong-Boag et al, eds, *Painting the Maple: Essays on Race, Gender, and the Construction of Canada* (Vancouver: UBC Press, 1998) 69 at 71-76.

98. Harvey, *Neoliberalism*, *supra* note 22 at 13-14.

border security and migration and the moral attention surrounding human trafficking and smuggling.⁹⁹

The potential of Harvey's theory lies in the framing of the relationship between these logics of power. It allows insight into specific situations that appear as paradox within more traditional liberal analysis. For example, in the case of temporary labour migration, many scholars have noted the seeming inconsistency of permitting temporary foreign workers into Canada without granting full membership rights.¹⁰⁰ This is problematic within a liberal democracy because there appears to be no possible justification for their exclusion that is consistent with liberal values. The basic dilemma of liberalism is created within migration law and maintained by courts whose sovereignty is based on the absolute right of a state to choose its members on a discretionary basis.¹⁰¹ Applying Harvey's theory to the same situation provides a different perspective: What seems an irresolvable paradox in liberal theory may be seen as an interaction between the logic of capital and the logic of territory. This expands the analysis to explain political and economic motivating forces beyond those associated with liberal values.

With the increasing primacy of the logic of capital in relation to that of territory, foreign workers comprise a growing proportion of the Canadian workforce in an employer-driven process. The fact that workers are authorized entry in numbers determined purely by the demand of employers—in combination with the fact that such workers may be seen as more flexible and thus profitable—underscores the prevalence of the logic of capital in current temporary migration policy. Both the logic of capital and the logic of territory are evident in the failure to grant full membership rights to these workers. In terms of the logic of territory, no matter how permanent the employment requirements are, foreign workers are not permitted to stay beyond the limit of their temporary authorization and, as emphasized in Sharma's analysis described above in Part I, many of these workers tend to be construed as "racialized Others."¹⁰² Yet, this serves the logic

99. Catherine Dauvergne, "Security and Migration Law in the Less Brave New World" (2007) 16 Soc & Leg Stud 533; Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (New York: Cambridge University Press, 2008) at 72.

100. See e.g. Joseph H Carens, *Immigrants and the Right to Stay* (Cambridge, MA: MIT Press, 2010); Stephen Castles, "The Factors that Make and Unmake Migration Policies" (2004) 38 Int'l Migr Rev 852; Alexander Reilly, "The Ethics of Seasonal Labour Migration" (2011) 20 Griffith L Rev 127.

101. Donald Galloway, "Noncitizens and Discrimination: Redefining Human Rights in the Face of Complexity" in Oliver Schmidtke & Saime Ozcurumez, eds, *Of States, Rights, and Social Closure: Governing Migration and Citizenship* (New York: Palgrave Macmillan, 2008) 37.

102. Sharma, *Home Economics*, *supra* note 28 at 146.

of capital as well. Workers without membership rights are workers who are more vulnerable to exploitation, less likely to demand improvements in wage or working conditions, and without mobility—all of which makes them more profitable for employers. Put another way, liberal values may come into play in the rhetoric or action of governing a liberal state as part of the logic of territory. However, where the liberal state is also capitalist, as in the case of Canada, these liberal values coexist with the logic of capital. As such, the role of law and policy can be cast in the broader context of both global and local forces based on the constant interplay between the two logics. Policy and advocacy arguments in support of migrant rights would benefit from an analysis that incorporates the role and interplay of these two logics of power as deeply influential factors in the development of law and policy. Because the particular manner in which membership and entitlement play out in governance is also influenced by the specific political basis of the state, Harvey's theory functions well in tandem with Kedar's theory of the settler state and Ford's theory of racially identified spaces, discussed in Part III(A), above. The result is an analytical approach to labour migration in Canada that has the potential to address both the ethnocentric history of Canada and its particular economic situation under conditions of globalization. In the next Part, with the aim of assessing the viability of current responses to concerns over the temporary worker program, I will briefly examine one federal report and two federal initiatives—one legislative and one policy-based—that promise greater worker protection. I will focus on assessing their potential to deliver such protection in light of the theoretical framework outlined above.

IV. RECENT CHANGES IN TEMPORARY FOREIGN WORKER REGULATION

This Part will provide an overview and brief analysis of three recent federal responses concerning temporary foreign worker regulation, namely the 2009 House of Commons Report on *Temporary Foreign Workers and Non-Status Workers*,¹⁰³ the recent legislative changes to the *Regulations* that concern foreign workers, and HRSDC's "voluntary compliance" employer enforcement program. All of these include rhetoric about rights protection for temporary foreign workers in Canada, but none address the underlying basis of inequality of foreign workers so as to provide the foundation for an effective response to the detrimental consequences of the program.

103. *Report, supra* note 2.

The *Report* considered input from employers, recruitment agencies, union representatives, legal representatives, and non-profit organizations serving temporary foreign workers. It cites the backlog of permanent residence applications in overseas visa offices as one reason for the significant increase in the proportion of temporary workers and states that “the temporary foreign worker program has become the faster and preferred way to get immigrants to Canada to meet long-term labour shortages.”¹⁰⁴ However, the backlog of permanent residence applications from overseas is comprised of workers who would by definition fit within the high-skilled category (which legally requires one year of high-skilled work), whereas the growing majority of temporary foreign workers is comprised of a different class of low-skilled workers who are permitted into Canada for a limited time, no matter how permanent the labour shortage appears to be, and who are differentiated in terms of social and legal benefits as described above in Part II. The presence of the foreign worker program in place of a permanent migration policy demonstrates the operation of the logic of capital, as the program requires employers to display proof of the labour shortage in order to justify the issuance of work permits to foreign nationals. Additionally, it economically benefits employers through the provision of a class of flexible, marginalized workers who depend heavily on their employer for status and who have little effective recourse against the employer.

The *Report* states that employers and employer organizations emphasized the importance of the temporary worker program and how it has been essential for growing and maintaining their businesses.¹⁰⁵ As noted in Sharma’s analysis of the genesis of the foreign worker program (above in Part I), the notion of labour shortage in richer nations such as Canada is often more complicated than a simple lack of workers to fill jobs.¹⁰⁶ Rather, it is more accurate to say that there are certain types of work—described by the “three Ds”: dangerous, dirty, and difficult—which are perceived as undesirable by Canadians and permanent residents and are therefore appropriate for temporary labour.¹⁰⁷ Given Canada’s particular history of ethnically specific migration and settlement policies, this work becomes racialized and associated with specific socio-economic classes and

104. *Ibid* at 5.

105. *Ibid* at 3.

106. Sharma, *Home Economics*, *supra* note 28 at 108.

107. David Ellerman, “Labour Migration: A Developmental Path or a Low-Level Trap?” (2005) 15 *Develop’t Pract* 617 at 617. See also *e.g.* Daiva K Stasiulis & Abigail B Bakan, “Marginalized Dissident Non-Citizens: Foreign Domestic Workers” in Barrington Walker, ed, *The History of Immigration and Racism in Canada: Essential Readings* (Toronto: Canadian Scholars’ Press, 2008) 264 at 267.

places of origin because of the increasing proportion of workers from the global South. Although the *Report* does take note of the potential risks to workers by describing the changes in terms of a response to program backlogs, it fails to frame the increase of the proportion of temporary to permanent forms of labour migration as a qualitative shift that is attributable to underlying economic drivers and that brings about politically specific effects. The *Report* proposes multiple recommendations to the federal government, including the provision of legal avenues to permanent residence for workers regardless of category,¹⁰⁸ greater attention to issues of family unification,¹⁰⁹ and a spot check program that would monitor employers even in the absence of specific worker complaints.¹¹⁰ Given current patterns, however, prospective migration policies are unlikely to provide permanent residence or family reunification to temporary foreign workers because these goals are not agreeable with the role of foreign worker migration in settler state development or with the logics of capital and territory, as described above in Part III. All of the *Report's* recommendations are certainly welcome—and, if implemented, would likely improve the circumstances of foreign workers—but in order to be meaningfully operationalized, these suggestions require a more thorough analysis of the economic and political factors that underpin the existing program and its particular historical basis. Unfortunately, as revealed below, federal legislative and policy changes have not incorporated the *Report's* recommendations, nor have they addressed the inequality of temporary workers in any substantive way. Rather, I will argue that in combination with ineffective enforcement mechanisms, they have further entrenched the segregation of low-skilled workers.

In terms of a legislative response, in August 2010 several changes to the regulations governing foreign workers became law.¹¹¹ First, workers are now subject, as a condition of their status in Canada, to an obligation not to enter into an employment agreement with a “blacklisted” employer.¹¹² Second, the

108. *Report*, *supra* note 2 at 51.

109. *Ibid* at 15-16.

110. *Ibid* at 39.

111. *Regulations Amending the Immigration and Refugee Protection Regulations (Temporary Foreign Workers)*, SOR/2010-172.

112. *Ibid* at s 3. Employers can now be “blacklisted” for a period of two years, during which time employees who accept positions with those employers will be penalized. The basis for the creation of this list is found in s 3 as follows:

3. The Regulations are amended by adding the following after section 200.1:

Offers deemed to be not genuine

200.1 (1) Despite subsection 200(5), the following offers of employment are deemed to be not genuine:

“genuineness” of a job offer is now assessed by an HRSDC officer upon application for an LMO, by a visa officer in an overseas office, or by a border officer upon entry to Canada.¹¹³ The standards for assessing genuineness relate to the active engagement of the employer in the specified business, the “reasonable employment needs” of the employer, the ability of the employer to fulfil the terms of employment, and the past compliance of the employer or recruiter with federal and provincial labour standards.¹¹⁴ Job offers are automatically considered to be non-genuine in situations where the employer has, in the past two years, (a) provided wages or working conditions that deviated from those originally approved, (b) provided work of a “significantly different” nature from that originally approved, or (c) was deemed to have made a non-genuine job offer in the past.¹¹⁵ Third, workers are only permitted to remain in Canada for four years and are required to leave Canada for four years before returning as foreign workers.¹¹⁶

According to the government’s Regulatory Impact Analysis Statement concerning these changes, they are designed to respond to “unprecedented demand and unique economic conditions [that] have caused new challenges for the [temporary foreign worker program] over the last five years, including a rising

(a) an offer of employment made by an employer who, in the two-year period preceding the day on which the offer of employment was received by the Department or the Department of Human Resources and Skills Development,

(i) provided to a foreign national wages or working conditions that were significantly different from the wages or working conditions that were offered by the employer to the foreign national, or

(ii) employed a foreign national in a significantly different occupation than the occupation described in the employer’s offer to the foreign national; and

(b) an offer of employment received by the Department or the Department of Human Resources and Skills Development within two years from the day on which the employer who made the offer was informed by an officer that an offer of employment made by the employer was deemed to be not genuine under paragraph (a).

Notice

(2) A list shall be maintained on the Department’s website that sets out

(a) the names and addresses of employers who have made offers of employment that have been deemed, within the preceding two-year period, to be not genuine under paragraph (1)(a); and

(b) the date on which each employer was informed that their offer was deemed not to be genuine.

113. *Regulations*, *supra* note 3, ss 200(1)(c)(ii.1), 203(1).

114. *Ibid*, s 200(5).

115. *Regulations Amending the Immigration and Refugee Protection Regulations (Temporary Foreign Workers)* (2009) C Gaz I, 3058 [*Amending Regulations*].

116. *Regulations*, *supra* note 3, s 200(3)(g)(i). Seasonal agricultural workers are specifically excluded from the four-year limit pursuant to s 200(3)(g)(iii) of the *Regulations*.

concern for the fair treatment of temporary foreign workers.”¹¹⁷ The anticipated benefits of the changes, according to the same document, include

increased competitiveness for businesses, enhanced working conditions for all workers, a more efficient labour market, ... a more positive international reputation for Canada ... [and] continued access [for genuine Canadian employers] to a reliable flow of [temporary foreign workers] into critical job openings.¹¹⁸

Thus, in framing the purpose and effect of the regulatory changes, it is assumed that there is no contradiction between the protection of workers and the competitiveness of business and economic efficiency. It appears from both current and historical labour migration policy, however, that foreign workers are recruited *because* they are available as cheaper labour and have regularly been subject to disproportionate levels of exploitation, some of which is made possible by the legal structuring of migration categories. As in any employment relationship, the less that is spent on wages and working conditions, the greater the profit or efficiency from the perspective of the employer. On a basic level, however, it is not accurate to assume that the interests of workers and employers can be neatly aligned. Although it is clearly important to focus on enforcement of existing labour standards with regard to particularly egregious employers, it is also essential to focus on the operation of power at a systemic level within the temporary foreign worker program itself in light of past examples in Canadian history and the economic and political context in which this program operates.

The legal obligation for workers to ensure that they do not accept employment from blacklisted employers adds another restriction to the legal status of workers who are already limited by the contingency of their status on a specific employer relationship and the resulting curtailment of labour mobility. In practice, this obligation requires all workers, whether recruited directly by the employer or through an agency, to be aware of the legal name of their employer and to use the Citizenship and Immigration Canada website¹¹⁹ to determine whether their employer is considered “blacklisted” for the purposes of a foreign worker application. As would be the case with other conditions imposed on work permit holders, a worker who fails to comply with this condition could be subject to reporting and enforcement actions pursuant to the *IRPA* and *Regulations*, the consequences of which can include inadmissibility, exclusion from entering Canada, or charges of misrepresentation.¹²⁰ This addition to the regulatory framework functions to add

117. *Amending Regulations*, *supra* note 115 at 3051.

118. *Ibid* at 3052.

119. Online: <<http://www.cic.gc.ca/>>.

120. *Regulations*, *supra* note 3, ss 41-42.

risk and uncertainty for workers. It will also affect workers differentially on the basis of whether or not they are literate in written English or French, have access to the internet, and are aware of this obligation prior to their acceptance of the job offer. If they are recruited from overseas by a third party recruitment agency, they may have no direct knowledge of the work permit process at all. Because workers who are categorized as low-skilled are less likely to speak English or French, may have little or no formal education, and are more likely to be at risk from unscrupulous third party recruiters, this amendment is very likely to have a differential effect depending on the category of worker. Although detrimental to the interests of foreign workers generally, it will likely negatively impact a greater proportion of low-skilled workers through legal penalties, delay, or inability to enter Canada to work.

The addition of a limitation on the cumulative period of time that a worker can spend in Canada on a work permit also has a differential effect. Although, on the face of the regulation, this time limit applies equally to both high-skilled and low-skilled workers, recent changes in the law concerning permanent residence allow a person with two or more years of high-skilled work experience in Canada and with a basic level of English or French to apply for permanent residence as a member of the Canada Experience Class.¹²¹ As a result, foreign workers who enter Canada on high-skilled permits are entitled to become permanent residents after two years of full-time work and would have ample time in which to do so even if their stay in Canada is limited to four consecutive years. In contrast, the growing majority of workers classified as low-skilled have no such opportunity for permanent regularization of their legal status and would be required by law to return to their country of origin for a four-year period.¹²² Effectively, the provisions specifying a cumulative period of time more deeply entrench the distinction between high-skilled and low-skilled workers and serve to polarize the social entitlements and labour mobility of these two groups, further accentuating the distinction of social and legal entitlements between them.

The increased scrutiny of the genuineness of a job offer is also likely to affect foreign workers detrimentally and differentially. Although the language of genuineness denotes the laudable goal of avoiding fraud and screening out unethical employers, the assessment of genuineness at the visa office or port of entry effectively transmits the employer's responsibility to the worker. In the current regime, the employer must obtain authorization to hire foreign workers through an LMO process in which the existence of a labour market shortage and the

121. *Ibid*, s 87.1(2)(a)(ii).

122. *Ibid*, s 200(3)(g)(i).

terms of the job offer are examined and accepted or rejected by HRSDC and the latter. An approved LMO is required for the issuance of a work permit in certain categories of work.¹²³ In the current legal structure, the onus is on the employer to demonstrate a legitimate demand for the worker and the appropriateness of wage and working conditions. There has been criticism of this system on the basis that HRSDC lacks an effective enforcement mechanism and that the soft law of the employment contract and provincial employment standards procedures insufficiently protects foreign workers.¹²⁴ However, forcing workers to account for the conditions of employment, the needs of the employer, and the capacity of the employer to meet the stated conditions of employment in a determination of genuineness that occurs within the work permit process—which is focused on the worker outside Canada and occurs after the issuance of an LMO within Canada—is unlikely to protect workers or screen out unethical employers. This requirement may also affect workers differentially due to the nature of their work and circumstances. Low-skilled workers are less likely to have actively participated in the formation of their contract¹²⁵ or to have information about the employer's capacity to meet the stated conditions. Furthermore, as described above in this Part, low-skilled workers may face a disadvantage in the work permit process due to linguistic and educational differentials, which are likely to impact their capacity to engage with the work permit process in a manner consistent with that required by the proposed amendments. Consequently, this change is also likely to have a disproportionately negative impact on low-skilled workers and risks their further marginalization relative to high-skilled workers.

In terms of a federal policy response on enforcement, in April 2009 HRSDC launched a program (the "Monitoring Initiative") designed to enhance enforcement with regard to employers seeking to hire foreign workers through the LMO process.¹²⁶ The program is based on voluntary compliance, so each employer seeking a regular LMO has the opportunity to participate by indicating their willingness to do so on the application form for the LMO. Participation on the part of employers gives permission to HRSDC to perform monitoring of such factors as the existence of a contract between worker and employee, payment of wages, the job duties of workers, the safety of work conditions, and the additional requirements imposed on employers hiring low-skilled workers such as return

123. *Ibid.*, s 203(1).

124. Fudge & MacPhail, *supra* note 66 at 29-30.

125. The job contract is mandated by law with specific form and content, but it is very difficult to enforce. It is also not subject to negotiation by workers. *Ibid.* at 22.

126. HRSDC, "Monitoring Initiative Fact Sheet," *supra* note 4.

airfare and accommodation. In the event of non-compliance, HRSDC may issue “corrective measures” to remedy the situation; while participation in the program is voluntary, these measures are enforced by the risk of losing authorization to hire foreign workers or the risk of the non-compliant record being a consideration in future decisions.¹²⁷

Based on information obtained through *Access to Information Act*¹²⁸ requests to HRSDC, approximately 14,995 employers who were issued new LMOs from April 2009 to January 2010 gave consent to participate in the program, comprising about 43 per cent of applications during that time period.¹²⁹ Despite the fairly sizeable number of employer participants, after nineteen months of operation HRSDC disclosed that a total of seven employers had been subject to requests for corrective measures and no employers had been the subject of enforcement action, which includes placement on a list for refusal of LMOs, on the basis of failure to complete corrective measures.¹³⁰

Although this program is still in its infancy, there are several obvious obstacles to real enforcement. Making enforcement a voluntary process means that employers are able to decide whether or not they are subject to enforcement. Accordingly, it is easy for employers who are underpaying or otherwise exploiting workers to self-select out of the enforcement process, with no penalty for doing so. As mentioned above, among the thousands of employers who did register for participation in the program, only seven were selected for corrective action, and none of those were subject to enforcement action. Although it is difficult to provide quantitative conclusions without national statistics on the frequency of employer wrongdoing, based on various accounts of temporary worker exploitation as explained above in Part II, it is difficult to imagine that there were only seven employers in Canada who merited any kind of corrective action and that enforcement action was not appropriate for any of them. Although it is beyond the ambit of this article to provide a detailed analysis of this nascent program,

127. *Ibid.*

128. RSC 1985, c A-1.

129. Letter from Jackie Holden, Director, Access to Information and Privacy, Human Resources and Skills Development Canada to Sarah G Marsden (29 April 2010) HRSDC File #: A-2009-00326 (on file with author). The response provided statistics showing a total of 34,750 LMOs issued from 19 April 2009 to 10 January 2010, of which 14,995 included employer consent to participate in the Monitoring Initiative. Data from Quebec were not included in the disclosure package from HRSDC.

130. Letter from Jackie Holden, Director, Access to Information and Privacy, Human Resources and Skills Development Canada to Sarah G Marsden (14 March 2011) HRSDC File #: A-2010-00148 (on file with author).

from the currently available data the HRSDC employer monitoring program does not appear to hold much promise for foreign worker protection because it is ineffective; the interests of employers predominate due to self-selection, and even with high rates of participation, the absolute lack of enforcement action speaks for itself in terms of capacity to protect foreign workers.

V. CONCLUSION

Despite the recommendations given in the *Report* and the rhetoric of worker protection evident in law and policy, it is clear through closer examination that the recent regulatory changes will likely further entrench existing patterns of socio-economic stratification. These changes will maintain and support the existence of a racialized subclass of temporary workers in Canada who are excluded from social and legal entitlements by the categorical operation of law, yet whose labour benefits Canadian employers and contributes to the Canadian economy and social benefits regimes. In this article, I sought to draw on tools from multiple disciplines to provide a theoretical approach to the ongoing development of Canadian labour migration law and policy. The functions and benefits associated with the use of flexible migrant labour can be understood as an aspect of the maintenance of Canada as a settler state through the interplay of the logic of territory and the logic of capital. In contrast to the liberal and egalitarian values espoused in the rhetoric of multiculturalism and nation, Canada's continuing history may be more appropriately described as one that is deeply rooted in an ethnocratic settlement policy in which the regulation of migrant workers perpetuates the territorial and capitalistic functions of the state through the creation of a subclass of labour. By providing insights into the foundational aspects of migration policy in Canada, the development of a multidisciplinary understanding promises not only to provide a politically and economically contextualized approach to the role of law and policy but also to inform the responses that may better address the needs of temporary foreign workers.